April 13, 2017

BY COURIER & EMAIL

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Union Gas Limited ("Union")
Kimpe Storage Compensation
EB-2016-0030

Pursuant to Procedural Order No. 1, attached please find Union's submissions in regards to this matter.

In the event that you have any questions on the above or would like to discuss in more detail, please do not hesitate to contact me.

Yours truly,

[original signed by]

W.T. (Bill) Wachsmuth, RPF
Senior Administrator, Regulatory Projects
:sb
Attach.

cc: Zora Cronojacki
Nancy Marconi
Achiel Kimpe, Via Courier
Mr. Anthony Rizetto c/o MP Bob Bailey's Office, bob.baileyco@pc.ola.org

Application by Mr. Achiel Kimpe to determine the amount and method to calculate storage rights compensation in the Bentpath Designated Gas Storage Pool operated by Union Gas Limited, located in the Township of Dawn-Euphemia in Lambton County

SUBMISSIONS OF UNION GAS LIMITED
April 13, 2017

1. This evidence is given in response to Procedural Order No. 1 (the "Procedural Order") dated March 31, 2017 requiring Union Gas ("Union") to file information regarding any compensation paid to Mr. Kimpe for the period from January 1, 1991 to December 31, 1999 inclusive, and for the period from January 1, 2009 to the present inclusive. This evidence is also to include any information regarding the methodology used to establish Mr. Kimpe's compensation.

2. In the Procedural Order, Union is deemed to be a party to this proceeding. As set out below, Union's position is that the Board should refrain from revisiting its earlier decisions with respect to the just and equitable compensation owed to landowners in the Bentpath Storage Pool (the "Pool"), including Mr. Kimpe.

3. However, in the event that the Board is inclined to revisit these earlier decisions, Union respectfully submits that this would engage broader issues of significant interest to all the landowners in the Pool. In such a circumstance, Union suggests that it would be appropriate for all such landowners to be given notice of the proceeding and an opportunity to participate, and for Union to be given an opportunity to provide further evidence and submissions.

4. This evidence is broken down in to five sections:

    I. Unions Understanding of Mr. Kimpe Request

    II. The Bentpath Decision

    III. Methodology for Compensation

    IV. Compensation for the Period from January 1, 1991 to December 31, 1999

    V. Compensation for the Period from January 1, 2009 to the Present

I. Union's Understanding of Mr. Kimpe's Request

5. Mr. Kimpe is a landowner in the Pool. His property includes 50 acres inside the Designated Storage Area (the "DSA") and 25 acres outside the DSA. The DSA covers approximately 750 acres and includes 15 landowners. An aerial photo showing the Pool, the current area of the reef, and property ownership can be found at Schedule 1.

6. It is Union's understanding that Mr. Kimpe has based his calculations for compensation on the Unit Operating Agreement (the "UOA") that was approved by the Ontario Energy Board (the "Board") in 1971. A copy of the UOA approved by the Board can be found at Schedule 2.

7. In reviewing Mr. Kimpe's submissions of December 18, 2015 and March 3, 2017, it is Union's understanding that Mr. Kimpe is proposing to change the methodology for compensating landowners within the DSA.

8. Union's current practice is to compensate all landowners who have property in the DSA annually, at the same per acre rate.

9. Mr. Kimpe is proposing that only landowners who have the actual storage reef under their property be compensated. This would result in landowners within the DSA who do not have storage reef under their property not being compensated.

10. Mr. Kimpe is also proposing that landowners who have outside acres, continue to be compensated.

11. This would mean under Mr. Kimpe's proposal, Mr. Kimpe's compensation would increase from 6.66% to 13.9 % of the total compensations that Union currently pays to landowners in the DSA. It would also mean that 9 landowners who currently receive payment for their storage leases would no longer receive any payment.

II. The Bentpath Decision

12. On July 16, 1982 the Board released their Reasons for Decision in proceeding E.B.O. 64(1) & (2) (the "Bentpath Decision"). Pursuant to what was then section 21of the *Ontario Energy Board Act*, the Bentpath Decision dealt with all aspects of compensation in regard to the Pool. A copy of the Bentpath Decision can be found at Schedule 3.

13. In the Bentpath Decision, the Board reviewed a number of different methods of compensation and determined how residual gas should be compensated.

14. Mr. Kimpe was represented by legal counsel at that proceeding.

15. The Board determined all aspects of what landowners should receive as compensation for the period from 1974 to 1990 inclusive.

16. The Board concluded at page 107 of the Decision "just and equitable compensation for the Bentpath Pool for the period 1974 to 1982 inclusive will be $18.50 per annum per acre, and for the period 1983 to 1990 inclusive, it will be $24.00 per annum per acre".

17. In regard to residual gas payments, the Board determined that residual gas should only be compensated to a bottom hole pressure of 50 psi.

18. Like all landowners in the Pool, Mr. Kimpe has received compensation since 1974 on the basis of the compensation methodology set out in the Bentpath Decision.

19. Mr. Kimpe brought proceedings EB-2012-0314 and EB-2013-0073 before the Board in an attempt to have the Bentpath Decision varied. In both proceedings the Board rejected Mr. Kimpe's request on the basis that the appropriate compensation for landowners in the Pool had already been determined in the Bentpath Decision. Copies of these decisions can be found at Schedules 4 and 5.

20. There has been no change in circumstances since 1982 that would justify a variation from the Bentpath Decision or a deviation from Union's standard practice and industry standard practice.

III. Methodology for Compensation

21. In any event, the compensation methodology that Mr. Kimpe proposes is not appropriate. Union has a long standing practice of compensating all landowners within a designated storage area at the same rate per acre. This policy dates back to the 1940s when the first storage pools were developed. Mr. Kimpe's proposal, if implemented, would reverse that long-standing policy.

22. The Crozier Report released in 1964 (the "Report") dealt with how landowners should be compensated for storage rights. Union has been following the recommendations in the Report since it was released. A copy of the Report can be found at Schedule 6.

23. The Report discusses the issue of compensation for the reef and the protective area around the reef. At page 8 the Report states "the practice among both operators and landowners is to recognize the protective acreage as of equal value to the productive or "participating" acreage for storage purposes".

24. In addition to gas being stored in the reef, there is often a secondary storage zone in the A1 Carbonate surrounding the reef. The designated storage area is selected in order to

provide a buffer zone for this secondary storage zone as well as the reef. As a result, it is necessary to extend the boundaries of the designated storage area a distance from the reef to include all potential storage sites.

25. The Report describes Principle 7 at page 23, which states that "there should be a minimum storage rental payment per acre". This confirms the principle that all areas of a designated storage area should be treated equally.

26. In the Bentpath Decision, the Board determined specific compensation for landowners in the Pool. In this decision the Board stated, at page 101, that "since much of the basic rationale with respect to storage remains unchanged, the Board's report *(the Crozier Report)* is of considerable assistance." The principles developed in the Crozier Report were followed in the Bentpath Decision.

27. In the RP-2000-0005 proceeding, storage compensation was again reviewed. In this proceeding it was agreed that all landowners within the boundaries of a designated storage area should receive the same level of compensation regardless of the amount of storage reef on their property.

28. There has been no change in circumstance since the Report and decisions were released by the Board which would warrant a deviation from Union's standard practice and industry standard practice in compensating landowners for storage rights.

IV. Compensation for the Period from January 1, 1991 to December 31, 1999

29. In the Procedural Order the Board stated it will not examine Mr. Kimpe's compensation for two periods of time. These time periods are from 1974 to 1990 and from 2000 to 2008. For these periods of time the Board has stated that compensation for Mr. Kimpe was determined in an earlier decision of the Board.

30. It is Union's position that compensation for Mr. Kimpe has also been determined by the Board for the period from January 1991 to December 1999 inclusive.

31. In the standing Decision in the RP-2000-0005 proceeding, Mr. Kimpe was identified as a represented applicant. In the evidence submitted by the Lambton County Storage Association ("LCSA"), Mr. Kimpe is identified as a represented applicant. The represented applicants had legal counsel representation throughout the proceeding.

32. The Decision and Order for RP-2000-0005 approved the settlement agreement between Union and the LCSA. The settlement agreement contained the following condition, "the represented applicants have reached a settlement with Union covering all claims for compensation asserted in or which could have been asserted in the amended application". A copy of the Decision and Order for RP-2000-0005 can be found at Schedule 7.

33. As Mr. Kimpe could have made a compensation claim for the period from January 1991 to December 1999 inclusive in the RP-2000-0005 proceeding, Union's position is that the

settlement agreement precludes him from bringing forward a claim for that period in this proceeding.

V. Compensation For the Period from January 1, 2009 to the Present

34. Since 2009, Mr. Kimpe has been compensated following the same principles as all of the other landowners in Union's storage pools.

35. Subsequent to the RP-2000-0005 proceeding, Union successfully re-negotiated storage compensation with the LCSA for two periods. Negotiations occurred in 2007 for the period from 2009 to 2013, and in 2012 for the period from 2014 to 2018. In both negotiations, it was agreed that all landowners within the DSA should receive the same level of compensation. Over 90% of the storage landowners agreed to the new compensation packages and signed new amending agreements.

36. For any landowner who did not sign the new amending agreements (including Mr. Kimpe), Union compensated the landowners as if they had signed the new amending agreements. As a result of the 2007 and 2012 negotiations, Mr. Kimpe's annual compensation for acreage inside the DSA increase from $5,726.50 in 2009 to $7,117.00 in 2017.

37. Mr. Kimpe did not sign the amending agreements but has been compensated as if he had signed the amending agreements.

38. Mr. Kimpe has accepted all payments made by Union for the period from January 1, 2009 to the present inclusive.

39. Attached at Schedule 8 is a summary of the storage compensation payments made by Union to Mr. Kimpe from January 1, 2009 to the present inclusive.

Summary

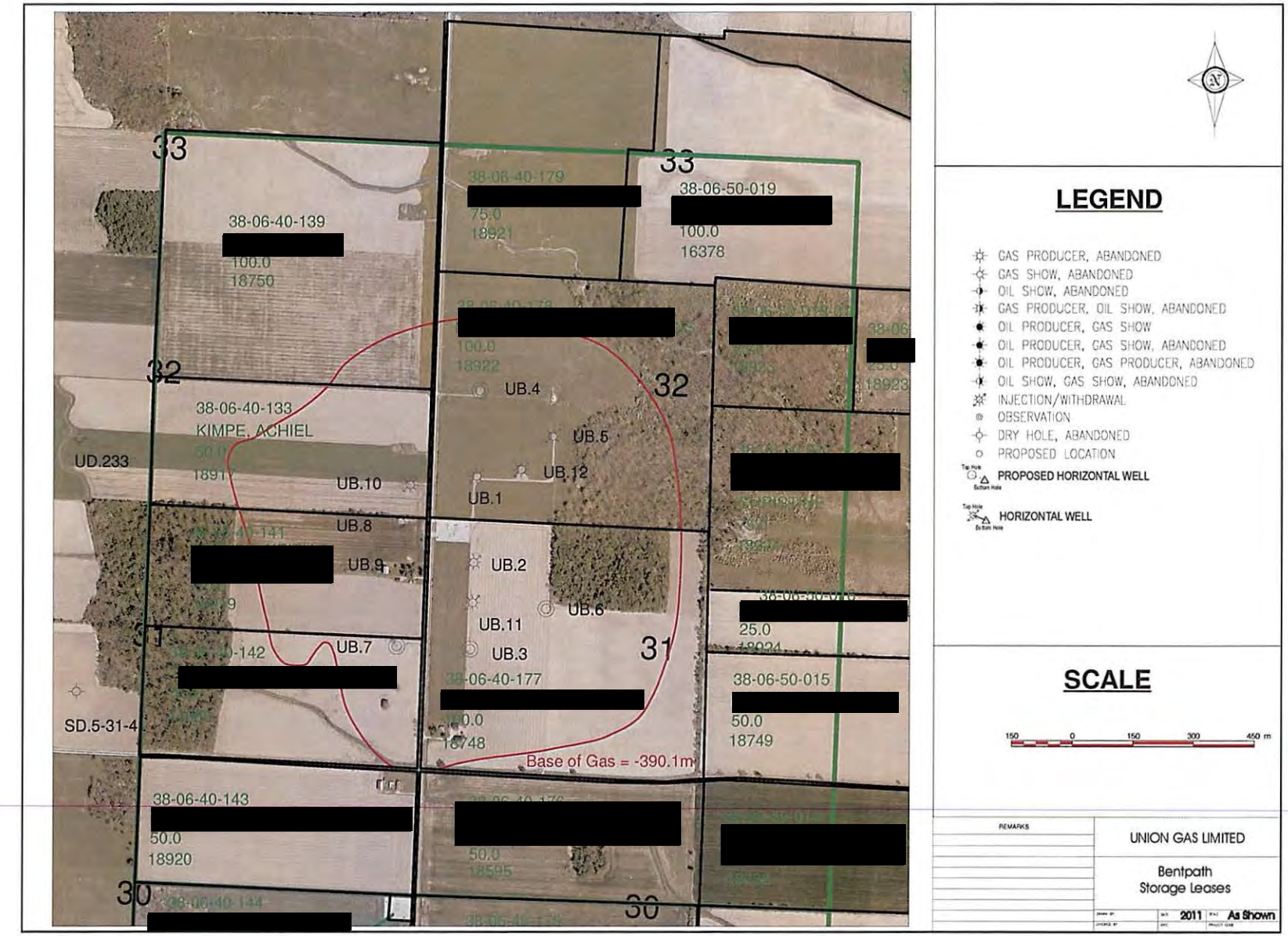
40. Union's current practice has been confirmed by the Board in past storage compensation proceedings and reports.

41. Union's current practice is to compensate all areas within a designated storage area at the same rate, whether they are over the reef or are adjacent to the reef but are protecting the reef.

42. Mr. Kimpe's position is that Union should: compensate landowners within the DSA for areas over the reef; not compensate landowners within the DSA for areas not over the reef; and compensate landowners for outside acres. This position is not defensible.

43. The practice of paying all landowners in the Pool the same per acre rate whether their properties are over the reef or not has been a long standing practice of Union and should not be changed. To implement Mr. Kimpe proposed change would mean only 6 landowners would receive a storage lease payment instead of the 15 currently receiving compensation.

44. It is Union's position that the Board should order Union to compensate Mr. Kimpe at the same rate as the other landowners in the Pool for the period from December 18, 2015 to December 31, 2018 inclusive. This would give Mr. Kimpe the same compensation as the other landowners in the Pool, and result in equitable compensation for all of the landowners in the Pool.



Filed: 2017-04-13
EB-2016-0030
Schedule 1

ONTARIO ENERGY BOARD

IN THE MATTER OF The Ontario Energy Board Act, R.S.O. 1970, Chapter 312 and in particular Section 24(c) thereof;

AND IN THE MATTER OF an Application by Union Gas Company of Canada, Limited to the Ontario Energy Board for an Order requiring and regulating the joining of the various interests within a field in the Township of Dawn, in the County of Lambton known as the Bentpath Pool for the purpose of drilling and operating wells, the designation of management and the apportioning of the costs and the benefits of such drilling or operation.

BEFORE:

A. B. Jackson, Esquire, Acting Chairman
and
I. C. MacNabb, Esquire, Vice-Chairman.

Thursday, the 28th day of October, 1971 and Tuesday, the 14th day of December, 1971.

-:- O R D E R -:-

Upon the Application of Union Gas Company of Canada, Limited, ("Union") dated the 30th day of July, 1971, ("the said Application") pursuant to Section 24(c) of The Ontario Energy Board Act, 1964 (now Section 24(c) of The Ontario Energy Board Act, R.S.O. 1970, Chapter 312) for an Order requiring and regulating the joining of the various interests within an area known as the Bentpath Pool (being the lands more particularly hereinafter referred to) for the purpose of drilling and operating wells, the designation of management and the apportioning of the costs and benefits of such drilling or operation; upon the said Application having been served as directed by the Board and Objections having been filed on behalf of The Consumers' Gas Company ("Consumers'"), McClure Oil Company ("McClure"), Pounder and Harmon Consultants Limited ("Pounder and Harmon"), on behalf of Imperial Oil Limited ("Imperial") and Imperial Oil Enterprises Ltd. ("Enterprises") and by certain registered landowners namely, Mary Turner Graham, Walter Higgs, George Higgs, Max McFadden, Gordon Higgs, Larry Richards, Frank M. Pomajba, Keith A. Turner, Florence A. H. Turner, Achiel Kimpe, Ella M. Thompson, Rose A. Patterson, Clayton J. Patterson, Albert A. Atchison, Andrew Thompson, Casper E. Atchison, Grant Turner, Allen Turner, Edward Jaques and Lena Pearl Jaques ("the registered landowners"); and upon Notice of Hearing being duly served, advertised and filed as directed by the Board, the said Application then coming on for hearing before the Board at the Supreme Court Room,

Justice Building, in the City of Sarnia, Ontario on Thursday, the 28th day of October, 1971, in the presence of Counsel for Union, Counsel for Imperial and for Enterprises, Counsel for the Lambton Gas Storage Association on behalf of the registered landowners, Counsel for The Corporation of the Township of Dawn and Counsel for the Board and the Board being then advised by Counsel for Union that on the authority of Counsel for Consumers', McClure and Pounder and Harmon their Objections were withdrawn and the Board being further advised by Counsel for Imperial and Enterprises that their Objections were withdrawn but that Counsel for Imperial would continue to participate in the proceedings; upon hearing the evidence adduced and reading the Exhibits filed and upon hearing Counsel aforesaid and the matter being then adjourned and resumed again before the Board in the County Council Chambers at the Justice Building, Sarnia, Ontario on Tuesday, the 14th day of December, 1971, pursuant to Notice of Resumption of Hearing by the Board duly served upon one Frank Pomajba, owner of the northeast one-quarter of Lot 33, in the 4th Concession of the Township of Dawn, in the County of Lambton, in the presence of Counsel aforesaid and Counsel for the said Frank Pomajba; upon hearing the evidence then adduced and reading the Exhibits then filed and upon hearing Counsel aforesaid, the Board was pleased to reserve decision and subsequently issued Reasons for Decision dated the 16th day of February, 1972 providing for this Order:

1. THIS BOARD DOTH ORDER that the interests of those persons listed in Schedule "C" to the form of "Unit Operation Agreement, Bentpath Pool" attached hereto as Appendix I and forming part of this Order (hereinafter referred to as "the Unit Agreement") who taken together are the owners of the lands described in Schedule "A" to the Unit Agreement and depicted in Schedule "B" to the Unit Agreement and the interests of those persons who are encumbrancers of certain of the said lands more particularly set forth in Appendix II to this Order, be and they are hereby all joined and regulated for the purpose of drilling and operating wells and the carrying out of the various matters more particularly provided for in the Unit Agreement as if they and each of them had reached agreement on the terms and conditions set forth in the Unit Agreement and that such joining and regulation be in accordance with and subject to the terms and conditions set forth in the Unit Agreement.

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EB-2016-0030
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2. THIS BOARD DOTH FURTHER ORDER that the lands described in Schedule "A" to the Unit Agreement shall be operated as a unit in accordance with and subject to the terms and conditions of the Unit Agreement which shall enure to the benefit of and shall be binding upon the said lands and all of the aforesaid persons, their and each of their heirs, executors, administrators, successors and assigns and upon Union and upon McClure, Consumers', Pounder and Harmon and Enterprises named in the Unit Agreement, their and each of their successors and assigns as fully and effectually as though they were all parties to and as though they had all executed the Unit Agreement, as the same may relate to their respective lands and interests, which lands are more particularly described in the leases thereof listed in Schedule "C" to the Unit Agreement.

3. THIS BOARD DOTH FURTHER ORDER that the benefits of such unit operation to the persons and Companies referred to in paragraph 2 of this Order and the apportionment thereof shall be as provided for in the Unit Agreement and that The Corporation of the Township of Dawn as statutory owner of certain road allowances adjoining the said lands shall not share in such benefits.

4. THIS BOARD DOTH FURTHER ORDER that Union shall be the manager of the unit operation and shall bear the entire costs thereof.

5. THIS BOARD DOTH FURTHER ORDER that notwithstanding the provision in the Unit Agreement for alteration of the boundaries of the unit area and of the participating area, no such alteration shall be effective until approved by this Board, after a Hearing.

6. THIS BOARD DOTH FURTHER ORDER that this Order shall take effect only upon revocation of Ontario Regulation 396/70 and shall take effect forthwith upon such revocation.

7. AND THIS BOARD DOTH FURTHER ORDER that Union shall pay to the Board its costs of this Hearing forthwith after the fixing thereof.

DATED at Toronto, Ontario, this 6th day of March, 1972.

ONTARIO ENERGY BOARD

(SEAL)

Secretary.

APPENDIX I

UNIT OPERATION AGREEMENT

BENTPATH POOL

AGREEMENT made this day of , 19 .

B E T W E E N: _____

_____

_____

of the _____ of _____ in the County of _____ Province of Ontario, hereinafter called "the Lessor" of the First Part, and McCLURE OIL COMPANY, a body corporate having its head office at the City of Alma, in the County of Gratiot, in the State of Michigan, one of the United States of America which has been granted an Extra Provincial Licence in the Province of Ontario; UNION GAS COMPANY OF CANADA, LIMITED, a Company incorporated under the Laws of Ontario with head office at the City of Chatham, in the County of Kent and Province of Ontario; THE CONSUMERS' GAS COMPANY, a Company incorporated under the Laws of Ontario with head office at the City of Toronto in the County of York and Province of Ontario; and, POUNDER AND HARMON CONSULTANTS LIMITED, a Company incorporated under the Laws of the Province of Ontario with head office at the City of London, in the County of Middlesex and Province of Ontario, hereinafter called "the Lessee" of the Second Part.

WHEREAS by an Oil and Gas Lease dated the _____ day of _____ A.D. 19 , and registered on the _____ day of _____, A.D. 19 in the Registry Office for the Registry Division of the County of _____ as No. _____ for the Township of _____ (hereinafter together with any amendments thereto made prior to the date hereof, referred to as and included in the expression, the "said lease"), the Lessor (or the Lessor's predecessor in title or interest) did demise and lease unto the Lessee (or its predecessor in interest) for the purposes set forth therein, those certain lands in the Township of _____, in the County of _____ Province of Ontario, described as follows:

containing in all _____acres more or less (hereinafter referred to as the "Lessor's lands");

AND WHEREAS it is believed that the Salina and Guelph-Lockport formations underlying those certain lands listed and described in Schedule "A" hereunto annexed and made part hereof, (and which include all or part of the Lessor's lands but whatever of the Lessor's lands is so included is hereinafter referred to as "the said lands") contain a certain gas or gas and oil reservoir or pool known as the Bentpath Pool (hereinafter called the "said pool");

AND WHEREAS for the purpose of protecting the said pool from unnecessary and wasteful drilling and undue depletion, and for the protection of their correlative rights therein with respect to production of the leased substances, the parties hereto desire to amend the said lease and to unite and combine that portion of the said lands which is included in Schedule "A" hereunto annexed and made part hereof, with all of the other lands in the said Schedule, into a single operative unit to the extent hereinafter set forth;

WITNESSETH that in consideration of the mutual considerations hereinafter contained and the sum of Five Dollars ($5.00) by the Lessee to the Lessor in hand paid (receipt whereof is hereby acknowledged), the parties hereto each covenant and agree with the other as follows:

1. In this Agreement, including this clause, unless the context otherwise requires:

(a) "leased substances" means severally and collectively gas and oil and related hydrocarbons other than coal;

(b) "unit area" means the lands described in, and from time to time remaining in, Schedule "A" hereunto annexed and made part hereof;

(c) "participating section of the unit area" means that portion of the unit area shown coloured red on the plan in Schedule "B" hereunto annexed and made part hereof, or as the same may be amended from time to time in the manner hereinafter provided;

(d) "Bentpath Pool" means the Salina and Guelph-Lockport formations underlying the participating section of the unit area;

(e) "MCF" means one thousand cubic feet measured and computed as hereinafter provided;

(f) "other Lessors" means all those persons other than the Lessor herein, who, or whose predecessors in title or interest at any time prior to the date of or during the currency of this Agreement shall have demised and leased lands in the unit area for oil and gas development purposes;

(g) "Lessors" means the Lessor herein and the other Lessors, collectively;

2. It is understood and agreed that the Lessee and the other Lessees of other lands in the unit area are endeavouring to have executed by all of the other Lessors in the unit area agreements similar to this Agreement, and that this Agreement together with any such other agreements entered into and executed shall be interpreted and treated as a common agreement for the purpose of developing and obtaining production of the leased substances from those portions of the unit area covered by this Agreement and such other agreements.

3. Schedule "C" hereunto annexed and made part hereof, is a list of the oil and gas leases now held from the Lessors in the unit area as presently delineated showing in respect of each such lease the acreage in the participating section of the unit area and the acreage in the non-participating section of the unit area.

4. Notwithstanding anything to the contrary expressed or implied in the said lease:

(a) It is understood and agreed that in respect of each calendar year hereafter the Lessee shall pay or tender to the Lessor in lieu of all payments under the said lease:

(1) that proportion of the following royalties which the Lessor's acreage from time to time in the participating section of the unit area bears to the total acreage at such respective times in the participating section of the unit area:

(i) Two cents ($.02) per MCF for all gas produced, saved and marketed by the Lessee from the participating section of the unit area as measured by the Lessee;

(ii) Twelve and one-half per cent (12½%) of the current market value at the point of measurement of crude oil produced, saved and marketed by the Lessee from the participating section of the unit area;

which royalties shall be paid or tendered to the Lessor monthly not later than the last day of the month following the month during which production is taken; provided that if the total of such royalties paid or tendered to the Lessor during any calendar year hereafter is less than an amount which taken along with the amount per acre per annum of any payment the Lessor also received during such calendar year from any source for underground gas storage rights in the said lands will total the sum of Seven Dollars ($7.00) for each and every acre of the said lands which during such year has been included in the participating section of the unit area, the Lessee shall, not later than the thirty-first day of January next following, pay or tender to the Lessor and the Lessor shall accept in respect of such calendar year an amount sufficient to bring the total amount payable to the Lessor under this sub-clause (a) (1) during such calendar year, up to the said total sum of Seven Dollars ($7.00) per acre;

(2) an amount for each and every acre of the said lands which during such calendar year has been retained by the Lessee under the said lease and/or this Agreement and which has not been included in the participating section of the unit area during such year, which taken along with the amount per acre per annum of any payment the Lessor also received during such calendar year from any source for underground gas storage rights in the said lands will total the sum of Seven Dollars ($7.00) for each and every acre of the said lands not included in the participating section of the unit area during such year, which sum shall be paid or tendered to the Lessor not later than the thirty-first day of January next following;

(3) the sum of Five Dollars ($ 5.00) for each and every acre of the Lessor's lands which during such calendar year has been retained by the Lessee under the said Lease and which has not been included in the said lands during such year, which sum shall be paid or tendered to the Lessor not later than the thirty-first day of January next following;

and as long as the payments in this sub-clause (a) provided are made or tendered, the leased substances shall be deemed to be produced from, and operations for the recovery of same shall be deemed to be conducted by the Lessee on the said lands under the said lease, and the said lease as hereby amended shall remain in full force and effect as to all of the Lessor's lands retained by the Lessee under the said lease and/or this Agreement.

Provided further that any royalties or rentals paid in advance under the said Lease in respect of any period within the effective term of this Agreement and which under the provisions of this sub-clause (a) would not have been required to be paid, shall be deducted from the payments aforesaid.

And provided further that in the calendar year in which this Agreement becomes effective the minimum payments under this sub-clause (a) shall be that proportion of the aforesaid minimum payments which the unexpired term of the said calendar year bears to the full calendar year.

(b) This Agreement shall be deemed to become effective on the first day of December, A.D. 1970.

5. The Lessee shall have the right from time to time and at any time to include as a part of the unit area additional lands in the vicinity thereof and the same thereafter for the purposes of this Agreement shall be treated in all respects as if included in the appropriate schedules hereto; PROVIDED, however, always that such additional lands shall not be included in the unit area except with the consent in writing first had and obtained of those Lessors who together own not less than sixty per cent (60%) of all the lands within the unit area (as existing immediately prior to such enlargement) which are then subject to agreements with the Lessee similar to or identical in terms with this Agreement.

6. It is understood and agreed that the Lessee shall, at any time or from time to time, have the right to withdraw all of the said lands or any portion or portions thereof from the unit area, whereupon such lands or portion or portions thereof so withdrawn shall no longer be subject to the terms of this Agreement, but shall be governed thereafter instead by the terms of the said lease.

7. The Lessee shall have the right at any time and from time to time to enlarge or reduce the limits of the participating section of the unit area within such limits as may be determined from the geological and scientific information then available to it.

8. Whenever the limits of the unit area or of the participating section of the unit area are altered in accordance with the provisions of any of the three clauses next preceding, the change so made shall be deemed to have occurred at the expiration of the last day of the month in which the same was effected, and the payments required to be made under the provisions of Clause 4 hereof shall be adjusted and apportioned accordingly. The Lessee shall notify the Lessor in writing of all such changes.

9. The spacing pattern, location and number of wells drilled in the unit area and the rate of drilling and the manner of operating such wells, including amongst other things but not so as to limit the foregoing, the rate of production of the leased substances therefrom shall be at all times in the sole discretion of the Lessee.

10. As part of the consideration for the payments provided for under Clause 4 hereof, the Lessor hereby grants and conveys to the Lessee for so long as development or production are continued or deemed to be continued on the unit area, the right and privilege to fence any portion of the said lands used as a well site not in excess of fifty feet by fifty feet.

11. The Lessee may at its option pay or discharge any tax, mortgage, lien, balance of purchase money or encumbrance of any kind or nature whatsoever, incurred or created by the Lessor and/or the Lessor's predecessors or successors in title or interest which may now or hereafter exist on or against or in any way affect the said lands or the leased substances, in which event, and in addition to any similar or other remedies in that behalf conferred upon the Lessee under the terms of the said lease, the Lessee shall have the right at its option, to reimburse itself by applying on the amount so paid by it any and all sums accruing to the Lessor under the terms of this Agreement.

12. It is hereby declared and agreed that this Agreement and all the terms, conditions and covenants herein contained shall extend to, be binding upon and enure to the benefit of the parties hereto, their heirs, executors, administrators, successors and assigns respectively, it being understood that the privilege of assigning in whole or in part is hereby expressly allowed and that the unit operation contemplated herein may be conducted by someone other than the Lessee and that the terms of this Agreement binding on the Lessee may be performed by someone on behalf of the Lessee. No assignment, however, of this Agreement by the Lessor, and no change or division in ownership of the said lands and no change or division in the ownership of the sums payable hereunder, shall operate to enlarge the obligations or diminish the rights of the Lessee hereunder.

13. All payments to the Lessor provided for in this Agreement shall, at the Lessee's option, be paid or tendered either to the Lessor, or on behalf of the Lessor to the credit of _____ at the _____ (Bank or Trust Company) at _____ (hereinafter called "the depository"), which said depository shall be deemed to be the Lessor's agent and shall continue as the depository for receipt of any and all sums payable hereunder regard-

less of any change or division in ownership (whether by assignment or otherwise) of the said lands or of the leased substances therein contained or of the royalties or other payments to accrue hereunder, unless and until the Lessee shall have been directed in writing by the Lessor to make such payments to another depository in Canada which shall be specified in such direction; PROVIDED, however, that only one such depository shall be designated at any time or from time to time as aforesaid. All such payments or tenders may be made by cheque or draft either mailed or delivered to the Lessor or to the depository by him so designated.

14. This Agreement shall be of the same force and effect to all intents and purposes as a covenant annexed to and running with all of the lands included within or partly within the unit area which are covered by agreements similar to or identical in terms with this Agreement, and shall be binding upon every person who acquires an interest in any such lands regardless of the manner in which such interest is acquired, provided that nothing in this clause or herein elsewhere expressly or by implication provided shall affect the Lessee's right to surrender in whole or in part its interest in the said lands or any portion or portions thereof, under the said lease and/or this Agreement.

15. Excepting as herein and hereby expressly modified or amended, the said lease shall continue in all respects in full force and effect for so long as therein and herein provided, and the same as so amended or modified is hereby ratified and confirmed. Subject, however, thereto it is agreed that the entire contract and agreement between the Lessor and the Lessee with reference to the operation of the unit area is embodied herein and that no verbal warranties, representations or promises have been made or relied upon by the parties supplementing, modifying or inducing the execution of this Agreement.

16. This Agreement and all the terms, conditions, covenants and obligations contained herein shall take effect and be binding upon the parties hereto as of and from the day specified in Clause 4 hereof and shall continue in force and effect for so long as the unit operation herein provided for continues and any portion of the said lands remains within the unit area, and in any event for so long as the payments provided for in Clause 4 (a) hereof are made or tendered.

17. All notices to be given hereunder may be given by letter delivered or mailed by prepaid registered post and addressed to the Lessor or at and to the Lessee at 50 Keil Drive, Chatham, Ontario, or such other address as either from time to time may appoint in writing, and every such notice so mailed shall be deemed to be given to and received by the addressee twenty-four (24) hours after such mailing.

And _____, wife of the said Lessor, hereby bars her dower in the said lands for the purpose of permitting the Lessee the complete enjoyment of the rights hereby granted.

And _____ mortgagee or other encumbrancer of the said lands hereby consents to the grant of these rights and the complete enjoyment thereof by the Lessor.

IN WITNESS WHEREOF the Parties hereto have executed and delivered these presents as of the day and year first above written.

SIGNED, SEALED AND DELIVERED)
in the presence of:)

_____

_____

UNION GAS COMPANY OF CANADA, LIMITED

_____
Director.

_____
Assistant Secretary.

APPROVED

_____
LANDS DEPT.

McCLURE OIL COMPANY

_____
President.

_____
Secretary.

THE CONSUMERS' GAS COMPANY

_____
President.

_____
Secretary.

POUNDER AND HARMON CONSULTANTS LIMITED

_____

_____

IMPERIAL OIL ENTERPRISES LTD. having an overriding royalty interest in the said lease consents to and concurs in this Agreement.

IMPERIAL OIL ENTERPRISES LTD.

_____

_____

UNIT OPERATION AGREEMENT
BENTPATH POOL
DAWN TOWNSHIP, LAMBTON COUNTY
SCHEDULE "A"
ORIGINAL DECEMBER 1, 1970

ALL AND SINGULAR those certain parcels or tracts of land and premises, situate, lying and being in the Township of Dawn, in the County of Lambton and Province of Ontario and being more particularly described as follows:

FIRSTLY: BEING composed of part of Lot 30, in the Fourth Concession of the Township of Dawn;

COMMENCING at the Northeasterly angle of the said Lot 30;

THENCE Southerly in the Easterly limit of the said Lot 30 to its point of intersection with the dividing line between the Northeast one-quarter and the Southeast one-quarter of the said Lot 30;

THENCE Westerly in the dividing line between the Northeast one-quarter and the Southeast one-quarter of the said Lot 30 to its point of intersection with the dividing line between the Northeast one-quarter and the West one-half of the said Lot 30;

THENCE Northerly in the dividing line between the Northeast one-quarter and the West one-half of the said Lot 30 to its point of intersection with the Northerly limit of the said Lot 30;

THENCE Easterly in the Northerly limit of the said Lot 30 to the place of commencement.

SECONDLY: BEING composed of parts of Lots 31, 32 and 33 in the Fourth Concession of the Township of Dawn;

COMMENCING at the Southeasterly angle of the said Lot 31;

THENCE Westerly in the Southerly limit of the said Lot 31 to its point of intersection with the dividing line between the East one-half and the West one-half of the said Lot 31;

THENCE Northerly in the dividing line between the East one-half and the West one-half of the said Lots 31, 32 and 33 to its point of intersection with the dividing line between the Southeast one-quarter and the northeast one-quarter of the said Lot 33;

THENCE Easterly in the dividing line between the Southeast one-quarter and the Northeast one-quarter of the said Lot 33 to its point of intersection with the Easterly limit of the said Lot 33;

THENCE Southerly in the Easterly limit of the said Lots 31, 32 and 33 to the place of commencement.

Filed: 2017-04-13
EB-2016-0030
Schedule 2
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THIRDLY: BEING composed of parts of Lots 31, 32 and 33 in the Fifth Concession of the Township of Dawn;

COMMENCING at the Southwest angle of the said Lot 31;

THENCE Northerly in the Westerly limit of the said Lots 31, 32 and 33 to its point of intersection with the dividing line between the North one-half and the South one-half of the said Lot 33;

THENCE Easterly in the dividing line between the North one-half and the South one-half of the said Lot 33 to its point of intersection with the dividing line between the West three-quarters and the East one-quarter of the said Lot 33;

THENCE Southerly in the dividing line between the West three-quarters and the East one-quarter of the said Lots 31, 32 and 33 to its point of intersection with the Southerly limit of the said Lot 31;

THENCE Westerly in the Southerly limit of the said Lot 31 to the place of commencement.

