ONTARIO ENERGY BOARD

Volume: 1

12 JUNE 2003

BEFORE:

A. C. SPOEL	PRESIDING MEMBER
B. SMITH	MEMBER

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*.

RP-2000-0005

12 JUNE 2003

HEARING HELD AT TORONTO, ONTARIO

APPEARANCES

STEVE McCANN	Board Counsel
ZORA CRNOJACKI	Board Staff
ROMAN CHYCHOTA	Board Staff
PAUL VOGEL	LCSA
EMMALENE LANG	On her own behalf
DOUGLAS SULMAN	Union Gas Limited

TABLE OF CONTENTS

EXHIBITS

EXHIBIT NO. B.7.1.2: DOCUMENT BRIEF OF UNION GAS LIMITED

[135]

12

UNDERTAKINGS

13

14 --- Upon commencing at 9:30 a.m.

15 MS. SPOEL: Good morning. Welcome, everybody.

16 This is a hearing under the *Ontario Energy Board Act*. The file number is RP-2000-005. My name is Cathy Spoel and I'm the presiding Board member today, and with me is Mr. Brock Smith.

17 This matter today is dealing with the question of the status of certain applicants and prospective applicants in the broader hearing to determine compensation for gas storage -- gas storage --

18 [Technical difficulty]

19 MS. SPOEL: Sorry, is that better?

20 The purpose of today's hearing is determine the status of certain --

21 MR. McCANN: I think the technician is trying to assist you, Madam Chair. Maybe we could just take a couple of seconds to sort this out, because otherwise we're going to get off to a less-than-optimal start.

22 MS. SPOEL: I'll try again.

23 The purpose of today's proceeding is to --

24 [Technical difficulty]

25 MR. McCANN: Let's just take a second and get this sorted out here.

26 MS. SPOEL: Thanks. Third try. Try again? Can everyone hear me now? Great.

27 The purpose of today's proceeding is to determine the status of certain --

28 [Technical difficulty]

29 MS. SPOEL: Let me try this, okay. I hope we're not going to have this problem all day.

30 We're here to determine the status of certain applicants and prospective applicants for -- it's off again.

MR. McCANN: Can I make the suggestion, Madam Chair, that we take a five-minute break and sort this out because otherwise things are not going to go well.

MS. SPOEL: We'll retire for five minutes and see if we can get things working.

MR. McCANN: All rise.

--- Recess taken at 9:34 a.m.

--- On resuming at 9:40 a.m.

MS. SPOEL: Thank you. Please be seated.

The purpose of today's proceeding is to determine the status of certain applicants and prospective applicants to participate as such in the proceeding to determine compensation for gas storage and related issues. We will not be dealing with any specific matters of compensation at today's proceeding. We're simply dealing with the question of whether or not certain applicants whose status has been objected to by Union Gas will be entitled to participate as applicants in the main proceeding, which will be scheduled at a later date.

Our understanding is that today's proceeding is intended to proceed on the basis of oral argument only; that the evidence has been prefiled by both Union Gas and the applicants. I understand most of the applicants are represented by the law firm of Cohen Highley, except Mrs. Lang who is here to represent herself; is that correct?

MR. VOGEL: That's correct, Madam Chair.

MS. SPOEL: Thank you.

Before we proceed with any preliminary matters, could I have appearances, please.

APPEARANCES:

MR. McCANN: I'm Steve McCann, appearing for the Ontario Energy Board today.

MR. VOGEL: I'm Paul Vogel, and I represent the Lambton County Storage Association, LCSA, applicants. With me is Robyn Marttila, an associate, and Cheryl Dusten, a student in our office.

MS. SPOEL: Thank you. Could you at some point provide the court reporter with spellings of those names.

MR. VOGEL: Yes, I will.

MS. SPOEL: Thank you.

MR. SULMAN: Good morning, Madam Chair. My name is Douglas Sulman, and I represent Union Gas in this proceeding. And I have provided my spelling, my counsel sheet, I guess.

MS. SPOEL: Thank you, Mr. Sulman.

And are there any other appearances?

MS. LANG: My name is Emmalene Lang; I represent myself.

MS. SPOEL: Thank you, Mrs. Lang.

All right. Are there any preliminary matters? Mr. Sulman, I understand you've filed some updated material.

PRELIMINARY MATTERS:

MR. SULMAN: Thank you, Madam Chair, we have. Maybe I can run through them in coordination perhaps with Mr. McCann, and I can give some names.

First, Karen Fournie -- for the record, we had initially objected to several applicants, and with facts that we've later learned, we sent letters. But I think for the purposes of the record it might be good if we set out who we now do not object to.

And Karen Fournie, by letter of May 2nd, we have agreed that she is -- should have standing. The question of standing, of course, is not up to us to determine, it's up to the Board. But for our purposes we no longer object to Karen Fournie having standing for both -- she has an expired amending agreement so she would have standing in that regard, and she also has an expired roadway agreement so she would have standing in that regard. And we don't object to Karen Fournie in that regard.

You'll recall from our evidence that William Thomas - that would be paragraph 34 of our evidence for the purposes of the transcript - he had applied to be both an applicant and an observer. And I understand now that he simply -- he wishes to be an applicant for purpose of additional storage payment. And we're content that he be an applicant, subject, of course, to the Board's ruling.

Douglas Henderson and David Byers. In paragraph 35 of our evidence, we had objected because we said they don't have any agreements with Union Gas and hence aren't properly before you. And we do not object to them attending as observers and observing the proceedings.

60 Neil Coke was -- we initially objected to Neil Coke. That was, in part, because of the fact that we didn't believe he had any ownership interest. But what has occurred since that time is that Mrs. Miller, who did have ownership interest, is now deceased. Mr. Coke is a grandson of Mrs. Miller and I believe he's now the property owner. So we don't have any objection there. And I should say that we have sent a letter indicating also that.

61 We objected to Wilf Allaer, in paragraph 32 of our evidence, and that was because we had understood that Annie Harris had retained the storage rights. We've subsequently learned that it's not the storage rights that she has retained but rather a stream of revenue. The legal rights are held by the Allaers; the stream of revenue by way of a life interest in the revenue only, not in the mineral rights, is reserved by Ms. Harris, so the Allaers are the proper applicants.

62 Sadly, I will tell you that Olive Vansickle passed away on Tuesday, and I believe that one Larry Vansickle is listed as an applicant. The difficulty with that is, during her lifetime I suppose she was his representative or agent, I don't know. There was never a power of attorney filed so we didn't have that proper documentation. But I just bring this forward because at some point in time -- at the end of the day, not at this hearing but at the end of the day, if there's an order, there will be a list of applicants who will then be -- there will be orders as to what they receive or don't receive. But if they receive something, you'll need the actual names. The difficulty is going to be that it will probably be the estate of, and there isn't an estate representative at this time.

63 And I should tell you that given the number of owners that are involved and the passage of time since the beginning of this proceeding, you're going to face that on an ongoing basis. People do pass away, properties are transferred, and we simply -- there's no way of keeping up with that until the end.

64 MS. SPOEL: Mr. Sulman, you don't have any objection, however, that this is more of a matter of keeping the appropriate records and making sure that the determination at the end of the case is flexible enough or appropriately worded so as to take into account transfers or estates or representatives intervening through the passage of time. I take it that you don't have any objection to the status of whoever the property owner -- the legal property owner might be, or legal representative being an applicant in this case, with respect to this particular asset or right or whatever?

65 MR. SULMAN: I think that's a very fair comment. And at this point we're content that Mr. Vansickle appears a representative of the estate of Olive Vansickle. Our concern is at some point in time - and this is just an example, Olive Vansickle; there may be others that occur before ultimately there's a hearing - there's a practical problem that you don't want to pay the cheques to the wrong people. And when there's an estate, you want to know who is getting the cheques otherwise you have -- you can imagine the objections you may get from beneficiaries.

66 That's not an issue for today. I just wanted to bring forward that this -- the objection to Larry Vansickle, we're prepared to let him proceed as the estate representative. And if there's some evidence at a later point in time that he's not the appropriate estate representative, or there's an administrator appointed, whatever, that would be up to the applicants to let us know, I think. And there may be other changes, as I say, as we go through.

67 Those are all the preliminary matters that we had from that perspective, changes from the time of our evidence till now.

68 MR. McCANN: And I would just note that Mr. Sulman has made reference to a letter that he wrote to the Board on June the 6th with some attachments which are the basis for the updates that he's given us this morning. All those have exhibit numbers and are in the exhibit list.

69 Perhaps that's a good moment to just note that we do have an exhibit list. I don't know whether -- oh, okay, sorry, which we will distribute to the parties here today and their representatives. I think it's up to date as of yesterday, and we'll give exhibit numbers to material that's introduced today.

70 I don't know whether Mr. Vogel had any preliminary remarks.

71 MR. VOGEL: Just one preliminary matter, Madam Chair.

72 We have delivered a supplementary volume which contains some legal authorities that we may be referring to, and I'd request that that be made as an exhibit to this proceeding as well.

73 MS. SPOEL: I don't think it's actually our practice to mark books of authorities and legal argument as exhibits per se. We've received it; we have copies of it.

74 MR. VOGEL: Yes. It's entirely up to Board practice.

75 MR. McCANN: I think that's right. We've certainly received it. I don't think we would typically give it an exhibit number, though.

76 MS. SPOEL: We try to keep the line between evidence and argument defined, at least to an extent. We try not to mark things that aren't evidence as exhibits.

77 MR. VOGEL: No, that's fine.

78 MS. SPOEL: we have received it. Thank you very much.

79 MR. VOGEL: Thank you.

80 MR. McCANN: Can I just ensure that Mrs. Lang has been given a copy of that document. Yes, she has.

81 MS. SPOEL: Mrs. Lang, have you any preliminary issues to raise? We'll deal in a moment with the procedure we intend to follow today.

82
MS. LANG: No, thank you, I'm fine.

83
MS. SPOEL: Thank you.

84
MR. SULMAN: Madam Chair, now that I have the exhibit list, which I didn't have before, we did send a -- this is not a brief of authorities, but we did send a document brief to all the -- on June 9th, which you have before you in a black binder. We sent it to everyone, I trust. It says, "All perspective applicants." I don't think that has been given an exhibit number, nor do I --

85
MR. McCANN: We've certainly received that as well, Mr. Sulman.

86
MS. SPOEL: Yes, we have a copy of that, Mr. Sulman. My understanding is that everything that's in that document brief has already been filed, as the affidavit attached to it suggests that everything in it has been already filed with the Board in some other form -- in the same form but in some other bundle of documents.

87
MR. McCANN: I think to be fair, Mr. Sulman's covering letter indicates that the majority of documents have been filed.