FOURTHLY: BEING composed of part of Lot 30 in the Fifth Concession of the Township of Dawn;

COMMENCING at the Northwest angle of the said Lot 30;

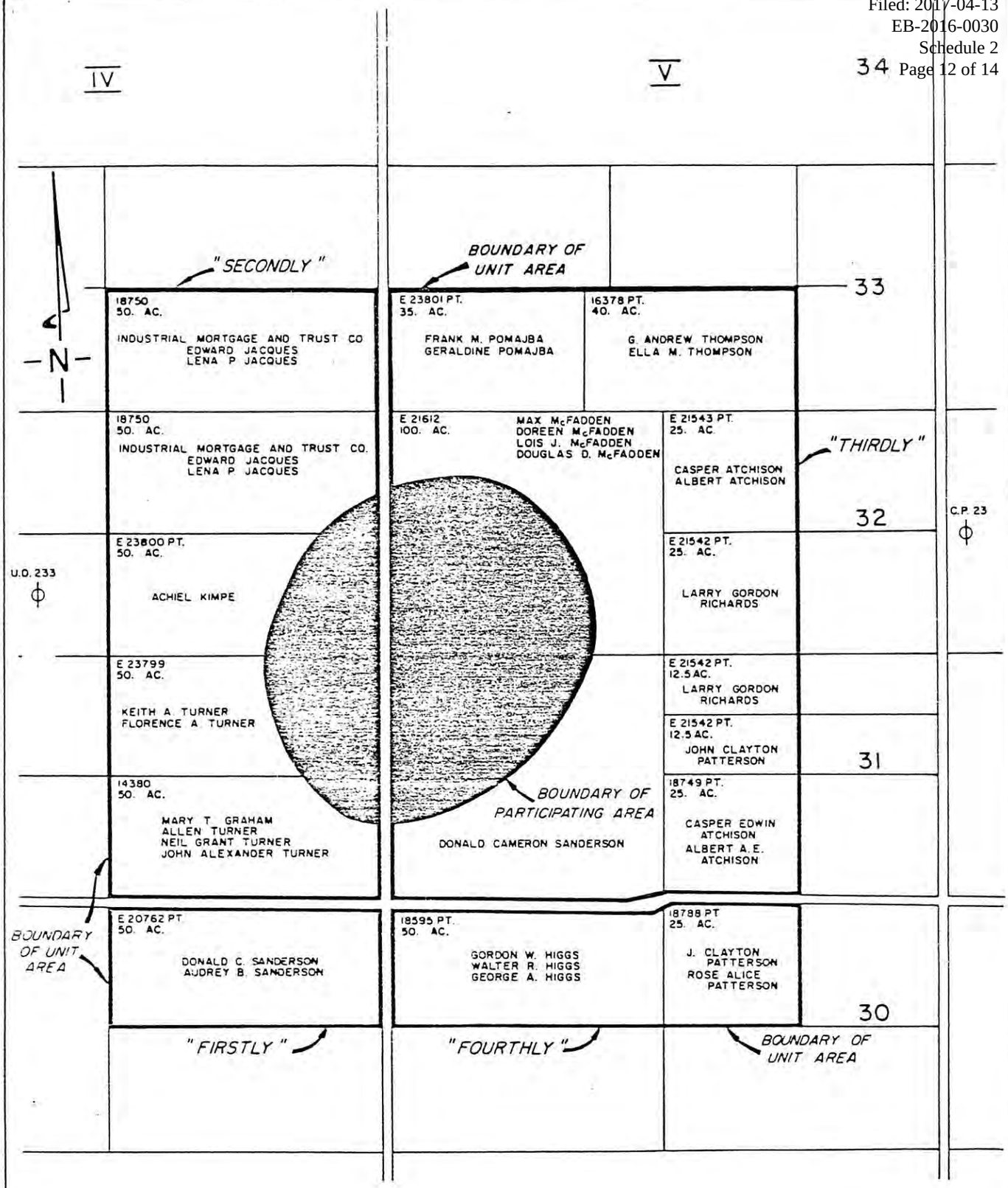
THENCE Easterly in the Northerly limit of the said Lot 30 to its point of intersection with the dividing line between the West three-quarters and the East one-quarter of the said Lot 30;

THENCE Southerly in the dividing line between the West three-quarters and the East one-quarter of the said Lot 30 to its point of intersection with the dividing line between the North one-half and the South one-half of the said Lot 30;

THENCE Westerly in the dividing line between the North one-half and the South one-half of the said Lot 30 to its point of intersection with the Westerly limit of the said Lot 30;

THENCE Northerly in the Westerly limit of the said Lot 30 to the place of commencement.

The herein described parcels of land are all as shown as outlined by means of a heavy black line on the copy of the map or plan by Union Gas Company of Canada, Limited, dated December 1st., 1970, hereunto attached and made part hereof.



—LEGEND—

- B. 2 (WELL NO.)
- GAS WELL
- SHOW OF GAS AND ABANDONED
- DRY AND ABANDONED

UNIT OPERATION AGREEMENT

SCHEDULE "B"

ORIGINAL DECEMBER 1, 1970

BENTPATH POOL

PORTION OF DAWN TOWNSHIP
LAMBTON COUNTY
SCALE: 1" = 1000'

UNION GAS COMPANY OF CANADA, LIMITED — CHATHAM, ONTARIO.

UNIT OPERATION AGREEMENT
BENTPATH POOL
DAWN TOWNSHIP, LAMBTON COUNTY
SCHEDULE "C"
ORIGINAL DECEMBER 1, 1970

Lease No.	Registered Instrument No.	Name of Lessor	Acreage In Unit Area	Acreage in Participating Area	Acreage in Non-Participating Area	% of Lessors' Acreage in Participating Area to Total Acreage of Participating Area
18750	272772	Industrial Mortgage and Trust Co. Edward Jacques Lena P. Jacques	100	2.07	97.93	1.65
E-23801 pt.	276966	Frank M. Pomajba Geraldine Pomajba	35	0	35	0
16378 pt.	103282	G. Andrew Thompson Ella M. Thompson	40	0	40	0
E-23800 pt.	253850	Achiel Kimpe	50	17.45	32.55	13.90
E-21612	194483	Max McFadden Doreen McFadden Lois J. McFadden Douglas D. McFadden	100	47.38	52.62	37.74
E-21543 pt.	194061	Casper Atchison Albert Atchison	25	0	25	0
E-21542 pt.	194062	Larry Gordon Richards	37.5	0	37.5	0
E-23799	253849	Keith A. Turner Florence A. Turner	50	19.19	30.81	15.29
14380	24662	Mary T. Graham Allen Turner Neil Grant Turner John Alexander Turner	50	3.81	46.19	3.04
18748	271075	Donald Cameron Sanderson	100	35.63	64.37	28.38
E-21542 pt.	194062	John Clayton Patterson	12.5	0	12.5	0
18749 pt.	271076	Casper Edwin Atchison Albert A. E. Atchison	25	0	25	0
E-20762 pt.	190860	Donald C. Sanderson Audrey B. Sanderson	50	0	50	0
18595 pt.	280377	Gordon W. Higgs Walter R. Higgs George A. Higgs	50	0	50	0
18788 pt.	275727	J. Clayton Patterson Rose Alice Patterson	25	0	25	0
			750	125.53	624.47	100.00

Note: pt. = partial lease.

DATED 19

- and -

McCLURE OIL COMPANY, UNION GAS COMPANY OF CANADA, LIMITED, THE CONSUMERS' GAS COMPANY and POUNDER AND HARMON CONSULTANTS LIMITED,
50 Keil Drive, N., Chatham, Ontario.

* UNIT OPERATION AGREEMENT *

REASONS FOR DECISION

in the matter of certain applications
under the Ontario Energy Board Act by

Bentpath Pool Landowners

E.B.O. 64(1)&(2)

July 16, 1982

Ontario Energy Board

Ontario

E.B.O 64(1)&(2)

IN THE MATTER OF the Ontario Energy Board Act, R.S.O. 1980, c. 332;

AND IN THE MATTER OF certain applications to the Ontario Energy Board in respect of the Bentpath Pool to make determinations pursuant to s.21 of the Act and to rescind or vary Orders E.B.O. 46 and E.B.O. 64.

BEFORE: S. J. Wychowanec, Q.C.
Vice-Chairman and
Presiding Member

J. C. Butler
Member

REASONS FOR DECISION

Appearances*

J. A. Giffen, Q.C.	-	for the Applicants, with the exception of the Higgs family
J. J. Robinette, Q.C. L. G. O'Connor, Q.C. J. B. Gee, Q.C.	-	for Union Gas Limited ("Union")
P. Y. Atkinson	-	for The Consumers' Gas Company Ltd. and Tecumseh Gas Storage Limited ("Tecumseh")
J. A. Ryder, Q.C.	-	for the City of Kitchener
B. Carroll	-	for the Industrial Gas Users Association
M. Robb on behalf of W. E. Tennyson	-	for certain landowners in the Payne Pool and the Waubuno Pool
Ms. Francoise Bureau	-	for Gaz Metropolitain, inc.
Byron Young	-	for himself

C. E. Woollcombe, Q.C.) - for the Ontario Energy Board
L. Graholm) ("the Board")

*1. The appearances do not include appearances before the Board in preliminary hearings or on Motions relating to any of the applications or the consolidated application.

2. Messrs. Atkinson, Ryder, Robb and Tennyson and Ms. Bureau did not actively participate in the hearing.

3. The Higgs family was not represented at the hearing.

PART I

The Applications

By Board Order dated November 4, 1981, applications under dockets E.B.O. 64(1), E.B.O. 64(2) and E.B.O. 64(1)&(2)-C were consolidated under docket E.B.O. 64(1)&(2) bearing the style of cause set out above and a commencement date of December 1, 1981 was set for hearing the consolidated applications. These Reasons for Decision pertain to all the applications consolidated by that Order.

A historical background and a brief summary of the various applications filed is necessary for a better understanding of the issues involved in this hearing.

The Bentpath Pool is situated in the Township of Dawn in the County of Lambton and lies under some 767.43 acres of land that had been designated as a gas storage area by O. Reg. 585/74 made August 7, 1974 and filed August 19, 1974. By Board Order E.B.O. 64 dated

August 19, 1974 the Board authorized Union to inject gas into, store gas in and remove gas from, the Bentpath Pool and to enter into and upon the designated lands and to use them for such purpose.

The process began with an application filed on July 26, 1977 on behalf of George Arthur Higgs, Walter Reginald Higgs and Ruth Maxine Higgs, in her personal capacity and as executrix of the Estate of the late Gordon Wesley Higgs, under section 21(3) of the Ontario Energy Board Act ("the Act"). This application ("the Higgs Application") was assigned docket number E.B.O. 64(1). It recited the progress of the negotiations which began in October 1974 between certain landowners, including the Higgs family, and Union with respect to gas storage rights in the Bentpath Pool.

The Higgs Application stated that negotiations had ended in failure and, since there was no gas storage agreement between the Higgs family and Union, requested the Board to determine compensation payable for storage rights pursuant to section 21(3) of the Act.

The Board directed that the Higgs Application be served on Union, Tecumseh, the Township of Dawn, the Ministry of Natural Resources and all persons having an interest in the northwest quarter of Lot 30, Concession 5, in the Township of Dawn.

On November 18, 1977, Union responded to the Higgs Application with a Demand for Particulars in which it stated that it intended to file an Answer, but that

the application was defective in that it did not set forth the relief or remedy to which the Higgs family claimed to be entitled. This was the first move in a long procedural battle which took place over several years between all the Applicants and Union and which, from the vantage point of the Board, would often have been unnecessary had the parties in this hearing shown a degree of co-operation one with the other and greater care in preparing their material.

Mr. R. A. Blackburn, counsel for the Higgs family, did not reply to the Demand for Particulars until April 1978. Union found the reply to be unsatisfactory and brought a motion requiring the Higgs to file full particulars of the relief or remedy sought.

Eventually the Higgs family submitted that "fair, just and equitable compensation" for gas storage rights in the Bentpath Pool should be an annual payment by Union of 2 percent of the residential retail price of natural gas per thousand cubic feet multiplied by the number of thousand cubic feet of storage capacity of the pool apportioned to the Higgs on the basis of the percentage that the lands owned by them bears to the total lands in the pool. In addition a well payment of $500 per year was claimed. All such payments were to be calculated on January 1 in each and every year and be payable on or before February 1 in each year.

It is not necessary for purposes of these Reasons for Decision to mark every milestone of the Higgs Application. Suffice to say that it was not until April 9, 1979, that Union filed its Answer to the Higgs formula and stated that fair, just and equitable compensation was $7.00 per acre per year as determined in Board Order E.B.O. 46 and paid to the Higgs since 1974. Union also pointed out that, as there were no wells on the Higgs property, the payment of $500 per well per year was irrelevant.

Although by Notice of Hearing dated July 19, 1979, the Board appointed September 25, 1979, for hearing the Higgs Application, that hearing was aborted and in lieu thereof, the Board heard argument relating to an application, contained in several "Answer and Notice of Intention to Intervene" filed by Mr. Giffen on behalf of numerous landowners in various storage areas in southwestern Ontario, to add such persons as respondents and to adjourn the hearing to January or February, 1980.

Before the Board could dispose of Mr. Giffen's application, he filed another application dated February 28, 1980, on behalf of the following landowners ("the Kimpe Applicants") who are all landowners in the Bentpath Pool:

Achiel Kimpe

Keith Anderson Turner and Florence Annie Helen Turner

Mary Turner Graham, Allen Turner, Neil Grant Turner and Anna Mae Webster (formerly Turner)

Donald Camerson Sanderson and Audrey Bernice Sanderson

Frank Mathew Pomajba and Geraldine Frances Pomajba

George Andrew Thompson and Ella Marie Thompson

Max McFadden, Doreen McFadden, Douglas McFadden and Lois Jean McFadden

Larry Gordon Richards and Mary Jo Richards

Jack Ralph Smit and Melva Jeannette Smit

The Corporation of the Township of Dawn

Fredrick E. Sole and Jean M. Sole

William L. Thomas and Evelyn M. Thomas

This application was assigned docket number E.B.O. 64(2). The relief requested was for a determination by the Board of fair, just and equitable compensation for the loss of oil and gas rights, gas storage rights and compensation for any damages necessarily resulting from the exercise of the authority given to Union by the Board under Board Order E.B.O. 64. The application set out the details of the compensation claimed and requested interest on the amounts awarded as provided in section 33 of The Judicature Act, R.S.O. 1970, c. 228 as amended.

A few days later another application was filed with the Board by Mr. Giffen which was substantially the same as the February 28 application but which, in addition,

included a claim for costs of the application from Union on a solicitor and client basis using the Supreme Court scale. To differentiate between the two applications, the later one was designated by the Board as the 'Corrected' Application.

Numerous demands for particulars and notices of motion were issued by both Union and the Kimpe Applicants and eventually on July 30, 1980, the Board issued an ex parte order respecting the Board's practices and procedures in this case, and in particular it consolidated the application brought on behalf of the Higgs family E.B.O. 64(1) with that brought by Mr. Giffen on behalf of the Kimpe Applicants in the Bentpath Pool E.B.O. 64(2) under docket number E.B.O. 64(1)&(2).

Union's answer to the Corrected Application was filed on August 14, 1980. Interrogatories, replies, refusal to reply to certain interrogatories, motions to require replies, a motion to state a case to the Divisional Court and scores of letters passing between the Applicants and Union followed upon Union's answer. It is not necessary to detail the claims and counter-claims, however, the Board again observes that many of the difficulties, particularly those between Union and the Kimpe Applicants could have been avoided or settled by the parties talking to one another rather than writing, by working in a spirit of co-operation instead of obstruction and by using some common sense.

In addition, on March 18, 1981, Mr. Giffen, having previously abandoned a motion brought for this purpose, filed a further application on behalf of the Kimpe Applicants wherein he requested that pursuant to section 31 of the Act (now section 30) the Board rescind or vary the Orders made by it in E.B.O. 46 (the Board's unitization order for Bentpath) and E.B.O. 64 (the Board's authorization to inject order). In addition, the Kimpe Applicants requested costs of the application on a solicitor and client basis.

This application was given docket number E.B.O.64 (1)&(2)-C and is hereafter referred to as "the Application to Rescind". Union's answer to this application was filed on July 13, 1981.

On June 24, 1981, Mr. Giffen filed on behalf of his clients an "Amendment to Application of February 28, 1980". In these Reasons for Decision this application is referred to as the "Kimpe Application". The amendments to the earlier application were significant. The Kimpe Applicants now chose to rely on the report prepared by Messrs. Havlena, Freidenberg and Ruitenbeek (subsequently filed as Exhibit 63 and referred to as the "Havlena Report") as the basis of their claim for compensation for storage rights and abandoned all other alternatives for calculating such compensation.

On July 13 Union filed an amended answer in response to the Kimpe Application in which, among other things, it

reiterated that the Kimpe Applicants' claims for compensation were exorbitant and calculated contrary to the Expropriations Act or, if that act was not applicable, to the common law rules of expropriation, and denied any alleged misrepresentation on its part.

On November 4, 1981, as previously noted, the Board issued an order whereby the applications under dockets E.B.O. 64 (1), E.B.O. 64(2) and E.B.O. 64(1)&(2)-C were consolidated under docket E.B.O. 64(1)&(2) and a date for the commencement of the hearing was set for December 1, 1981.

During the course of the hearing, Mr. Giffen, on January 4, 1982, filed a "Second Amendment to Application of February 28, 1980," in which he added, as a basis of valuation of storage rights compensation, the principles followed by the Board in E.B.R.O. 365 and the methodologies used by Union, Tecumseh, and The Consumers' Gas Company Ltd. for purposes of deciding whether or not to obtain gas storage rights from other companies. On March 16, Mr. Giffen filed a "Third Amendment to Application of February 28, 1980", in which he added clause (h) which reads "In accordance with the evidence adduced herein and the exhibits thereto." This finally concluded the pleadings between the Kimpe Applicants and Union.

The Hearing

In August 1981, prior to appointing a date for the hearing to commence, the Board invited the parties of record at that time to a meeting to discuss, among other matters, a mutually convenient commencement date and the site of the hearing. The Board offered to hold all or part of the hearing in London or Sarnia, but pointed out the logistic problems in doing so. By letter dated September 9, Mr. Giffen advised that his clients had agreed to the entire hearing being held in Toronto commencing December 1, 1981. As both the site and date had been discussed and accepted by those parties attending the August meeting, the Board issued a procedural Order dated November 4, 1981, wherein a hearing date of December 1 was set and the following persons were considered to be respondents in the consolidated application:

- Union
- Tecumseh
- the Township of Moore
- those represented by Mr. Tennyson
- those represented by Mr. Giffen who were not applicants
- the storage customers of Union, and
- those intervenors who had appeared in Union's rate case E.B.R.O. 380.

A Notice of Hearing bearing the same date was also issued confirming the commencement date of the hearing and providing that the following matters would be dealt with by the Board at the hearing:

- compensation payable under section 21 of the Act to the Higgs family and the Kimpe Applicants; and
- whether Board Orders E.B.O.46 and 64 should be rescinded or varied.

The hearing commenced on schedule and, pursuant to an agreement amongst counsel, the first part was limited to the issue of alleged misrepresentation to Messrs. Kimpe, McFadden, Pomajba, Richards, Thompson and Turner by representatives of Union in connection with the negotiations of Gas Storage Agreements, Gas Storage Lease Agreements and oil and gas leases.

This phase of the hearing lasted four days. The witnesses called by Mr. Giffen and appearing on their own behalf were:

Achiel Kimpe

Douglas McFadden

Max McFadden

Frank M. Pomajba

Larry G. Richards

G. Andrew Thompson

Florence A. H. Turner

The witnesses called by Union were:

Ross M. Day - Manager, Lands Department, Union

John W. Thompson - former employee Lands Department, Union, now retired.

At the conclusion of this phase, the hearing was adjourned to January 11, 1982. It continued thereafter with some interruptions to March 4, 1982. The second phase dealt primarily with the issue of compensation payable under section 21 of the Act.

The witnesses called on behalf of the Kimpe Applicants by Mr. Giffen were:

H. Jack Ruitenbeek, Applied Economics Research Associates*

Z. G. Havlena - President D. G. Havlena, Hydrocarbon Consultants Limited

W. Brent Friedenberg, President, Brent Friedenberg & Associates Limited and co-partners of Applied Economics Research Associates.

J. Andrew Domagalski, Attorney at law, State of Michigan, U.S.A.

Dalen Ferns, Policy Development Director, Ontario Federation of Agriculture

Philip W. Bowman, Partner, Price Waterhouse

*The evidence given by Mr. Ruitenbeek during the hearing was adopted by Messrs. Havlena and Friedenberg.

The witnesses called by Union were:

Ross M. Day - recalled

Gary D. Black, Manager, Gas Supply, Union

David W. Patterson, Manager of Engineering and Planning, Union

Henry B. Arndt, Vice President, Utility Accounting, Union

Arthur C. Newton, Manager, Geology, Union

Oliver B. Rayment, Senior Lands Agent, Union

Jack R. Elenbaas, Petroleum Engineer, Consultant

Robert L. Warwick, Real Estate Appraiser, Primesite Appraisal Service

W. J. Elliott, Real Estate Appraiser

The witnesses called by Board counsel were:

Robert Mason, Senior Partner, Central Ontario Appraisals

Gary T. Kylie, Appraiser, Central Ontario Appraisals

As noted earlier, no one appeared on behalf of the Higgs family. By letter to the Board dated January 22, 1982, Mr. R. A. Blackburn advised the Board that:

> "I am therefore content to withdraw his (Walter R. Higgs) pre-filed evidence in support of the application. I am not withdrawing the Higgs application and am relying on the evidence called by Mr. Giffen to support the Higgs application."

Subsequently, in response to a letter of Board counsel, Mr. Blackburn, in a letter dated March 30, 1982, advised that ". . . I am supporting and in fact relying on Mr. Giffen's argument in support of the Higgs application."

The taking of evidence concluded on March 4, 1982. Written argument was requested by the Board and final reply argument by Mr. Giffen was filed on May 14, 1982.

The Board received arguments on behalf of the following:

- the Kimpe Applicants
- Union
- Board staff
- Industrial Gas Users Association
- Gaz Metropolitain, inc.
- Payne Pool Landowners and Harold and Dorothy Williams

Essentially, the Higgs family and the Kimpe Applicants are concerned with the determination by the Board of two issues - how much money are they entitled to for their storage rights, and who is entitled to receive such amount. However, in addition to these two fundamental questions, numerous sub-issues were raised as well. Consequently, the hearing lasted for some twenty days during the course of which 110 exhibits were filed. There were in addition, over 250 interrogatories issued and answered. Further, with respect to the Application to Rescind Board Orders E.B.O. 46 and 64, Counsel for the Kimpe Applicants and for Union filed statements of fact and law in which each set forth the positions to be taken by them in argument.

A verbatim transcript of the proceedings extending over 2,000 pages was made and is available for public scrutiny. It is therefore not necessary to summarize the evidence or submissions in detail. The entire record was considered in deciding the issues.

Introduction

The Board does not believe that Union deliberately set out to create an atmosphere of confusion and misunderstanding in the minds of the landowners in the Bentpath Pool. Nevertheless, the evidence before the Board indicates that this atmosphere, however created, did exist throughout the period in question. A brief summary of events surrounding the leasing of drilling and storage rights in the Bentpath Pool is necessary for a better understanding of the situation. Exhibit 40, Item D15, prepared by Union, identified the landowners in the Pool, the type of leases they have given and the payments being made. The relevant parts of that exhibit are attached as Appendix "A".

It appears that the first lease taken in the designated area was a lease entered into between Union and Archibald Turner in May 1951. These lands are now owned by Mary Turner Graham, Allen Turner, Neil Grant Turner and Anna Mae Webster, and the lease is referred to as the "Graham Turner Lease". This was an oil and gas lease which included gas storage provisions. The next lease taken was an oil and gas lease with gas storage provisions, signed in 1956 between Union and the Andrew Thompsons. In 1963 Imperial Oil Enterprises Ltd. ("Imperial") moved into the area and signed some eight landowners to oil and gas leases, but with no provision for storage. These leases were with the Pomajbas, the

Deightons (now Kimpe), the McFaddens, the Atchisons (now Gall), Russell Patterson (now the Richards), the Soles, the Turners and the Sandersons.

Union re-entered the picture in 1969. Donald Cameron Sanderson and Audrey Bernice Sanderson and Casper Edwin Atchison and Albert Anslow Atchison (now Edith Vera Gall) signed oil and gas leases with gas storage provisions. The Jacques (now the Smits), the Higgs and the Pattersons (now the Thomases) signed oil and gas leases without gas storage rights. In April 1970 the Pattersons (now the Thomases) signed a Gas Storage Lease Agreement which leased the gas storage rights to Union.

Between April 27, 1970 and May 5, 1970 those landowners with Imperial leases signed Gas Storage Agreements with Union. Attached to the Gas Storage Agreement was a Gas Storage Lease Agreement and a Lease and Grant Agreement. The net result was that all landowners within the Bentpath pool area, with the exception of the Township of Dawn, have leased their rights for drilling and production of oil and gas, and all landowners with the exception of the Township of Dawn, the Higgs and the Smits have signed leases for their gas storage rights.

There are significant differences in terms and conditions among the various gas storage agreements. The Graham Turner Lease provided, among other things, that the term of the lease was for 20 years and was to

continue as long as production continued in "paying quantities" and so long as the lands were being "used for storage of gas", that a notice of determination of the storage area would be given in writing, and that Union would pay the lessors $100 per year per well situated on the property.

The Gas Storage Agreement signed with those landowners who had leased oil and gas rights to Imperial provided for a 10 year term with automatic renewal in perpetuity at Union's option upon payment of the storage rental ($5 per acre per year payable in advance on the anniversary date); a prohibition against the extension of the Imperial lease without prior notice to Union; the execution of a Lease and Grant in the form attached to the Gas Storage Agreement; and the execution of a Gas Storage Lease Agreement also attached to the main agreement. Both the Gas Storage Lease Agreement and the Lease and Grant were initialled by the Lessors. The Gas Storage Agreement also contained the provision that the lessors would not oppose any application brought by Union to have the lands designated for storage.

The Gas Storage Lease Agreement signed by the Pattersons (now the Thomases) provided for a term of ten years subject again to automatic renewal in perpetuity on the same terms and conditions on the part of Union; for payment of $1.00 per acre per year payable in advance on the anniversary date of the agreement; for no injection of gas into the Pool without ten days notice (the

injection notice) whereby Union would notify the lessors of the commencement date of injection and the amount of additional storage rental Union was prepared to pay; for arbitration before the Board if the lessor and Union could not agree on the rental payment following injection; for payment of $1'00 for each well per year on the property and for the payment of $5.00 per acre per year for storage rights after the date specified in the injection notice.

The Gas Storage Lease Agreements initialled by those who signed Gas Storage Agreements did not specify the annual amounts that would be paid before and after injection.

Donald Cameron Sanderson executed a Union Oil and Gas Lease Agreement and the Unit Operation Agreement which was later approved by the Board in Order E.B.O. 46. For immediate purposes the details of these two agreements are not necessary.

Shortly before the last storage agreement was signed, the first discovery well was drilled on the McFadden property and some six months later, on December 7, 1970, gas was first produced from the Bentpath Pool. It is not clear when Imperial assigned all its oil and gas leases to Union, but it appears that it was during July 1972.

The next event of importance which is alleged by Union to affect the gas storage rights of the landowners in the Bentpath Pool is the Board's unitization order

E.B.O. 46 which was issued pursuant to section 24 (c) of the Act on March 6, 1972. The Board will deal with this Order and Board Order E.B.O. 64 in greater detail later in these Reasons for Decision. However, it is important to note that, among other things, the interests of the landowners in the Pool were joined and regulated by the Board for the purpose of drilling and operating wells and the carrying out of various matters, more particularly provided for in the Unit Operation Agreement, as if they and each of them had agreed to terms and conditions set forth in that agreement and that such joining and regulation be in accordance with the terms and conditions in the Unit Operation Agreement.

The Board's Order stated that it was to take effect only upon revocation of Ontario Regulation 396/70. Attached to the Order was the Unit Operation Agreement. The section which Union claims amended the Gas Storage Agreements is paragraph 4 which is reproduced in full below.

"4. Notwithstanding anything to the contrary expressed or implied in the said lease:

> (a) It is understood and agreed that in respect of each calendar year hereafter the Lessee shall pay or tender to the Lessor in lieu of all payments under the said lease:
>
> > (1) that proportion of the following royalties which the Lessor's acreage from time to time in the participating section of the unit area bears to the total acreage at such respective times in the participating section of the unit area:

(i) Two cents ($.02) per MCF for all gas produced, saved and marketed by the Lessee from the participating section of the unit area as measured by the Lessee;

(ii) Twelve and one-half per cent (12 1/2%) of the current market value at the point of measurement of crude oil produced, saved and marketed by the Lessee from the participating section of the unit area;

which royalties shall be paid or tendered to the Lessor monthly not later than the last day of the month following the month during which production is taken; provided that if the total of such royalties paid or tendered to the Lessor during any calendar year hereafter is less than an amount which taken along with the amount per acre per annum of any payment the Lessor also received during such calendar year from any source for underground gas storage rights in the said lands will total the sum of Seven Dollars ($7.00) for each and every acre of the said lands which during such year has been included in the participating section of the unit area, the Lessee shall, not later than the thirty-first day of January next following, pay or tender to the Lessor and the Lessor shall accept in respect of such calendar year an amount sufficient to bring the total amount payable to the Lessor under this sub-clause (a) (1) during such calendar year, up to the said total sum of Seven Dollars ($7.00) per acre;

(2) an amount for each and every acre of the said lands which during such calendar year has been retained by the Lessee under the said lease and/or this Agreement and which has not been included in the participating section of the unit area during such year, which taken along with the amount per acre per annum of any payment the Lessor also received during such calendar year from any source for underground storage rights in the said lands will total the sum of Seven Dollars ($7.00) for each and every acre of the said lands not included in the participating section of the unit area during such year, which sum shall be paid or tendered to the Lessor not later than the thirty-first day of January next following;

(3) the sum of Five Dollars ($5.00) for each and every acre of the Lessor's lands which during such calendar year has been retained by the Lessee under the said Lease and which has not been included in the said lands during such year, which sum shall be paid or tendered to the Lessor not later than the thirty-first day of January next following;

and as long as the payments in this sub-clause (a) provided are made or tendered, the leased substances shall be deemed to be produced from, and operations for the recovery of same shall be deemed to be conducted by the Lessee on the said lands under the said lease, and the said lease as hereby amended shall remain in full force and effect as to all of the Lessor's lands retained by the Lessee under the said lease and/or this Agreement.

Provided further that any royalties or rentals paid in advance under the said Lease in respect of any period within the effective term of this Agreement and which under the provisions of this sub-clause (a) would not have been required to be paid, shall be deducted from the payments aforesaid.

And provided further that in the calendar year in which this Agreement becomes effective the minimum payments under this sub-clause (a) shall be that proportion of the aforesaid minimum payments which the unexpired term of the said calendar year bears to the full calendar year.

(b) This Agreement shall be deemed to become effective on the first day of December, A.D. 1970."

According to Union this section superseded any agreement relating to payment for storage rights and thereafter Union paid to the landowners $7.00 per acre per year in arrears, claiming this included payment under gas storage agreements, and made necessary adjustments retroactive to December 1, 1970.

Production of gas from the Bentpath Pool ceased in August 1972 with estimated recoverable reserves remaining in the Pool of 466,216 Mcf.

In August 1974 the Board issued its Order E.B.O. 64 which allowed Union to inject and store gas in the Bentpath Pool. In June of that year Union offered Gas Storage Lease Agreements to those landowners holding its Gas Storage Agreements but the payment offered was $7.00 per acre per year, the same amount Union had paid from the effective date in the Board's Order E.B.O. 46. All the landowners refused to sign the new agreements and although negotiations continued thereafter for some period of time, no new agreements were signed.

To add to the confusion caused by the proliferation of different types of agreements and the changes in method and amount of payment, Union sent injection notices to the Kimpes, the McFaddens, the Pomajbas, the Richards and the Turners in February 1975. Those notices included offers to purchase the residual gas at 2 cents per Mcf, increase the acreage rental for storage to $12.36 per acre per year and pay $100 per year per well to those with wells on their property. The offers were not accepted by any of the landowners and were withdrawn in 1978. The Thomases, who should have received notice under the terms of the Gas Storage Lease Agreement before injection of gas could begin, did not receive the injection notice until February 27, 1975. An amended notice was sent to them in January 1978.

Notices of Determination, required under certain of Union's combined oil, gas and storage leases, should have been issued in 1974 at the time the Pool was being

designated for storage, but these were not sent until December 28, 1977. No well payments were made to these landowners for the intervening years even though the pool was being used for storage. Subsequent to December 28, 1977, well payments were made to these landowners and, in addition, were gratuitously made to other landowners whose agreements contained no provision for well payments.

All in all it must be said that Union's rather slap-dash dealings with the owners in the Bentpath Pool have neither been conducive to good public relations nor in keeping with sound business practice.

PART II

Applicants With Standing Before The Board

Jurisdiction of the Board

Section 13, subsection 1 of the Act provides that:

> "The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and fact."

Section 21, subsection 2 of the Act reads as follows:

> "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 fair, just and equitable compensation in respect of such gas or oil rights or such right to store gas; and
>
> (b) shall make to the owner of any land in the area fair, just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by such order."

It was common ground amongst the parties that three of the Applicants, namely the Higgs, the Smits, or their predecessors on title, and the Township of Dawn have never executed agreements purporting to lease or assign or grant storage rights to Union. Kimpe, the McFaddens, the Pomajbas, the Richards, the Thompsons and the Turners have executed documents, which Union claimed have the effect of vesting storage rights in Union, and which Mr. Giffen categorized as "pieces of paper".

It was Union's position that those Applicants who have signed agreements with Union are bound by them, and that the Board lacks jurisdiction to look behind the agreements to determine their validity or enforcability.

Mr. Giffen, on the other hand, argued that the Board does have the jurisdiction to determine the validity of the contracts and in fact must do so before the Board can exercise its jurisdiction to determine fair, just and equitable compensation.

Board counsel supported Mr. Giffen's position.

In support of its contention, Union cited Board decision E.B.O. 57, dated July 1973, wherein the Board declined to exercise jurisdiction to declare certain contracts invalid. In that decision the Board said "the Board considers that if there is doubt as to the validity of the agreements, the proper place for the parties to obtain redress is in the courts." The Board agrees with Board counsel that E.B.O. 57 did not affect those customers with agreements. It also notes that that decision was delivered in 1973, well before the recent pronouncements by the Supreme Court of Canada on the jurisdiction of provincially appointed tribunals, which are referred to later herein.

Union also referred the Board to various exchanges between Mr. Kimpe and the then presiding member during the Bentpath designation hearing, E.B.O. 64, in Sarnia,

and again pointed out that the Board declined jurisdiction to review the methods used by Union in obtaining the Gas Storage Agreement with Mr. Kimpe.

The Board notes that Union attempted to distinguish the case of Re: Wellington v. Imperial Oil Limited [1970] 1 O.R. 177 on the basis that the Court had in issue before it compensation, not the validity of the contract. A similar distinction can be made with respect to the Bentpath designation hearing since that application was brought under section 21, subsection 1 of the Act, and Mr. Kimpe's agreement or contract was not an issue in any way in those deliberations.

Union also claimed that the Board lacks jurisdiction in this matter on constitutional grounds. Union maintained that the Board's jurisdiction to declare written agreements relating to interests in land invalid or unenforcable would be ultra vires on the ground that such jurisdiction has been exercisable solely by judges of superior, district or county courts since 1867. Union agreed that the Provincial Legislature may confer on a provincially appointed tribunal the right to decide incidental questions of law within that tribunal's jurisdiction. Union stated however that the Provincial Legislature cannot confer on a provincially appointed tribunal a power vested in superior or county courts to determine the validity of an agreement when the validity or otherwise of such agreement is a condition

precedent to the jurisdiction of such tribunal. In support of this submission, Union cited the Reference re: The Residential Tenancies Act, (1980) 26 O.R. (2d) 609, affirmed by the Supreme Court of Canada (1981) 37 N.R. 158 ("The Residential Tenancies case").

The same Supreme Court decision was cited by Board counsel to support an opposite view, that the Board does have jurisdiction, in the particular circumstances, to determine whether the agreements are valid.

Mr. Giffen's submission in relation to this issue was based on the statutory powers contained in the Act and several decisions of the Ontario Courts, including the Wellington case, which generally have held that the Board has been invested with broad general powers relating to matters specifically assigned to it by the Legislature.