88
MS. SPOEL: Well, then, maybe we should give this an exhibit number, then.

89
MR. McCANN: Maybe that would be the safe course. I'm not sure where we -- if you could just continue and we'll interject at some convenient point with what the exhibit number actually is, because we just need to catch up with the system.

90
MS. SPOEL: Thank you.

91
All right. If those are all the preliminary matters, I'd just like to quickly review how we propose to proceed today, and I understand this order has been discussed with the parties.

92
First of all, as it is Union Gas who is objecting to the status of certain applicants and prospective applicants, Union will proceed first with a general argument on matters relating to standing. Mrs. Lang will then make her presentation. Union will have an opportunity to reply to Mrs. Lang's presentation. Then the applicants' counsel, the remaining applicants' counsel, Mr. Vogel, will have an opportunity to respond to Union's argument on standing. Then we'll proceed to the specific issues, again with Union proceeding first with respect to specific individual applicants. And it would be very helpful, to the extent counsel can do this, to group applicants by issue and relate them back, if they can, to the general standing principles. I'm sure you can appreciate that it becomes confusing for us. We'll do that first with the gas issues and then with the roadway issues. And then the applicants will have an opportunity to respond to all of that, followed by any reply from Union.

93
If that's acceptable, I think we will turn it over to you, Mr. Sulman.

GENERAL ARGUMENT ON STANDING BY MR. SULMAN:

MR. SULMAN: Thank you, Madam Chair. I hope I'm able to, in my later presentation, follow, and I think I can by -- certainly by pool and certainly by area.

I don't intend to repeat our written evidence that's been filed, but I think it may be helpful to understand why we're here today to consider a little history, and I will be somewhat brief with that.

Lambton County was the center of the first oil production in North America, and the local names, and I don't know whether you passed them along the way, but Oil City, Oil Springs, and Petrolia really affirm that reputation. In the early years of the oil boom, in the mid-1800s, Lambton County and Lambton County Natural Gas was, to say the least, an unwelcomed and unappreciated discovery for speculators looking for oil.

As the Lambton County oil field protection levels dropped and the gushers were gone and the oil boom ended in this area, speculators and the wildcatters moved on to greener pastures or, I guess in the oil industry, more appropriately, blacker pastures.

The oil business, they left here and first went to Northern Ohio, Pennsylvania, where the Rockefeller fortunes were made, and then on to Texas and Oklahoma and Louisiana. However, oil production continued in Lambton County, and that may be an issue at some point today or in later proceedings.

But what's essential also is that those in that oil business understood that there were vast, untapped quantities of natural gas reserves underground in Lambton County, in neighbouring Kent, which really isn't the subject matter of this hearing, both of which were situated on an old prehistoric sea. And that's where we get to the reefs that have resulted in underground natural gas storage.

So the natural gas production industry grew up in Lambton County and exceeded the oil production in this area, while the oil production continued and continues even today, and we'll see some discussion perhaps in that regard. But as the industry grew, so did the customary business practices, and that's what, in part, we're here for today.

The potential gas producer would approach, and continues to approach, landowners seeking to obtain the right to explore, produce -- and produce natural gas below the surface of the lands which have traditionally been owned by farmers. Lands agents from various companies - but early on they were principally Imperial Oil, which you'll see in the filings Imperial Oil agreements; and later Union Gas; Tecumseh Gas, which has sort of morphed into Consumers and now Enbridge; Ram Petroleums; Michigan Oil; McClure Oil, to name a few, and those are documents that are throughout - they would acquire from the landowners what at law is known as a profit a prendre, which is a right to enter the lands and remove a natural substance that is existing in the lands, in this case natural gas; in other instances, it would be oil or salt or gravel or precious metals, all which are collectively referred to usually as mineral rights.

103 Landowners owned the land in fee simple, and do, for the most part, still, and they have what is often called in law a bundle of rights. And they can lease, they can sell or otherwise dispose of some of those rights, all of those rights, or maintain some of those rights. And that's what you'll see in the documents that we'll refer to throughout.

104 Classically you'll find in these proceedings, these contractual business practices, a land owner keeps some of the service rights, leases yet others; may sell some subsurface rights -- surface rights, excuse me, and will lease subsurface rights, such as the right to store natural gas. And they may, in fact, retain the right to produce oil in certain instances.

105 These agreements go by various names, and as you see the documentation you'll wonder why it isn't all identical. They go by various names: Natural gas agreements, gas leases, gas lease agreements, storage agreements; roadway agreements, sometimes called sometimes easements. The terminology you see when you look through these documents is, in part, dependent upon the era in which the agreements are entered into and, in part, determined by the company that was involved. Imperial may have used one form, Union another, McClure yet another.

106 All these agreements provided a benefit for the landowner as he or she was able to tap into a new revenue source which he or she would not otherwise be able to achieve, because exploration and production involves geological and technological expertise, and a great amount of capital. And so while -- to the land owner, while accessing this new revenue source, the land owner was still able to receive his primary revenue from farming.

107 Now, the customary business practice in the early years was to enter into production agreements similar to the oil agreements, and that's why I take you back to the oil which are based upon that profit a prendre concept in law; the taking of an existing natural substance from the land, and the right to enter to do that.

108 But it all changed in or about 1940. The geologists were developing a method of injecting natural gas from another source into a depleted natural gas reserve and then extracting it again and going through that cycle of injection, extraction, injection, extraction. And that's when the storage industry was born. But that's a different concept than profit a prendre because you're not extracting an existing natural resource or mineral.