The Wellington case was decided in 1969 and dealt with the Board's powers to interpret an agreement for purposes of section 21, of The Ontario Energy Board Act, 1964, which was the predecessor of section 21 (1) of the Act. In that decision, Pennell, J. said at Page 183:

> "It is to be observed that the Legislature imposed upon a board of arbitration, in the event of a dispute, the duty of deciding the amount of compensation. It may well be that in the discharge of its duty, the board of arbitration may become involved in a matter of law as well as a matter of fact. In such cases it seems to me, having regard to s. 21, the board of arbitration will have to ascertain the law and also ascertain the facts. I do not say that a board of arbitration has jurisdiction to

> determine an abstract point of law. But it seems to me that in many cases where a dispute arises as to the amount of compensation, the first thing the board of arbitration has to do is to enquire what were the subsisting rights at the time the right to compensation arose; and that in some cases such enquiry would necessarily involve the interpretation of agreements in which the subsisting rights were embodied."

Since that time, the Courts have taken an even more liberal view of a provincial tribunal's power to exercise a jurisdiction of the superior court.

Dickson, J. in The Residential Tenancies case reviews the liberalization process and concluded that:

> "I do not think it can be doubted that the courts have applied an increasingly broad test of constitutional validity in upholding the establishment of administrative tribunals within provincial jurisdiction. In general terms, it may be said that it is now open to the provinces to invest administrative bodies with "judicial functions" as part of a broader policy scheme."

The Court then formulated a three-step test to be applied in determining whether powers conferred on a tribunal by a Provincial Legislature constituted an invasion of the federal power to appoint judges under s. 96 of the B.N.A. Act. In this regard the Court had the following to say:

> "The jurisprudence since John East leads one to conclude that the test must now be formulated in three steps. The first involves consideration, in light of the historical conditions existing in 1867, of the particular power or jurisdiction conferred upon the tribunal. The question here is whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation. This temporary segregation, or isolation, of the

impugned power is not for the purpose of turning back the clock and restoring Toronto v. York, as the governing authority, an approached deplored in Mississauga. It is rather the first step in a three step process.

"If the historical enquiry leads to the conclusion that the power or jurisdiction is not broadly conformable to jurisdiction formerly exercised by s. 96 courts, that is the end of the matter. ...If, however, the historical evidence indicates that the impugned power is identical or analogous to a power exercised by s. 96 courts at Confederation, then one must proceed to the second step of the enquiry.

"Step two involves consideration of the function within its institutional setting to determine whether the function itself is different when viewed in that setting. In particular, can the function still be considered to be a 'judicial' function? In addressing the issue it is important to keep in mind the further statement by Rand, J., in Dupont v. Inglis that '...it is the subject matter rather than the apparatus of adjudication that is determinative'. Thus the question of whether any particular function is 'judicial' is not to be determined simply on the basis of procedural trappings. The primary issue is the nature of the question which the tribunal is called upon to decide. Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a 'judicial capacity'.

"...If, after examining the institutional context, it becomes apparent that the power is not being exercised as a 'judicial power,' then the enquiry need go no further, for the power within its institutional context, no longer conforms to a power or jurisdiction exercisable by a s. 96 court and the provincial scheme is valid. On the other hand, if the power or jurisdiction is exercised in a judicial manner, then it becomes necessary to proceed to the third and final step in the analysis and review the tribunal's function as a whole in order to appraise the impugned function in its entire institutional context. The phrase - 'it is not the detached jurisdiction or power alone that

> is to be considered but rather its setting in the institutional arrangement in which it appears' - is the central core of the judgement in Tomko. It is no longer sufficient simply to examine the particular power or function of a tribunal and ask whether this power or function was once exercised by s. 96 courts. This would be examining the power or function in a 'detached' manner, contrary to the reasoning in Tomko. What must be considered is the 'context' in which this power is exercised. ...It may be that the impugned 'judicial powers' are merely subsidiary or ancillary to general administrative functions assigned to the tribunal...or the powers may be necessarily incidental to the achievement of a broader policy goal of the legislature. ...In such a situation the grant of judicial power to provincial appointees is valid. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal (Farrah) so that the tribunal can be said to be operating 'like a s. 96 court'.

The Court then reviewed the functions of the Residential Tenancies Commission in detail. The Court noted that the primary purpose and effect of the 1979 act was to transfer jurisdiction over a large and important body of law affecting landlords and tenants from the s. 96 courts, where it had been administered since Confederation, to a provincially appointed tribunal. The Court concluded that the primary role of the Commission was not to administer policy or to carry out administrative functions, but was to adjudicate. The Court stated that:

> "In the instant case the impugned powers are the nuclear core around which other powers and functions are collected...the whole of a s. 96 court's jurisdiction in a certain area, however limited, has been transferred to provincially appointed officials."

The Court therefore declared that in the particular circumstances the statutory provision conferring superior court powers upon a provincial tribunal was ultra vires and therefore invalid.

In the instant case the Board is being asked by a number of Applicants to determine fair, just and equitable compensation under section 21, subsections 2 and 3 of the Act. Before the Board can make such determination, it must ascertain what the subsisting rights of the parties are and in order to do this, it must ascertain if there are valid agreements in effect. If the agreements are valid the Board has no jurisdiction to determine compensation in respect of these Applicants. In short, the issue is: does the Board have jurisdiction to determine the validity of a written contract, a power usually reposing in a s. 96 court.

The Board's powers were reviewed at some length by the Divisional Court in Union Gas Limited v. Township of Dawn 15 O.R. (2d) 722. The judgment of the Court was delivered by Keith, J. At page 731, he states:

> "In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements, are under exclusive jurisdiction of the Ontario Energy Board..."

In the Board's view it cannot be said, as was said in The Residential Tenancies case that:

> "...the impugned powers are the nuclear core around which other powers and functions are collected".

The Board also finds comfort in words of Pennell, J. in Wellington already referred to.

In the Board's opinion the exercise of the power to determine the validity of a contract for purposes of section 21, subsection 2 and 3 of the Act, is a power which "is merely an adjunct of, or ancillary to, a broader administrative or regulatory structure." According to The Residential Tenancies case only if the impugned power forms a dominant aspect of the function of the tribunal is the conferral of such power ultra vires.

Based on the decisions in the Wellington case and The Residential Tenancies case, the Board concludes that it does have the power, as part of its broader administrative function, to determine the validity of contracts for purposes of making a determination under section 21, subsections 2 and 3 of the Act.

Effect of Section 22 of the Act

Mr. Giffen argued that any agreement relating to gas storage rights in the Bentpath Pool that was signed after January 1, 1965, is invalid because it had not received Board approval under section 22, subsection 2, of the Act.

At the time the Gas Storage Agreements were signed in 1970, section 22(2) read as follows:

> "No storage company shall on or after the first day of January 1965, enter into any agreement or renew any agreement with a transmitter or distributor with respect to the storage of gas unless,
>
> (a) the parties to the agreement or renewal;
>
> (b) the period for which the agreement or renewal is to be in operation; and
>
> (c) the storage that is subject to the agreement or renewal,
>
> have first been approved by the Board with or without a hearing."

In 1973 this subsection was amended by section 7 of The Ontario Energy Board Amendment Act, 1973. The amendment struck out the words "a transmitter or distributor" and inserted in lieu thereof "any person".

The Board is of the opinion that section 22, subsection 2 is not applicable to the issues before it. The agreements before the Board deal with property rights in gas storage facilities and not with the matter of storage of gas for others which is the subject matter of subsection 2 of section 22.

The Plea of Non est factum

Exhibit 34 in these proceedings contains the individual pre-filed evidence of Messrs. Kimpe, McFadden, Pomajba, Richards, Turner and Thompson. The pre-filed testimony was supplemented by evidence given at the hearing by each of these Applicants with the exception of Mr. Turner. In the case of the Turners, Mrs. Turner adopted the evidence of her husband and gave testimony in his place. (The Board had been informed that Mr. Turner was too ill to testify and although Mr. Giffen undertook to provide a medical certificate to that effect, none was produced during the proceedings.)

Generally, the pattern of the pre-filed evidence was that the landowners had not known that they were executing a gas storage lease and that they had relied upon the representations of Mr. J. W. Thompson of Union as to the nature of the documents.

Mr. Giffen entered a plea of non est factum on their behalf and in addition alleged misrepresentation and unconscionability on the part of Mr. Thompson and Union in their dealings with these Applicants.

It appears that at the present time the law in Ontario is as set out in the decision of the Supreme Court of Canada in Prudential Trust Co. v. Cugnet et al (1956), S.C.R. 915; 5 D.L.R. (2d) 1. This is the conclusion reached by the Ontario Courts, albeit somewhat

reluctantly in both Horvath v. Young (1980), 15 R.P.R. 266, and Marvco Colour Research Limited v. Harris et al (1980), 107 D.L.R. (3d) 632.

The unrefuted evidence in the Cugnet case was that a Mr. Hunter called upon Edward Cugnet at his home and told him that he wanted an option in respect of certain mineral rights and offered to pay Mr. Cugnet $32 on each quarter section for an option to take a petroleum and natural gas lease, such lease to take effect upon the expiration of the leases previously granted to other companies, and a further $32 yearly rental for each quarter section when the option was exercised and the petroleum and natural gas lease granted. After apparently a short conversation Mr. Cugnet signed a document entitled "assignment" wherein he transferred an undivided one-half interest in all petroleum, natural gas and related hydrocarbons in and under his lands, subject to a petroleum and natural gas lease covering the said lands, and agreed to deliver a registerable transfer of such interest. He also granted an exclusive option to acquire a petroleum and natural gas lease covering the said lands for a term of 99 years and at the same time executed a transfer in favour of Prudential of an undivided one-half interest in all mineral rights, excluding coal.

In the Cugnet case, Nolan, J. determined that the principle contained in Carlisle & Cumberland Banking v. Bragg [1911] 1 K.B. 489 should be applied rather than the

one contained in the case of Howatson v. Webb [1908] 1 Ch. 1. The principle in the Carlisle case is stated in the judgment of Buckley, L.J. as follows:

> "The true way of ascertaining whether a deed is a man's deed is, I conceive, to see whether he attached his signature with the intention that that which preceded his signature should be taken to be his act and deed. It is not necessarily essential that he should know what the document contains: he may have been content to make it his act and deed, whatever it contained; he may have relied on the person who brought it to him, as in a case where a man's solicitor brings him a document, saying "this is a conveyance of your property," or "this is your lease," and he does not inquire what covenants it contains, or what the rent reserved is, or what other material provisions in it are, but signs it as his act and deed, intending to execute that instrument, careless of its contents, in the sense that he is content to be bound by them whatsoever they are. If, on the other hand, he is materially mislead as to the contents of the document, then his mind does not go with his pen. In that case it is not his deed. As to what amounts to materially misleading there is of course a question."

The Carlisle case has been overruled by the House of Lords in Saunders v. Anglia Building Society [1971] A.C. 1004. Nevertheless both the Horvath case and the Marvco case have held that the Carlisle case continues to apply. The question before the Board therefore is, did the Applicant know the nature and character of the document which he signed, that is, did he know he was leasing his gas storage rights and was that his intention.

The document which each party executed consisted first of a seven page document entitled in bold type "Gas Storage Agreement" to which was attached an eight page

document entitled "Lease and Grant" and another eight page document entitled "Gas Storage Lease Agreement." The title of each of the attached documents is in bold type and with the possible exception of Douglas McFadden and Mrs. Turner the first page of each was initialled by the Applicant, and his wife when necessary. The two attached documents are referred to in clauses 3 and 4 of the Gas Storage Agreement.

It should be noted that the first page of the Gas Storage Agreement had been completed by Union prior to presentation in that the names of the lessors had been typed in as well as the description of the properties, specific reference to the underlying Imperial oil and gas lease affecting the property and the amount of consideration paid. Page 2 of the said agreement also had typed in the annual rental rate. The Lease and Grant and the Gas Storage Lease Agreement were incomplete as no names or property descriptions had been inserted.

The Gas Storage Agreement contains 14 clauses in all. The first clause which appears in part on page 1 reads as follows:

> "1. Subject to the third party lease,
>
> (a) the Lessor does hereby demise and lease unto the Lessee, its successors and assigns, all strata, formations and horizons in and under the surface of the said lands together with the exclusive rights to bring gas from any source obtained into, to introduce, to inject and to store such gas at will in all or any part or parts of such strata, formations

and horizons and to keep or remove at will all or any part of such gas by pumping or otherwise through any well owned by the Lessee now existing or hereafter drilled in the said lands or in lands adjoining the said lands or in the vicinity thereof and with the exclusive right to use such strata, formations and horizons for the protection of gas stored in the said lands and/or within a gas storage area designated by law of which the said lands are part,

(b) the Lessor also grants and confirms unto the Lessee the right from time to time and at all times to enter upon the said lands to drill wells, to rework, operate or abandon any and all wells hereafter drilled by the Lessee in the said lands, to lay down, construct, operate, maintain, inspect, remove, replace, reconstruct, keep and use pipes, pipelines, well-heads, tanks, stations, structures and equipment necessary or incidental to the operations of the Lessee under this Agreement and including equipment necessary for the cathodic protection of the Lessee's pipelines, wells or well-head equipment at any time hereafter located on or in the said lands, together with the right of entry upon and of using and occupying so much of the surface of the said lands as may be necessary or convenient to carry on such operations and together with the right to fence in any portion of the surface of the said lands so used by the Lessee."

Clause 2 provides that the term of the agreement is for ten years subject to further automatic renewal for a further ten years on the same terms and conditions including the right to further renewal.

Clause 6 provides that the Lessors will not oppose any designation of the property as a storage area. Clause 7 provides that in the event that a Lease and Grant and a Gas Storage Lease Agreement are not entered into by the parties, the Gas Storage Agreement continues to apply at the same rental.

The Gas Storage Lease Agreement contains a number of provisions significantly different from those in the Gas Storage Agreement. Of particular importance are clauses 3, 4 and 6(b) which are set out below:

> "3. The Lessee shall not inject gas for storage into the said lands under this Agreement or use the said lands for the protection of gas stored within a gas storage area designated by law of which the said lands are part, until it has given the Lessor at least ten (10) days advance written notice ("the injection notice") specifying,
>
> (a) the date upon which the said lands will first be used for the injection, storage and removal of gas or the protection of gas stored within a gas storage area designated by law of which the said lands are part;
>
> (b) the amount of additional acreage rental per acre per annum the Lessee is willing to pay to the Lessor in respect of the use or uses mentioned in paragraph (a);
>
> (c) the total surface acreage of the designated gas storage area of which the said lands are part, the total surface acreage of the participating area of the said designated gas storage area ("the participating acreage", meaning the surface acreage of the estimated productive area of the gas storage pool contained within the said designated gas storage area), "the Lessor's participating acreage", meaning the number of surface acres of the said lands contained in the participating acreage of the Pool, and, the total volume of residual gas above a reservoir pressure of 50 p.s.i.a. bottom-hole on the date mentioned in paragraph (a) in the storage pool contained within the said designated gas storage area, and,
>
> (d) the amount of an offer to purchase from the Lessor ("the purchase price") the Lessor's royalty interest in any residual gas in the said lands on the date

mentioned in paragraph (a) above a reservoir pressure of 50 p.s.i.a. bottom-hole at a price of 2 cents per m.c.f. such interest to be that percentage of the total volume of residual gas above the reservoir pressure aforesaid on the date above mentioned in the storage pool contained within the designated gas storage area of which the said lands are part, which the Lessor's participating acreage on such date bears to the total participating acreage in such designated gas storage area, taken on a surface acreage basis.

4. Upon receipt of the injection notice, the Lessor shall within thirty (30) days advise the Lessee in writing that he disputes any or all of the additional acreage rental, the participating acreage, the Lessor's participating acreage or the total volume of residual gas specified in the injection notice and in default of such notice of dispute, the Lessor shall be deemed to have agreed to such matters as specified in the injection notice and the same shall become final and binding upon the Lessor and the Lessee. In the event that the Lessor gives such notice of dispute, then any of the items of the additional acreage rental, the participating acreage, the Lessor's participating acreage or the total volume of residual gas so disputed shall be determined by arbitration in the manner provided for in The Ontario Energy Board Act, 1964 and the Regulations thereunder or under any Act or Regulations in amendment or substitution therefor, with right of appeal as therein provided for.

6. From and after the date specified in the injection notice,

(b) the Lessee shall pay to the Lessor a well payment of One Hundred Dollars ($100.00) per annum per well for each well drilled and retained in the said lands for the injection and withdrawal of gas, for so long as such well is so retained; with respect to any such well in existence on the date specified in the injection notice, the first well payment shall be due and payable within thirty (30) days of such date but the Lessee shall be given credit for the unearned portion of any

> well payment with respect to such well under the said lease and thereafter, each succeeding annual payment shall be due and payable annually in advance on the anniversary of the date specified in the injection notice; with respect to any such well completed after the date specified in the injection notice, the first well payment shall be due and payable on the first anniversary of the date specified in the injection notice following the date of completion of such well and succeeding payments shall be due and payable annually in advance on the anniversary dates thereof;"

The provisions of the Lease and Grant would give Union the usual oil and gas drilling rights for a term of ten years and so long thereafter as "these substances or any of them are produced or deemed produced from the said land, subject to the other provisions herein contained".

It is evident from the foregoing that the documents clearly are neither simple nor likely to be immediately and totally comprehensible to the average person.

The Board is faced with the unenviable task of determining whose evidence is to be given greater weight, the landowners or Mr. J. W. Thompson of Union since the evidence is often contradictory. The difficulty is compounded because the evidence relates to events which took place twelve years ago, and in one case over twenty-six years ago. Subsequent events may to some degree have coloured the witnesses' recollections. Mr. Thompson of Union perhaps was most candid in an exchange with Mr. Giffen at page 440 of the transcript:

> "Q. (by Mr. Giffen)... you have no recollection of the specific questions asked by Mr. Kimpe, nor the specific answers given by you?

A. No, sir, not after almost twelve years, I don't, on anything.

Q. On anything?

A. Including Mr. Kimpe."

and with Mr. Woollcombe at page 499 in the following exchange:

"Q. With hindsight, would you agree with me that looking at these three documents might create confusion in the minds of even a well-educated person?

A. I would certainly go along with that, sir, unless you're familiar with them.

Q. And you were familiar with them?

A. Absolutely, sir.

Q. You attempted to make the landowners familiar with them?

A. That I did, sir.

Q. And there may still have been some confusion on their part?

A. Absolutely, sir; still is, I think on some."

It is necessary to review the evidence of each individual Applicant, for purposes of ascertaining whether or not the plea of non est factum is available to him.

We will begin with Mr. Kimpe.

Mr. Kimpe came to Canada in 1958 from Belgium. In August 1968, he purchased lands situate in the Bentpath Pool which were already subject to an oil and gas lease in favor of Imperial. The Gas Storage Agreement with Union was signed by him on or about the first day of May 1970. At that time Mr. Kimpe said his understanding of

the English language was "limited" and that he was "confused by a number of words." Mr. Kimpe's evidence is contained in Exhibit 34, Tab 1, and transcript pages 28 through 112. The cross-examination of Mr. Kimpe runs from pages 49 to 112. Mr. Kimpe's answers to questions 13, 14, 15, 16 and 17, under Tab 1, contain the gist of his recollection of the discussion that took place between himself and Mr. Thompson at the time the Gas Storage Agreement was signed. In essence, Mr. Kimpe stated that he did not read the document, did not understand it because of his limited English, did not consult anybody about it, and he relied "totally on the representations of Mr. Thompson in connection therewith and in connection with its contents." According to Mr. Kimpe, Mr. Thompson told him that the Gas Storage Agreement would "bring up-to-date" or replace the existing Imperial lease; that he and his neighbours would all have "the same thing"; that it was not a Gas Storage Agreement and that in the event gas was found, another document would have to be signed. The discussion between Mr. Thompson and Mr. Kimpe apparently lasted about one hour with Mrs. Kimpe present most of the time. (Mrs. Kimpe was not called upon to give evidence.)

At page 8 of Exhibit 43, Mr. Thompson stated:

> "Mr. Kimpe did not read the entire Agreement with its attachments, page by page. However, I explained to him the substance of the Agreement and its attachments, and we discussed the entire document and its effect. I answered any

> of his questions and explained any matter which he questioned. He did not ask to read over the entire agreement, nor did he ask me to read it over to him. He seemed quite satisfied."

Notwithstanding that he had received a letter from Union dated May 12, 1970, which stated in the first paragraph, "Thank you for granting this company a Gas Storage Agreement over the above-mentioned property.", Mr. Kimpe said that he was not aware that he had signed a lease for gas storage until some time in the fall of 1970 or early 1971, after a discussion with his neighbour, the late Mr. Jacques. Following this conversation with Mr. Jacques, Mr. Kimpe attended at the registry office in Sarnia, checked the leases of some of his neighbours including Mr. Jacques' against his own and found that they were not the same. Mr. Jacques' property was subject to an oil and gas lease only.

The Board agrees with its counsel that in view of the time lapse the more reliable evidence would be any written evidence.

Exhibit 46 consists of three pages of hand-written notes prepared by Mr. Kimpe, apparently as an aide memoire for a meeting with his solicitor, Mr. Steele, which took place about April 27, 1972. These notes were based on notes prepared by Mr. Kimpe for himself some time after his conversation with Mr. Jacques, either in late 1970 or early 1971. The latter consists of two pages that were entered as Exhibit 47. Exhibit 47 states in part that "Thomas [sic]

mentioned that this was not a storage agreement and when gas was founded I would have to sign a paper where I would receive $20 an acre." Mr. Robinette took the position that these two exhibits were not admissible because they were not made concurrently with or within a reasonable time of the events being described. In weighing this evidence, the Board has taken Mr. Robinette's objection into account. Under Tab 8 of Exhibit 34, there is a letter of objection to the application in E.B.O. 64, dated June 3, 1974, addressed to the Board. Mr. Kimpe in paragraphs 7, 8, 9 and 10 asked the Board to "check into the manner in which the leases have been signed" and stated that the language is confusing, the term is too long, and the price is too low. During the hearing of that application, Mr. Kimpe told the Board that "I am irritated about the way Union Gas has been approaching us about signing leases." It should be noted that prior to that hearing Union had attempted to have the landowners sign Gas Storage Lease Agreements at the same rental as provided in the Gas Storage Agreement. Union was unsuccessful in this regard. The Board is not sure whether Mr. Kimpe's reference to the manner of signing related to the Gas Storage Agreement or the Gas Storage Lease Agreement or both. In 1976, Mr. Kimpe wrote to the Ombudsman. (Exhibit 34, Tab 14.) He stated "On the 2 May, 1976, [sic] under the false pretense and threats of property

expropriation, I signed a lease with Union Gas Limited..." and later in the same letter "I know I have been taken by Union Gas Company...". The Ombudsman declined to act because of his limited statutory jurisdiction in these matters.

After an evaluation of the evidence, the Board has no doubt that Union believed it had obtained a valid and binding Gas Storage Agreement from Mr. Kimpe. Certainly its letter of May 12, 1970, and the comments on the vouchers accompanying the cheques indicated this. However, Mr. Kimpe is adamant that at the time he signed the Gas Storage Agreement he believed it to be a drilling lease only. Certainly in the period since signing he has made repeated attempts to correct the situation through representation to this Board and to others. Mr. Thompson's recollection of the discussion with Mr. Kimpe in May of 1970, is unclear. In some respects he confirms Mr. Kimpe's testimony, and in others contradicts it. The Board accepts that Mr. Thompson tried to help Mr. Kimpe by explaining the Gas Storage Agreement and the attachments. Nevertheless, as indicated earlier herein the Board considers that the Union agreements are not easily understood and, on the evidence before it, has concluded that Mr. Kimpe did not understand the nature and character of the document that he signed, that he believed it would be replaced by the Gas Storage Lease Agreement when storage was needed by Union, that he would

have the opportunity of negotiating a higher rental and that he did not intend to grant the gas storage rights to his property to Union when he executed the Gas Storage Agreement. Accordingly the plea of non est factum must succeed with this Applicant. The Board has also considered whether laches or estoppel would apply in these circumstances and concludes that they do not. The Board having reached this conclusion does not need to make a finding as to misrepresentation or unconscionability with respect to Mr. Kimpe.

The next Applicants to put forward a plea of non est factum are Douglas McFadden and Max McFadden, two brothers who jointly own property in the Bentpath Pool area. Their prefiled evidence is found in Exhibit 34, Tabs 20 and 21, and transcript pages 112 to 164. Douglas McFadden recalled signing the Gas Storage Agreement but did not remember initialling or seeing or discussing the Gas Storage Lease Agreement and the Lease and Grant. In his prefiled testimony he stated that Mr. Thompson of Union offered $5.00 an acre for the lease "which I understood to be for drilling and production".

Max McFadden had little recollection of the relevant facts including initialling the two documents attached to the Gas Storage Agreement but said that the initials M. M. "could be mine".

During examination Douglas McFadden recalled that Mr. Thompson discussed storage and that he, McFadden, said, "This is funny; you are asking me to sign the

storage lease [emphasis added] when you haven't even got gas." According to Mr. McFadden, Mr. Thompson replied that it was not really a Storage Agreement but a "working agreement". At page 134, in response to Mr. Robinette, Douglas McFadden admitted that gas storage had been discussed with Mr. Thompson and that he had probably been aware of the title Gas Storage Agreement. In response to a question of the Presiding Member of the Board:

> "Q. Did you not question each other: Do you understand what this is all about?
>
> A. Maybe I did. I don't really recall now. I trusted Mr. Thompson, and he said that it was about storage agreement and, as I said before, he said it was a working agreement, and he needed our signature ...".

The agreement according to Max McFadden was left with the McFaddens and discussed between themselves before they and their wives signed it.

Mr. Thompson discussed his meeting with the McFaddens in Exhibit 43. Although he later amended his testimony as to the place where the agreement was finally signed by the McFaddens and their wives, he maintained throughout his examination that he told the McFaddens that storage rights were the subject of the agreement.

Again, as with Mr. Kimpe, there is some conflicting evidence as to what took place.

The Board found Douglas McFadden to be a shrewd, if somewhat less than candid individual. He appears to be the dominant of the two brothers, and the Board believes that it would have been his decision which carried the

most weight. The Board concludes from his testimony that he knew that what Union wanted to lease was the gas storage rights on the property. Max McFadden was of little help to the Board as he readily admitted that he had little recollection of the events that transpired when the agreement was signed on or about April 29, 1970.

The Board concludes from the testimony that neither of the McFaddens, nor Mr. Thompson, had a clear or accurate recollection of what specifically was said when the agreement was brought to the McFaddens for signature, but in this instance the Board is satisfied that the McFaddens knew the nature and character of the document which they executed, that is, they knew they were leasing their gas storage rights and they intended to do so. Under these circumstances the plea of non est factum must fail. The Board does not find that there was any misrepresentation on the part of Mr. Thompson in the negotiations, indeed none was alleged. The Board also finds that the plea of unconscionability fails with respect to all the Kimpe Applicants for reasons detailed later herein. Accordingly the Board finds that the agreement between the McFaddens and Union is valid and binding, therefore these Applicants have no standing before the Board with respect to section 21, subsections 2 and 3 of the Act.

Mr. Pomajba, the next Applicant, was 31 years old with four years of high school and two years of agricultural school when he signed the Gas Storage

Agreement. His prefiled testimony is under Tab 22, Exhibit 34. He stated there that he thought that Union was getting no more than Imperial already had under its oil and gas lease with him, and that the offer of $5.00 was an improvement over the $1.00 being paid by Imperial at that time. Mr. Pomajba said he thought Imperial already had storage rights. Mr. Pomajba's written evidence is confusing. He stated at page 3 of his prefiled testimony "I felt, because of my loss at the hearing regarding the assignments that I had to now sign these agreements." The Board takes from this evidence that Mr. Pomajba was referring to the unitization hearing which did not take place until October 1971, some considerable time after the Gas Storage Agreement was signed.

Mr. Pomajba was obviously uncomfortable during his appearance before the Board; however, the Board considers his answers to be truthful to the best of his knowledge. During examination by his counsel, Mr. Pomajba became confused, partially, in the Board's view, because of the manner in which Mr. Giffen posed his questions. Mr. Pomajba admitted that Mr. Thompson told him that the Agreement was for storage rights. Although he repeated that he thought Imperial already had such rights under its agreement, this testimony was reversed in cross-examination by Mr. Woollcombe. Mr. Pomajba also stated that he had the document in his possession for a

couple of days in order that he and his father could look it over and, with the concurrence of his father, he signed it.

Again applying the principle in the Cugnet case the Board concludes, based on Mr. Pomajba's testimony that he knew the nature and character of the Gas Storage Agreement which he was signing. While he may have been confused as to the term and may have had some reservations as to the price, he knew that he was leasing his storage rights to Union and intended to do so. Therefore, the plea of non est factum fails, and the Pomajbas have no standing before the Board with respect to section 21, subsections 2 and 3 of the Act. The Board also finds that there was no misrepresentation on the part of Mr. Thompson in obtaining the Gas Storage Agreement such as to render it voidable.

Mr. Richards was 26 years old with four years of high school when he signed the Gas Storage Agreement in 1970. His prefiled testimony is found in Exhibit 34, Tab 23. It appears from this evidence that Mr. Richards relied upon Mr. Thompson's representation. He stated in examination-in-chief that it was his understanding from Mr. Thompson that "if gas was discovered and if they [Union] wanted land for storage later, we would negotiate it at a later date." It appears that Mr. Richards had the Gas Storage Agreement in his possession for a week before he signed it. He admitted reading it, and

discussing it with his wife, but he stated that he did not understand it or what gas storage was and that he was under the impression that it was a drilling lease.

Mr. Thompson denied that he told Mr. Richards that the Gas Storage Agreement was a drilling lease. He maintained that he told Mr. Richards that he, Mr. Thompson, was there to lease the storage rights on his farm, and that the document which was discussed was clearly a Gas Storage Agreement not an oil and gas production lease.

In this instance, as with Mr. Kimpe, there is a direct conflict of evidence between Mr. Richards and Mr. Thompson of Union. Unlike the case of Mr. Kimpe, there is no written evidence to indicate that Mr. Richards believed that he had been induced to sign an agreement under false pretences, nor that he did not know what he was signing; nor did he make any effort in the intervening years to redress any injustice which he now claims that he suffered. The Board does not disbelieve Mr. Richard's recollection of the events in 1970. It concludes from the evidence, however, that although Mr. Richards likely expected to sign a further agreement when the pool was used for storage, and although he may not have known precisely what gas storage was or how it worked at the time he signed the Gas Storage Agreement, he did know that he was leasing his gas storage rights to Union and that he intended to do so. Under these circumstances the plea of non est factum must fail and the

Board finds that the Gas Storage Agreement is not voidable on the grounds of misrepresentation. The Richards, therefore, have no standing before the Board with respect to section 21(2) and (3) of the Act.

As noted earlier Mrs. Turner adopted the prefiled evidence of her husband, Keith Turner, and she gave evidence at the hearing. In Exhibit 34, under Tab 28, Mr. Turner stated that Mr. Thompson had said in effect "we might as well sign these now, I'm here. If anything is wrong it can be straightened out later." He also said:

> "Mr. Thompson was very select in what he pointed out regarding this document. My counsel has informed me that these documents may be construed to go on forever. We were very shocked when we learned this. We never understood these documents, which Mr. Thompson must have known. We also did not realize that this document was for storage which Mr. Thompson did not point out to us. We think he took advantage of us."

At page 21 of Exhibit 43 Mr. Thompson responded to the above and stated:

> "This is definitely not correct. I well recall my meeting with Mr. Turner on that occasion. Mr. Turner was one of those persons who insisted on complete discussion. I clearly recall spending considerable time with him in discussing the details of the Gas Storage Agreement I was presenting to him and they were discussed in considerable detail. We spent considerable time doing so, and I certainly did not tell him to sign and we'd straighten out anything later. We had a detailed discussion."

Mr. Thompson went on to say that this discussion took place before the agreement was signed and that Mr. Turner seemed to quite understand what he was signing.

In addition to farming the land in the Bentpath Pool, Mr. Turner is currently employed as a stationary engineer. He has three years of high school. Mrs. Turner completed high school and has a year of business school.

Mrs. Turner admitted that she and her husband knew about "the whole idea of storage" and that they were aware at the time the Agreement was signed of "serious problems that had been encountered in other pools." She also admitted that the discussion with Mr. Thompson easily lasted a couple of hours. She insisted, however, that "we do not recall discussing storage with Mr. Thompson at all.".

When cross-examined by Mr. Robinette with respect to the Gas Storage Agreement, particularly with reference to the heading and the granting clause she insisted that she could not recall seeing either of them at the time the document was signed and finally said that she and her husband had read the Lease and Grant and "thought we were signing that." In response to the question by Mr. Robinette whether she thought there had been either an accidental or a fraudulent transposition of papers,

Mrs. Turner did not answer the question but again averred "we thought we were signing a lease and grant to drill on our property".

The Board has considerable difficulty with Mrs. Turner's evidence. Mrs. Turner is clearly an intelligent woman with some business experience. According to Mr. Thompson, Mr. Turner is a person who wants to know all the facts. Mrs. Turner confirmed this when she agreed with Mr. Woollcombe that her husband insists on a complete discussion before he signs anything. The Turners had themselves executed the Lease and Grant with Imperial in 1968; therefore, they knew their drilling rights had already been leased to that company. Since the Turners had heard that there had been problems with Union with respect to storage rights, one would expect that they would have been very careful in their dealings with Union. Under these circumstances the Board finds it impossible to believe that there was nothing said about storage during the two hours that Mr. Thompson was at the Turners' home. The Board also has difficulty in believing that neither Mr. nor Mrs. Turner saw the heading "Gas Storage Agreement" on the document they executed. Mr. Turner initialled the first page of the Lease and Grant, and the Gas Storage Lease Agreement, but both he and Mrs. Turner signed the Gas Storage Agreement. Mrs. Turner says that she and her husband would have had to have been "stupid" or "idiots"

to sign the Gas Storage Agreement. The Board certainly did not see either of these traits in Mrs. Turner during the hearing. No action was taken by the Turners subsequent to the execution, to right what they now allege to have been a wrong. Mr. Turner appeared before the Board at the designation hearing E.B.O. 64, and his primary concern at that time was the noise and odour from a nearby dehydrator. He made no mention of any misrepresentation with respect to the Gas Storage Agreement. The correspondence between the Turners and both Union and Imperial, found in Exhibit 38 does not show any allegation of misrepresentation as to the nature of the agreement although dissatisfaction with the level of compensation is expressed.

The Board, after carefully weighing the evidence of the Turners and Mr. Thompson, concludes that the evidence of Mr. Thompson is to be preferred. It finds the Turners were told that the Gas Storage Agreement would convey the gas storage rights to Union and they signed the Agreement knowing this to be the case. The Board finds that there was no misrepresentation and that the plea of non est factum is not supported by the evidence. Accordingly the Turners have no standing before the board with respect to section 21, subsections 2 and 3.

The last Applicant to rely on the plea of non est factum was Andrew Thompson. Andrew Thompson signed an agreement with Union in April 1956, (Exhibit 24, tab 4)

which granted Union oil and gas rights and storage rights for a term of 20 years and so long thereafter as any of the said substances are produced in paying quantities or the lands are used for underground storage of gas.

Andrew Thompson has been farming since he was 15 years old, and he has a public school education. He recalled in his prefiled testimony Exhibit 34, Tab 24, that Mr. Reaume of Union told him that the agreement was a petroleum and natural gas lease and that he relied solely on Mr. Reaume to explain the document to him.

In response to a question from the Board, Andrew Thompson agreed that while he did not understand all the words in the Agreement, he understood that storage rights were being granted to Union. He added that at that time he was in need of money. Under the circumstances the plea of non est factum fails. There was no misrepresentation alleged by Andrew Thompson with respect to the Union Agreement.

In the alternative, Andrew Thompson pleaded that the agreement dated April 24, 1956 had expired.

The term of the agreement is contained in the following clauses:

> "The rights hereby granted shall continue for a term of twenty years from the date hereof and so long thereafter as any of the said substances is or are produced in paying quantities from the said lands or any part of them and/or so long as the Lessee continues operations on the said lands or any of them and/or so long as the said lands, or any part thereof, are used for underground storage of gas as aforesaid.

> In order to provide for the storage of gas underground and for the purpose of protecting the said gas so stored the Lessee shall have the right at any time, and from time to time, to determine that any lands covered by grants or leases held by it shall be a storage area. Notice of such determination shall be given in writing to the owner for the time being of each parcel of land included in the said storage area. Should the lands above described at any time be included in any such storage area and notice be given as aforesaid then the rights and privileges granted by this Indenture, as same exist at the time of said notice, and subject to all covenants and conditions, including the amount then being paid as rental, at that time binding upon the Lessee, shall continue as long as gas is being stored in the designated area or for any part thereof."

Therefore the basic term of the Thompson lease would normally have expired April 24, 1976. According to Exhibit 36 (new) Group 1-38, final production ceased in the Bentpath Pool on August 16, 1972. First injection, though unauthorized, commenced July 31, 1974. Board authority to inject was granted on August 19, 1974 by Board Order E.B.O. 64.

Mr. Giffen argued that, regardless of the facts of the matter, Union did not designate the Bentpath Pool as a storage area until it sent out a Notice of Determination as required in the agreement. This notice was not sent to the Thompsons until December 28, 1977, and consequently the basic term had expired. Further, Mr. Giffen alleged that no payments on account of storage were ever made under the Thompsons' lease. He submitted that there is no storage agreement affecting the Thompsons' land, and that therefore the Andrew Thompsons have standing before the Board with respect to section 21(2) and (3) of the Act.

Union argued that Board Order E.B.O. 46 which was issued by the Board March 16, 1972 effective March 20, 1972 had a "fundamental effect" on the agreement because that Order provided through the Unit Operation Agreement that so long as payments under the latter agreement were made or tendered, the leased substances were deemed to be produced and the lease was deemed to remain in full force and effect. It was Union's position that all payments called for in E.B.O. 46 have been duly and properly made or tendered and have been accepted, therefore, the basic term of the original lease has been extended and continued.

The Board does not accept Mr. Giffen's argument that the effective date of designation of the storage area is that given by Union in its Notice of Determination. Union was clearly remiss in failing to inform the Thompsons that the pool was to be designated as a storage area, but it was Ontario Regulation 585/74 which designated the pool as a storage area on August 8, 1974, not Union's notice. At the date of expiry of the basic term, that is April 21, 1976, the lands in question were being used for storage and therefore under the provisions of the agreement of 1956, the term was extended and continued so long as the lands are used for storage. The Board therefore finds the agreement to be valid and binding and that the Andrew Thompsons have no standing before the Board with respect to section 21 (2) and (3) of the Act.

Expiry Dates of Other Leases

The Donald Cameron Sanderson lease with Union, in the same form as that signed by the Andrew Thompsons, is found at Tab 11, Exhibit 24. This agreement dated July 7, 1969 had a basic term of five years. It was amended by an Oil and Gas Grant Amending Agreement dated September 25, 1970, which essentially only amended the payments under the original agreement. The basic term of the agreement would have expired July 7, 1974. The arguments of Mr. Giffen and Union are the same with respect to Mr. Sanderson as they were with respect to the Thompsons. On the date that the basic term would have expired, there was no production from the Bentpath Pool nor had the area been designated or used for storage purposes. Board Order E.B.O. 46 incorporating the Unit Operation Agreement was issued on March 6, 1972. The Board agrees with Board counsel that paragraph 4 of the Unit Operation Agreement kept the Sanderson lease alive beyond the basic term provided in the original lease. Therefore the Sandersons cannot be considered to be Applicants before the Board for the purposes of section 21(2) and (3).

On May 18, 1951 Archibald Turner executed an Oil and Gas Grant with Union, again in the same form as that signed by Andrew Thompson. The primary term was for 20 years, and unless there was production in paying

quantities or storage the term would expire on May 18, 1971. The Graham Turners obtained their land subject to this agreement (the "Graham Turner Lease").

Exhibit 88 shows the production history of the Bentpath Pool. As indicated earlier, first production commenced December 7, 1970 and continued during the months of January, February, and March 1971. On April 1, 1971 the pool was apparently shut down for stabilization. There was no production from the pool between April and October 1971 inclusive. Production resumed for the months of November and December, ceased in January and February and resumed in March and continued to August 16, 1972. On the specific date of May 18, 1971 no gas was being produced from the pool.

Mr. Giffen argued that this lease expired on that date and that order E.B.O. 46 could not revive it. On the other hand Union submitted that since a producing gas well had been completed on the Graham Turner property in January 15, 1971, it would be appropriate to construe "gas produced" as equivalent to or meaning the same thing as "completion of a well capable of production in paying quantities". On this basis Union argued that the Graham Turner Lease was in fact a valid and subsisting lease on the effective date of the issuance of the Board E.B.O. 46 and was continued in full force and effect pursuant to the terms of that order.

Some background is necessary to place the events relating to the operation of the Bentpath Pool in perspective.

Union was prohibited by Ontario Regulation 396/70 from producing the pool without the consent of the Minister of Mines and Northern Affairs (Exhibit 27, Tab 33). By letter dated October 14, 1970 Union was authorized on behalf of that Ministry to produce gas from the pool providing that all the interests of the parties were joined not later than April 30, 1971. Union produced gas during the months of January, February and March 1971, as previously noted, with cumulative production of 3.078 Bcf. The April 30 date was extended by letter from the Ministry dated April 8, 1971 which was filed as Exhibit 24 in the E.B.O. 46 hearing. The letter reads in part as follows:

> "1. Production from the Bentpath pool commenced 7 December 1970 and was temporarily terminated 1 April 1971. Production from this pool will commence again on or about 1 November 1971.
>
> 2. This Department's instructions to you, dated 14 October 1970, include the condition that all the interests in the pool shall be joined for the purpose of producing the well or wells not later than 30 April 1971. In view of the difficulties which are being experienced in respect of complying with The Ontario Municipal Act, this date is being extended to 15 June 1971. If unitization of the pool has not been voluntarily agreed to by all parties concerned, the matter is to be referred to the Ontario Energy Board for compulsory unitization.

Why the period was extended to only June 15, 1971, when Union apparently had no intention of recommencing production until November 1, 1971 was not explained at that hearing.

Union did not apply to the Board for unitization until July 30, 1971. The matter was heard in Sarnia on October 28, 1971 and was resumed again on December 14, 1971. Reasons for Decision approving unitization were issued on February 16, 1972 followed by an Order dated March 6, 1972.

Meanwhile by letter dated November 9, 1971, the Minister again extended the time for production, this time to December 15, 1971. Apparently production resumed upon receipt of that letter and continued to December 15, 1971. No subsequent production took place until the Board Order was issued in March, 1972.

There were two periods, therefore, when Union had no authority to produce gas from the Bentpath Pool - the first June 15 to November 9, 1971, inclusive, and the second December 15, 1971 to March 6, 1972 inclusive. During those periods production did not take place. Between April 30 and June 15, 1971, Union could have produced gas from the pool, nevertheless it decided not to do so. When Mr. Newton was asked during E.B.O. 46 hearing for the reason for this, he replied as follows:

> "Under our contract we were negotiating with other interested parties, at that time we had in mind under that contract trying to establish production figures in the order of 3 BCF of gas. We had reached slightly over that 3 BCF

> by the end of March 31, 1971, and that was, having that in mind, we shut it in and we had fulfilled the obligations we had intended to execute at that time."

The situation therefore is that on May 18, 1971 Union could have produced gas from the pool in paying quantities, and it was in a position to do so until June 15, 1971. Thereafter, without Board Order or further Ministerial authorization, Union was prohibited from producing gas from that pool. The Board is not impressed with Union's ingenious argument and in the Board's view the hiatus following June 15 was sufficient to terminate the Graham Turner Lease. The Board agrees with its counsel that Board Order E.B.O. 46 could not revive a lease which had already expired and therefore the Graham Turners do not have a storage agreement with Union. The Graham Turners therefore have standing before the Board with respect to an application to determine fair, just and equitable compensation under section 21 (2) and (3) of the Act. In the circumstances of this agreement, the Board finds that neither estoppel nor laches applies.

Subject to the above findings the Board agrees that the Union oil and gas leases which contained storage provisions have been extended by Board Order E.B.O. 46 so long as payments provided in the Unit Operation Agreement were made.

The Plea of Unconscionability

Mr. Giffen's argument on unconscionability was short and his pleadings were silent on this issue. Nevertheless the Board takes from his argument and the cases cited by him that the Gas Storage Agreements were unconscionable because the rental payment offer was unreasonably low, Union's bargaining position was much stronger than the landowners, and Union induced the landowners to sign the Gas Storage Agreements with promises that were not kept and by misrepresentation as to the nature and content of the agreement. Mr. Tennyson supported Mr. Giffen's argument on this issue.

In support of the allegation of unconscionability Mr. Giffen cited the evidence, which he stated is uncontradicted, that fair market value of the least cost alternative to Union would be $1,950 per acre per annum in 1980 and that in contrast Union is paying the Applicants a mere $7.00 per acre per annum in perpetuity. For reasons detailed in Part III hereof the Board does not agree with Mr. Giffen's submission as to fair market value. His reliance on this evidence to support the allegation of unconscionability is, therefore, ill-founded and his argument is rejected by the Board.

An analysis of the table prepared by the Central Ontario Appraisals (Exhibit 103) indicates that in the period 1972 to 1974 Union's payment of $5.00 per acre per

annum to landowners in the Bentpath Pool was neither the highest nor lowest payment among lessees for gas storage rights in Lambton County, nor was it the highest or lowest paid by Union to its lessors. The Board does not find that "the total facts in this matter shriek of unconscionability." It cannot be said that the landowners were coerced into signing the agreement, in any way, or prevented from obtaining independent advice, or that the amounts paid to them under the various lease agreements were out of line with payments being made to other landowners in the same general vicinity for the same type of rights at that time. In short, the Board concludes that the evidence does not support a finding of unconscionability.

The parties having standing before the Board on the issue of compensation therefore are the Higgs, the Smits, the Township of Dawn, Achiel Kimpe, and the Graham Turners.

PART III

Compensation

Effect of Board Order E.B.O. 46 on Storage Payments

It was claimed on behalf of the Kimpe Applicants that certain payments that they were entitled to under the various leases and agreements had not been received and as such the agreements should be declared void. Evidence was submitted detailing the payments made by Union to each landowner and in addition, Mr. Giffen called Mr. Bowman, who had analyzed payments made to the McFaddens, Thomases and Turners.

The evidence before the Board is that although several of the Applicants had expressed their concern that the payments were insufficient, there was no evidence filed to show that they had in fact objected to Union changing the payments from 'in advance' to 'in arrears', or that they considered that payments were not being made at all under any lease or the Gas Storage Agreements. In any event, the Gas Storage Agreement has no penalty in the event of failure of the Lessee to comply with the terms of the agreement. And under the Union oil and gas leases which included storage, the lessor was required to give Union thirty days notice

of any default so that it could be removed before the lease could be declared void. Since such notice was not given by the lessors prior to this proceeding, the Union lease agreements cannot be considered void for reasons of non-payment. The Board concludes, therefore, that none of the leases or the Gas Storage Agreements is voidable on the grounds of non-payment.

The Act requires the Board to determine the amount of compensation payable to the owner of storage rights which are not subject to agreement. The Board agrees with its counsel that the Board is not a collection agency, but since the landowner's storage rights were taken as of July 31, 1974, the date of first injection, the period from 1974 to 1982 must be considered and recognition must be given to payments that have already been made by Union. A determination of outstanding compensation due to an Applicant necessitates an analysis of payments to determine under which leases, agreements or Board Orders they were made.

In reviewing the amounts that have been paid by Union under the various agreements, it appears that payments were made in full under the individual agreements prior to Board Order E.B.O. 46 being issued and also under Union's interpretation of the Unit Operation Agreement that formed part of Board Order E.B.O. 46. However, it is questionable whether payments under the Gas Storage Agreements have actually been made by Union.

The Gas Storage Agreements assigned the storage rights to Union with compensation set at $5.00 per acre per year, payable annually in advance, on the anniversary date of the agreement. Five out of the eight Gas Storage Agreements were dated May 1, 1970, two on May 5, 1970 and one on April 29, 1970. Payments were made in accordance with these agreements for the periods 1970 to 1971 and 1971 to 1972.

Board order E.B.O. 46 was issued on March 6, 1972, and, the Board, at page 12 of its Reasons for Decision in E.B.O. 46, made reference to Union's proposed payments under the Unit Operation Agreement and noted that:

> "These payments are in substitution for all payments under the petroleum and gas production leases and gas storage agreements and appear to have been designed to remove the inequity between the Union and Imperial lessors arising from the fact that the Union lessors signed away their storage rights for no present consideration other than the holding rental under the production leases, whereas the Imperial lessors are compensated not only by the holding rental under the production leases, but also by the separate storage rental under the Union gas storage agreement."

Union concluded that the Board Order amended both oil and gas leases and Gas Storage Agreements so that payments were no longer made in accordance with the agreements that had been signed, but were now made in accordance with Union's interpretation of the terms of the Unit Operation Agreement (See page 19 herein). Those landowners with acreage in the participating area received royalties as gas was produced and those outside

the participating area received the minimum annual rental, in arrears. It will be noted from page 19 herein that the applicable section of the Unit Operation Agreement requires that the lessors be paid by the lessee not later than the 31st day of January, next following, an amount per acre that will bring the total received from royalties and any payments for underground storage rights from any source up to a minimum of $7.00 per acre per year for that land within the unit area and $5.00 per acre per year for land outside the unit area. This does not amend the Gas Storage Agreements but provides for a common minimum payment to all landowners.

It should be noted that neither the Board's Reasons for Decision nor the Order in E.B.O. 46 amended the Gas Storage Agreements or specifically approved or required any adjustment to the timing of payments under the Gas Storage Agreements. This is not surprising, since Union had indicated during the course of that proceeding that it considered storage and compensation for storage to be outside the Board's jurisdiction in that particular proceeding. In the subsequent proceeding that dealt with the designation of the Bentpath Pool as a storage area, E.B.O. 64, the agreements were referred to, but again neither the Board's Order, nor the Reasons for Decision altered or amended those existing Gas Storage Agreements.

Reference to the remittance vouchers used by Union, show that prior to 1977, the terminology used was

"Expires indef. Not advanced. Unit agreement Bentpath Pool Unit." From 1977 onwards, the terminology is similar, except the words "unit agreement" are replaced with "storage payment", followed by the Gas Storage Agreement number for each landowner. Although the terminology changed in 1977, the amount paid by Union to the landowners was still calculated in accordance with the Unit Operation Agreement approved in E.B.O. 46.

The evidence before the Board, therefore, is that the Gas Storage Agreements have not been amended by any action of the Board or the lessors, and as such $5.00 per acre per annum should have been paid to the lessors in advance. Nor does the evidence show that the level of compensation for storage rights was set at $7.00 per acre per annum as alleged by Union. Oil and Gas leases taken by Union that included storage were amended by E.B.O. 46 and as such it appears that payment was made under those leases. The landowners without storage agreements have in fact, received payments under the Unit Operation Agreement. Since the Unit Operation Agreement established the minimum payment under the oil and gas leases, but could not establish compensation for storage since that matter was not before the Board, then these landowners have not received any payment for storage from July 31, 1974 to date.

In summary then, the Board finds that Board Order E.B.O. 46 did not amend or alter the payments to be made

for gas storage rights to those landowners who had signed Gas Storage Agreements, nor did it directly or indirectly set the level for gas storage compensation at $7.00 per acre per year.

Principles of Compensation

The Applications by the landowners were made pursuant to section 21 of the Act. That section provides that an appeal from a determination of compensation by the Board must be to the Divisional Court under section 33 of the Expropriations Act R.S.O. 1980 C. 148.

Since the above acts include several cross-references one to the other, it became an issue in this proceeding whether the Board should make its decision on compensation solely on the basis of the Ontario Energy Board Act, or whether the Expropriations Act, or particular sections of that act, or the common law should influence its decision.

Union noted that the Board, in at least two Reasons for Decision issued in designation proceedings, has stated that approving the designation of an area for storage has the effect of expropriating storage rights from those within the area who had not signed a storage agreement. Union argued that these Board decisions together with section 2 of the Expropriations Act, require that the determination of compensation by the Board be undertaken using the general principles of compensation as set out in section 14 of that act. Union also argued that the procedural requirements relating to storage matters before the Board were governed by section 35 of the Ontario Energy Board Act.

Mr. Giffen, for the Kimpe Applicants, considered that the Board, having been given the widest powers by the Legislature to deal with compensation and such matters as agreements, should determine fair, just and equitable compensation without recourse to the principles that are intended to govern the determination of compensation under the Expropriations Act.

He submitted that Union was not in a position to ask the Board to take the Expropriations Act into consideration since Union had not complied with the procedures specified in that act. He pointed out that the courts in the past have required a strict compliance with the procedural requirements of expropriation statutes and argued that since Union had not complied with the procedures set out in the Expropriations Act it would have to start the process all over again if it wished to apply any portion of the Expropriations Act to the determination of compensation.

The difference between the "taking" of property, generally dealt with in expropriation proceedings, and the "entering" and "use" terminology used in section 21 of the Ontario Energy Board Act, was noted by Mr. Giffen. He argued that "entering and use" was not an expropriation and that the Board should set "fair, just and equitable compensation" as required by section 21(2). He agreed with Union that the procedural requirements for storage matters were governed by section 35 of the Ontario Energy Board Act.

Mr. Tennyson's submission on behalf of certain landowners in the Payne Pool area generally endorsed the arguments of Mr. Giffen and in particular dealt with the principles of compensation. He submitted that the Board should consider all the issues of compensation and not limit itself solely to the narrow grounds of the law of expropriation. These landowners were concerned that the Legislature, through the provisions of the Ontario Energy Board Act, has "taken away the rights of the private landowners to sell this gas storage resource to the highest bidder in a free and open market". They, therefore, asked the Board to take the statutory limitations imposed by the Act on their ability to sell their rights into consideration when fixing fair, just and equitable compensation.

Board Counsel traced the numerous amendments to both acts and concluded that the Ontario Energy Board Act governs as far as the procedure to be followed is concerned, but that the principles set down in sections 13 and 14 of the Expropriations Act should be followed in establishing the level of compensation.

The Board having reviewed the evidence and the arguments of all counsel, concludes that it has two issues to decide in order to establish what principles or precedents should guide it in setting compensation. The first is whether the taking of the landowners storage rights constitutes expropriation, the second is the

extent to which the relevant statutes and the common law should be considered by the Board in determining compensation.

The Board, in Reasons for Decision E.B.O. 64, stated that the granting of Union's application had "the effect of expropriating the storage rights" of two private landowners and the Township of Dawn. It would therefore seem that the Board, at that time, considered that the taking of storage rights was akin to an expropriation.

Subsequent to the designation of an area as a storage pool, a Board Order appoints an exclusive operator. In the case of Bentpath, it was Union. Once such an order has been issued storage rights that have not been assigned to the operator have no value to the landowner because he cannot independently use them. In effect they have been taken from the landowner without his consent. The definition of "expropriation" in the Expropriations Act includes "the taking of land without the consent of the owner by an expropriating authority". In the same act, "land", is defined to include "any right or interest in, to, over or affecting land". In this case the subject is a "right or interest in" land, and Union is in effect the expropriating authority through the approval of the Board.

The Board has concluded that the distinction between "entry and use" and "taking" referred to by Mr. Giffen

is really a distinction without a difference in this case and that for all practical purposes the landowner's rights have been expropriated.

The sections of the Expropriations Act that appear to have relevance in this matter are section 2(1) and (4), section 4(1) and (2) and section 12. These are as follows:

> Section 2:
>
> "(1) Notwithstanding any general or special Act, where land is expropriated or injurious affection is caused by a statutory authority, this Act applies.
>
> "(4) Where there is conflict between a provision of this Act and a provision of any other general or special Act, the provision of this Act prevails."
>
> Section 4:
>
> "(1) An expropriating authority shall not expropriate land without the approval of the approving authority as determined under section 5.
>
> "(2) Subsection (1) does not apply to an authorization of the Ontario Energy Board under the Ontario Energy Board Act in respect of storage of gas in a gas storage area or to an expropriation authorized under section 49 of that Act."
>
> Section 12:
>
> "Section 21 of the Ontario Energy Board Act applies in respect of the use of designated gas storage areas."

The Board considers that section 2 expresses the intent of the Legislature that the Expropriations Act should apply in all cases where a property owner could be deprived of property, or rights associated with that property.

The Board is also satisfied that sections 4 and 12 of the Expropriations Act would preclude any application under that act with respect to matters associated with the storage of gas. Those sections also establish the Board as the approving authority for gas storage designation and pipeline expropriations. Mr. Giffen is, therefore, in error in suggesting that Union would have to start expropriation proceedings under the Expropriations Act before the remaining applicable provisions of that act can be considered.

Section 21(1) of the Ontario Energy Board Act establishes the Board's power to authorize a person to inject, store, and remove gas and section 35 of the Act sets out the procedures to be followed with respect to the designation of a gas storage area. Since the application by Union that resulted in the designation of the Bentpath Pool as a storage area was brought under these two sections of the Act, the Board concludes that the correct procedures have been followed and that those procedures do not preclude the consideration of the Expropriations Act in this proceeding.

Section 21(4) of the Act is as follows:

> "(4) An appeal within the meaning of section 33 of the Expropriations Act lies from a determination of the Board under subsection 3 to the Court of Appeal, in which case that section applies and section 32 of this Act does not apply."

This section makes it clear that the Legislature intended that an appeal from a determination of

compensation by the Board would be to the Divisional Court under section 33 of the Expropriations Act.

On the basis of the foregoing the Board has concluded that the determination of fair, just and equitable compensation must include recognition of the principles contained in the Expropriations Act.

During this proceeding many cases were cited by the participants, with a view to establishing the state of the common law with respect to the determination of compensation for an expropriation. The Board does not consider it is necessary to summarize the various cases that were cited but believes that the case of Farlinger Developments Ltd. v. Borough of East York (1973), 5 L.C.R. 95, 127 (LCB); varied (1975), 8 L.C.R. 112 contains one of the most recent and perhaps the most explicit interpretation of section 14 (1) of the Expropriations Act that has been expressed by the courts. In that case the Ontario Court of Appeal held that "In an expropriation there are really two fundamental steps, the first is to determine the highest and best use of the property expropriated and the second is to fix the compensation awarded to the owner based on such use." The definition of "highest and best use" was quoted from a previous hearing of the Ontario Land Compensation Board as "the highest economic use to which a buyer and seller, each willing and knowledgeable, would reasonably anticipate the lands would probably be put."

In this proceeding the issue is of course the compensation that should be payable for storage rights rather than the outright acquisition of land. Nevertheless, the Board is satisfied that recognition must also be given to the established common law with respect to expropriation matters.

With respect to the probability of the use of those storage rights, it must be remembered that the application by Union in 1974 was for the designation of the Bentpath Pool area as a natural gas storage area. It was, therefore, almost a certainty rather than a probability that the highest and best use of the subterranean void under the designated area would be for the storage of natural gas.

Bentpath Compensation

It is clear in this proceeding that the Applicants are dissatisfied with the treatment accorded them by Union. This dissatisfaction apparently results from their belief that the payments for storage rights received to date, the offer made when they were asked to sign the Gas Storage Lease Agreement and the subsequent offer of $12.36 per acre per year, were all inadequate.

Section 21, subsections (2) and (3) of the Act, which provide for a landowner's right to compensation for gas storage rights, read as follows:

> "(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),
>
> (a) shall make to owners of any gas or oil rights or of any right to store gas in the area fair, just and equitable compensation in respect of such gas or oil rights or such right to store gas; and
>
> (b) shall make to the owner of any land in the area fair, just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by such order.
>
> (3) No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount thereof shall be determined by the Board."

Under Part II ~~of these Re~~asons for Decision the Board has concluded that Kimpe, the Graham Turners, the Higgs, the Smits and the Township of Dawn all have standing before the Board in this proceeding and as such they are entitled under section 21(3) to have the Board

determine the amount of compensation that should be paid for their rights to store gas. Those landowners that have agreements have no standing before the Board in this proceeding, and Union is legally required only to pay the amount of compensation required by such agreements. For obvious reasons it is desirable that all landowners in a pool be treated equally and the Board would encourage Union to adopt a uniform treatment for all landowners in the Bentpath Pool. It recognizes, however, that it does not have the jurisdiction to order Union to do this.

In weighing the evidence and determining the amount of compensation that should be paid, the Board has taken into consideration the requirements of the Act that such compensation should be "just, fair and equitable".

The Board has also accepted that the principles established in the Expropriations Act should be considered in its determination of the compensation payable to the landowners. The sections of that act which contain those principles are sections 13 and 14 which are as follows:

> "13.(1) Where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.
>
> (2) Where the land of an owner is expropriated, the compensation payable to the owner shall be based upon,
>
> (a) the market value of the land;
>
> (b) the damages attributable to disturbance;

(c) damages for injurious affection; and

(d) any special difficulties in relocation,

but, where the market value is based upon a use of the land other than the existing use, no compensation shall be paid under clause (b) for damages attributable to disturbance that would have been incurred by the owner in using the land for such other use.

14.(1) The market value of land expropriated is the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.

(2) Where the land expropriated is devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, and the owner intends in good faith to relocate in similar premises, the market value shall be deemed to be the reasonable cost of equivalent reinstatement.

(3) Where only part of the land of an owner is taken and such part is of a size, shape or nature for which there is no general demand or market, the market value and the injurious affection caused by the taking may be determined by determining the market value of the whole of the owner's land and deducting therefrom the market value of the owner's land after the taking.

(4) In determining the market value of land, no account shall be taken of,

(a) the special use to which the expropriating authority will put the land;

(b) any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation; or

(c) any increase in the value of the land resulting from the land being put to a use that could be

> restrained by any court or is contrary to law or is detrimental to the health of the occupants of the land or to the public health."

During these proceedings a number of methods of determining compensation, or the market value of storage rights, were proposed by those participating. As a result, the Board was presented with an extremely wide range of possible values, each being supported by a witness who was considered to be an expert in his field.

Union submitted that the calculation of the market value should be based on the report prepared by the Board and submitted to the Lieutenant Governor in Council in 1964. In that report the Board concluded that compensation should be based on the performance rating of a pool and suggested three ratings; excellent, good and fair. The value proposed per million cubic feet of capacity for each of these ratings was 30¢, 27.5¢ and 25¢ respectively, with the total value being distributed to the landowners in proportion to the land owned by each to the productive acreage in the designated area. Union, having rated the Bentpath Pool as "good", had determined that $12.36 per acre per annum should be offered. Revising the rating to "excellent" caused Union, in its argument in this proceeding, to increase the offer to $13.48 per acre per annum.

Throughout the hearing the Kimpe Applicants relied heavily on the value as presented in the Havlena Report prepared by their consultants, Messrs. Friedenberg,

Havlena and Ruitenbeek. The Havlena Report, filed as Exhibit 63, included a determination of the annual rental value for storage rights in the Bentpath area and a value for purchasing the property including storage rights. Values were calculated for each of the years 1974 to 1981 and the annual rental per acre varied from a low of $425 in 1976 to a high of $3,049 in 1979. The outright purchase price per acre varied from a low of $4,192 in 1976 to a high of $28,818 in 1979.

In argument the Kimpe Applicants still favoured the Havlena method but now suggested that other methods which were not presented to the Board during the hearing might be acceptable. Seven methods were proposed by Mr. Giffen and in his order of preference these required that the Board:

1) either accept the Havlena Report as filed with the rental calculated for each year being reduced by one-half to provide for an equal sharing between the landowners and Union's customers (i.e. for 1981 the Havlena calculated rental rate of $1797.00 per acre per year would be reduced to $898.50), or use that Report as the basis for determining the appropriate annual compensation for each year;
2) determine compensation essentially as 1) above except that the amount would be determined for a three-year period instead of each year;

3) base compensation on the sales by one company to another of operating pools such as Wilkesport and Terminus, with the compensation so determined being adjusted to reflect inflation for each year in question;

4) recognize that Union has storage capacity to meet some 40 percent of its annual gas sales and on this basis, instead of halving the annual amounts produced by the Havlena Report, reduce them to 40 percent;

5) allow compensation to track changes in amounts paid for oil and gas leases. It was claimed that since oil and gas leases have increased from $1 per acre in the 1960's to approximately $25 today, the $7.00 per acre currently being paid for Bentpath should be increased by 25 times to $175 per acre per year. Further adjustments should be made in the future as changes in oil and gas leases occur and for any inflationary trends;

6) update the recommendations in the Board's 1964 report. It was suggested that an escalation equal to the increase in the price of natural gas in Eastern Canada since 1964 would produce appropriate rental figures for today. They calculate that the $13.48 would be increased to $94.54 per acre per year for Bentpath at

current gas price levels. The figure would, of course, increase as the price of natural gas increases;

7) alternatively, update the 1964 report using an assumed rate of inflation for the years since that report was issued. They suggest 10 percent per year inflation would be a reasonable average and on this basis the Kimpe Applicants calculated a rate for Bentpath of $75 per acre per year for 1982. This would of course be increased annually in accordance with the annual rate of inflation.

Board counsel filed a study that had been prepared by Central Ontario Appraisals and called Mr. Mason and Mr. Kylie of that company to testify. The study examined several approaches but finally recommended a method for the determination of what the authors considered to be fair, just and equitable compensation for the rights to store gas in the Bentpath Pool. This method consisted essentially of determining the fee simple value for the property based on other property sales in the area and an annual rental rate based on that fee simple value. Mr. Mason considered that the annual rental payable for storage rights should be a maximum of 50 percent of the fee simple rent. For the year 1981, the Central Ontario Appraisals method produced a fee

simple rental of $67.92 to $84.90 per acre per year so that the maximum storage rate would be $33.96 to $42.45 per acre per year.

Throughout the proceedings, Mr. Giffen characterized his clients as being uninformed and without bargaining power at the time that they signed agreements with respect to storage. He suggested that lack of knowledge caused his clients to sign agreements which provided for an inadequate level of compensation. In this respect it is interesting to note that having now received the opinions of several experts on the subject, the Board is faced with a somewhat astonishing range of proposals for compensation, all deemed by knowledgeable people to be appropriate for the Bentpath Pool area.

Mr. Giffen, who has now had over two years' experience and the advice of numerous experts, presented the Board with seven alternatives for 1981 ranging from $68.13 to $898.50 per acre per year. Union, although it has been in the business of storing gas for many years, did not express any corporate opinion, but chose to rely on the Board's 1964 report on storage in Ontario. Board Counsel submitted that the Mason evidence be used as a guide only and, on the basis of the increase in rates paid by Tecumseh and changes in the Consumer Price Index, they recommended that the compensation range found by the Board in 1964 be increased. They also submitted that the Board should determine the level of compensation for two

periods, and recommended that it should be between $15.00 and $25.00 from July 31, 1974 to July 31, 1982 and between $25.00 and $40.00 from July 31, 1982 to July 31, 1987.

It is apparent that the "knowledge" that Mr. Giffen alleged was not previously available to his clients is subjective in that the evidence now before us indicates that its aquisition does not lead to one irrefutable value but, depending on the viewpoint, to a very wide range of possible values. The Board can only conclude that lack of knowledge was in reality a minor factor in the total dissatisfaction of the landowners.

The wide variation of expert opinions now faced the Board in this case is not unique. In the appeal arising from Runnymede Development Corporation v. The Minister of Housing, (1978) 20 O.R. (2d) 559, affirmed 18 L.C.R. 65 [C.A.]. The court at page 564 referred to the Land Compensation Board's difficulty;

> "The Board finds it difficult to comprehend how two sets of knowledgeable appraisors having the same information as to planning and services, and having available the same records of sales which may be relevantly comparable to the subject properties, can arrive at values for 413 acres of raw land, which, taking the higher and lower of the values in evidence, shows a difference of almost $5 million."

The Court in its decision noted that "it was the Board's responsibility to weigh the conflicting evidence and act upon the evidence that it found to be credible and persuasive." It also pointed out that the Land

Compensation Board was not obliged to accept the whole of the evidence of any witness and could refuse to accept part of the opinion of certain witnesses. The court concluded that the inferences made by the Land Compensation Board "were reasonable in the face of the difficult and conflicting body of evidence it had to deal with," and dismissed the appeal.

In weighing the evidence before it, this Board must now examine each of the alternatives proposed by the participants, in light of the principles and common law referred to in the preceding section.

Section 13 of the Expropriations Act requires that landowners receive compensation based on the market value of the land, but where the market value of the land is based upon the use of the land other than existing use, no compensation shall be paid for damages attributable to disturbance. Section 14 of that act defines the market value of the land as the amount that a willing seller might expect if the land were to be sold to a willing buyer in the open market. The determination of market value of land, however, cannot take account of any special use to which the expropriating authority will put the land, or to the effect on value of the imminence of any development. Section 13 clearly recognizes that market value can be based on a use other than the existing use, whereas section 14 specifically bars the value of land being based on the special use intended by

the exproriating authority, or the change in the value resulting from the imminence of such a development.

The relevent principle in common law has been referred to as the Pointe Gourde Rule the purpose of which was stated in Wilson et al v. The Liverpool City Council, [1971] 1 All E.R. 628 as being:

> "... to prevent the acquisition of the land being at a price which is inflated by the very project or scheme which gives rise to the acquisition."

This rule, however, is not interpreted by the courts as restricting the determination of market value to that of value to the owner, or to eliminate consideration of the future potential for the land. In Fraser v. The Queen, [1963] S.C.R. 455, Richie J. referred to the decisions in Cedars Rapids Manufacturing and Power Co. v. Lacoste; Fraser v. City of Fraserville; and Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendant of Crown Lands as the leading authorities usually quoted in support of the contention that potential value over bare ground could not be considered if solely related to the purpose for which the land was expropriated. He went on to say:

> "None of these cases is, in my opinion, authority for the proposition that a hitherto undeveloped potentiality of expropriated property is to be entirely disregarded in fixing the value of that property for compensation purposes on the ground that the expropriating authority is the only present market for such potentiality and that it has developed a scheme which involves its use. These cases do, however, make it plain that the amount fixed by way of compensation must not reflect

> in any way the value which the property will have to the acquiring authority after expropriation and as an intregral part of the scheme devised by that authority."

With respect to the seven proposals submitted by the Kimpe Applicants for determination of market value, the Board notes that the first two are based on the Havlena Report. This Report established for each year what the authors termed the "value" of the Bentpath Storage Pool by an economic analysis of the market conditions and the alternative methods that Union might use to meet the demands of its customers if storage were not available. They concluded that purchasing from TransCanada PipeLines under various rate schedules would be the least cost alternative and calculated the cost addition that would be involved were Union to adopt that alternative. This additional cost was considered to be the value of storage and the annual value or rental was determined from this on a per acre basis and the purchase value was determined by discounting the yearly value by rate of return.

The Board considers that the values produced in the Havlena Report are a measure of the gross margin, or contribution, to Union as a result of the use of storage. This margin could not be realized without Union's distribution system and Union's customers. It clearly is a calculation of the value of the storage rights to the expropriating authority, namely Union. It has been noted that the consultants made no claim that

the value determined in the Havlena Report was that which might be paid in the open market to a willing seller by a willing buyer.

The methodology used in the Havlena Report was largely unchallenged in this proceeding and the Board does not propose to deal with it in detail. It should be noted, however, that the application of that methodology to other companies, such as Tecumseh which purchases no gas other than for compressor fuel, or Consumers' Gas Company Ltd., which has little storage, would produce substantially different values for storage rights, even in the same area.

The Board concludes that the methodology used in the Havlena Report is limited in application and fails to comply with the principles established both in the statute and in common law and as such cannot be used for the determination of the market value or of compensation for storage rights.

The Kimpe Applicants' third preference requires that the Board determine compensation on the basis of a comparison with prices that are being paid by storage companies to acquire pools from other companies. Mr. Giffen also requested the Board to recognize the one case in Michigan where landowners organized and forced the utility to pay a higher price. The Kimpe Applicants claim that the prices paid by a storage company for gas storage rights reflect the market value and point out that in such a sale both parties are knowledgeable.

The Board will disregard the Michigan case for two reasons. First, the transaction was not between willing parties, rather the utility was "driven" to meet the demands by the circumstances of that time. Second, the law in Michigan is different from the law in Ontario.

The Board is of the opinion that there is no similarity between the outright purchase by one company from another of an assembled pool area or an operating pool area, and the rental of storage rights from a land-owner. In acquiring new storage rights from a landowner in an unexplored area it is the operating company, not the landowner, that incurs a risk that the area may not be suitable for storage, that market conditions may not permit economic development and use of the area for storage, or that after development the costs involved with operation of the particular pool may be too high. However, when a company purchases an assembled area most, if not all, of this risk has already been borne by others. The purchasing company generally has available to it geological information, the drilling experience associated with the pool and data relating to the production and operation of the pool. This information normally forms part of the sale from one company to the other and it can effectively eliminate much of the initial risk associated with development of the pool for storage. The value that the two companies place on the

geological and operating data, the assembly of a pool area, or any residual risks appears to the Board to be quite separate from the annual rental paid to landowners for storage rights, which rental continues to be paid to landowners regardless of change of ownership.

From the above it is apparent that the price paid by one company to another for the right to operate a particular pool has no bearing on the market value of storage rights. The Board, therefore, rejects this as a method of determining market value.

The Kimpe Applicants' fourth method of fixing compensation again relied on the Havlena Report and for reasons stated above the Board rejects this as a reasonable method of determining market value or compensation.