109 The advent of the Panhandle Eastern Pipeline bringing gas from Oklahoma to Lambton County, principally Dawn Township where the early wells were, via Detroit provided the opportunity to store natural gas in the summer when the demand was low and extract it in the winter when the demand was high. And that's where the storage industry began.

110 Now, in the 1960s, and I'll get us to this century soon, the 1960s saw three things happening in the storage gas industry in Lambton County. The first was an expanded development of natural gas storage to several pools. The second was the formation of the Lambton County Ratepayers, Landowners and Gas Consumers Association, which is sort of the grandfather of the Lambton County Storage Association that's here today. And thirdly, the Langford Committee, the government of Ontario struck the Langford Committee on oil and gas resources from which the Ontario govern-

ment developed the regulation of the storage business, which is why we're here today, and from which came the section 38 that governs our proceedings here today, which at an earlier time was section 21. And I guess I'm just old enough that I'm still used to section 21.

111 Union Gas about that time became the largest storage company when it combined its gas storage rights under documents that it has with some of the landowners with the majority of the Imperial Oil gas leases that you'll see as you go through, or gas rights.

112 You'll see, as we address, and I think Mrs. Lang has one of them, you'll see that you have Union Gas leases that date back to the early 1950s, and in other cases you'll see that they are Imperial leases. The Langford Committee recommended, and the government placed under their jurisdiction the jurisdiction of your predecessor board, the Ontario Fuel Board, for the first time, the power to actually designate gas storage areas. So they had a mandatory power, which is the designation.

113 But despite the presentations that were made to the Langford Committee, and those presentations were saying, Look, you should control contracts, you should have uniform contracts because they're all over the map, from different companies and different eras. The government decided not to do that and said that contracts should be respected; our role would be one of regulating, and it will be regulating through the Ontario Energy Board. And they left to the individuals and companies in Lambton County and Kent County and elsewhere the right to make their own agreements in accordance with the customary practice that had developed first in the oil industry and then in the natural gas industry.

114 And that's what you have before you today, is contracts between individuals and companies without interference by the government or regulators.

115 So Union and land agents and others entered into agreements with landowners over time, and the Ontario Energy Board, as now amended, operates under section 38 which I'll briefly read to you, because it's the essence of everything we're doing here.

116 Section 38(1) reads:

117 "The Board by order may authorise a person to inject gas into, store gas in and remove gas from a designated storage area, and to enter into and upon the land in the area and use the land for that purpose."

118 And of course all the applicants that are before you are in designated storage areas, some of them having been designated as early as the 1960s. So that's the mandatory provision.

119 Section 38.2 is the section that deals with compensation, and here's the key to it all:

"Subject to any agreement with respect thereto..." in other words, any contract that has been reached, and that's what the -- all the prior cases of the Board, particularly the Bentpath case have indicated and set although not precedent, direction to you.

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

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

(b) shall make to the owner of any land in the area just and equitable compensation for damage necessarily resulting from the exercise of the authority given by the order."

So in other words, you can make an agreement and that resolves the issue; if there is no agreement, then you look to paragraph 38.3, which says:

"No action or other proceedings lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board."

Only when we you get to that hurdle, failing agreement, shall an amount be determined by the Board.

Section 38 has a bit of history. It was to keep people from going to the court. This goes back to the Langford Committee. This Board was set up as having jurisdiction to determine disputes between landowners and storage companies when there is not agreement, when there is not a contract in place, rather than having proceedings going to the court.

So that's what section 38 is about. And it's from this section that the Board derives all its authority to hear this application, the applications that may ultimately be before you at some future point in time. Well, they are before you, but depending on who has standing and what applicants may be there.

This phase of the hearing is called to determine which landowners who seek to become applicants in the proceeding are entitled to be granted status as applicants, or granted standing for the various different types of compensation sought, be it storage rights, roadways or residual gas. And I'll address those in the later argument specifically, as you've requested.

Clearly put, to be granted standing, an applicant must be an owner of lands. And that's why I had some confusion about Mr. Vansickle earlier, and we may throughout the proceedings have that. He must first be an owner of lands or have gas or oil rights or storage rights in a Board-designated area; and either have no agreement for compensation in respect of those rights or have an agreement which has a provision allowing for Board determination of compensation. And that is what you'll find throughout these proceedings referred to often as amending agreements. So there are agree-

ments under section 38, the predecessor section 21. But there are subsequent agreements that allow -- called amending agreements, that allow for determination of compensation by the Board.

131 It's Union's position that any potential applicant who does not fall within the provisions of section 38 of the *Act* does not have a right to attend these proceedings. This is not a new or novel position, neither is it draconian. It is a time-honoured practice of this Board, and it's supported in the Bentpath case, which is E.B.O. 64(1) and 64(2), in which the Board held a similar hearing to the one that we're holding today, to determine standing.

132 In that hearing it concluded that those landowners who had no agreements would have standing; those who had agreements would have no standing; and one landowner, whose name is Achiel Kimpe, would also have standing because they rule on a matter -- he pled non est factum, in other words to laypeople, he pled that he didn't have an agreement. He signed an agreement but he said, I didn't know what I was signing at the time because I have limited comprehension in English, and so I didn't know what it was about. And the Board took the time to go through and apply the legal principles and ruled that he had -- that in fact there was no agreement because of the principle of non est factum.

133 Just for a moment I would ask you -- well, I can read it to you, but I will tell you the reference. It is at the -- the Bentpath decision is found at tab 16 of our document brief. I don't know if we have an exhibit number yet on that.