With respect to the fifth method proposed by the Kimpe Applicants, it should be noted that when the Board approved $7.00 per acre per year in E.B.O. 46, it pointed out that it was to be a total figure including all payments received for oil and gas rights and storage. In addition there is no evidence before the Board that demonstrates that the rental for oil and gas rights is related to the rental for storage rights. It would, therefore, be inappropriate to use the $7.00 as the base figure, and to increase this in the manner proposed by the Kimpe Applicants.

In view of the variation in payments required under the original oil and gas leases and since E.B.O. 46

specifically amended these leases, the Board considers this approach to be inappropriate in the circumstances.

The sixth method proposed by the Kimpe Applicants seems to suggest a link between the value of storage rights and the price of natural gas in Eastern Canada. The price of gas at the Toronto city gate is now set by the Canadian Government under the Petroleum Administration Act and is outside the control of both Union and TransCanada PipeLines. The Board cannot accept that changes in the level of tax imposed on all Canadians through gas sales, or the imposition of a Canadianization tax, should have any impact on the value of storage rights in Ontario, nor that increases in the cost of gas should impact directly on storage rights or their value.

The Board can find no support for the claim that there is such a relationship between the price of gas and the market value of storage rights and so rejects this proposal.

The seventh and final method proposed by the Kimpe Applicants suggests that Union's offer of $13.48 per acre per year be increased annually on the basis that the annual average rate of inflation has been about 10 percent for the 1974 to 1982 period. There was, however, no evidence filed to show that market value of storage rights has any relationship with the rate of inflation or with changes in the Consumer Price Index. The Board, therefore, rejects this approach as a method of determining compensation for storage rights.

The study prepared by Central Ontario Appraisers and submitted by Board counsel in this proceeding contained the recommendation that the market value of storage rights should be determined by the Board using the rental rate developed from fee simple value of the land. Implicit in this method is the assumption that the value of storage rights bears some relationship with the value of the land. In argument, Board counsel did not recommend that the Board adopt the approach proposed by Central Ontario Appraisers but suggested that it could be of some guidance to the Board.

The Board has reviewed the method recommended by Central Ontario Appraisers and concludes that there is no justification for the assumption that there is any correlation between the fee simple value of the land and the market value of the storage rights. It is understood from the evidence before the Board that none of the properties in the Bentpath Pool area was purchased for the storage potential but for the use of the top few centimetres of the land and any buildings thereon. That oil and gas was later discovered under such property must be considered a windfall to a landowner who has incurred no expense, expended no effort, and has not been exposed to any financial risk. Similarly, if the pool should later prove to be suitable for storage then this must be considered as an additional windfall. The use of the top few centimetres of soil has not been affected in any way,

except for those landowners where wells have been drilled, and in those cases only a few square metres of surface are required.

The evidence presented by the real estate appraisers suggested that the difference in value per acre for land located in a storage pool area, compared to land located outside a storage pool area, is insignificant. The Board, therefore, concludes that the presence of storage is not detrimental to land values, and that a reasonable level of rental rates for storage rights does not cause land values to inflate.

The Board agrees with its counsel that the Central Ontario Appraisers method is not suitable for the purposes of determining compensation in these circumstances.

The Board's responsibility in this procedure is to determine the compensation that would have been fair, just and equitable at the time that the storage rights were effectively expropriated from the landowners, that is July 31, 1974. The Board considers that it must also determine if the compensation continues to be fair, just and equitable as of the present and to make any adjustments that it considers necessary.

The offer made by Union to the landowners of the Bentpath Pool was based on the Board's 1964 report; a report that was based on data that was some ten years out of date as of the date of expropriation of the storage

rights, and is currently some 18 years out of date. Since much of the basic rationale with respect to storage remains unchanged, the Board's report is of considerable assistance. However, it must be recognized that values in general have increased during the intervening years.

When considering the Board's 1964 report, it should also be recognized that the report was the response to a reference of the Lieutenant Governor in Council that required the Board "to adjudicate on and examine and report on the following questions respecting energy:

"1. Payments with respect to storage of gas in designated gas storage areas.

2. Terms and conditions of Gas and Oil Leases.

3. The Gas and Oil Leases Act."

The Board was, therefore, not dealing with a question of expropriation of rights and due compensation, and was not constrained by the requirements of any statutes. The Board, in fact, declined to set specific compensation for any pool, because the fixing of rates for certain landowners in Dawn No. 156 Pool was to be the subject of arbitration before the Board at a later date and an appeal to the Ontario Municipal Board with respect to the Payne Pool had yet to be heard.

In essence, the Board in that report noted that earlier settlements for storage rights represented an annual rental of approximately 16 ¢ per million cubic feet of capacity and the latest one prior to the 1964

report had increased to approximately 19 ¢ per year per million cubic feet. Using this as a basis and giving "a good deal of weight to the increased use and usefulness of storage during the past thirteen months," the Board considered that rates should be substantially higher. It concluded that pinnacle reef pools should be categorized according to the performance ratings, namely; excellent, good and fair, and that the rates per million cubic feet of storage capacity, should at 30¢, 27.5¢ and 25¢ respectively. The figure of 30¢ per million cubic foot of storage capacity was used by Union to calculate the figure of $13.48 per acre per annum which has now been offered to the Bentpath Pool landowners.

It is interesting to note that in 1964, the Board was aware of a growing requirement for gas storage and that it gave weight to this in recommending the rental payments. This growing requirement appears to have been reflected in some of the rental rates paid in Ontario. Rates for the pools referred to as Dawn 1 and 2, designated formally in 1950, were apparently the subject of prolonged negotiation between Union and the landowners; subsequently resulting in an adjustment to $7.50 and $6.00 per acre per annum respectively in 1957, made retroactive to 1951. Union later responded voluntarily to the Board's 1964 report by increasing rates to all pools it operated for storage in accordance with the Board's recommendations. The increase varied from $3.60

to $8.88 per acre per year but Union did not respond to the May 4, 1964 report until August 1, 1967. No further increases in rental rates have been made by Union since 1967.

Tecumseh, on the other hand, appears to have shown a greater willingness to adjust rental rates. The landowners in the three pools originally used by Tecumseh - Kimball-Colinville, Seckerton and Corruna - received an increase from $5.00 per acre to $6.00, $8.75 and $8.60 respectively in 1964. Although these rates did not exactly correspond to those suggested in the Board's report, being somewhat higher, they appeared to represent a voluntary acceptance of the Board's concern that unit capacity and quality of each pool should be recognized in the pricing structure. In 1976 however, these rates were voluntarily increased again to a uniform $15.00 per acre, and in 1981 they were again voluntarily increased to a uniform $21.50 per acre. Apparently Tecumseh concluded that a differential based on pool performance was no longer justified.

In course of the study undertaken by Central Ontario Appraisers, a survey was made of gas storage lease agreements entered into between landowners and various companies in Lambton County. They concluded that the wide range of acreage rates paid was such "that no logical conclusion as to 'fair, just and equitable compensation' can be obtained from the leases." The

Board agrees with this observation, but considers that the survey data does produce some useful information. Of significance is that there were some eleven companies actively seeking storage rights in the county during the years covered by this survey. In addition, while there is a considerable variation in the rental rates being paid prior to actual use of the storage areas, there is an indication in the agreements that the rates that will be paid when and if pools are used for storage have been increasing during the years covered by the survey. For example, earlier agreements taken by McClure Oil Company carried a provision that use for storage would result in a renegotiation of annual payments within the range of $5.00 to $13.00 per acre, whereas by 1976 the range had increased to $15.00 to $30.00 per acre. Dow Chemical signed agreements between 1977 and 1980, which contained a requirement that the rental rate would be renegotiated between $20.00 and $30.00 per acre per year when the area is to be used for storage.

The number of companies that are or have been in the market place, the increase in the rental rates currently being paid, or that will be paid when the pools are used for storage, supports the observation by counsel for IGUA that there is in fact a market in existence and that market forces are causing rental rates to increase.

The Board concludes that direct reliance cannot be placed on the rates found appropriate by the Board in its 1964 report. In that report the Board appeared to recognize the existence of a market, in that the recommendations of that report were apparently based on the rates actually being paid in Southwestern Ontario at that time and trends that were perceived by the Board as to the future use and usefulness of gas storage. It is noted that the latter point could be considered as introducing an element of "use to the taker" or reflecting the scheme for which the property was expropriated. However, the Board is satisfied that some recognition can be given to the potential for land or rights without specific consideration of the value that might be ascribed to the storage as a result of the expropriation. The Board also recognizes that, as pointed out by Consumers' Gas during the hearing that led to the Board's 1964 report, a porous rock formation under a landowner's property is an asset that is reusable, unlike minerals which once removed are gone forever. The landowner in this case has lost the right to use the asset, not the title to the asset.

The right to use the asset can of course be relinquished by the operating company and perhaps for this reason the most accepted form of compensation for storage rights in Ontario is the annual rental per acre. The Board accepts the annual rental as being the most appropriate method of compensation in such cases.

On the basis of the foregoing, the Board believes that the appropriate method to determine compensation for landowners in the Bentpath Pool that will be fair, just and equitable is to use the market at a point in time, and to recognize any relevant trends which are evident for the future.

The Board can determine a rental rate that would be appropriate for 1974, but is then faced with the knowledge that changes in circumstances since that date are such that the rate should be higher now. The concern expressed by Union that the Board should only determine compensation on a "once and for all basis" has been noted. The Board considers, however, that while such a determination may well be appropriate for an expropriation of land where title is transferred, it would not be appropriate where the issue is the compensation to be paid pursuant to a Board Order. The Board also takes comfort from section 16 of the Act which reads:

> "16. The Board in making an order may impose such terms and conditions as it considers proper, and an order may be general or particular in its application."

The Board, while not sharing Union's view that rates should be set once and for all, does agree that some stability is required and that adjustments should not be made at too frequent intervals. The Board will, therefore, set a rental rate for the period 1974 to 1982 inclusive and a rate from 1983 to 1990 inclusive. Both

rates will be somewhat higher than the rate considered appropriate for 1974 and for 1983, but are not necessarily the average of the two periods in question.

The Board, having reviewed carefully the evidence placed before it including the 1964 report issued by the Board and the many submissions, recommendations and proposals in this proceeding; having concluded that there is a market operating in Ontario with respect to gas storage rights; having examined the rates most recently accepted by landowners in the market place and noting the trends; having noted the adjustments made to rates by Tecumseh from 1960 to present, concludes that fair, just and equitable compensation for the Bentpath Pool for the period 1974 to 1982 inclusive will be $18.50 per annum per acre, and for the period 1983 to 1990 inclusive, it will be $24.00 per annum per acre.

The Board notes that E.B.O. 46 amended the oil and gas leases held by landowners so that differences between the agreements would be eliminated and all would receive $7.00 per acre per year, including income from storage agreements.

The Applicants with standing before the Board in this hearing are those who do not have agreements, either because agreements were never signed, were void ab initio, or expired by the date of first injection. The annual amount paid to each of these landowners pursuant to Board Order E.B.O. 46 has therefore been

totally on account of oil and gas rights. The Board has determined the compensation to be paid for storage rights to these Applicants to be $18.50 per acre per annum up to and including 1982 and $24.00 per acre per annum from 1983 up to and including 1990. These amounts shall be paid in advance on or before the 15th day of January of the subject year and shall be in addition to the payments provided in Board Order E.B.O. 46 for the oil and gas rights. Compensation in respect of storage rights beyond 1990 will be renegotiated taking into consideration the circumstances of that time. In the event that the parties cannot agree on compensation and there are no agreements subsisting at that time between the parties, either can again apply to the Board under section 21 of the Act, or any successor act, to have the Board determine future compensation.

The above compensation or rental rates shall be paid to the landowners who do not have valid agreements with Union for storage, namely the Higgs, the Smits, Kimpe, the Graham Turners, and also to The Township of Dawn. As indicated earlier the Board believes that it would be appropriate if Union, in the interests of fairness, equity and good public relations, offered the same compensation to all other landowners in the Bentpath Pool.

The Board has considered the provisions of section 35(1) and (4) of the Expropriations Act and has

concluded that interest should be paid to the above named landowners on all outstanding amounts from July 31, 1974 to the date of payment at the rate of 11.98 per cent per annum, not compounded.

Compensation For Gas or Oil Rights

Mr. Giffen, on behalf of the Kimpe Applicants, claimed that compensation for the gas remaining in the Bentpath pool at the time injection commenced for storage (the residual gas) should be priced at 12.5 percent of the now current gas price. He further claimed that all of the gas in the pool was the property of the landowners so that residual gas volumes should be calculated down to zero psia, not to 50 psia bottom-hole as used by Union.

Board Order E.B.O. 46 approved a Unit Operation Agreement that provided for payment to the lessors of 2 cents per Mcf for all gas produced, saved and marketed. The evidence before the Board is that there remained in the pool at the time of the injection a further 466,216 Mcf of gas that could have been produced, saved and marketed. The Board is satisfied therefore that the only loss suffered by the landowners is that these volumes were not produced in 1974, and as a result of the pool being used for storage, it is unlikely that they will ever be produced.

The Board is not persuaded by Mr. Giffen's arguments. The submission 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. The residual gas that could have been economically produced in 1974, but it wasn't. Union could have

offered payment prior to 1982 but apparently didn't. The appropriate penalty to Union is to require payment of interest rather than adjust the unit cost to reflect the current price which no longer bears any resemblance to the cost of production but has been inflated by the action of governments.

The Board will, therefore, require Union to pay to the lessors the appropriate amounts in proportion of their land in the participating area to the total participating acreage less that held by the Township of Dawn, as if the residual volumes of 466,216 Mcf had been produced on July 31, 1974. The rate to be used in calculating the payments shall be 2 cents per Mcf. Union will also pay interest on the outstanding amount for each landowner at the non-compounded interest rate of 11.98 per cent per year for the period that the amount has been outstanding.

Since the Township of Dawn was prohibited from participating in royalty payments for gas produced from the Bentpath Pool, it should not receive any portion of the amount to be distributed in payment for the residual gas.

Compensation for Damages

The only damages claimed by the Kimpe Applicants are in respect of the annual payments for well sites located in the pool area. Currently, the payment being made to landowners by Union is $100 per well per year, and it is the Kimpe Applicants' contention that this should be increased to $1,000 per well per year. They support this claim on the basis that the value of property in the area has increased at least ten times since Union first used $100 per well per year in the Bentpath area.

Most landowners do not have wells on their property. Those that are affected in the Bentpath Pool are the McFaddens and Donald Cameron Sanderson, each having three wells located on their property, the Turners and the Graham Turners, each having one well.

Board Counsel pointed out that of the above, all are covered by valid agreements with the exception of the Graham Turners whose agreement expired and as such the Board has no jurisdiction to make changes in compensation except for the Graham Turners. Board Counsel made no comment on the Applicants' claim that the rate should be changed from the current levels, but they did recommend that payment should be made for all wells, for the period from July 31, 1974 to December 28, 1977, and that interest should also be paid on the outstanding amounts.

Well payments that have been made by Union have been made under the terms of agreements with Mr. Sanderson and

the Graham Turners. The well payments to the McFaddens and to the Turners have been made gratuitously, since the oil and gas lease entered into between these landowners and Imperial and the Gas Storage Agreement entered into with Union contain no provision for well payments. The Board understands Union decided to make the payments gratuitously in order to maintain uniformity throughout the pool area.

The clause in the Union Agreement of Lease that relates to well payments permits Union to determine which lands covered by leases held by it shall be included in a storage area and requires that notice of such determination shall be given in writing to the owners of such land. When notice has been given then the rights and privileges granted by the agreement continue as long as gas is being stored in the designated area or any part thereof. The agreement states that "the Lessee shall pay to the landowner $100 per year per well for each well drilled for the storage of gas during the term of this lease and such extension thereof."

In the case of the Bentpath Pool, Union commenced storage operations in August 1974 but failed to give any Notice of Determination until December 28, 1977. Well payments have been made since the date of the Notice of Determination but not for the period August 1974 to December 28, 1977. Union's witnesses could not explain why the Notice of Determination had been delayed, or why

December 28, 1977 was deemed to be the appropriate date for such notices and for the commencement of the well payments.

The Board notes that Union, in applying to the Board for designation of the area, had exercised its right to determine that land covered by these leases was to be included in the storage area. The Board finds great difficulty in understanding why, when the Board approved designation, Union did not comply with its own agreement and issue a Notice of Determination. It appears evident that in this case the landowners have suffered a financial loss because of the failure of Union to comply with the terms of its own agreement. The Board will require Union to make payment in the amount hereafter determined to the Graham Turners for one Well, B7, from first injection to December 28, 1977, together with annual interest at 11.98 percent, not compounded, for the period involved, and would urge Union to make similar payments to the other landowners with wells on their property.

The Board notes from Exhibit 62-1 that Tecumseh had established a payment for surface use, for whatever reason, at $150 per acre or part thereof and that this amount had been voluntarily increased in 1978 to $250 per acre or part thereof. On the basis of this information and the evidence as to the increase in land values it is apparent that the $100 per well site per year is inadequate under current conditions. Because of the

minimal impact on a landowner's property, the Board does not consider it necessary to increase the rental rates by the factor proposed by the Kimpe Applicants; neither does it consider that an annual adjustment should be made between 1974 and 1982 as suggested by them. Accordingly the Board will require that the $100 rate remain in effect up to and including 1981.

The well payment of $100.00 per well per year was established as long ago as 1951 in the Bentpath area and since the Board is now increasing the storage rate by a factor of about 2 from 1964 when the Board's report was issued, it would appear equitable to increase the well payment rate somewhat more than the storage rate. Also recognizing the level of well payments being made by others the Board concludes that well payments should be at the rate of $300.00 per year per well for the period from 1983 to 1990 inclusive. Again, this rate will apply to the Graham Turners, but the Board would urge that this rate be applied to all other landowners in the Bentpath Pool with wells located on their property.

PART IV

Application to Rescind or Vary E.B.O. 46 and E.B.O. 64

As previously noted, in an Application dated March 18th, 1981 ("The Application to Rescind"), the Kimpe Applicants requested the Board to rescind or vary orders made by it in E.B.O. 46 and E.B.O. 64. Nine grounds were stated in support of this application.

Board Order E.B.O. 46 ("the Unitization Order") made pursuant to section 24 of the Act, was issued March 6, 1972. The Order provided that Union would be the manager of the unit operation; that the oil and gas interests of those persons having an interest in land in the Bentpath Pool area were all joined and regulated. . .

> "... for the purpose of drilling an operating well and the carrying out of the various matters more particularly provided for in the Unit Agreement as if they and each of them had reached agreement on the terms and conditions set forth in the Unit Agreement and that such joinings and regulations be in accordance with and subject to the terms and conditions set forth in the Unit Agreement";

that the Township of Dawn be specifically excluded from sharing in the benefits of the unit operation; that the boundaries of the unit area could not be altered without Board approval; and that the Order would take effect "only upon revocation of Ontario Regulation 396/70 and shall take affect forthwith upon such revocation". It should be noted, however, that the Unit Operation Agreement, referred to in the Order as the Unit

Agreement, which was attached to and formed part of the Order was deemed to have come into effect on December 1, 1970.

It is a matter of record that all the Kimpe Applicants or their predecessors on title were served by Union's Application in E.B.O. 46; that by letter the majority of the landowners in the Bentpath Pool area stated their opposition to Union's Application; that an opportunity was given to the landowners or their representatives to participate in that hearing; that since the issuance of Order E.B.O. 46 no appeal has been taken and until this Application to Rescind, no attempt had been made to rescind or vary that Order.

Board Order E.B.O. 64 ("the Injection Order") made pursuant to section 21(1) of the Act was issued August 19, 1974. The Order authorized Union to inject gas into, store gas in and remove gas from the Bentpath Pool which had been designated as a storage area by Ontario Regulation 585/74, and to enter upon such lands and to use them for such purposes.

Again, it is a matter of record that all the Kimpe Applicants or their predecessors on title were served by Union's Application in E.B.O. 64; that objections to the Application were received from the Turners, Max McFadden, and Achiel Kimpe; that the Township of Dawn advised the Board of its By-law 40, 1973, but did not object to the Application; that an opportunity was given to the

landowners to participate and Messrs. Kimpe, Richards and Turner did participate; that since the issuance of Order E.B.O. 64 no appeal has been taken; and that until the Application to Rescind, no attempt was made to rescind or vary that order.

To expedite matters, counsel for the Kimpe Applicants and for Union filed a factum or a statement of law and fact relating to this application during the course of the hearing.

Basically, Mr. Giffen submitted that the Board exceeded its jurisdiction with respect to the Unitization Order E.B.O. 46 because that order purported to deal with storage rights and was retroactive to December 1, 1970. Mr. Giffen argued that, in exceeding its jurisdiction, the Board adversely affected the rights of; the Higgs and the Smits by in fact establishing the level of compensation to them for storage at $7 per acre per year in perpetuity; the Graham Turners and the Thompsons by keeping alive their leases which would have otherwise expired; and the remaining applicants by changing the payment dates for storage from payment in advance to payment in arrears. Mr. Giffen also raised the technical matter of the incorrect reference to Ontario Regulation 396/70 as well as several other matters which the Board does not consider material or relevant to the issue.

Mr. Giffen asked the Board now to rescind or vary Order E.B.O. 46 to provide that such order and the

storage payments allegedly made thereunder should not affect compensation or the level of compensation for purposes of the determination made under section 21 of the Act.

The Board has already determined that the Unitization Order did not affect storage rights, the level or timing of payments for storage rights or the lease of the Graham Turners. For these purposes then, there is no need to rescind or vary the order in the manner proposed by Mr. Giffen.

The argument relating to the error in referring to Ontario Regulation 396/70 which was consolidated and renumbered as Regulation 258 R.R.O. 1970 is, in the Board's view, not sufficient ground for rescinding the order. The correctly identified regulation was revoked by regulation 134/72 which was filed on March 20, 1972. That is the date upon which the Board's order took effect. The order was not retroactive as alleged by Mr. Giffen and interpreted by Union. Again, Mr. Giffen has failed to show sufficient cause to justify the rescinding or varying of the Order.

Board Counsel submitted that the Unitization Order should be varied to limit the term of the Order to the period of time during which production of gas took place or to rescind it effective the date Board Order E.B.O. 64 was issued, namely August 19, 1974. Board Counsel pointed out that the purposes for which the Order was

issued have now ceased to exist and therefore there is no need to continue it. In support of this submission, the Aldborough Pool Decision E.B.O. 93 decided in December 1979, was cited. In that case the Board decided first that provided production started within 12 months, the term of the Order would be for ten years or the period required to produce the gas reserves, whichever was less; and second that any existing oil and gas leases should continue except to the extent that they were amended or superseded by the unit operating agreement approved by the Board and that the unit operating agreement could be amended or superseded by any Order of the Board. In that case there were apparently no storage leases granting storage rights to any persons whereas at the date of the Bentpath Unitization Order, storage rights had been obtained by Union from the majority of the landowners in the Bentpath Pool area and there was an intent on Union's part, assuming conditions were appropriate, to use the pool for gas storage at some date after the cessation of production. Accordingly, the Board finds the Aldborough decision distinguishable from this case.

In the Board's view it is not unreasonable to protect gas storage rights leased from others through an underlying and concurrent oil and gas lease. Union clearly intended to have this protection because Clause 3 of the Gas Storage Agreement provides that the landowner shall not lease oil and gas rights to any person upon the

expiration of the Imperial lease, other than to Union. The clause also provides that at Union's request, at any time after the expiration of the Imperial lease and during the lifetime of the Gas Storage Agreement, the landowner shall enter into the Lease and Grant Agreement with Union in the form attached to the Gas Storage Agreement. It appears therefore, that even if the oil and gas rights reverted to the landowners by the revocation of the Unitization Order, Union could require those landowners who signed the Gas Storage Agreement to execute the Lease and Grant and again obtain these rights. The same situation may not apply in a case where Union has a combined oil and gas and storage agreement. The Board is not certain what effect, if any, the revocation of the Unitization Order would have on these leases. The Board agrees with Union that so long as the oil and gas rights are held by Union no one else may drill in the area of the Bentpath Pool. The Board considers this exclusive right to be reasonable under the circumstances. Union's rights to enter upon the lands for purposes of working on the wells and laying field lines are incorporated in the Gas Storage Agreements held by Union, but not everyone signed such Agreement. These rights of Union should also be protected. The Board is aware that, for the most part, the need for the Unitization Order expired when production ceased and the pool was designated for gas storage. The fact remains,

however, that with the revocation of the Unitization Order, the Unit Operation Agreement would also terminate, which could result in the loss of oil and gas rights. The Board accepts that this would not be desirable under the existing circumstances.

The Board is aware, as was pointed out by the Board Counsel, that the prolongation of the Unitization Order continues the different levels of payments being made to the various landowners for their oil and gas rights. The Board expects that with the issuance of these Reasons for Decision the difficulties between Union and the landowners will be resolved and, as noted earlier, hopes that Union will conclude a satisfactory arrangement with the landowners to pay the same rental for oil and gas rights and storage rights to all the landowners in the Pool.

The Board therefore concludes that it would be imprudent at this time to vary or rescind Board Order E.B.O. 46.

Mr. Giffen, in his Statement of Fact and Law also asked the Board to rescind Board Order E.B.O. 64 until Union offered to the lessors in the Bentpath Pool a Gas Storage Lease Agreement amended in a manner set out by him in his Statement. The lessors were also to be given 30 days in which to execute such agreement. Apparently, under Mr. Giffen's suggestion, once the Gas Storage Lease Agreements were signed, the Board would determine

compensation in the present hearing on the basis of the amended Gas Storage Lease Agreement for all landowners who are Applicants. This submission appears to have been altered somewhat in Mr. Giffen's reply argument dated May 14, 1982 where on Page 64 he states:

> "I continue to take the position that those orders were obtained by Union's misrepresentation and they should be rescinded or at least varied to provide that compensation on the basis found in these proceedings in favour of the Township of Dawn, for example, would be extended to all other applicants in the Bentpath Pool."

Board Counsel submitted that to rescind the Injection Order would work an injustice on both Union and its customers as it would deprive Union of its rights to use the pool for storage purposes. However, they pointed to the inequity which would result if Union were to comply with a Board Order issued pursuant to this hearing only with respect to those Applicants whom the Board finds to have standing before it. Accordingly, Board Counsel suggested that the Board reserve its decision in respect to rescinding or varying Board Orders E.B.O. 46 and 64, give Union 90 days in which to offer all the landowners the same compensation as is determined in this hearing and then, depending on what happens in the interim, decide this issue.

Union objected to both submissions but its major concern was that rescinding E.B.O. 64 would deprive it of its benefit and investment in the Bentpath Pool which, it argued, would not be in the public interest.

The Board believes that it is useless to speculate on what would have happened if Union had offered more than $7 per acre per year when it returned to the landowners to have the Gas Storage Lease Agreements signed because, in the final analysis, it was the landowners who refused to sign these agreements which would have given them standing in this proceeding. The Board is disturbed by the fact that it was not fully apprised by the parties of the difficulties that existed between Union and the landowners at the time of the E.B.O. 64 hearing. The Board's understanding of the situation at that time is outlined in its Reasons for Decision E.B.O. 64 dated August 9, 1974 wherein it states on Page 6:

> "The Applicant in this case has offered a new uniform storage agreement to all private landowners in the pool and has undertaken to negotiate an agreement with the Township of Dawn similar to outstanding agreements. The new storage agreement offered to the private landowners (Exhibit 19) provides for the negotiation of compensation, and, in effect, puts all landowners who enter into such agreement in a position where, failing agreement as to the amount of compensation, the amount would be determined by this Board in accordance with section 21 (4) of the Act. The Township of Dawn is similarly in a position of having the amount of compensation determined by the Board if the agreement cannot be reached."

Not only did Union fail to bring the expected events to fruition in so far as the agreements with the landowners and the Township of Dawn were concerned, Union also ignored the statutory and contractual requirements

in a number of instances with respect to the operation of this pool. These instances are well documented in Board Counsel's argument. The issue before the Board is whether Union's actions before, during and subsequent to the injection hearing E.B.O. 64 would justify the rescission or variation of the order issued thereunder.

On this issue the Board has weighed the interests of the landowners as against the interest of Union, and more particularly against the interest of Union's customers, if the order is rescinded and concludes that to rescind the Injection Order would not be in the general public interest. The Board, having reached this conclusion, sees no purpose in reserving its decision on this issue. Accordingly, the Board will not rescind Board Order E.B.O. 64. In these Reasons for Decision the Board has determined fair, just and reasonable compensation for storage rights for those landowners who have no agreements with Union. As noted earlier the Board has no authority to require that this level of compensation be paid to the balance of the landowners in the Pool. The Board agrees with Union that to vary Board Order E.B.O. 64 in the manner proposed by Mr. Giffen would be an attempt to do indirectly what it cannot do directly and therefore, it will not vary the Order in the manner proposed by Mr. Giffen.

PART V

Costs

Section 28 of the Act reads as follows:

> "28 (1) The costs of and incidental to any proceeding before the Board are in its discretion and may be fixed in any case at a sum certain or may be taxed.
>
> (2) The Board may order by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.
>
> (3) The Board may prescribe a scale under which such costs shall be taxed.
>
> (4) In this section, the costs may include the costs of the Board, regard being had to the time and expenses of the Board."

Mr. Giffen asked that costs be awarded to the Kimpe Applicants on a solicitor/client basis, regardless of results. Although he recognized that the Act invests the Board with discretionary powers relating to costs, he submitted that the criteria set out in section 34 of the Expropriations Act should be applied in this instance, that is, that "the reasonable legal, appraisal and other costs actually incurred by the owner for the purpose of determining the compensation payable" be paid by the expropriating authority, in this case, Union.

Mr. Blackburn, in his letter to the Board dated March 30, 1982, stated that it was his position that his clients, the Higgs, are also entitled to costs should the decision of the Board "be in their favour". Mr. Blackburn pointed out that he was involved in

negotiations with Union in 1974 and that he commenced the original application on behalf of the Higgs family.

Union submitted that the only Applicants with any status before the Board are the Higgs, the Smits, and The Township of Dawn and that all other Applicants should not be entitled to any costs. With respect to the Higgs, Union counter-claimed for costs against them because Union was put to the effort and expense of developing a defence to their application and then found that the basis of the claim was not prosecuted. It was Union's position that if costs are to be awarded against it, the costs should be determined by the Board in a lump sum, however, Union urged that a decision should not be made at this time and requested the opportunity to make further submissions on this issue after the Board has handed down its Reasons for Decision.

Board Counsel recommended that those Applicants who are successful should have their costs on a solicitor/client basis and that such costs should be taxed by the Taxing Master at Toronto. Those costs would be paid by Union together with the Board's costs resulting from this hearing.

The Board has considered the argument of counsel and has concluded that pursuant to section 28 of the Act, costs should be awarded to the successful Applicants on a solicitor/client basis and should be taxed rather than fixed in a sum certain.

The Applications carried by Mr. Giffen were in essence a class action on behalf of most landowners in the Bentpath Pool. The Board requires Mr. Giffen first to segregate the solicitor/client costs related to the determination of who is entitled to status before the Board from those related to the determination of the level of compensation. The Board further requires Mr. Giffen to remove from the first category those costs related to the unsuccessful applications of Messrs. McFadden, Pomajba, Richards, Thompson and Turner, including the costs of preparing their evidence and attendance before the Board on their behalf. Insofar as the costs relating to the level of compensation are concerned, it is the view of the Board that these would have been incurred whether or not there was one or more Applicant, therefore, solicitor/client costs related to this aspect of the hearing will be allowed in full. The Board, although it has rejected the applicability of the Havlena Report is of the opinion that reasonable costs incurred in relation to the preparation and presentation of that Report and the attendance of the authors at the hearing should be recovered, as should the costs relating to the other expert witnesses called by Mr. Giffen. With respect to the Higgs, they too are entitled to claim solicitor/client costs in this matter. However, their solicitor took no part in the hearing once it began and certainly did not make any contribution to a better

understanding of the issues before this Board. In the Board's view only those costs relating to the actual preparation of the Higgs' Application and the costs incurred by Mr. Blackburn's actual appearances before the Board should be allowed. Costs relating to negotiations in 1974 and the preparation of evidence, which was withdrawn, should not be allowed. The Board rejects Union's claims for costs against the Higgs in connection with this matter.

The Board will not award or charge costs of the Application to Rescind to any participant. Such costs are also to be segregated and deleted by Mr. Giffen.

Subject to the directions set forth above the Board orders Union to pay to those successful Applicants the reasonable legal, appraisal and other costs actually incurred by them for purposes of determining their status before the Board; also reasonable legal, appraisal and consultants costs in relation to the determination of compensation payable. The Board also orders that the determination of the amount of such costs be referred to a Taxing Officer of the Supreme Court of Ontario for taxation. The costs and expenses of the Board in this hearing will be charged to Union.

Order

An order, in accordance with these Reasons for Decision, will issue in due course.

DATED at Toronto this 16th day of July, 1982.

ONTARIO ENERGY BOARD

S. J. Wychowanec
Vice Chairman

J. C. Butler
Member

Union Gas Limited
Eastpath Pool
Original Union Leases

(398 acres)

(b) Company Lease No.	(c) Original Landowner(s)	(d) Current Landowner(s)	(e) Lands in Pool	(f) Oil and Gas Lease	(g) Storage Rights	(h) Unitization	(i) Acreage Payment Under Unitization	(j) Notice of Determination	(k) Storage Payment
18750	Ind. Mtg. & Trust Co. Ed. Jaques & Lena Jaques	Jack Ralph Smit Malva Jeanette Smit R.R.#1, Inwood, Ont.	SE¼ Lot 33, Con. 4 & NE¼ Lot 32, Con. 4, Dawn - 100 acres	12 Aug 1969 reg'd 12 Sept 1969 #272772	nil	EBO 46 dated 6 Mar 1972 reg'd 8 Mar 1972 - #308634	$7.00 per ac. per annum incl. of pet. under any Gas Storage Agreement	nil	Included in Acreage payment of $7.00 per acre per annum
16378	Geo. Andrew Thompson & Ella Marie Thompson R.R.#1, Oil Springs (jt. tenants)	same	W 40 ac. S. 65 ac. S½ Lot 33, Con. 5, Dawn - 40 acres	24 Apr 1956 reg'd 10 May 1956 #103282	storage provisions in Gas Lease	As in Item 1	As in Item 1	28 Dec. 1977	$7.00 per acre per annum under Notice of Determination
14380	Archibald Turner	Mary Turner Graham, R.R.#2, Tupperville; Allen Turner, R.R.#1, Oil Springs; Neil Grant Turner, R.R.#3, Dresden; Anna Mae Turner, 201 Cameron St., Corunna	SE¼ Lot 31, Con. 4 Dawn - 50 acres	18 May 1951 reg'd 6 June 1951 - #24662	as in Item 3	As in Item 1	As in Item 1	As in Item 2	As in Item 3
18748	Donald Cameron Sanderson	Donald Sanderson & Audrey Bernice Sanderson, R.R.#2, Dresden NOP 1M0 (Jt. tenants)	W½ Lot 31, Con. 5 Dawn - 100 acres	7 July 1969 reg'd 5 Aug 1969 - #271075	as in Item 3	As in Item 1	As in Item 1	As in Item 3	As in Item 3
18749	Casper Edwin Atchison and Albert Anslow Edward Atchison	Edith Vera Gall, R.R.#6, Dresden	W½SE¼ Lot 31, Con. 5, Dawn - 25 acres	8 July 1969 reg'd 5 Aug 1969 - #271076	as in Item 3	As in Item 1	As in Item 1	As in Item 3	As in Item 3
18595	Gordon Wesley Higgs, Walter Reginald Higgs, George Arthur Higgs	Walter Reginald Higgs George Arthur Higgs Ruth Maxine Higgs R.R.#6, Dresden	NW¼ Lot 30, Con. 5 Dawn - 50 acres	18 Mar. 1970, reg'd 7 Apr 1970 - #280377	nil	As in Item 1	As in Item 1	nil	As in Item 1
18788	John Clayton Patterson, Rose Alice Patterson	William L. Thomas, Evelyn M. Thomas, R.R.#2, Dresden (jt. tenants)	W½NE¼ Lot 30, Con. 5, Dawn - 25 acres	30 Oct. 1969 reg'd 25 Nov. 1969 - #275727	Gas Storage Lease Agreement 27 Apr. 1970 reg'd 28 May 1970 - #282211	As in Item 1	As in Item 1	Injection Notice 27 Feb. 1975	$6.00 by Gas Storage Lease Agreement, increased to $7.00 under Unit Order; royalty payment and well payment n/a

1979

Union Gas Limited
Bentpath Pool
Original Imperial Leases
(360 acres)

(b) Company Lease No.	(c) Original Landowner(s)	(d) Current Landowner(s)	(e) Lands in Pool	(f) Oil and Gas Lease	(g) Storage Rights	(h) Unitization	(i) Acreage Payment Under Unitization	(j) Storage Payment
18921	Frank M. Pomajba and Geraldine Pomajba, R.R.#7, Chatham	same	N 35 acres of S½ Lot 33, Con. 5, Dawn - 35 ac.	3 Apr 1968 reg'd 23 Dec. 1969 - #276966	Gas Storage Agreement 5 May 1970 reg'd 2 June 1970 - #282459	E.R.O. 46 dated 6 Mar 1972 reg'd 8 Mar 1972 - #308634	$7.00 per acre per annum incl. of any payment under Gas Storage Agreement	$6.00 per acre per annum under Gas Storage Agreement increased to and included in acreage payment of $7.00 per acre per annum
18917	Laurie E. Deighton, Donna L. Deighton	Achiel Rimpe, R.R.#2, Oil Springs	SE¼ Lot 32, Con. 6, Dawn - 50 acres	3 Apr 1968 reg'd 27 May 1968 - #253850	Gas Storage Agreement 1 May 1970 reg'd 2 June 1970 - #282461	Same as Item 2	Same as Item 2	Same as Item 2
18922	Max McFadden, Douglas McFadden, R.R.#7, Dresden	same	W½ Lot 32, Con. 5, Dawn - 100 acres	9 Nov. 1963 reg'd 27 Be. 1968 - #194481	Gas Storage Agreement 29 Apr 1970 reg'd 2 June 1970 #282456	Same as Item 2	Same as Item 2	Same as Item 2
18923	Casper Edwin Atchison Albert Anslow Atchison	Edith Vera Gall, R.R.#6, Dresden	W½NE¼ Lot 32, Con. 5, Dawn - 25 acres	9 Nov 1963 reg'd 17 Feb 1964 - #194061	Gas Storage Agreement 1 May 1970 reg'd 2 June 1970 #282457	Same as Item 2	Same as Item 2	Same as Item 2
18924	Russell Patterson	Larry Gordon Richards, R.R. #3, Dresden	W½ SE¼ Lot 32, Con. 5, Dawn - 25 acres & W½ W½ NE¼ Lot 31, Con. 5, Dawn - 12.5 acres total 37.5 acres	9 Nov. 1963 reg'd 17 Feb 1964 - #194062	Gas Storage Agreement 1 May 1970 reg'd 2 June 1970 #282455	Same as Item 2	Same as Item 2	Same as Item 2
18919	Keith Anderson Turner Florence Annie Helen Turner, R.R.#2, Oil Springs	same	NE¼ Lot 31, Con. 6, Dawn - 50 acres	3 Apr. 1968 reg'd 27 May 1968 - #253849	Gas Storage Agreement 1 May 1970 reg'd 2 June 1970 - #282460	Same as Item 2	Same as Item 2	Same as Item 2
18926	Russell Patterson	Frederick E. Bole Jean M. Bole, R. R.#1, Petrolia (jt. tenants)	W½ S½ NE¼ Lot 31, Con. 5, Dawn - 12.5 acres	9 Nov. 1963 reg'd 17 Feb. 1964 - #194062	Gas Storage Agreement 1 May 1970 reg'd 2 June 1970 - #282454	Same as Item 2	Same as Item 2	Same as Item 2
18920	Donald Sanderson Arthur Sanderson	Gerald Donald Sanderson and Marilyn Gladys Sanderson, R.R.#2, Dresden	NE¼ Lot 30, Con. 6, Dawn - 50 acres	22 Apr 1963 reg'd 8 Nov. 1963 - #190868	Gas Storage Agreement 5 May 1970 reg'd 2 June 1970 - #282458	Same as Item 2	Same as Item 2	Same as Item 2

t 1979

Ontario Energy Board

Commission de l'énergie de l'Ontario

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

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[1] 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[2] 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.

1 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.
2 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 seizes. 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 bellow 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"[3]).

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.

3 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".[4]

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."[5] 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".[6]

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")[7] 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

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."[8] 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."[9]

8 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

9 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

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2013-0073

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

AND IN THE MATTER OF a Motion to Review and Vary by Achiel Kimpe pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review of the Board's Decision and Order in proceeding EB-2012-0314.

BEFORE: Marika Hare
Presiding Member

Peter Noonan
Member

Cathy Spoel
Member

DECISION
ON MOTION TO REVIEW
July 18, 2013

INTRODUCTION

On March 11, 2013, Mr. Kimpe filed with the Board a motion to review and vary the Ontario Energy Board's ("Board") Decision and Order in EB-2012-0314 dated February 21, 2013 (the "Motion"). The Decision and Order EB-2012-0314 denied Mr. Kimpe's application for compensation for residual gas from a pressure of 50 pounds per square inch absolute ("psia") to 0 psia used in the operation of Union Gas Limited's ("Union") Bentpath Storage Pool (the "Decision").

BACKGROUND

On July 9, 2012 Mr. Kimpe filed an application EB-2012-0314 with the Board under section 38(3) of the *Ontario Energy Board Act* ("Act"). Mr. Kimpe identified Union as the respondent in the application. Mr. Kimpe requested an Order of the Board for compensation for residual gas and use of residual gas from a pressure of 50 psia to 0 psia used in the operation of Union's Bentpath Storage Pool (the "Pool"). Mr. Kimpe sought compensation for the period of time from the designation of the Pool to present.

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 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. Mr. Kimpe 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 permitted Mr. Kimpe to apply to the Board, pursuant to section 38(3) of the Act, for a determination of compensation.

In the Motion Mr. Kimpe has alleged the Board made errors in its Decision. Mr. Kimpe's submission raised a question as to the correctness of the Decision. Mr. Kimpe submitted that where no definite pressure is mentioned the assumption should be that all residual gas to 0 psia will be compensated for. He also noted that the effect of Union's use of residual gas is tantamount to an expropriation of his interests in the resource.

Mr. Kimpe noted in his submission that Union has admitted that residual gas has value as set out in a report to the Ministry of Natural Resources and further Mr. Kimpe stated that his gas is being used as part of Union's integrated storage and as such Union has the use of his gas without having to pay compensation.

With respect to the Crozier Report, referenced in the original Decision, Mr. Kimpe submitted that the fifty-year old report was outdated. What the Board decided 31 years ago in 1982 in Bentpath proceeding, may well have been the accepted industry practice at the time, but circumstances have changed since the date of that decision. By comparison, Mr. Kimpe stated that the Jacob pool is being produced below 50 psia unlike the Bentpath pool. Furthermore, Mr. Kimpe maintained that the Brittain Report, which was submitted in the Bentpath case, supports the view that arbitrary cut-offs for cushion gas are inappropriate.

Other errors alleged by Mr. Kimpe include the fact that the Board accepted a photocopy of the Crozier Report and not the original document, and therefore that evidence ought

not to have been considered. Lastly, Mr. Kimpe believes that the 1982 Bentpath decision relied on Michigan law rather than Ontario law, and is therefore not a suitable precedent for the current circumstances.

THE THRESHOLD TEST

The Board may review its decisions pursuant to s. 21.1(1) of the *Statutory Powers Procedure Act* which states:

> "A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order."

The Board implemented that power by enacting Rule 42.01 of its Rules of Practice and Procedure (the "Rules") which provides that any person may request a motion requesting the Board review all or part of a final order or decision, and to vary suspend or cancel the order or decision.

In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits (Rule 45.01).

Rule 44.01 reads:

"Every notice of motion made under Rule 44.01, in addition to the requirements of Rule 8.02, shall:

(a) Set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
   i. Error in fact;
   ii. Change in circumstances
   iii. New facts that have arisen;
   iv. Facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

(b) If required, and subject to Rule 42, request a stay of the implementation of the order or decision, or any part pending the determination of the motion."

The Board has previously articulated a two-part test when administering this power. An applicant must meet a threshold test of reviewability before the Board will permit a review of one of its decisions to occur. As set out by Union in its submission, the threshold test was articulated in the case of Natural Gas Electricity Interface Review Motions to Review Decision ("NGEIR Motions Decision"[1]) as follows:

> "Therefore, the grounds must 'raise a question as to the correctness of the order or decision … the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended." (p.18)

The Board agrees that this is the appropriate test and further notes the use of a threshold test is often employed by administrative agencies which possess a power of administrative review. For example, in *Amoco Canada Petroleum Co. v Canadian Pacific Ltd*., [1974] CTC 300, the Canadian Transport Commission Review Committee ("CTC Review Committee") in reviewing a decision of the Commission's Commodity Pipeline Transport Committee stated:

> "The Committee must be satisfied that the matter is reviewable before a review is carried out and where an application for review is made, the burden of satisfying that the matter is reviewable rests upon the applicant." (p.315)

A threshold test is appropriate because as the CTC Review Committee explained subsequently in its decision "… the power to review must be exercised sparingly and circumspectly if the finality of a decision is to remain meaningful, - more particularly when the finding or determination of the Commission was upon a question of fact." (p.325)

The Board also is of the view that an element of a motion to review that is relevant to this case is a policy against allowing parties to re-argue the original case in the guise of a review. In the NGEIR Motions Decision the Board stated:

> "With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case."(p. 18)

[1] *OEB Motions to Review the Natural Gas Electricity Interface Review Decision, Decision with Reasons, EB-2006-0322;EB-2006-0338;EB-2006-0340, May 22, 2007*

The CTC Review Committee expressed a like view in the Amoco Canada case, stating:

> "It is for pragmatic reasons that the power to review has been given to the Commission. We are firmly of the opinion that the power was not intended to be used as a means to 'impeach' the finality of quasi-judicial decisions, through a process of re-examination by another group of Commissioners where a first panel has reached a value judgment by drawing inferences from a given body of facts." (p. 324)

As both the Board staff and Union in their respective submissions acknowledged, the Divisional Court agreed with this principle in the case of *Corporation of the Municipality of Grey Highlands v. Plateau*. In that case, the Court dismissed an appeal of the Board decision in EB-2011-0053 where the Board determined that the motion to review did not meet the threshold test. The Divisional Court stated:

> "The Board's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing."[2]

BOARD FINDINGS

Pursuant to Rule 45.01, the Board has determined, without a hearing, the threshold question of whether the matter in this Motion should be reviewed. For the reasons below, the Board has determined that the matter raised in the Motion should not be reviewed.

The Threshold question can be stated as follows:

Has Mr. Kimpe presented sufficient grounds that raise a doubt about the correctness of Decision EB-2012-0314?

The Board finds the answer to the threshold question in the negative as Mr. Kimpe has failed to present sufficient grounds. Specifically, no new facts have been presented by Mr. Kimpe in this Motion to Review application. Mr. Kimpe has not shown that the factual findings of Decision EB-2012-0314 contain errors. With respect to the use of a photocopy of the Crozier Report the Board has the authority to receive photocopied

[2] *Grey Highlands (Municipality) v. Plateau Wind Inc*. [2012] O.J. No. 847 (Div. Court) (*"Grey Highlands v. Plateau"*) at para.7.

documents in its proceedings and therefore no error occurred with respect to that matter.

Mr. Kimpe has not demonstrated that the findings are contrary to the evidence that was before the Panel, that the Panel failed to address a material issue, that the Panel made inconsistent findings, that there has been a change in circumstance or that new facts have arisen.

The Board has determined that this Motion is an attempt by Mr. Kimpe to reargue the issue put forward in his original application; namely his request for compensation for residual gas and use of residual gas from 50 to 0 psia. Therefore, the Board, in considering the threshold question provided for in section 45.01 of the Rules, has determined that the matter in the Motion should not be reviewed on its merits, and dismisses the Motion.

DATED at Toronto, July 18, 2013

ONTARIO ENERGY BOARD

Original Signed By

Marika Hare
Presiding Member

Original Signed By

Peter Noonan
Member

Original Signed By

Cathy Spoel
Member

GAS STORAGE REPORT

TO

THE LIEUTENANT GOVERNOR IN COUNCIL

BY

THE ONTARIO ENERGY BOARD

OC 1354/62

May 4, 1964

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APPENDICES (INCLUDING TERM OF REFERENCE 3)

1. List of briefs, hearings and visits;
2. Report of February 25, 1963 on Term of Reference 3, The Gas and Oil Leases Act;
3. Storage Capacity used in Ontario to March 31,1964 and indicated requirements to March 31, 1974;
4. Data Relating to Storage Pools in Ontario;
5. Storage Compensation Rates in the United States;
6. Capacities and Storage Rentals for Storage Pools in Ontario;
7. History of Negotiations and Payments made to Landowners in Dawn #1 and Dawn #2 Pools.

MAP (Back Cover)

IN THE MATTER OF The Ontario Energy Board Act (R.S.O. 1960, Chapter 271) and particularly clause (j) of Section 28 thereof.

REPORT TO THE LIEUTENANT GOVERNOR IN COUNCIL

INTRODUCTION

Pursuant to clause (j) of Section 28 of The Ontario Energy Board Act, Your Honour was pleased to pass Order-in-Council OC-1354/62 on the 17th day of April, 1962, requiring this Board to adjudicate on and examine and report on the following questions respecting energy:

1. Payments with respect to storage of gas in designated gas storage areas.
2. Terms and conditions of gas and oil leases.
3. The Gas and Oil Leases Act.

Since April, 1962, the Board has held a number of hearings in the field with landowners and has held ten separate meetings with the gas and oil industry, including gas utilities and pipe line companies, and with the Federation of Agriculture. In the course of this study and investigation the Board received seventeen briefs from interested persons, corporations and organizations. To supplement information obtained from sources in Ontario, the Board visited a number of states in the United States and ascertained the latest gas storage developments and methods of dealing with storage payments and other related matters. A list of the hearings, meetings, briefs and visits is included with this report as Appendix 1.

The Board also had recourse to such appropriate information as has come into its possession in connection with its activities from day to day and to legislation and regulations in effect in other jurisdictions.

Because it was possible to complete consideration of Item 3 of

the terms of reference before final conclusions could be reached on the other two items, and because there was indicated an immediate need for a revision of The Gas and Oil Leases Act, the Board submitted its report and recommendations on this item on February 25th, 1963. For convenience, a copy of this earlier report is included with the present report as Appendix 2.

Investigation and study of the subject matter of Items 1 and 2 has now been concluded, and the Board presents herein its review of the evidence received, with its findings and recommendations on, first, payments with respect to storage of gas in designated gas storage areas, and, second, terms and conditions of gas and oil leases.

GAS STORAGE - GENERAL REVIEW

It is appropriate to begin with a general review of the introduction, growth, present extent and future position of underground gas storage in Ontario, with brief reference to the trends and extent of similar operations in the United States.

Natural gas was first stored underground in Welland County in 1915 by the Provincial Gas Company. This project was short-lived, being primarily an experiment in the transfer of gas from high pressure to low pressure wells. The first use in the United States was in 1916, in the Zoar field near Buffalo, and this storage pool is still in use. The Bow Island gas field near Calgary has been in continuous operation as a storage facility since 1930. Ontario's Lambton County storage facilities have been used continuously since 1942, at which time "still" or refinery gas was first injected, to be supplanted entirely by natural gas from 1953 onward.

The rapid growth of gas storage operations in the United States

dates from the years following the Second World War and coincides with the build-up of the network of long-distance gas transmission lines from the southern states in a northerly and north-easterly direction to serve the large consumer markets. This growth still continues, as is evidenced by the fact that gross underground gas storage capacity in the United States, including projects under development, has increased during the last eight years from 1.6 to 3.76 trillion cubic feet, of which 1.92 trillion cubic feet is working capacity. The balance, namely 1.84 trillion cubic feet, is the volume of cushion gas*, which, together with working storage, makes up the "gross" figure.

The growth in the actual use of storage capacity in Ontario is illustrated in Appendix 3, which shows annual injections and withdrawals in the Union Gas Company's storage system, this being to date the sole storage operating agency. It will be noted from this table that a moderate rate of growth up to 1955 has been followed by a marked increase in rate with the introduction of Alberta gas and the completion of transmission facilities (in 1957) between Trans-Canada Pipelines' service at Lisgar near Toronto and the storage area in Lambton County. (See Map at end of report.) Data relating to the storage pools in Lambton, Kent and Welland Counties are summarized in Appendix 4.

As to the future in Ontario, it is significant to note that the American states bordering on the Great Lakes, show a more rapid rate of increase in storage capacity than the national average for the United States. It is in this part of the United States that conditions as to climate, concentrations of population and distance from main sources of supply most closely resemble those which apply in this province.

* Cushion gas is gas held in the reservoir to maintain minimum operating pressure for storage purposes.

Various estimates have been made of the amount of working storage capacity that will be required to meet Ontario's needs in future years. Only actual experience will indicate the validity of such forecasts. It is clear, however, that a conservative approach suggests that within twenty years normal expansion will use up all of the facilities that have now been developed to the point of actual use or designation, with a capacity of approximately 105 billion cubic feet of working storage. Over and above normal growth within the province, some provision must be made for emergency supply.

In Ontario, storage reservoirs now in use or in prospect have been identified solely with depleted or partially depleted gas fields. Possible alternatives are depleted oil pools, aquifers, salt cavities, abandoned mines and specially prepared pits for liquefied natural gas.

Aquifers, or water-bearing formations in which oil or gas is not present in significant quantities, are useful for peak shaving or basic storage, and in some midwestern states are supplementing depleted gas fields.

Caverns created by removal of salt deposits, in solution, are in use or under development for gas storage in Michigan and Saskatchewan. This type of storage is new for natural gas, although it has been in common use for some years for liquid petroleum gas (propane). In the Michigan case there is an established gross capacity of close to 400 million cubic feet. In Saskatchewan the planned gross capacities of the two reservoirs are 2 billion (Regina) and 300 million (Melville) cubic feet respectively.

An old coal mine is used for natural gas storage near Denver, Colorado. Last season it provided a maximum 24-hour withdrawal of 104

million cubic feet.

For meeting high peaks on a limited number of days, the first storage pit for liquefied natural gas (frozen-hole storage) in the United States is to be started this year in New Jersey. This project is designed to deliver 200 million cubic feet of gas per day for five peak days. A similar project is being undertaken in Le Havre, France, capable of receiving the equivalent of 50 million cubic feet of gas per day. The New Jersey facility will receive its natural gas by pipeline, whereas the one in France will be supplied with gas in liquefied form via tanker from Algiers.

Those engaged in the gas industry in Ontario are constantly studying all these alternatives while at the same time taking note of additional possibilities for storage arising from the depletion of present productive gas fields.

In its search for information as to payments being made at present with respect to storage of gas, the Board has made a comprehensive study of practice in the United States. The main impression gained from this scrutiny is that there is wide variation both in basis of compensation and in the amounts paid. Occasionally what looks like a firm formula appears, but frequently this is varied to suit purely local circumstances in an effort by the operators to improve goodwill. Some examples are given in Appendix 5, and of these 2 call for a single payment, 1 is based on output, 1 on input, 3 on acreage (with well rental) and 1 on output for gas pools or on single payment for aquifers. This indicates the wide differences in the approach to the question of compensation. The validity of the sample is attested by the fact that it covers approximately one-third of the storage reservoirs in the United States and embraces practically every type of payment actually in use.

The only point on which there is complete agreement in the United States cases is the acceptance of the principle that the owners of land and mineral rights upon which a storage company enters or in which it stores gas are entitled to compensation in payment for such rights. In most other respects they differ, not only one from the other, but also from the principles and practices which have been developed in Ontario over the past twenty years.

The annual acreage payments mentioned in Appendix 5, however appropriate to thin storage formations extending over large areas, cannot be recognized as adequate when applied to Ontario's established pools, most of which are of the pinnacle reef type with maximum reservoir thickness measured in hundreds of feet. Also the single lump sum of the order quoted in Appendix 5 would unquestionably be less attractive to landowners than the annual payments received by landowners in this province.

With regard to the use of the volume of gas injected or withdrawn as a basis for storage rentals, two examples will suffice to show that this method of dealing with compensation is not practicable. From the operating point of view, any storage reservoir is only part of a storage system and must be susceptible of flexibility in its use. It is often necessary to transfer stored gas from one reservoir to another, resulting in simultaneous input and output with respect to two or more pools. Under certain emergency conditions, there is a requirement for transfer from one storage system to another, which could quite conceivably be paid for in kind by a reciprocal transfer of an equal amount of gas between two entirely separate companies. Consequently it is difficult to find grounds for assuming that a toll on such movements is any way reasonable.

Compensation based on input and output has an equally serious implication for landowners. Efficient management of a storage system might

well involve the dedication of a particular reservoir to the holding of emergency reserves. These could be needed to provide security of service in the event of a major failure of transmission lines or of an abnormally long cold winter. Such reserves might lie dormant for several years, providing no storage rental for the landowner during that period. Yet, to the operator, the reservoir or reservoirs in question are just as important a part of his system as those which are in constant cyclic use.

In view of all the circumstances, the Board finds that the only fair and reasonable basis of payment for the storage of gas is one which is related to the capacity of the reservoir in terms of areal extent, volume and quality. This gives a true measure of the privilege granted by virtue of agreements made with owners of storage rights. Furthermore, such a basis is consistent with the trend in Ontario, as will be seen by examining the various agreements that have been reached by negotiations since 1942.

As part of the task of developing a formula or yardstick to be recommended as a basis for determining storage rentals, the Board has carefully examined the various submissions. There appears to be general acceptance of the principle that the major element to be considered in establishing storage payments should be reservoir capacity, which is related to the volume of the actual storage formation modified by appropriare factors for porosity and permeability. In the case of existing designated gas storage areas, the measurement of the reservoir capacity can readily be determined from calculations already made of the original reserves accumulated in the same place by natural processes. A reduction in this figure is normally made to allow for the fact that economical production does not completely remove the native gas. The reservoir capacity is therefore calculated as being equal to the original reserves down to a

reservoir pressure below which further production would be uneconomical.

The storage reservoir, however, underlies only a portion of the total designated area, being surrounded by a non-productive protective barrier (often referred to as the "walls of the warehouse") which is essential to the operation of the reservoir. In the presently designated areas in Lambton County, this protective zone accounts for some 64% of the total designated acreage. The practice among both operators and landowners is to recognize the protective acreage as of equal value to the productive or "participating" acreage for storage purposes. This is entirely reasonable having regard to the value of the ensured closure around the stored gas and the prevention of damage to the reservoir by the control of drilling which is effected over the whole designated area.

The formula to be established must therefore represent the usefulness of the storage reservoir in terms of the capacity to hold gas in the formation and at the same time must be applied on an equal basis to all the acres in the designated area. To meet these requirements, the Board has calculated the capacity of each designated pool to abandonment pressure and has divided this figure by the number of productive acres in the pool, to arrive at the capacity per acre of participating area. This establishes relative values of all pools for storage purposes. The Board considers that, subject to modification related to the performance characteristics of the particular pool, the application of a value in cents to each million cubic feet of capacity per participating acre is a reasonable and logical method of arriving at an annual rental per acre of the designated area. It then remains to determine an appropriate value in cents to be applied to the capacity having regard to the trend in prices as evidenced by actual agreements executed from time to time and by submissions received pursuant to the Order-in-Council calling for this report.

It appears to the Board that a logical approach is to take account of present agreed rental rates in Dawn No. 1 and Dawn No. 2 pools and of trends that have developed since these rates became effective.

With minor exceptions the actual rates of payment for storage rental are $7.50 per acre of the designated area in Dawn No. 1 and $6.00 in Dawn No. 2. It is seen that a differential is already established between the two pools as to actual rental per designated acre in keeping with the relationship between values as storage reservoirs. Working back from these present rates of payment and using the capacity per acre of participating area as outlined above, the current rates in both Dawn No. 1 and Dawn No. 2 work out to approximately 16¢ per million cubic feet capacity per productive or participating acre.

The Board has calculated annual acreage rental rates that would be obtained on the above basis, using 15¢, 20¢, 25¢ and 30¢ as shown in Appendix 6.

GAS STORAGE - REVIEW OF PAYMENTS IN ONTARIO

In dealing with this subject, the Board finds it necessary to make a distinction between the two main types of storage pools which have to be examined as to rental values. Of the designated pools in Lambton County, all but one are "pinnacle reefs" which are characterized by a dome-like shape with thickness at the apex of some 250 feet or more. The remaining pool (Dawn No. 3) is, like many other potential storage formations in Ontario and like the great majority of storage reservoirs in the United States, a thin, flat "lenticular" pool with a thickness of from 10 to 30 feet. Reference to Appendix 6 will show that the capacity per acre of the pinnacle reef pools ranges from about 13 to 54 million cubic feet per acre. Lenticular pools, on the other hand, rarely have a capacity as high as 10 million

cubic feet per acre and therefore require the leasing of several times as much acreage as is needed for pinnacle reef pools to obtain equal total capacity. In addition to the wide difference in ratio between the acreage and capacity, account must be taken of greater unit development and operating costs associated with the wide-spread thin storage reservoirs as compared with the much more compact pinnacle reef types.

As so much of the existing developed storage capacity in Ontario is in pools of the latter type, this review of compensation will deal first with pinnacle reef pools, after which reference will be made to the thinner formations.

Experience with continuous gas storage operations and the negotiation of compensation for storage rights has been confined almost entirely to Lambton County, and dates back to 1942. The first gas and oil lease agreements (for exploration, drilling and production) were entered into in 1927. These original agreements provided for initial payments of 50¢ per acre pending the drilling of wells, to be altered to well rentals when production started. The well rental was first set as a fixed sum and later changed to a graduated rate which varied with the open flow. Amending agreements were signed in 1942 to permit underground storage of refinery gas. In 1944 and 1945 a further change was negotiated to provide for the storage of natural gas and manufactured gas as well as refinery gas, or any mixture of them. The compensation to be paid was adjusted generally to an acreage basis plus a well rental of $100 per year per well.

The storage pools concerned, known as Dawn No. 1 and Dawn No. 2, were leased from 5 and 7 owners respectively. Together with Dawn No. 3, which is not a pinnacle reef pool and is of only marginal value, they were designated formally as gas storage areas in 1950, and the landowners then raised the question of increased compensation. The operating company,

Union Gas, while holding that the designation was of no incidence whatever as to increased consideration, was nevertheless willing to subscribe to an amending agreement to effect a full and final settlement. In its brief to the Board, the Company has stated that "These adjustments were made in 1957 and retroactive to 1951 and were considered justifiable in view of the fact that by 1957 the use and projected use of underground storage areas had become more extensive than forecast at the time the original agreements were entered into."

The Board notes that the negotiation period for this "final" settlement lasted approximately six years. It further notes that there was apparent recognition that, with more extensive use of existing storage facilities, the latter could become more valuable.

Another principle which appears to have been accepted in this settlement was that compensation on an acreage basis should take into account the differences in capacity and deliverability of different reservoirs. The agreements with landowners in Dawn No. 2 pool contain this stipulation: "If during the lifetime of these presents the value of #2 Storage Pool for underground storage of gas should, in the sole opinion of the Company, increase to the equivalent of #1 Storage Pool by reason of increase in capacity and improvement of deliverability, the Company will .....enter into an agreement to amend these presents by increasing the acreage payment herein provided for from $6.00 per acre per annum to $7.50 per acre per annum."

The 1951-1957 negotiations led to agreement on $7.50 per acre per annum for Dawn No. 1 and $6.00 per acre per annum for Dawn No. 2, plus in both pools $100 per annum for each well. The revenue jointly received by the 12 landowners in respect of storage rights is now slightly over $8000 per annum in contrast to the few hundred dollars paid for gas and oil rights

beginning in 1927 and less than $3500 per annum for production in the year immediately before storage operations began. The various phases of negotiation which occurred over the 30 years covered by this review of Dawn No. 1 and Dawn No. 2 Pools are shown chronologically in Appendix 7, as are the annual amounts paid jointly to the 12 landowners.

The Payne Pool was the fourth gas storage reservoir to come into use. Formal designation and authority to inject and store gas both took place in 1957. Compensation to various landowners in this pool was determined by an ad hoc board of arbitration appointed by the Ontario Government. In its award handed down on March 30, 1961, the board of arbitration set the storage rental as $5.00 per acre per annum. The Ontario Fuel Board had already fixed at 2¢ per Mcf the compensation in lieu of royalty on residual gas above 50 pounds per square inch.

The decision of the board of arbitration in the Payne Pool case has been appealed to the Ontario Municipal Board, but the appeal has not been heard.

The fifth storage pool to be developed in Ontario was the Waubuno Pool. It was designated as a gas storage area in ~~1954~~ 1955 and first used for storage in 1960. Although compensation is being paid or tendered to landowners who have signed storage agreements, the operating company has signified to this Board its intention to negotiate, or re-negotiate, storage compensation with all landowners in the light of the ultimate decision in the Payne Pool case.

The latest of the six presently operating storage reservoirs to come into use was Dawn No. 156, which was designated and first used in 1962. As in the cases of Payne and Waubuno Pools, final agreement has not been reached with all landowners as to storage compensation. In Dawn 156 Pool, however, the course of negotiations has followed a different path, as follows:-

August, 1961 - At the designation hearing the applicant company (Union Gas), which held storage agreements for the whole area, was willing to make a new offer to the landowners in the light of the amounts ultimately determined by proper authority for the Payne Pool, (i.e. after the result of the appeal from the arbitration decision had been handed down.)

June, 1962 - Although still awaiting settlement of the Payne Pool matter, the company offered a revised and higher schedule of storage payments to the landowners.

July, 1962 - At the hearing of the application for authority to inject gas in Dawn 156 Pool, it was agreed that landowners who were not satisfied with their existing agreements could be heard by the Ontario Energy Board sitting as a board of arbitration. The majority of the landowners requested arbitration as a result of this agreement.

December, 1962 and January, 1963 - Amended storage agreements were negotiated with 42.42% of the owners, representing 51.9% of the acreage in the designated area and 55.2% of the productive area. The amended agreements provide for a storage rental of $7.00 per acre per annum, plus 2¢ per Mcf for residual gas, plus $100 per annum for each well.

February, 1963 to December, 1963 - Arbitration proceedings were conducted by the Ontario Energy Board as to compensation for residual gas and apportionment of same among the landowners concerned. During the proceedings it was brought out that those who had reached agreement, being one-half of the private landowners concerned, had withdrawn their requests for arbitration. Also, in its award, the Board gave effect to certain amendments in the participating area. The second phase of arbitration, dealing with annual storage rental payments, is yet to be heard, but at present settlement has been reached to the following extent:

Private landowners	50%
Designated acreage represented	55.57%
Participating acreage represented	54.47%

In addition to Union's pinnacle reef pools, five such gas storage reservoirs have been developed by Imperial Oil Limited as listed in Appendix 4. Negotiations to obtain storage lease agreements for these five pools were concluded in a majority of cases in 1960. The resulting leases provide for an annual storage rental of $5.00 per acre from date of signing, this being in the nature of a holding or option payment during the period when storage rights were granted but not being exercised by the Lessee. As to payment to be made when use for storage commenced, there is the following provision:

"Subject to its rights, if any, under the oil and gas lease, the Lessee shall not inject gas into the demised lands under the provisions hereof until it has offered to the Lessor the additional acreage rental to be paid to the Lessor in respect of its storage operations to be conducted hereunder," and "the additional storage rental shall commence effective the date on which the Lessee first commences to inject gas into the demised lands."

There is no stipulation in the lease agreements as to how much the "increased acreage rental" would amount to, just as there was no knowledge in 1960 as to when any increase would become effective. The storage lease agreements provide that, if the additional acreage rental offered is not acccptable to the landowner, the amount of additional rental is to be determined by a board of arbitration under The Ontario Energy Board Act. Designation of the five gas storage areas took place in 1962.

In September 1963, however, Tecumseh Gas Storage Limited, a newly-formed company, was granted an Ontario charter by letters patent enabling it

to enter into the gas storage business. This new company acquired the storage rights and certain facilities of Imperial Oil Limited in three of Imperial's five designated pools, (Corunna, Kimball-Colinville and Seckerton) and entered into a contract with Consumers' Gas Company to commence storing gas for the latter company in 1964. Tecumseh applied for and received authorization to inject, store and remove gas with respect to its three pools and thus the stipulated offer of the "increased acreage rental" must be made to the landowners concerned before injection commences in 1964. Tecumseh has filed with the Board executed gas storage leases, embodying the terms already quoted, representing 85.3% of the designated acreage in the three pools, which leases have been assigned by Imperial Oil Limited to Tecumseh. It has been established, in relevant hearings before the Board, that the present storage customer of Tecumseh will require within ten years a storage service for thirty billion cubic feet of gas out of a total working capacity for the three pools of some forty billions.

The foregoing examples of negotiation for storage rentals are all concerned with gas storage reservoirs of the pinnacle reef type. Of a different nature are certain lenticular (lens-like) reservoirs, characterized by much lower vertical thickness, of the order of ten to thirty feet, and by much greater areal extent, than the porous formations found in pinnacle reefs. The latter generally have a thickness of 250 feet or more at the apex and underlie an area measured in hundreds of acres whereas lenticular reservoirs quite commonly underlie thousands of acres.

The lenticular pools in Ontario that have been the subject of storage rental negotiations are three in number and are known as Dawn No. 3, Zone and Crowland respectively. Details as to area, capacity, etc. are shown on sheet three of Appendix 6.

Dawn No. 3 Pool was designated in 1950 and was first used for

storage in 1954, but is of only marginal value at present. Existing storage lease agreements for this pool provide for annual storage rental of one or two dollars per acre, the average being $1.28.

The Zone Pool, which like Dawn No. 3 Pool, is a Union Gas Company development, was designated as a gas storage area in 1963 and the company is now conducting further operations to improve the deliverability of the reservoir. At the time of designation storage rental agreements had already been concluded with owners of approximately 75% of the lands involved (other than railways and roadways) providing generally for annual storage rental of $3.00 per acre.

The Crowland Pool, being developed by Consumers' Gas Company, differs from the other two pools mentioned in that it was approaching abandonment and authority was sought for a programme of experimental injection to test the feasibility of gas storage rather than for the designation of a gas storage area. If the experiment proves the usefulness of the reservoir for storage, designation and authority to use for storage will be sought. In the meantime owners of over 99% of the lands (other than railways and a municipality) have executed agreements providing for an annual storage rental of $1.00 per acre.

The annual rental figures quoted for these three lenticular pools are substantially lower than any of those mentioned in connection with pinnacle reef reservoirs. They are consistent with the lower capacities for holding gas in terms of millions of cubic feet per productive or participating acre. Reference to Appendix 6 shows that the lenticular pools can hold from one to three millions of cubic feet per acre whereas the pinnacle reef pools range in capacity from 13 to 54 millions. Before comparison can be made of rates on the basis of capacity, however, allowance must be made for other factors, such as right of access and control of drilling, which

are common to both types of pool. This calls for the setting of a minimum amount regardless of capacity and there is a large measure of agreement that this sum should be $1.00 per acre.

The Board has refrained from commenting on rentals which might apply in the case of reservoirs which are not depleted gas fields, such as mined caverns, salt cavities and aquifers, because such types have not yet been used in Ontario, and are subject to many special features regarding the setting of compensation.

DETERMINATION OF A BASIS FOR STORAGE COMPENSATION

As well as examining past agreements on compensation for gas storage rights, the Board has studied the suggestions put forward in briefs and at hearings and meetings regarding the establishment of a formula for the determination of such payments.

Imperial Oil Limited proposed that gas compensation should be a matter of negotiation and that, failing agreement, some upper limit should be established "which is acceptable to the industry, lessor and consumer." This maximum annual rental would be the equivalent royalty paid at 2¢/Mcf over the life of the pool to an abandonment pressure of 50 pounds per square inch absolute, prorated on an annual basis.

Union Gas Company suggested "that the current annual rental of $7.50 per acre as re-negotiated for Dawn No. 1 Pool be considered as a base on which to determine the annual rentals per acre to be paid for the use of storage space in any other pool in Ontario, to be adjusted upwards or downwards dependent upon the relative value" of such other area in the light of the various quality factors by which reservoirs are rated for usefulness. The Company further suggested that, on re-negotiation of existing agreements,

no landowners be required to accept a lower annual storage rental per acre than is now being received, that a minimum annual rental for the use of storage areas be established at $1.00 per acre, that in future a reasonable annual sum per acre be paid by the lessee for the granting of storage rights during the term of the lease and prior to actual use for storage purposes, and that provision be made for re-negotiation of storage compensation at intervals of 20 years.

Consumers' Gas Company, in its brief to the Board, pointed to the distinction between depletable minerals which, once removed from the property, are gone forever and porous rock formations suitable for storage which are not depletable assets. The Board believes that this distinction is important, as it indicates why storage payments are in the nature of rentals and not royalties. The submission went on to state that the porous rock has no other possible known use than as a storage container and has no value to the landowner unless someone engaged in underground storage chooses to use it for this purpose, and that its very existence is in fact not detectable except by a considerable expenditure for exploration. The brief suggested that the use of the porous rock is unlike the use of land for wells or other surface encumbrances, where the justification for compensation is obvious.