134 MR. McCANN: Yes we do. Maybe I can just introduce that. We've given that document, the document brief of Union Gas Limited, the exhibit number of B.7.1.2.

135 EXHIBIT NO. B.7.1.2: DOCUMENT BRIEF OF UNION GAS LIMITED

136 MR. SULMAN: Thank you. So at tab 16 of that exhibit, page 84, and you can either -- I can read it to you, but I think it's pretty easy to access. Tab 16, page 84 of the decision of this Board in E.B.O. 64(1) and (2), from July 16th, 1982, so about 21 years ago. And this was a decision on standing. The Board said:

137 "Those landowners that have agreements have no standing before this Board in this proceeding, and Union is legally required only to pay the amount of compensation required by such agreements."

138 And that's, in a nutshell, our position today. Generally, Union, you'll find, has not objected to potential applicants in the Oil City and Bluewater Pools who have not accepted Union's first offer after designation and before injection, under section 38 of the *Act*. But Union objects to those who have signed binding agreements, have taken payments, and now come forward to seek further additional compensation.

139 It's Union's position that the sanctity of contracts in the storage business, the oil and gas business, is vitally important. If written agreements are not upheld, then it throws the storage business and in fact the natural gas business into chaos. Stability disappears, and any incentive to resolve matters

by contract between parties without constant application to the Board requiring determination by the Board, all that dissolves. And not only does the principle of sanctity of contracts provide business and economic efficiency for Union and the landowners and its customers, but for all other companies in the natural gas storage business.

140 If Union's landowner contracts, if there's no sanctity of contract for those contracts, then the same applies to all other storage companies. Well, I guess there is only one at this point in time. But all other storage companies. There's only one other large one. And that affects the rates of all customers, consumers, and farmers in Ontario. In other words, it is adverse to the public interest to abrogate contracts and to destroy the sanctity of contracts that have been entered into over years.

141 This hearing is ultimately, when we get to the final hearing, it is ultimately a private compensation dispute. It's not a generic hearing on what compensation amounts or methodologies might be appropriate for all Lambton County. But an abrogation of contracts could lead exactly to that. This is a private compensation dispute, not a generic hearing. But open the contracts and that's what it becomes, and then others should be -- may want to participate.

142 In May 2000 this Board designated certain pools, namely, Oil City, Bluewater, Mandaumin, which throughout these proceedings may be referred to as the Century II Pools. In that hearing, the Board - and that was a designation hearing brought under section 38(1) that I referred to earlier - the Board determined that a compensation application that has been brought by certain pool landowners, most of whom are now represented by Mr. Vogel, would be deferred to a hearing specifically for compensation under section 38.2. And that's part of this proceeding, but it's only part.

143 I respectfully suggest the Board should be careful on this issue as it arises because all the Board did at that time, by Board order, was defer the compensation portion of the hearing. It didn't in any way rule or prejudge who would be entitled to standing in that ultimate compensation hearing. And there may be some argument, and I know in my friend's written evidence, there is some suggestion that by the Board deferring the compensation portion of that hearing, or actually the 38(2) application, that you somehow had some inalienable right as a landowner to open everything up and be heard. All the Board did was defer -- was separate the designation portion from the compensation portion, and said there will be a compensation portion in a hearing at a later time. That's what this whole application is about.

144 But as part of the compensation hearing, there is a standing phase of it, and that's the same thing that happened in the Bentpath case. There was a standing portion first and then a compensation where ultimately amounts were dealt with.

145 But there's no estoppel, if you will, to put it in some legal framework, by the -- that is, Union isn't estopped from saying, We object to certain standing. It was the Board's order that deferred the compensation to another time. Simply by deferring it, you don't -- I'm afraid what the argument might be, and maybe I'm pre-anticipating, is that, Look, you've told us it would all go to a compensation hearing. You now can't say to us, Some of you can't attend with standing as an applicant. And that was never what the Board's ruling was. It was everything goes to compensation; you can argue all those issues at that point in time.

146 So ultimately some of the landowners have now entered agreements with Union and they are not seeking standing here today. There are a greater number -- just so we can put it in perspective. There are a greater number of landowners in Lambton County than those who are applicants in this proceeding. Many have settled. And of those who have not settled and are applicants, we're seeking to object to their standing, although very few, as you can see. Some people did sign agreements and are nonetheless still seeking standing, and those we object to. That's what it comes down to.

147 The Bentpath decision of July 1982 has greatly affected Union's activities and set the precedent for everything that's been done in storage compensation since that time. In its decision, once again I will read it to you, I know you've had it turned up, that paragraph that I read to you goes on further. It says:

148 "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."

149 Not all Lambton County, the Bentpath Pool. All the Board said at that time was, Okay, we're going to determine compensation to some. Make sure it's equal to everybody in the Bentpath Pool. The Board said:

150 "It recognizes, however, it does not have the jurisdiction to order Union to" even compensate owners in the Bentpath Pool the same.

151 However, what happened was Union not only compensated the owners in the Bentpath Pool the same, in accordance with what they perceived as the Board's direction, they went one further. And that's how we get to what we're at now.

152 They put in place a policy for the uniform treatment of all the Bentpath Pool owners, and then they went out and tried to create a uniform treatment of all pool owners, again despite the fact that they weren't required to do so. And they did it in the spirit of the then wording of the *Act*. As I say, I'm just old enough to get back to section 21, which used to read "just, fair and equitable," now it reads "just and equitable." And they did that not only in the spirit of the *Act*, but also because they were trying to improve landowner relations at that point in time.