Nevertheless, Consumers' Gas Company accepted the position that some payment will be made to the lessor for lands put into gas storage service and suggested that such compensation be left to negotiation with the right on both sides to apply for arbitration. For use as a guide the Company further suggested an annual payment of one dollar per million cubic feet of storage capacity per acre (calculated for the designated area as a whole) with a minimum payment of one dollar per acre per year.

In contrast with the views of the three companies mentioned and

the review of agreements as set out above, certain landowners have put forward very different proposals for gas storage compensation. These have been received by the Board in briefs, at hearings and at meetings in the field; they are summarized in the written submission of the Ontario Federation of Agriculture which includes an appendix entitled "Recommendations of the Individual Pools." The spokesmen for the individual pools have used five different bases for their "requests": namely, (1) ½¢ per Mcf annually on total capacity of the pool, (2) 2¢ per Mcf annually on 75% of capacity above 350 pounds per square inch, (3) 2¢ per Mcf annually on total capacity above 50 pounds per square inch, (4) $5.00 per annum per acre plus 2¢ per Mcf annually on total capacity above 50 pounds per square inch, and (5) 2¢ per Mcf without indication of what fraction of capacity is intended, so that no computations can be made in this case. The following table shows, as far as they can be computed, the results that would be obtained if the rentals were calculated on the basis requested by the landowners in the respective storage pools:

Name of Pool	Basis	Annual Storage Rental per Acre
Sombra	(1)	$ 17.60
Bickford	(1)	$ 43.00
Dawn No. 2	(2)	$ 96.50
Dawn No. 156	(2)	$112.66
Corunna	(4)	$176.66
Waubuno	(2)	$184.64
Seckerton	(4)	$196.34
Payne	(3)	$495.50

It will be seen that in the Payne Pool, the annual rental requested is equivalent to several times what would appear to be a fair price for outright purchase of lands in the vicinity. Capitalizing this annual storage rental on the basis of ten years' payments would set the value of a 100-acre farm at $495,500. as to storage rights alone without regard to its value for agricultural or other purposes. Most of the other figures are only in lesser degree unrealistic.

If the basis of payment suggested above for the Payne Pool were applied to the six storage reservoirs now being operated by Union Gas Company, the annual cost of storage rentals would be increased from a present figure of approximately $35,000. to $1,423,000. a difference of $1,388,000. This added annual cost of operation, because of limitations imposed by firm contracts for the supply of gas to industries and to other gas companies, would fall most heavily on residential and commercial customers of all distributors using these present storage facilities and would have a significant effect on rates.

The Board, therefore, cannot find any justification for giving consideration to requests calculated on such bases. It must necessarily have recourse to a study of rental rates arrived at by negotiation, keeping in mind any significant trends that are in evidence and any principles that appear to be matters of general agreement.

PRINCIPLES RESPECTING GAS STORAGE PAYMENTS

At present in Ontario, payment for storage is a matter for free negotiation between the landowner and the proposed storage operator. Whether or not agreement is reached, the storage operation does not proceed unless the proposed operator obtains authorization under Section 19 of The Ontario

Energy Board Act, which requires payment to the landowner, in the absence of agreement, of compensation determined by arbitration.

The Board considers that this situation gives adequate protection to all parties and should be continued. The advantages, if there are any, of fixing the compensation by statute or regulation, would be far outweighed by the relative inflexibility and other disadvantages of such a system.

The Board is of the opinion that the following principles, if applied by the operating companies on the one hand and the landowners on the other hand, would result in fair and reasonable compensation to the latter for underground gas storage rights:-

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.

2. LANDOWNERS SHOULD, UPON THE USE OF A POOL FOR STORAGE, BE PAID FOR THEIR ROYALTY INTERESTS IN ECONOMICALLY RECOVERABLE OIL WHICH WILL NOT BE RECOVERED BY REASON OF THE STORAGE OPERATIONS.

Where recommendation 5 under term of reference 2 has been followed, the above principle will be applicable only to economically recoverable oil in the actual storage reservoir. In the case of lands where oil rights "above, around or below" the reservoir have not been dealt with as provided in the said recommendation 5, the above principle will be applicable to all economically recoverable oil in the designated area.

3. LANDOWNERS SHOULD RECEIVE ANNUAL PAYMENTS IN THE FORM OF RENTAL, FOR THE PRESENCE OF WELLS OR OTHER SURFACE ENCUMBRANCES.

This principle is in accord with the law and practice in Ontario and has created no serious difficulties.

4. LANDOWNERS SHOULD RECEIVE COMPENSATION FOR SURFACE DAMAGE.

This principle, likewise, is in accord with the law and practice and does not seem to present any problems in its application.

5. IN ADDITION TO ANY PAYMENTS PROVIDED FOR UNDER PRINCIPLES 1 to 4, LANDOWNERS SHOULD RECEIVE ANNUAL STORAGE RENTAL PAYMENTS.

As indicated earlier herein, all persons making representations recognized, as does the Board, that the annual rental payment basis is preferable to a lump sum or single payment basis.

6. STORAGE RENTAL PAYMENTS SHOULD BE BASED UPON THE CAPACITY AND PERFORMANCE RATING OF THE STORAGE RESERVOIR.

With respect to this principle, there appears to be general agreement that the storage rental payments should be related to capacity. It is also generally agreed that, although compensation is for convenience expressed in terms of acres, i.e. on a two-dimensional basis, capacity must be calculated in cubic feet, i.e. on a three-dimensional basis. This is evident from agreements already reached in connection with various storage areas, and is further demonstrated by the wide range of "capacities per participating acre" indicated in Appendix 6. When expressed in terms of the number of cubic feet of gas that a reservoir held at the original pressure, capacity takes into account the qualitative factor of porosity, and thus the compactness of the storage pool. Among other qualitative considerations are the rate at which gas may be injected into and withdrawn from the formation with or without the use of compressors, the pressure at

which maximum capacity may be attained, the presence of water and the location of the pool with respect to both compressor and transmission facilities and to the markets for gas.

7. THERE SHOULD BE A MINIMUM STORAGE RENTAL PAYMENT PER ACRE.

This principle recognizes the fact that, regardless of capacity and performance rating, storage lease agreements confer on the lessee certain rights or privileges. Common to all such agreements is the right of the lessee to enter upon the lands, and to store gas under them. Upon the designation of the storage area, restrictions on drilling are imposed as a protection against loss of gas. These rights or privileges are recognized as being proper matters for compensation. It has been submitted to the Board on behalf of certain operating companies that the reasonable minimum rental, regardless of capacity and performance, should be one dollar per acre per annum.

Most of the present storage pools in Ontario are of sufficient capacity to obviate the necessity of setting a minimum figure. In the limited number of cases where capacity is low, it would appear that satisfactory rental payments have been negotiated, and the actual minimum figure is one dollar per acre per annum. The Board therefore is of the opinion that this minimum rate may be considered reasonable.

8. IN THE DETERMINATION OF STORAGE RENTAL PAYMENTS, ACCOUNT SHOULD BE TAKEN OF THE USE AND USEFULNESS OF STORAGE.

This principle recognizes the fact that storage rental should reflect the market demand for storage capacity. The actual volumes of gas stored and withdrawn from storage annually in Ontario are shown in Appendix 3. The figures speak for themselves as to constantly increasing use, but if they are examined in the light of some of the developments which have taken place

their significance becomes more apparent.

The upward trend beginning in 1949 is related to the commencement of the importation of gas from the United States (Panhandle Eastern) under a 20-year agreement expiring in 1967 providing for 5.5 billion cubic feet annually.

Consumers' Gas Company entered into a 20-year contract for Union Gas Company to store up to 7.5 billion cubic feet annually commencing in 1958. This increment in storage requirements, supplemented by the growth in storage needs for Union Gas Company's own system, accounts for the upward trend from 1958 to 1963.

The most significant developments, however, are those which have occurred in the last thirteen months. On March 28, 1963, announcement was made of the proposal to loop the existing 26-inch transmission line from Dawn Township to Oakville with a second line of greater diameter. In due course formal leave to construct the first stages of this 34-inch line was granted. Mention has been made earlier in this report of the recent formation of a second storage company, Tecumseh Gas Storage Limited, and the contract by which this company will store seven billion cubic feet for Consumers' Gas Company in 1964-65, increasing to 30 billions in the tenth year.

In the application of this principle to an initial determination of storage rental payments, the use and usefulness of storage as at the date of first injection for storage should be taken into account. In renegotiation or redetermination under principle 9, the use and usefulness of storage as at the date of the commencement of these proceedings should be taken into account. It follows that any initial determination, re-negotiation or redetermination should not be given retroactive effect.

9. STORAGE LEASE AGREEMENTS, AND ARBITRATION DECISIONS IN RESPECT OF STORAGE RIGHTS, SHOULD BE SUBJECT TO RENEGOTIATION OR REDETERMINATION OF STORAGE RENTAL PAYMENTS AT STATED INTERVALS, WITH PROVISION FOR ARBITRATION IN THE EVENT OF DISAGREEMENT.

It appears to the Board that the principle of annual storage rental payments in itself imports the need of provision for change from time to time, either upward or downward, in order to keep the payments in accord with existing conditions. However, the Board recognizes that some degree of stability in contractual matters is desirable to avoid burdensome administrative costs and to facilitate orderly carrying out of financial arrangements, whether these be the raising of capital, provision for operating costs or the setting of consumer rates.

Representatives of both the industry and the landowners appear to agree with the principle of renegotiation, but there is a wide variation in the submissions to the Board as to the time interval which is desirable between such re-examinations. In fact, the variation is from a minimum of three years to a maximum of 20 years.

Under all the circumstances, the Board considers that it would be reasonable to require that the annual storage rental payments, whether fixed by agreement or by arbitration, should be open to renegotiation or redetermination at 10-year intervals, at the request of either party.

CONCLUSIONS

In the application of principle 6 the Board has concluded that the fairest method is, as set out earlier in this report, to use the formula applied in the preparation of Appendix 6, which formula is developed in the following manner:-

(a) Calculate the capacity of a pool, to a reasonable abandonment pressure, in millions of cubic feet.

(b) Divide the pool capacity by the number of acres in the participating or productive area in the pool, thereby arriving at the capacity, in millions of cubic feet, per acre of the participating area.

(c) Establish a reasonable value in cents for each million cubic feet of capacity per participating acre.

(d) Multiply the reasonable value in cents established in (c), by the capacity per acre as calculated in (b) to arrive at the annual payment per participating acre.

(e) Apply this annual payment determined in (d) to each acre of the entire designated storage area, both participating and non-participating.

In formulating conclusions as to payments with respect to storage of gas the Board's task is complicated by the varying conditions which currently apply in different pools. Landowners in Dawn No. 1 and No. 2 Pools are parties to lease agreements, in which annual storage rentals of $7.50 and $6.00 per acre respectively were negotiated in 1957 and made retroactive to 1951. Likewise, one-half of the private landowners in Dawn No. 156 Pool are parties to agreements negotiated in 1962 in which the annual rate per acre was $7.00. Reference to Appendix 6 will show that the earlier settlements represented a rate of approximately 16¢ per million cubic feet of capacity per productive acre and the later one approximately 19¢.

The fixing of rates for the remaining landowners in Dawn No. 156 Pool is to be the subject of arbitration before this Board pursuant to applications now filed with the Board, and an arbitration award in connection with the Payne Pool is the subject of an appeal to the Ontario Municipal Board which is yet to be heard.

The storage operator proposes to offer storage rentals in the Waubuno Pool on the basis of whatever final settlement is made in the Payne Pool.

Because of the existence of these agreements or because the fixing of rates is sub judice, as the case may be, the Board is not free to recommend action by way of any determination on its part as to what should be paid. In addition, of course, the Board has not had the benefit of the detailed evidence that would be placed before a tribunal upon an actual arbitration. It would therefore be improper for the Board to express a view as to what the rates in fact ought to be in any Pool.

However, the Board considers that to comply with its terms of reference it must give some indication as to the storage rental payments that in its view would be appropriate at the present time for the respective pools, based on the general evidence and information that it has gathered and the application of the above principles and formula, if the rental rates were now being negotiated or renegotiated. The Board stresses however, the fact that, in arriving at its conclusions, it has given a good deal of weight to the increased use and usefulness of storage during the past thirteen months, and therefore the rates that it considers would be appropriate at this time are substantially higher than would have been appropriate in, say, March, 1963, or at any earlier date.

The Board, having reviewed all the storage payments now in effect

under agreements and having noted the dates at which they were introduced; having carefully studied the payments and practices in this and other jurisdictions; having carefully considered all the representations made to the Board by interested parties; and having applied the principles and formula set out above, has come to the following conclusions as to the annual rental payments that would be appropriate to-day.

PINNACLE REEF POOLS

For these pools, such as are found in Lambton County (which have capacities exceeding 10 million cubic feet per acre of productive area) the Board has concluded that compensation could be based on a range of 25¢ to 30¢ per million cubic feet of capacity per productive or participating acre, to be applied to each acre of the designated area. Within this range, provision should be made for variation in performance rating, which indicates quality of the pool in terms of the rate at which gas may be injected and withdrawn. In considering storage rentals in existing pools, the other qualitative factors referred to on page 22 have not been given any specific effect in view of the general similarity of these reservoirs as to location, pressure and absence of water.

If the pinnacle reef pools listed were grouped in three categories as to performance rating, namely, excellent, good and fair, at rates of 30¢, 27½¢ and 25¢ respectively and if rates of annual storage rental were computed in the manner used in Appendix 6, the following results would be obtained:-

Name of Storage Pool	Performance Rating	Rate as per Appendix	Annual payment per acre of designated area
Dawn #1	Excellent	30¢	15.15
Dawn #2	Fair	25¢	9.60
Dawn #156	Good	27½¢	11.16 10.23
Payne	Good	27½¢	13.88
Waubuno	Fair	25¢	13.46
Corunna	Excellent	30¢	7.07
Kimball-Colinville	Good	27½¢	5.19
Seckerton	Fair	25¢	7.19

For the purposes of Appendix 6 and the above table, the capacities of the pools have been established, as the Board considers proper, at the volumes of the original reserves at original pressures, down to 50 p.s.i.a., assumed to be a reasonable abandonment pressure.

LENTICULAR POOLS

For these pools, which have capacities not exceeding 10 million cubic feet per acre of productive area, the formula used in connection with pinnacle reef pools would not be appropriate. Acreage rentals so computed would work out to amounts less than $1.00 in the three pools referred to below. As stated earlier the Board considers that a minimum of $1.00 per acre per year is reasonable and above this minimum, variations in capacity, performance and development costs have to be taken into account.

The Board has therefore concluded that, for lenticular pools, annual acreage rental could range from $1.00 to $4.00 per acre of the designated area depending on the capacity and other characteristics of the pool. On this basis, rates already agreed upon in Dawn No. 3, Zone and Crowland Pools respectively appear to be fair and reasonable.

TERMS AND CONDITIONS OF GAS AND OIL LEASES

GENERAL REVIEW

In dealing with this term of reference the Board took into account the fact that negotiations for oil and gas rights have been conducted in Ontario for over one hundred years and agreement has been reached by free negotiation between the parties. During this period a considerable body of legislation has developed in Ontario and elsewhere in North America with particular emphasis on conservation, safety and other matters related to the public interest. Statutory or regulatory control of the actual terms of oil and gas leases has not been generally applied and the principle of free negotiation has been the rule rather than the exception.

Enactments applying to gas and oil operations in Ontario have been under constant review to ensure their adequacy in the light of experience and in the light of changing conditions. Recent examples of the progress being made in this respect are the Ontario Regulation 220/62 under The Energy Act, The Gas and Oil Leases Act, 1962-63 and the revision in 1964 of both The Energy Act and The Ontario Energy Board Act. It is obvious, therefore, that every effort is being made in the fields of legislation and regulation to keep abreast of developments in the industry and to meet the requirements of operators and landowners alike for workable rules applying to those matters in which government may exercise its powers and responsibilities. The Board is of the opinion that a better knowledge of the laws as they stand and of the way in which various interests are already protected would remove much of the doubt, where it exists, as to the adequacy of existing legislation.

On the contractual side, where lessor and lessee must negotiate lease agreements, certain accepted patterns as to terms and conditions have

been developed over the years. These are generally well understood where they apply to exploration, development and production activities but some new problems have arisen with the introduction in Ontario in 1942 of the storage of gas, as an integral part of the functions of the industry. The solution of such problems depends on three factors, namely, the provisions made by law, such changes as may be effected in leasing practices and, where provided for by statute, the functions of the Board.

Mention has already been made of the progress made in the legislative field. As to the Board's part, it need only be recalled that, on applications for designation of gas storage areas or for authority to inject, store and remove gas and in arbitration proceedings there are ample opportunities for all interested parties to state their positions.

On the question of terms and conditions of leases, however, the submissions made to the Board clearly indicate the need for careful study of the different, and sometimes conflicting, views advanced. This investigation has now been completed and it has been found convenient to deal both with the submissions and the Board's comments and conclusions under the following headings:

I Standard Lease Forms

II Separation of Gas Storage Agreements from Exploration and Production Agreements

III Exclusion from Gas and Oil Agreements of Substances other than Hydrocarbons and Associated Fluids

IV Surrender of Mineral Rights which are not exercised by Lessees in Designated Gas Storage Areas.

I SUBMISSIONS RE STANDARD LEASE FORMS

The Energy Act empowers the Lieutenant Governor in Council to make regulations "prescribing statutory conditions of gas or oil leases and requiring and providing for the making of statements or reports thereon."

The Board finds there are widely divergent views as to exercising the powers to prescribe conditions of gas or oil leases. The Union Gas Company "Urges upon the Board the principle that the time is still remote when the Government of Ontario should exercise the power of prescribing conditions of gas or oil leases." The Ontario Federation of Agriculture put its case this way: - "We are not prescribing a uniform lease form but merely that each Company in the business of leasing shall not offer to a landowner a contract which contains less than these minimum terms."

Between these limits lies the suggestion of the Legislation Committee of the Gas and Petroleum Association of Ontario that, while that Committee was in agreement with the proposal to specify certain minimum conditions which must appear in all oil and gas leases in order to safeguard the interests of the lessors in Ontario, it would be undesirable to resort to definitive language in stating conditions as clauses which would be deemed to be included in each lease. Detailed language would involve risk of differences as between interpretation in the Courts and the intentions of the draftsman. The Committee suggested that the provisions be stated in general terms, so that the responsibility will be on the lessor and the lessee to prepare their own clauses dealing with the prescribed matters.

In its study of existing leases the Board noted the wide variation in the terms and conditions that have been considered desirable by different companies and was struck by the omission in many cases of one or more

provisions which ordinary prudence would suggest should be included. Lack of uniformity could be avoided by prescribing the subjects which, as a minimum, should be dealt with for the protection of the parties. Other matters appropriate to the particular lease transaction would then be left for negotiation between the parties.

The Board has given due consideration to a point continually raised by, or on behalf of, certain landowners who complain of the "inequality of bargaining positions as between the landowner and the company concerned." In its brief, the Ontario Federation of Agriculture contrasts the availability to the "Company" of financial and legal resources and of technical knowledge of the storage business with the "Farmer's" lack of these advantages.

The Board is of the opinion that there are several factors which tend to make apparent inequality of position less significant than the above contention would indicate. In the first place, the landowners concerned live in a part of Ontario where negotiations between the oil and gas industry and landowners have been carried on for something like three generations and, with respect to gas storage matters, for over twenty years. The knowledge and experience thus gained is evident from the material put forward by the same people in briefs, at hearings and meetings and on other occasions when their views are presented.

Secondly, in those matters dealt with by the Board fair and reasonable consideration is assured for the representations of all interested parties, none of whom is denied an opportunity to present his case.

Lastly, and of great importance, is the strength to be found in the landowner's position as a prospective grantor of rights. Rights being sought by a would-be lessee can be withheld by the landowner by simply refusing to sign the proposed agreement.

II SUBMISSIONS RE SEPARATION OF GAS STORAGE AGREEMENTS FROM EXPLORATION AND PRODUCTION AGREEMENTS

Both in the text of their briefs and in sample lease forms submitted therewith, companies engaged in gas and oil operations indicate divergences of opinion on this point. Union Gas Company states: - "Frankly, we see no reason for prescribing that such matters (pooling, unitization and storage) must be dealt with by means of separate and distinct contracts. Some landowners have a problem in appreciating that the document signed under the caption of "Oil and Gas Grant" contains clauses providing for these other rights. A simple solution (if one is necessary at all) is to prescribe in the general regulation that, where the lease provides for matters other than straight drilling and production, this shall be clearly set forth in descriptive words at the top of the lease for identification and such matters shall be set forth in separate clauses."

Imperial Oil Limited holds that "While producing operations and storage operations may have common problems in certain areas, it is our opinion that they are completely distinct operations and that it is detrimental to the production of petroleum and gas and hence contrary to the public interest that rights to explore for and produce natural gas or oil may be preserved, but not exercised, by reason of the fact that the holder of those rights is engaged in a gas storage operation on the lands." In line with this opinion Imperial Oil uses two separate lease agreements, one for gas storage and one for drilling and production.

Consumers' Gas Company contends that "This Company's present exploration project is a search for reservoirs suitable for gas storage, but it seeks the rights to pick up any or all other mineral assets that may be disclosed in the storage study. Part of Consumers' willingness to take these

large risks is the fact that it counts on having several strings to its exploration bow." Hence the Consumers' lease form has the caption "Oil, Gas, Mineral and Storage Agreement and Lease" and covers "all naturally occurring substances of the mineral kingdom except surface and near-surface sands, gravels and quarrying rock."

The Ontario Federation of Agriculture submits that "No gas or oil lease should contain a storage clause unless it is clearly set out in the heading of the lease that the lease does contain such storage agreement, and the section referring to storage shall be set apart from the rest of the lease."

These views must be considered in the light of the fact that formations which may be suitable for storage, even though they are devoted in the first instance to production, are carefully appraised and kept in mind as prospects for the storage role which is steadily increasing in relative importance.

III SUBMISSIONS RE EXCLUSION FROM GAS AND OIL AGREEMENTS OF SUBSTANCES OTHER THAN HYDROCARBONS AND ASSOCIATED FLUIDS.

On this subject too there are conflicting views. Union Gas Company's brief is so worded as to imply that the Company's only interest is in gas and oil. The accompanying sample lease form, however, provides for the granting of "all the petroleum oil, gas, salt or salts," and for payment of $100.00 per year for each well from which salt or salts is or are marketed in addition to royalty on oil and a graduated well rental on gas.

Imperial Oil Limited confines its discussion, in its brief, to gas and oil, and, in its lease form to the "taking of petroleum substances (liquid or gaseous) and all minerals, substances and other gas produced in association with the foregoing."

Consumers' Gas Company, as already noted above, includes all naturally occurring substances of the mineral kingdom.

The Ontario Federation of Agriculture says: "We do not feel that any gas or oil lease should contain for the lessee the right to salt or other minerals unless these rights are similarly set apart (i.e. similarly to storage rights) within the lease."

The Ontario Department of Mines, in its regulations and in licenses and leases dealing with oil and gas rights in Lake Erie, specifically reserves to the Crown the right to prospect for any substances other than natural gas, petroleum and petroleum products. It also requires that "The license shall not limit the staking or acquiring of other mines and minerals under the (Mining) Act."

Looking farther afield, the Board finds that it is widely accepted practice outside Ontario to confine gas and oil agreements, as to the substances covered, to Hydrocarbons and related fluids such as may be found in association with gas or oil or both on actual extraction from the reservoir. In only a limited number of cases is any reference made to other minerals.

The Board is of the opinion that this restriction is in the interest of true conservation, as it obviates the danger of "freezing" mineral assets the exploitation of which would benefit the economy. There is also the practical consideration that the administrative and regulatory functions of the Department of Energy Resources and of this Board relate to gas and oil operations only.

IV SUBMISSIONS RE SURRENDER OF MINERAL RIGHTS WHICH ARE NOT EXERCISED BY LESSEES IN DESIGNATED GAS STORAGE AREAS

Ever since underground storage of gas started in Ontario in 1942, emphasis has been placed on the need for adequate protection of the storage operations from loss of gas and other damage that could arise from uncontrolled drilling. Not only do storage operators acquire protective zones around the perimeter of the storage reservoirs, but the importance of protective measures is recognized by the prohibition of drilling in designated gas storage areas without consent of the Minister. The legislative control takes the form - "The Minister shall refer every application for a permit to bore or drill a well in a designated gas storage area to the Board, and the Board shall hold a hearing and report to him thereon, and he shall grant or refuse to grant the permit in accordance with the report."

Certain landowners feel that they have a legitimate grievance in that storage agreements which have been entered into as amendments to earlier gas and oil leases (for drilling and production) or as separate storage agreements have "frozen" mineral rights, including oil. As the lessees hold exclusive rights under existing lease agreements, their strictly legal position allows them to continue to hold potential mineral rights above, around and under the storage pool, without payment or drilling.

The legislation, however, allows for granting, as well as refusing, the right to drill within a designated gas storage area. The Board is of the opinion that, subject to certain reservations, the right to drill might well be granted in certain cases. The reservations are that no operation can be undertaken that would in any way endanger the storage reservoir and that on this point full consideration should be given to any representations by the

storage operator, both as to location of wells within the designated area and as to drilling and production methods to be used. A further reservation is that, taking into account the hazards involved in drilling through formations where gas is stored at the high pressures associated with such reservoirs as are found in pinnacle reefs, exploitation by drilling through the apex of formations of this type should, for the present at least, be prohibited.

An arrangement of this kind would then permit the exploration for oil, gas and other minerals above, around and under the storage reservoir. The Board notes that dual operations of this nature are not uncommon and has examined a number of typical lease agreement clauses from various states in the United States where they are provided for. The Board sees no reason why leases should not be so worded as to provide that the lessee either (a) shall surrender the necessary rights to the lessor in order that he, or some third party with whom he so arranges, could undertake such explorations or development, or (b) may retain the mineral rights on the basis that he must either conduct exploration for the minerals or pay rental with respect to such rights, or both.

This practice relieves the storage operator from criticism as to the "freezing" of resources which he believes would not be profitable to exploit.

RECOMMENDATIONS

1. The Board recommends that there be a requirement that all gas and oil lease agreements contain clauses providing for at least the following matters:

   (i) Caption

(ii) Date of Execution

(iii) Parties to the agreement

(iv) Object or purpose of the agreement.

(a) Operations to be conducted and access to lands.

(b) Substances to be sought and taken.

(c) Lands on and under which to operate.

(d) Limitations as to formation or depth (optional).

(v) Primary term and provisions for extension.

(vi) Compensation

(a) Initial sum on signing.

(b) Damages during preliminary surface operations.

(c) Delay or acreage rental for exclusive rights.

(d) Rental for occupation by surface encumbrances.

(e) Royalties

(vii) Indemnification of lessor for damages arising from lessee's operations.

(viii) Lessee's obligation re clearance from buildings etc.

(ix) Lessee's obligation re depth for burying pipes.

(x) Protection of lessor's fresh water supply.

(xi) Right of lessee to surrender or assign.

(xii) Obligation of lessee to register surrender.

(xiii) Restoration of lands on abandonment.

(xiv) Nullity of agreement if breach by lessee not remedied on notice by lessor within specified period.

(xv) Addresses for service of notices and for payments.

(xvi) Relief for non-compliance due to strikes, lockouts, etc.

(xvii) Obligation on lessee to comply with laws and regulations.

(xviii) Statement that the instrument embodies the entire agreement to the exclusion of any oral or other representations.

The Board finds that there is no demand for the prescribing by statute or regulation of a standard lease agreement form setting out in detailed language all of its terms and conditions.

2. The Board recommends that there be a requirement that, where storage rights are included in a production lease, the caption include, in bold type, reference to storage rights, and clauses dealing with storage be separated from those dealing with production.

The Board finds that there is no uniformity in actual practice in this respect. Some companies now offer separate storage agreements (subject where appropriate to existing production leases) and others combine the two instruments in one. Landowners, as represented by the Ontario Federation of Agriculture, believe that "no gas or oil lease should contain a storage clause unless it is clearly set out in the heading of the lease that the lease does contain such storage agreements, and that the section referring to storage shall be set apart from the rest of the lease." The Gas and Petroleum Association of Ontario presents the same suggestion but on an optional rather than a mandatory basis. The Board has concluded that, if its recommendation above is adopted, there is no need for a statutory provision that storage rights may not be included in drilling and production leases.

There will of course be a need for an instrument dealing only with storage rights in any case where storage is proposed in aquifers, which are water-bearing formations in which native gas and oil have not been found in significant amounts.

3. The Board recommends that there be a requirement that leases granting storage rights contain clauses providing for at least the following matters:

(Where the lease embodies both production and storage there is no need to repeat all of the eighteen headings already listed under recommendation No. 1. Therefore only those clauses which require to be amended to suit storage considerations or which must be added are dealt with in this recommendation. Except for the caption, however, clauses dealing with storage matters, should be set out separately, as provided for in Recommendation 2 above.)

(xix) The object or purpose of the lease agreement should include the right to inject, store and remove gas.

(xx) Compensation provided for should be consistent with statutes and regulations and particularly should cover

(a) Initial sum on signing.

(b) Delay or acreage rental while storage rights are held but not exercised.

(c) Rental for occupation by surface encumbrances.

(d) Damages resulting from exercise of the authority to inject, store and remove gas.

(e) Compensation in lieu of royalty on economically recoverable residual gas.

(f) Compensation in lieu of royalty on economically recoverable oil which will not be recovered by reason of the storage operations.

(g) Storage rental, including provision for re-negotiation of storage rental as recommended in this report.

(xxi) Provision for the alternatives as to surrender, or exploration, or compensation with respect to mineral rights in designated gas storage areas as referred to in recommendation 5 below.

4. The Board recommends that minerals other than Hydrocarbons and associated fluids be excluded from gas and oil agreements and from gas storage lease agreements.

The Board's reasons for this recommendation have already been given at the end of its review of submissions on the subject.

5. The Board recommends that future lease agreements contain a provision that, upon the commencement of the use of a storage reservoir for gas storage, the lessee either (a) shall surrender to the lessor the mineral rights above, around and under the storage reservoir, in order that the lessor, or some third party with whom he so arranges, could undertake exploration, or (b) may retain the mineral rights in question on the basis that he must either conduct exploration for the minerals or pay rental with respect to such rights, or both.

The surrender here referred to covers rights within a designated gas storage area which are normally included in original agreements and which give the lessee the exclusive control of the lands while the storage formation is being delineated and developed until injection. If, after that date, the storage operator does not propose to explore and develop mineral resources within the designated area but outside the actual storage reservoir, such surrender is desirable so that the lessor may undertake the development on his own account. Alternatively, the lessee should pay compensation in an amount to be negotiated in the light of the circumstances applying to the lands involved.

All of which is respectfully submitted.

DATED at Toronto this 4th day of May, 1964.

ONTARIO ENERGY BOARD

"A. R. Crozier"
Chairman

"E. A. Allcut"
Commissioner

"D. M. Treadgold"
Commissioner

"L. R. MacTavish"
Commissioner

APPENDIX 1

LIST OF BRIEFS, HEARING, MEETINGS AND VISITS

Briefs -	Township of Moore
	Mr. Donald A. McLachlin
	Lambton Gas Storage Asscciation
	Mr. H. E. Wellington
	Mr. James G. Walker (5 submissions)
	Ontario Federation of Agriculture
	Mr. Dryden Nisbet
	Imperial Oil Limited
	Union Gas Company of Canada Limited
	Trans-Canada Pipe Lines Limited
	Consumers' Gas Company
	Gas and Petroleum Association of Ontario
Hearing -	Advertised Public Hearing at Sarnia
Meetings -	Rutherford, Ontario, with local landowners
	Mooretown, Ontario, with local landowners
	Waubuno, Ontario, with local landowners
	Trans-Canada Pipe Lines Limited
	Union Gas Company of Canada Limited
	Imperial Oil Limited
	Consumers' Gas Company
	Ontario Federation of Agriculture
Visits -	Consumers' Power Company, Jackson, Michigan
	New York State Natural Gas Corporation and
	Peoples Natural Gas Company
	Ohio Fuel Gas Company

IN THE MATTER OF The Ontario Energy Board Act (R.S.O. 1960, Chapter 271) and particularly clause (j) of Section 28 thereof.

REPORT TO THE LIEUTENANT GOVERNOR IN COUNCIL

Pursuant to clause (j) of Section 28 of The Ontario Energy Board Act, Your Honour was pleased to pass Order-in-Council OC-1354/62 on the 17th day of April, 1962, requiring this Board to adjudicate on and examine and report on the following questions respecting energy:

1. Payments with respect to storage of gas in designated gas storage areas.
2. Terms and conditions of gas and oil leases.
3. The Gas and Oil Leases Act.

Since April, 1962, the Board has held a number of hearings in the field with landowners and has held ten separate meetings with the gas and oil industry, including gas utilities, pipe line companies and the Federation of Agriculture. In the course of this study and investigation the Board has received seventeen briefs from interested persons, including gas utilities, pipe line companies, individual owners and the Federation of Agriculture. To supplement information obtained from sources in Ontario, the Board visited a number of states in the United States in order to ascertain the latest gas storage developments and methods of dealing with storage payments and other related matters.

With respect to items 1 and 2 of the terms of reference, the Board is not yet in a position to report as it considers that it requires further information and investigation before it can properly make recommendations in relation to these matters.

However, all representations with respect to item 3 of the terms of reference indicate an immediate need for a revision of The Gas and Oil Leases Act and accordingly, the Board considers that it should now report with respect to this matter.

The Gas and Oil Leases Act was enacted in 1943 and has not been amended. It provides a simple procedure for clearing titles to land of leases of gas or oil rights in the land where specified defaults under the lease have continued for a period of three years. Most gas or oil leases are prepared on the basis of what is known as a "drill, pay or quit" type of lease under which the lessee is required to either drill for oil or gas or, in the alternative, pending drilling, to pay an annual rental. Where drilling was not commenced or rental paid the lease would expire, but the only procedure for removing the lease from the title to the land was the expensive procedure of taking action in the Supreme Court for a declaration that the rights under the lease had terminated. The Gas and Oil Leases Act substituted a simple procedure of an application to a county court judge based on affidavit, under which the judge, if satisfied that the default had continued for a period of three years, could declare the lease void and vacate its registration. The second basis for such an application was the case where the lessee had drilled a well for gas or oil but had failed to operate it and had failed to pay rentals, royalties or other remuneration.

The Act has been used a great deal. Its procedure benefits a landowner who may have title problems in selling or mortgaging his land, benefits both a landowner and an oil or gas operator who cannot undertake expensive drilling under a subsequent lease with a cloud on title arising from the registration of the existing lease, and benefits pipe line operators who require the removal of the cloud on title in order to ensure the acquisition of valid pipe line easements.

A number of briefs and other representations have been made to the Board suggesting minor changes. The main concern appears to be that the period of three years' default is too long. The complaint is that, particularly in the case of failure to even commence to drill and failure to pay rentals in lieu, the lease in fact should be quickly removed from title and the lessee should not be in a position to delay others from developing the property by reason of the three-year delay required under the present Act. Accordingly representations have been made that there should be no specified period of default in this regard.

Representations have also been made that in relation to the other default condition, namely where drilling has been done but the well is not operated and the lessee has failed to pay remuneration, the required period of default should be removed, and that the condition should be elaborated so that an application may be made in any case of default under the terms of the lease. The Board considers that it is reasonable in the case of general defaults to provide for a minimum period of two years' default before the Act would be applicable and to provide that within that period the lessor may give notice of the default and if the default is not cured within thirty days of the giving of the notice an application may then be made under the Act.

Under the Act the judge, on application, sets a time and place for his inquiry and notice thereof is required to be served on the lessee not less than thirty days before the date of the appointment. It has been suggested to the Board that the thirty-day period is longer than is in fact required and a recommendation has been made that the period be reduced from thirty days to fourteen. The Board however is of the opinion that, since this Act provides what is really an extraordinary remedy, it is not desirable to reduce the period of notice.

It has also been suggested that where the land originally leased has become subdivided problems exist under the present Act in that the owner of a portion of the subdivided land must obtain the co-operation of the owners of the remaining portions in order to clear the title to his own land. It has been suggested that an amendment be made to allow an order to be made with respect to all or any part of the land affected by the original lease. The fact is, however, that the Act is working in this regard, albeit there may be some difficulties, and the Board does not recommend any change with respect to this suggestion.

It has also been pointed out to the Board that section 8 of the present Act provides for the registration, against the title of the land concerned, of a certified copy of the order of the judge. It is suggested that this involves additional expense in the obtaining of a certified copy and that section 8 should be amended to provide as an alternative that the order itself may be registered.

The Act provides at present for the vacating only of the registration of the lease. Cases have arisen where the lease itself is not registered but an assignment has been registered. It has been suggested that provision be made for the vacating of the registration of the lease, or an assignment, or both.

A further suggestion was made that the Act should be amended to make it mandatory upon the judge to issue the order applied for if it appears from the evidence that the default exists. In view of the broadening of the bases upon which an application may be made the Board does not consider that such an amendment should be made. In any event it is not likely that the judge would refuse an application unless there were very substantial grounds for doing so.

The Board therefore recommends that The Gas and Oil Leases Act be revised to provide for the following:

1. That an application may be made forthwith after the occurrence of a default in failing to commence to drill a well and failure to pay rentals in lieu thereof.

2. That an application may be made in respect of any other default if the default has continued for a period of two years or if the default has not been cured within thirty days after the giving of notice of the default by the lessor to the lessee.

3. That provision be made for the registration against the title of either the order of the judge or a certified copy thereof.

4. That the Act be amended to provide for the vacating of any registration, whether it be of the lease or of an assignment thereof.

The carrying out of the above recommendations would involve as well complementary amendments to other provisions of the Act and they are of such an extent that if they are to be carried out it would be preferable to revise the entire Act rather than to make numerous spot amendments to the various sections and subsections of the Act. In addition certain minor modifications of language not involving changes in principles have been recommended to the Board which the Board considers desirable. Accordingly the Board has attached as a schedule to this report a copy of the Act revised in a manner that the Board considers would give effect to its recommendations set out above.

An additional suggestion to the Board was that the Act should be amended so as to apply not only to gas and oil leases, but also to storage and mineral leases generally. The Board considers that this suggestion requires further study in relation to the other terms of reference but that the revision of the Act recommended above by the Board should not be delayed pending such further study.

All of which is respectfully submitted.

DATED at Toronto this 25th day of February, 1963.

ONTARIO ENERGY BOARD

"A. R. Crozier"
Chairman

"L. R. MacTavish"
Commissioner

"D. M. Treadgold"
Commissioner

"E. A. Allcut"
Commissioner

"J. J. Wingfelder"
Commissioner

SCHEDULE

THE GAS AND OIL LEASES ACT, 1962-63

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Interpretation

1. In this Act,

(a) "gas or oil lease" includes any agreement, whether by way of option, lease, grant or otherwise, granting the right to operate lands for the production and removal of natural gas or oil or both, except a grant to so operate where the amount or payment of the consideration therefor is not dependent upon the operation of such lands or upon the production of gas or oil or upon the amount of gas or oil produced, and "lessee" and "lessor" have a corresponding meaning and include heirs, successors, administrators, executors, assigns and transferees of the lessee or lessor, as the case may be;

(b) "judge" means the judge of the county or district court of the county or district in which the land is situate. R.S.O. 1960, c. 160, s. 1, amended.

Application upon default

2. (1) Where the lessor of any land alleges,

(a) that a lessee has made default under the terms of a gas or oil lease affecting the land in that he has failed to commence to drill a well for natural gas or oil and has failed to pay rentals in lieu thereof; or

(b) that a lessee has made default under the terms of a gas or oil lease affecting the land, other than a default specified in clause a, and

(i) that the default has continued for a period of two years, or

(ii) that, the default having continued for a period of less than two years, the lessor has given notice in writing to the lessee specifying the default alleged and requiring the lessee to cure the default within thirty days of the giving of the notice, and that the lessee has not cured the default within such thirty days,

the lessor may apply, upon affidavit, to a judge for an order declaring the lease void and, if the lease or any assignment or transfer thereof is registered, vacating such registration. R.S.O. 1960, c. 160, s. 2 (1), amended.

Notice of default

(2) Notice of default under subclause (ii) of clause b of subsection 1 shall be given to the lessee either by delivering it to him, leaving it at his residence or sending it to him by registered mail at his address as indicated in the lease or at his last known address, but where an assignment or transfer of the lease has been registered in the registry or land titles office, the notice shall be given to the assignee or transferee, instead of the original lessee, in the manner prescribed in this subsection. New.

Appointment for inquiry into default

(3) The judge shall, in writing, appoint a time and place at which he will inquire and determine whether default has been made as aforesaid. R.S.O. 1960, c. 160, s. 2 (2).

Service of notice of inquiry

(4) A notice in writing of the time and place appointed, together with a copy of the affidavit used upon the application, shall be served upon the lessee either by delivering them to him, leaving them at his residence or sending them to him by registered mail at his address, as indicated in the lease, or at his last known address, or in such other manner and at such other address as the judge directs, not less than thirty days before the return of the appointment. R.S.O. 1960, c. 160, s. 2 (3), amended.

Idem

(5) Where an assignment or transfer of the lease has been registered in the registry or land titles office, the appointment shall be served upon the assignee or transferee, instead of the original lessee, in the manner prescribed in subsection 4. R.S.O. 1960, c. 160, s. 2 (4), amended.

Style of proceedings

3. The proceedings shall be entitled in the county or district court of the county or district in which the land lies, and shall be styled:

"In the matter of ....., Lessor, and ....., Lessee." R.S.O. 1960, c. 160, s. 3.

Where lessee fails to appear

4. (1) If at the time and place appointed the lessee fails to appear and it appears to the judge

(a) that default has been made as indicated in clause a of subsection 1 of section 2, or

(b) that default has been made as indicated in clause b of subsection 1 of section 2 and

(i) has continued for a period of two years, or

(ii) has not been cured within thirty days after

the giving of a notice under subclause (ii) of the said clause b,

as the case may be, the judge may, notwithstanding any provision in the gas or oil lease requiring the lessor to give notice to the lessee of any default, make an order declaring that the gas or oil lease is void and, if the lease or any assignment or transfer thereof is registered, vacating every such registration. R.S.O. 1960, c. 160, s. 4 (1), amended.

Where lessee appears

(2) If the lessee appears, the judge shall, in a summary manner, hear the parties and their witnesses and examine into the matter, and, if it appears to the judge

(a) that default has been made as indicated in clause a of subsection 1 of section 2, or

(b) that default has been made as indicated in clause b of subsection 1 of section 2, and

(i) has continued for a period of two years, or

(ii) has not been cured within thirty days after the giving of a notice under subclause (ii) of the said clause b,

as the case may be, the judge may, notwithstanding any provision in the gas or oil lease requiring the lessor to give notice to the lessee of any default, make an order declaring that the gas or oil lease is void and, if the lease or any assignment or transfer thereof is registered, vacating every such registration. R.S.O. 1960, c. 160, s. 4 (2), amended.

Description of land

(3) Every order shall contain a description of the land affected sufficient to permit registration of the order and

where the order vacates the registration of a lease or an assignment or transfer thereof, the order shall contain a reference to the registration number of such lease, assignment or transfer. R.S.O. 1960, c. 160, s. 4 (3), amended.

Irregularities in procedure

5. The judge has the same power to amend or excuse irregularities in the proceedings as he has in an action. R.S.O. 1960, c. 160, s. 5.

Subsequent drilling, etc., not to be taken into account

6. The judge, upon the hearing of the application, shall not take into account

(a) any drilling done or sought to be done after the making of the application

(b) any rentals or other remuneration tendered after the making of the application; or

(c) any other attempt, made after the making of the application, to cure a default,

unless such drilling, tender or other action is agreed to or accepted by the applicant. R.S.O. 1960, c. 160, s. 6, amended.

Appeal

7. An appeal lies in the Court of Appeal from the order of the judge granting or refusing an order under section 4. R.S.O. 1960, c. 160, s. 7.

Registration of order

8. Any order made under section 4, or a copy thereof certified by the Clerk of the court under the seal of the court, may be registered in the proper registry or land titles office. R.S.O. 1960, c. 160, s. 8, amended.

APPENDIX 3, Sheet ONE

UNION GAS COMPANY OF CANADA, LIMITED

Record of Volumes of Gas Stored and Withdrawn from Storage by Union and Ontario Storage, All Pools - 29 October, 1942 - 31 March, 1964

Fiscal Years ended March 31	Volume In MCF	Volume Out MCF
1943	28,750	26,290
1944	451,625	428,387
1945	426,142	351,159
1946	512,982	530,222
1947	470,694	482,868
1948	238,677	610,698
1949	1,614,178	609,558
1950	2,183,464	755,232
1951	2,638,312	1,652,897
1952	3,162,194	2,821,101
1953	4,646,948	3,026,142
1954	4,526,009	3,277,648
1955	4,501,093	4,252,621
1956	4,514,309	4,913,331
1957	3,612,357	2,527,191
1958	8,022,283	5,458,074
1959	7,770,308	11,034,408
1960	10,812,260	8,939,636
1961	16,887,811	15,228,834
1962	19,512,973	18,581,906
1963	21,251,681	25,763,637
1964 (est.)	25,980,000	25,640,000

April 4, 1963 APPENDIX 4

"A" UNION GAS COMPANY'S OPERATING GAS STORAGE POOLS (LAMBTON COUNTY) Sheet one.

Name	Dawn No. 1	Dawn No. 2	Dawn No. 3	Payne	Waubuno	Dawn 156	Total
Township	Dawn	Dawn & Sombra	Dawn	Moore	Moore	Dawn & Enniskillen	
Year Discovered	1932	1932	1914	1949	1951	1952	
First used for Storage	1943	1942	1954	1957	1960	1962	
Designated as Storage area	1950	1950	1950	1957	1955	1962	
Injection Authorized	--	--	--	1957	1960	1962	
Original Pressure (Wellhead psig)	865	865	760	877	931	877	
Original Gas in Place to zero psia wellhead pressure in billions of cubic feet	8.66	5.33	2.00	19.59	9.25	31.58	76.41
Cushion Volume (Billion cu. ft.)	4.65	1.95	1.12	7.06	3.09	11.04	28.91
Working Volume (Billion cu. ft.)	4.01	3.38	.88	12.53	6.16	20.54	47.50
Operating Pressure (Wellhead psia)							
- cushion pressure	**500	350	300	350	350	350	
- maximum pressure	880	880	*515	892	946	892	
Performance Rating	excellent	fair	poor	good	fair	good	
Primary Use	peak load	base load	inactive	combination	base load	combination	
Daily Deliverability in mmcf (at 80% back pressure)							
- at cushion pressure	107	14	0.5	65	31	77	294.5
- at maximum pressure	183	44	2	200	92	219	740.0

* 500 psig maximum pressure carried because of limitation of lines, valves, etc.

**Cushion pressure in Dawn No. 1 Pool is high to provide high deliverability.

April 4, 1963 APPENDIX 4

"B" IMPERIAL OIL LIMITED'S *DESIGNATED GAS STORAGE POOLS (LAMBTON COUNTY) Sheet two.

Name	Kimball-Colinville	Seckerton	Corunna	Sombra	Bickford	Total
Township	Moore	Moore	Moore	Sombra	Sombra	
Year Discovered	1947	1952	1950	1951	1954	
Designated as Storage Area	1962	1962	1962	1962	1962	
Original Pressure (reservoir psia)	919	950	943	995	986	
Original Gas in Place to Zero psia reservoir pressure in billions of cubic feet	44.82	13.29	7.69	2.64	20.20	88.64
Cushion Volume (Billion cu. ft.)	15.42	4.65	3.16	.83	6.30	30.36
Working Volume (Billion cu. ft.)	29.40	8.64	4.53	1.81	13.90	58.28
Operating Pressure (reservoir psia)						
- cushion pressure	350	350	350	350	350	
- maximum pressure	919	950	943	995	986	
Performance Rating**	good	fair	excellent			

* Unlike the Union Gas Company's operating pools in Lambton County, the pools owned by Imperial Oil Limited have been designated only. To date the latter have not been the subject of applications for "authority to inject".

**Maximum daily deliveries from storage will be determined when actual operating requirements establish number of wells compressor and line capacities etc.

April 4, 1963 APPENDIX 4

"C" POTENTIAL GAS STORAGE POOLS IN LAMBTON & KENT COUNTIES Sheet three.

Billions of Cubic Feet - Estimated

Name	Township	County	Original Volume of Gas in Place	Cushion Volume	Working Volume	Remarks	Year of Discovery
Zone	Zone	Kent	10.5	5.6	4.9	Designation applied for	1943
Dawn 167	Dawn & Enniskillen	Lambton	4.5	3.0	1.5	Potential	1953
Enniskillen 28	Enniskillen	Lambton	2.0	1.0	1.0	Possible	1954
De Clute	Raleigh	Kent	23.2	10.9	12.3	"	1929
~~Becher~~	Sombra	Lambton	6.6	4.2	2.4	"	1946
Mandaumin	Plympton	Lambton	2.3	1.0	1.3	"	1956
Dover	Dover	Kent	13.4	8.1	5.3	"	1917
Morpeth	Howard	Kent	5.0	2.5	2.5	"	1954

Notes:- 1. Figures for Zone and Dawn 167 Pools are based on more detailed engineering study than the other six pools and estimates for the two are therefore closer.

2. In addition to the pools listed above, all other producing fields and pools are kept under observation by companies interested in storage with a view to possible future consideration for storage use.
For example,
Consumer's Gas Company is investigating storage possibilities in Welland County and examining in detail a selected location in which there is believed to be a stratigraphic trap.

STORAGE COMPENSATION RATES

IN THE UNITED STATES

Company	State	Rates
Consumers Power	Michigan	Agricultural Area 7.50/acre (one payment) Urban areas 10.00/acre one payment. Free gas to one dwelling. Well rental $100 to $300 per acre/well/year (land occupied by well only)
U.S. Federal Government (Govt. owned land)		Basic Rental 1.00/acre/year plus Input of Rental/acre/year 0- 5 billion of 1+1 $2.00 5-10 1+2 3.00 10-15 1+3 4.00 over 15 1+4 5.00
Peoples Natural Gas Co. and New York State Natural Gas Co.	Pennsylvania	2.00/acre/year or $300/well per year whichever is larger (some older leases still at $1.00 and 1.50)
Ohio Fuel Gas Co.	Ohio	1.00/acre/year or $200 per well per year whichever is greater plus free gas up to 200 mcf/year
Midwestern Gas Transmission (T.G.T.) (oil pools)	Illinois	$20/acre (one payment) $1000/acre for land occupied 5.00/rod for pipelines 10" and over 2.00/rod for pipelines under 10" 2.00/rod for electric lines
Natural Gas Storage of Illinois	Illinois	(a) Gas Pools 2¢ MCF output (b) Aquifers $45/acre (one payment) plus $1000/acre-in well, $400/acre observation well, $5/rod for pipelines per year
Pacific Lighting Gas Supply Co.	California	1¢/MCF output - entire area plus another 1¢/MCF for those in productive area - unitized.
United Fuel Gas Company	West Virginia	$300/year/well or $1/acre/year whichever is greater.

CAPACITIES OF

PINNACLE REEF GAS STORAGE POOLS

IN LAMBTON COUNTY

Appendix 6

Sheet one.

UNION-ONTARIO	First Use for Storage	Designated Acreage	Productive Acreage	* Capacity above 50 psia Mmcf	Capacity per Productive acre Mmcf
Dawn No. 1	1943	450	163.0	8,233	50.51
Dawn No. 2	1942	525	132.0	5,068	38.39
Dawn No. 156	1962	2,730	822.5	30,604	37.21
Payne	1957	752	369.0	18,631	50.49
Waubuno	1960	500	164.0	8,829	53.83
TECUMSEH					
Corunna	1964	529	200	4,716	23.58
Kimball-Colinville	1964	4,721	2,224	42,000	18.88
Seckerton	1964	1,227	422	12,141	28.77
IMPERIAL OIL (2 Pools designated as gas storage areas but not yet authorized for use)					
Bickford	--	2,391	1,047	19,400	18.53
Sombra	--	767	180	2,460	13.67

* Capacities at 60 deg. F. and pressure base of 14.73 psia (Union-Ontario) and 14.65 psia (Imperial-Tecumseh)

CALCULATION OF STORAGE RENTAL PER ACRE FOR

PINNACLE REEF GAS STORAGE POOLS

IN LAMBTON COUNTY

Appendix 6

Sheet two.

UNION-ONTARIO	Performance Rating	Amount per million cubic feet capacity per productive acre 15¢	20¢	25¢	30¢
Dawn #1	Excellent	$7.58	$10.10	$12.63	$15.15
Dawn #2	Fair	5.76	7.68	9.60	11.52
Dawn #156	Good	5.58	7.44	9.30	11.16
Payne	Good	7.57	10.10	12.62	15.15
Waubuno	Fair	8.08	10.77	13.46	16.15
TECUMSEH					
Corunna	Excellent	$3.54	$ 4.72	$ 5.90	$ 7.08
Kimball-Colinville	Good	2.83	3.77	4.72	5.66
Seckerton	Fair	4.32	5.76	7.20	8.64
IMPERIAL OIL					
Bickford		$2.78	$ 3.71	$ 4.64	$ 5.56
Sombra		2.05	2.73	3.41	4.10

CAPACITIES OF LENTICULAR POOLS

DEVELOPED OR BEING DEVELOPED

Appendix 6

Sheet three.

Name	Status	Designated Acreage	Productive Acreage	Capacity above Abandonment Pressure-Mmcf	Capacity per Productive acre Mmcf
Dawn #3	Inactive	3,100	642	1,817	2.83
Zone	Under development	10,326	5,163(a) to 7,744	10,900	1.41 to 2.11
Crowland	Under development	2,005(b)	1,230	1,000(c)	0.81

(a) Productive acreage not yet delineated, but will fall in this range.
(b) Designation not yet made, but indications are that it will be proceeded with.
(c) Approximate only.

CALCULATION OF STORAGE RENTAL PER ACRE

FOR ABOVE POOLS

	Amount per million cubic feet capacity per productive acre				Agreed rental per acre
	15¢	20¢	25¢	30¢	
Dawn #3	$0.42	$0.56	$0.70	$0.84	$1.00 or $2.00
Zone	0.21 to 0.32	0.28 to 0.42	0.35 to 0.53	0.42 to 0.63	$3.00
Crowland	0.12	0.16	0.20	0.24	$1.00

HISTORY OF NEGOTIATIONS BETWEEN UNION GAS CO. AND LANDOWNERS IN DAWN #1 & #2 POOLS

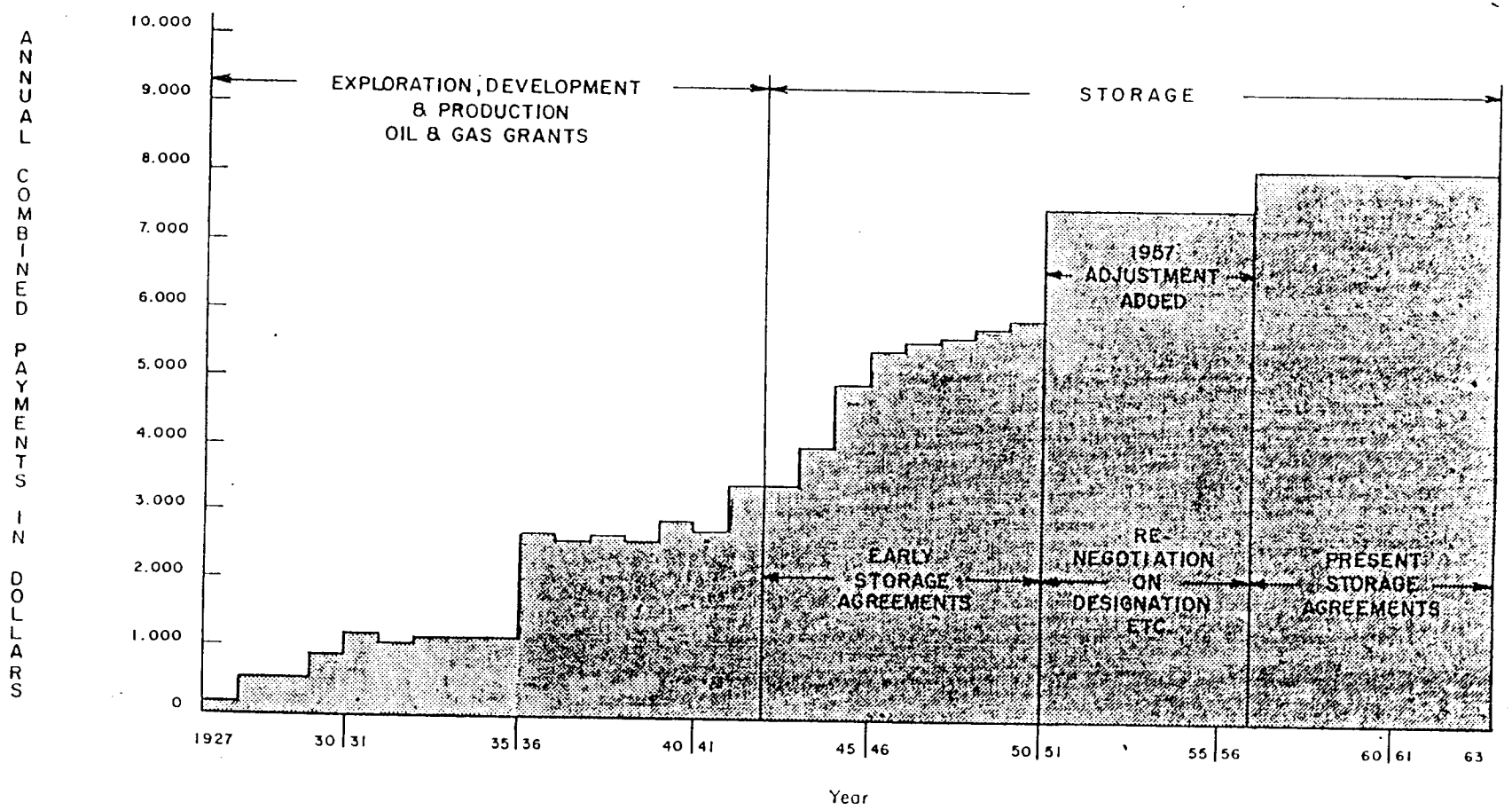
FROM 1927 to 1957 APPENDIX 7

	1927	1928	1930	1931	1933	1936	1937	1939	1940	1942	1944	1945	1946	1947	1948	1949	1950	1957
Dawn #1																		
Owner 1	A					B								D				E
2	A					B				C	D							E
3				A					B			D						*
4	A			B						C	D							E
5	A				B			B			D				B			E
Dawn #2																		
Owner 1	A		B							C	D					B	B	E
2	A	B										D						E
3	A		B									D						E
4	A						Al				D					D		E
5	A					B				B								*
6	A						Al					D						E
7		A					Al						D					**

LEGEND - A - Original oil & gas grant @ 50¢ per acre
Al- Acreage payment increased to $1.00 per acre
B - Well or wells completed
C - Storage agreement for still gas
D - Storage agreement for all types of gas
E - Latest agreement now in effect.

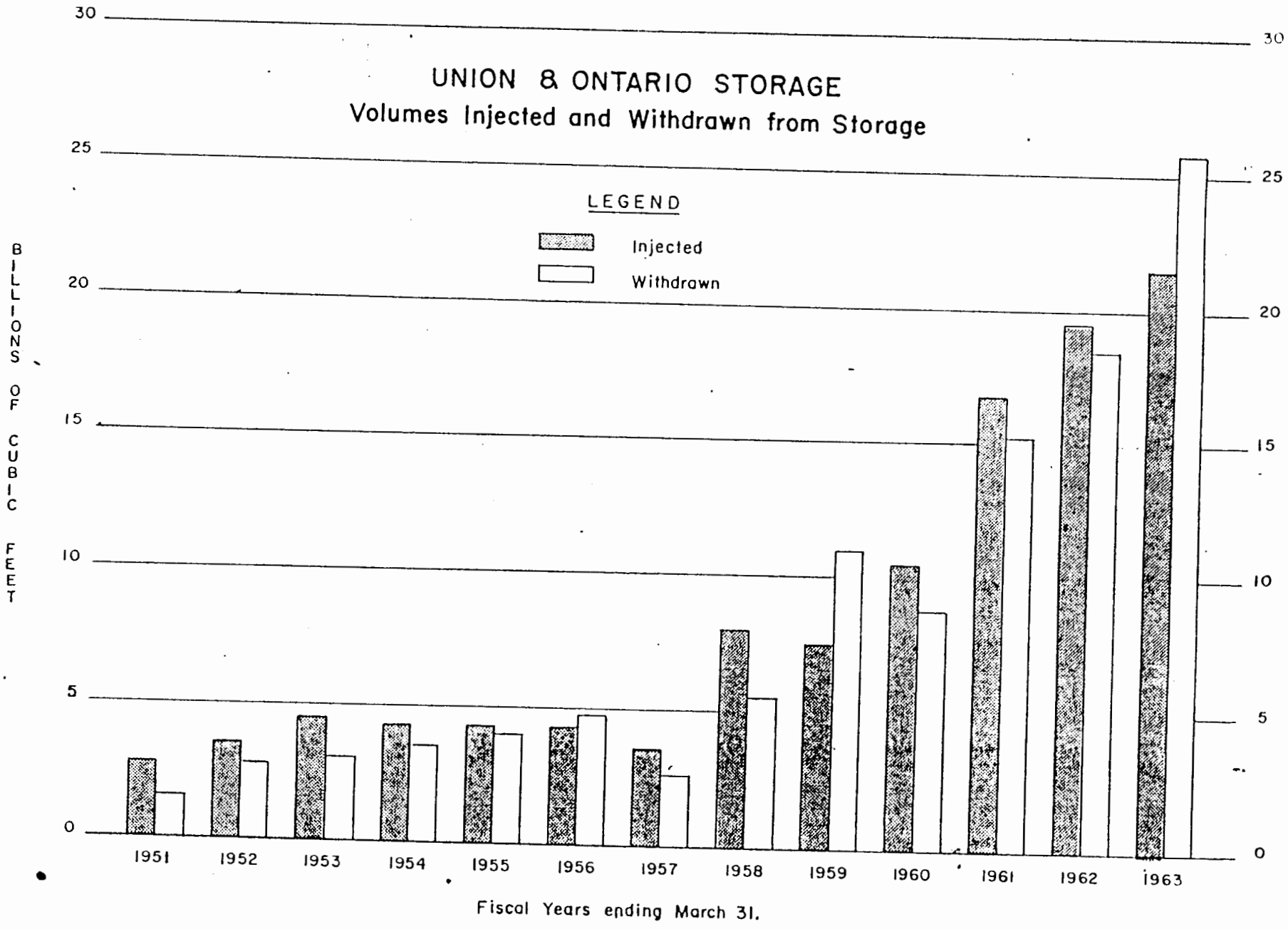
* Did not sign latest agreement, - already getting more than it provided.
** Did not sign latest agreement, - decided to continue with earlier (and lower) payment.

COMBINED PAYMENTS TO LANDOWNERS
DAWN No.1 & DAWN No.2 POOLS
(Oil Royalties not included)

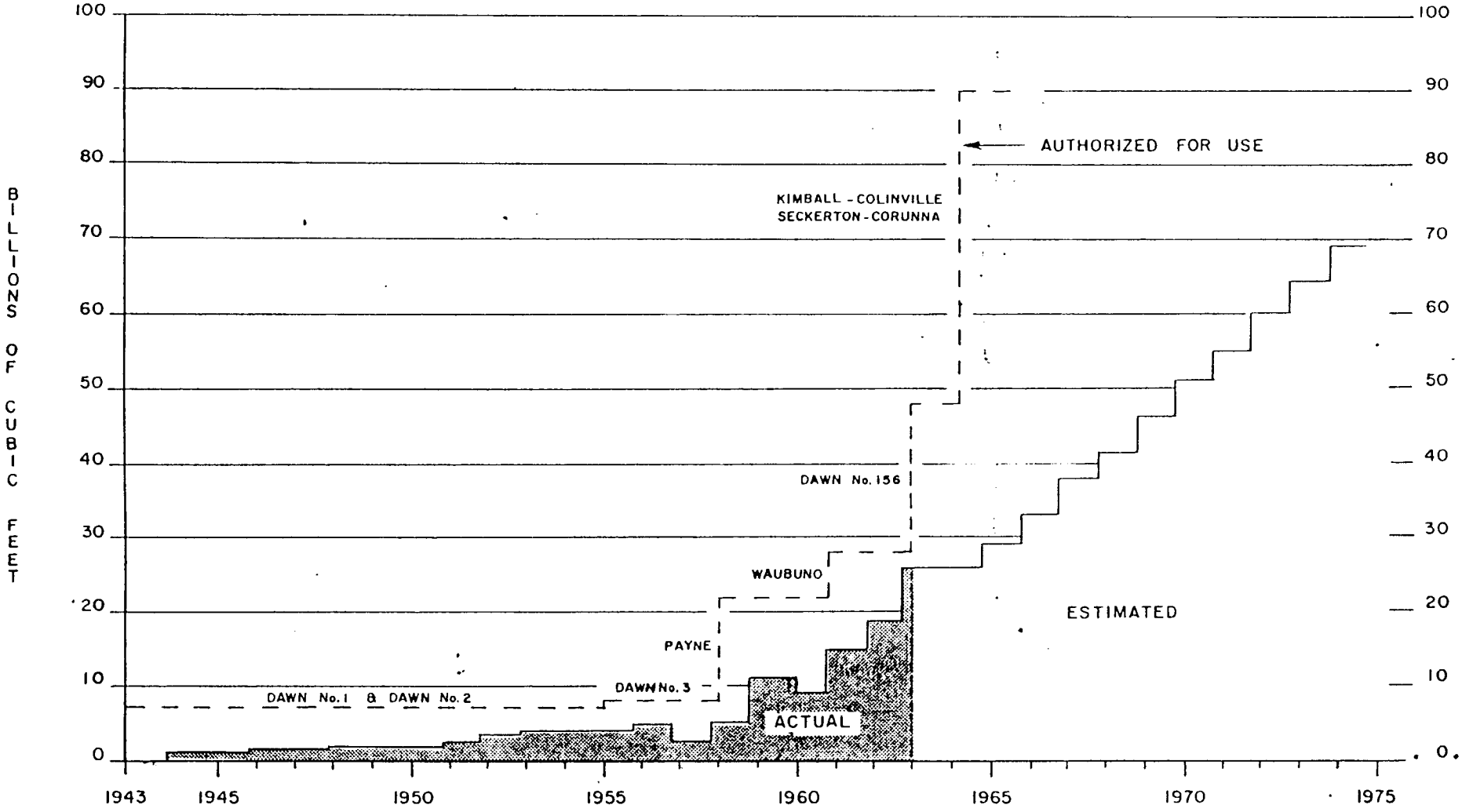


UNION & ONTARIO STORAGE

Volumes Injected and Withdrawn from Storage



UNDERGROUND GAS STORAGE IN ONTARIO
ACTUAL ANNUAL VOLUMES WITHDRAWN
TO MARCH 31, 1963 AND ESTIMATED
CAPACITY REQUIRED TO MARCH 31, 1974
BY UNION GAS AND CONSUMERS' GAS COMPANIES



Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

RP-2000-0005

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 the landowners in the Amended Application for just and equitable compensation in respect of gas or oil rights or the right to store gas under section 38(3) of the *Ontario Energy Board Act;*

AND IN THE MATTER OF an Application by the landowners in pools being the subject of proceedings in Board file RP-1999-0047 (Century Pools Phase II) pursuant to the Board's order of February 2, 2000, for just and equitable compensation for the Century Pools Phase II development under section 38(2) of the *Ontario Energy Board Act;*

BEFORE:

A. Catherina Spoel
Presiding Member

Bob Betts
Member

DECISION AND ORDER

An application was filed on January 28, 2000, by the Lambton County Storage Association with the Ontario Energy Board under section 38(3) of the Ontario Energy Board Act, S.O. 1998, c.15 Sched.B ("the Act") seeking just and equitable compensation for the right to store gas in geological reservoirs beneath the properties of landowners listed in the Bentpath, Bentpath East, Bickford, Black Creek, Booth Creek, Dawn 47-49, Dawn 59-85, Dawn 156, Dawn 167, Edy's Mills, Enniskillen 28, Oil Springs East, Payne, Sombra, Terminus, Waubuno, Bluewater, Mandaumin and Oil City Pools, all being designated gas storage areas operated by Union Gas Limited ("Union") in Lambton County.

The Board assigned the application Board File No. RP-2000-0005. The application was amended on October 15, 2002 (the "Amended Application").

By a Decision dated September 10, 2003, the Board determined those applicants who have standing and who are eligible for a Board Order. 11

The Board has been informed that the applicants with standing who are eligible for a Board Order represented by Cohen Highley LLP (the "Represented Applicants") have reached a settlement with Union covering all claims for compensation asserted in, or which could have been asserted in, the Amended Application, the evidence and any answers to interrogatories. The Board has further been informed that the term of the settlement is for the years 1999 to 2008, inclusive, and that the settlement is conditional on the Board determining that the compensation to be paid to the Represented Applicants is just and equitable. 12

Union and the Represented Applicants agree and jointly submit that the following constitutes just and equitable compensation: 13

1. For the Year 2004: 14

   (a) for each Represented Applicant eligible for an order in respect of storage rights, a payment of $92.50 per acre for each inside acre, defined as an acre within the boundary of a designated storage area, owned by the Represented Applicant in the designated storage areas which are the subject of the Amended Application, such amount being for the lease of storage, and for petroleum and natural gas rights; 15

   (b) for each Represented Applicant eligible for an order in respect of storage rights, a payment of $27.79 per acre for each outside acre, defined as an acre of land on a property severed by a boundary of a designated storage area leased by Union and owned by the Represented Applicant in the designated storage areas which are the subject of the Amended Application, such amount being for the lease of storage, and for petroleum and natural gas rights; 16

   (c) for each Represented Applicant eligible for an order in respect of roadways, a payment of $825.00 per acre of roadway on land owned by the Represented Applicant, who holds a roadway agreement which is the subject of the Amended Application, such amount being for the lease of land for facilities and in respect of all damages, including disturbance, loss of opportunity, and crop loss ; and 17

   (d) for each Represented Applicant eligible for an order in respect of facilities, a payment of $1,050.00 for each wellhead on land owned by the Represented Applicant in the designated storage areas which are the subject of the Amended Application, such amount being for the lease of land for facilities and in respect of all damages, including disturbance, loss of opportunity, and crop loss. 18

2. For each of the years 2005 to 2008, the amounts referred to in paragraph 1(a) to (d) above adjusted annually by the lesser of the consumer price index or 5%; and, 19

3. In respect of the years 1999 to 2004, the amounts set out in Schedule 1 to this Order such amounts (i) representing an increase over amounts previously paid by Union to the Represented Applicants and (ii) being net of the Represented Applicants' contribution to the costs of the application as set out in paragraph 2 of this Order below.

4. For residual gas, the following amounts to be paid to the Represented Applicants listed below, which amounts have been calculated at a royalty rate of 12.5% on all residual gas down to 50 psia,

Blue Water Pool

1	Ron Hardy	$179,987.68
2	Duncan MacRae	$6,422.79
3	Eli Androschuk and Catherine McNulty-Androschuk	$2,061.95

Oil City Pool

1	William Cascaden	$31,884.43
2	Broadbent - Estate of	$30,090.61
3	Fred Stirling	$16,319.38
4	George Hoven	$1,980.46
5	Heinz Hoffmueller	$37,637.88

On reading the Amended Application, the evidence and supplementary evidence of the Represented Applicants and Union, the answers to interrogatories and supplementary interrogatories of the Represented Applicants and Union and on hearing the submissions of counsel for the Represented Applicants and Union, the Board finds that the amounts referred to in paragraphs 1, 2, 3 and 4 above represent just and equitable compensation within the meaning of section 38(2) of the Act in respect of all claims for compensation asserted by, or which could have been asserted by, the Represented Applicants in the Amended Application, the evidence and any answers to interrogatories.

For years after 2008, the Represented Applicants shall be entitled to just and equitable compensation as agreed upon by the Represented Applicants with Union or, failing which, as determined by the Board pursuant to the Act.

The Board has further been informed that Union and the Represented Applicants have reached an agreement with respect to the costs of the application. 28

THE BOARD THEREFORE ORDERS THAT: 29

1. Union shall pay the Represented Applicants the amounts listed in paragraphs 2, 3 and 4 above. 30

2. Union shall pay to Cohen Highley LLP $845,000 (which amount includes the Represented Applicants' contribution referred to in paragraph 3(ii) of the preamble to this Order in the amount of $595,000) on account of all costs of the application. 31

3. Union shall pay to the Represented Applicants and Cohen Highley LLP the amounts referred to in paragraphs 3 and 4 above, as well as the amount of $845,000 for costs, within 60 days of the date of this Order. 32

DATED at Toronto, March 23, 2004 33

ONTARIO ENERGY BOARD

Peter H. O'Dell
Assistant Secretary

Bentpath Pool
Storage Compensation

Achiel Kimpe

	Inside acre payment	Outside acre payment
2009	$5,726.50	$859.75
2010	$5,726.50	$859.75
2011	$5,739.00	$866.00
2012	$5,963.50	$895.25
2013	$6,083.00	$913.25
2014	$6,701.00	$1,006.00
2015	$6,841.50	$1,027.25
2016	$6,978.50	$1,047.75
2017	$7,117.00	$1068.50