153 So it embarked on a landowner negotiation period and entered into further agreements called amending agreements, and that's what you'll find throughout this proceeding. These amending agreements, that is, those who signed them, amended the agreements under the then section 21 of the *Act* to bring compensation levels up in accordance with the consumer price index.

154 I emphasise it wasn't a change in compensation methodology, only the amount. And you've got to also remember that this was post-1982, which was the Bentpath decision, and what it did was -- what these amending agreements and bringing compensation levels up to the consumer price index did was recognise inflation, which, as you'll recall in the 1980s, was rampant and on a run-away level. And so that's what amending agreements -- that was the theory behind amending agreements. So when you see these amending agreements, Why did Union do this, it was arising out of the Bent-

path and out of hope to put in place some way of dealing with inflation and improve landowner relationships.

155 Now, I should tell you, there was no contractual obligation on the part of Union to do any of that. And more importantly, when you look in the Lambton County natural gas wider business, the other large storage company did not do that, and does not do that. They have no amending agreements. They gratuitously, after Union makes their arrangements, traditionally and customarily, they gratuitously raise their landowners also. But they have no contractual obligation to do that. We do by amending agreement. And when people don't have amending agreements, we have no obligation to do that. But that's why there are amending agreements in place.

156 And these amending agreements are generally, originally, 10 years in term. The ones that are signed more recently have a shorter term. I think it's simply the evolution of the contractual practices in the natural gas field. Some have been renewed; some have expired. And we'll discuss those throughout. But it's Union's position that those parties with expired amending agreements are entitled to status before this Board, because what the amending agreement, put simply again, does is it allows for a person to seek a change in their compensation. It did change the compensation. And then when it expires, they're in a position where compensation falls back under section 38(2).

157 So that's our position. They have status. Those with agreements that have not expired do not have status. They have an agreement under section 38.

158 This is a statutory Board whose jurisdiction is dependent upon that statute. And it's my respectful submission that there's no right to simply come before the Board because you don't like the deal you got. You have to be here under section 38.

159 Because you have a new theory of compensation or a new methodology of compensation theory, unless you're in a position under section 38(2) because you either, A, don't have an agreement, or you have an agreement that's expired, that you can't simply come because you want to. Your right to be here is dependent upon section 38 of the statute.

160 Because a landowner may have a tentative negotiation session or a landowners communication meeting with Union Gas, there doesn't spring from that attendance a right to seek compensation under section 38. And you'll hear some argument in that regard, I believe.

161 There is no right to standing simply because you don't like the agreement you've entered into or because you believe that the circumstances in the marketplace have changed. You've got to be here because there is a right within the agreement to reopen the agreement, or that you don't have an agreement at all under section 38. And to do otherwise strikes at the sanctity of all contracts and results in all storage contracts properly being reopened, or the opportunity to reopen them.

162 And not only these but every contract that's in Lambton County for storage, and probably on an ongoing basis. Every time there's a change in circumstances, I think I'll bring an application. Contracts are there for a reason.

163 Those are my general comments. I've not read back to you, and I wouldn't presume to do that, read back the words of the prefiled evidence. Although at this time we'll adopt them as our position at this time. I'll address Union's specific issues on each landowner at the appropriate point in the schedule, as you've indicated, and they will be specific to each individual landowner and each topic, whether it be residual gas, roadways, or storage rights.

164 Those are our initial comments, and if I can answer any questions, I'd be pleased to do so.

165 MS. SPOEL: Mr. Sulman, can I just ask, referring to the amending agreements, and I'll deal with that -- I expect you'll deal with this more later in your specific comments, but just as a general issue.

166 If you have a landowner who has an amending agreement that's going to expire next year, let's say - I don't know if any of them do, but you referred to some of them being 10 years, some of them being 5, whatever - those who have relatively current amending agreements, I assume those agreements will expire at some point in time. They are not in perpetuity; is that correct?

167 MR. SULMAN: That's generally correct. Let's say for the majority that's correct.

168 MS. SPOEL: Let's just deal with that particular case. Is it Union's position that -- let's say before this hearing, this process has been going on for a couple of years, that if someone's agreement expires next fall, let's say, and we haven't issued an order yet in this case, would that person then have the right to join in as a new applicant because their agreement has now expired? And I don't know if anyone is in that situation. I'm just raising this as a general question.

169 MR. SULMAN: I think that's -- let me get the time frames right. If this proceeding is not -- I shouldn't say finally determined, but not finally determined by the Board, in any event. I mean I don't want to consider what would happen if there's all sorts of levels of appeal, but let's say it's not finally determined by a Board order. Anybody whose agreement expired during -- from now to that point in time certainly would have the right or the option to come forward as an applicant.

170 Now, I say "the option". Remember, people have the right to negotiate their own deals; that's what contracts are all about, give and take and agreement. But if they were to expire -- you can't do anticipatory expiration, if you will. So if someone says, Well, you know, my agreement is going to expire in 2005, why don't you just consider me too. That's where we have a problem, because anything can happen between this order and 2005. They may like the order and say, Okay, I'll now settle. I know which way the wind is blowing.

171 MS. SPOEL: I don't know what Union's practice will be. But assuming that you were to follow a similar approach to what -- that Union were to follow a similar approach to that followed following the Bentpath decision, which is, in fact, to offer the other owners in the pool the same terms as the ones who were parties to the hearing, if you were to follow that approach following the disposition of this case, which would be an option open to Union - I won't comment whether you would be required to do so or not, but certainly that would be an option - if one of those owners whose agreement happened not to have expired in that interim period felt that they might provide something

useful to this hearing, are you saying that because of the timing of it they have to -- they don't have an opportunity to be heard about what the compensation in the future should be. They have to put up to whatever this Board decides without them having an opportunity to provide us with their input into it. Is that essentially your position?

172

MR. SULMAN: Yes, that is -- that's essentially our position because they would not be entitled technically to standing. They may have all sorts of things they want to tell you or give you input, but so might that other storage company, so might other landowners, so might customers. That's the fear; is that, in trying to be generous in that regard, it opens up this whole thing past a private compensation situation. They have no -- they have an agreement in place. There may be others who have all sorts of wonderful things to tell you that might be helpful too.

173

The reality is, the decision that comes out of this ultimate hearing will give a strong indication to anybody who has an agreement in place and about to expire, and they're ably represented by counsel -- those who already have expired agreements are ably represented by counsel. And the beauty of it is for that person who's maybe two years out before they have an expiration, is that they now know what the Board has ruled and they know then what -- whether they want to come back and make an application or whether they want to accept the compensation levels that have been decided by this Board.

174

So they don't need to come forward and give you -- our position is that they don't have a right to do that, because they can only come here if they have a right under section 38. They can come and observe.

175

MS. SPOEL: So you're saying that the Board has no jurisdiction, in effect, to give a person party status, whether we call them an applicant or some other kind of party, that they cannot be a party to this proceeding unless they fit narrowly within the requirements of section 38 of the *OEB Act*.

176

MR. SULMAN: They cannot be an applicant, because an applicant brings with it certain -- the status of applicant brings with it certain rights and certain obligations. They would, at the end of the day, assuming that there's an order that sets out compensation, an applicant, all the names will have to be listed with the amount that they get, based on their rights and their acreage, et cetera. You are would not be -- respectfully, you would not be in a position, nor have jurisdiction to order us to pay someone who has a contract already. That's what the Bentpath case says.

177

But that doesn't mean they couldn't attend as an observer, or if there's some other status short of applicant. But they certainly aren't entitled to be an applicant because it brings with them the obligation to pay costs if they lose, and we determined that in a -- we had all that debate in 2000 in this same hearing, and we had agreement.

178

So there comes with it a -- being an applicant, a benefit, but also a potential burden, if they don't act reasonably in their -- in their presentation.

179

So I would say those people are not entitled to be applicants in this proceeding. But I wouldn't -- I don't think they are in any way being prejudiced. They've got an agreement in place, and they'll see

what this order is and either -- there will be efficiency in the storage industry in Lambton County because they've entered agreements, or the numbers will be so few that they will be able to make applications as they see fit. But in all likelihood that won't be the case. They'll rely on the order.

180 The other issue you brought up was would you -- if Union followed the same trend that it has. I won't set policy here, but you know what the history is. And as long as there's a reasonable amount, that's what history has been.

181 MS. SPOEL: Thank you.

182 Mrs. Lang, I think it's your opportunity now.

183 MS. LANG: Thank you.

184 MS. SPOEL: You'll want to press the little green button on the microphone to make it work when you're ready to go. At the bottom, underneath the word "micro" there's a fairly big button.

185 **PRESENTATION ON STANDING BY MRS. LANG:**

186 MS. LANG: Madam Chair, I would like to thank the Energy Board for this opportunity to speak today.

187 My name is Emmalene Lang, the holder of an oil and gas grant signed by my mother and Union in 1951. I inherited this property. I'm the owner of the mineral rights and the gas and oil grant.

188 Now, my case is unique, and this is why I am acting alone. In brief, the oil and gas grant gave Union the right to drill for, produce, and store natural gas. The oil and gas grant in 1951 does not include residual gas. The ownership of the residual gas remaining in the cavern after production ceased was not given to Union. The lessors have never at any time, in any way, given up or relinquished to Union the ownership of their residual gas.

189 We will be asking the Energy Board to make a ruling to that effect, and to order a payment for residual gas to be paid down to 0 pressure. The following is a short historical review of how events unfolded.

190 In 1951 Union drilled a well on our property after my mother had signed the lease. It was the first drilling in the area and was within sight of our own little private gas well. Union was in partnership with Imperial Oil, and they were searching for both oil and gas. Natural gas was found.

191 In the years 1951 to 1960, there was gas reduction. We were paid $700 annually; $200 for the lease and 500 for production. This was in accordance with our signed gas and oil grant of 1951.

192 From 1955 to 1960 there were agreements; firstly, the unit operating agreement, and then further storage agreements, storage amending agreements. All these agreements were signed by other landowners in the pool. None were signed by my family.

193 In 1960 production ceased. Union had mapped out a storage grid and the Ontario Fuel Board declared Waubuno as a designated gas storage area. In 1960 Union used their storage grid map to calculate how many acres each farmer had in the pool, then offered to pay each farmer an annual gas storage rental for each acre that was held in the pool. This was called the unit storage agreement, which is still the backbone of all present storage agreements.

194 Union had been unable to extract all the gas from the cavern during production. There was some residual gas left in the cavern. The signing of the unit storage agreement, the unit agreement, and the payment for residual gas went hand in glove, part and parcel, of the same deal. Union paid each farmer outright for his residual gas. This was calculated on a per-acre basis, using a formula based on volume and pressure. All other landowners in the pool signed the storage agreement and received the residual gas payments. You see, it went hand in glove.

195 My parents did not sign so they did not receive the residual gas payment. Union kept paying my parents their usual $700 annual production payment while arguments and negotiations were going on, and my parents kept taking the annual $700 cheques without prejudice. They did not choose to accept this as total payment. As the oil and gas grant of 1951 states, it was a lease payment for the right to store gas.

196 My parents kept refusing to sign the agreement, and Union kept paying them $700 annually for production, even though production had ceased. In this way the lease was kept alive for Union and the familiar payments were taken without prejudice by my parents as a continuation of the previous payments.

197 A state of limbo ensued. Several documents referred to this long-standing dispute, to this state of limbo. It was a stalemate for everyone concerned, an impasse, a long impasse. The matter has never settled.

198 I wish to list some documents to show existence of this dispute, which is recognised by Union.

199 The first item is an indenture of Union and Imperial. When they split up, they discussed at great length the dispute -- the disputed lease number 14335, which Union held with my mother. Both Union and Imperial "acknowledge that certain payments in lease number" that, in the name of Isobel McBean Young are under dispute by the lessor, and at final determination of the dispute, Imperial shall then make settlement with Union."

200 The second item, Mr. McGee and O'Connor from Union in 1985 saying, "Mrs. Young continued to accept rental payments of $700."

201 This statement shows the $700 annual payment as rent only, and this is what I've said before. We accepted the $700 as rent because it was in the original lease. There's a long sentence there.

202 Next item. In 1990 Mr. Hunter of Union Gas urges me to sign the unit storage amending agreement and postpone "historical disputes."

203 Next item. David Lowe from Union in 1993 tells me that, this is important, "ownership of the residual gas still resides with you under the provisions of the petroleum and natural gas lease and grant." He wants me, in 1993, to sign the storage amending agreement, and Union would make "suitable acknowledgement of the outstanding matter of residual gas payment." This is 40 years already.

204 So it can be seen that all along the line there has been a dispute about residual gas, and a procrastination from Union about paying for the residual gas on a stand-alone basis.

205 Each cycle of the cavern changes the physical gas in the whole cavern. However, no matter how often this occurs, the gas at the lowest pressure, whether it's called residual gas or cushion gas, which is necessary in the storage business - cushion gas is necessary - it all remains mine. And the value of the space is enhanced every time Union borrows and replaces, borrows and replaces. In their storage operations, it's borrowing and replacing. They don't own it, but they borrow it and replace it. They use the space.

206 Next I would like to present my response to Union's evidence. Now, I did prefile a response. I'd like to add to that because I missed something, please?

207 MS. SPOEL: Certainly.

208 MS. LANG: Thank you. And I made a horrible faux pas in typing my first response, I used the word "lessee" instead of "lessor", and should have stuck with plain English and said the residual gas belongs to me, okay?

209 [Applause]

210 MS. LANG: I would like first to refer to page 2, paragraph 6, of Union's response -- Union's evidence, this black book, binder. I hope I can get to this. This is regarding section 38 of the *Energy Board Act*. Section 38, this is in paragraph 6, page 2, everybody.

211 I see a list of concerns which would allow me to come before the Board to get corrected. Paragraph 6, item 2(a) does apply to me because I am seeking just and equitable compensation in respect of gas which, in my case - which in my case - is residual gas.

212 Next item. On the very last page of your book, and I missed it at first, my name is missing. On table 1, page 5 of 5, under the column "Standing for Payment for Residual Gas to 0 PSI," I want to make

sure everyone knows that this is exactly why I am here today. Compensation for the full amount of residual gas down to 0 PSI. Do you see that column at the end? Actually, I think that's where I should fit, perhaps.

213 Now, back one page, page 4 of 5, my name is in entered and challenged under "Standing for Additional Compensation for Storage Lease Agreement." Well, I don't really have a storage lease agreement, so let's postpone that until after the residual gas is paid for. Once I signed -- once I receive payment for my residual gas, then I'll be very, very happy to sign all these agreements that I've missed out on all these years, and I'll be on a level playing field and Union will be happy. Everybody should be the same, okay?

214 Next item. On page 3, paragraph 10, item D, "Compensation for Loss of Commercially recoverable Gas Production, hereinafter called Residual Gas." I would like to feel that I am qualified under that point to be allowed to be a participant.

215 Now, on this item, on page 9, paragraph 28, the last line of paragraph 28, Union states they have no objections to someone who did not accept Union's offer of compensation at the time the pool became a DSA. Union did, indeed, make us an offer. We did not accept it.

216 Next point. On page 10, paragraph 33, where they deal specifically with me, Union paid, and continues to pay, total compensation of a formula based on previous volumes of gas produced despite the fact that gas has not been produced since the early 1960s. Union is using the term -- this is my answer. Union is using the term "total compensation of $702" to claim that it absolves them from all past, present, and future disputes.

217 Other Union documentation refers to the same payments as paying Mrs. Young a total rental of $700 per year, and has continued to do so. This is storage rental and has nothing to do with any residual gas payment. Strictly payments covered in original lease for gas storage.

218 Also in that same paragraph, line 5, "Mrs. Lang's family chose to continue with the agreement." I take exception to any statement by Union that my family chose to continue with the status quo. The status quo continued all by itself, without any choosing. There were many disagreements going on and everyone thought that sooner or later some kind of settlement would be made. It never was.

219 In my original submission I state that Union and I have a mutual problem. The problem I have with Union is that they won't pay me for my residual gas. The problem that Union has with me is that I won't sign their agreements, nor will I accept their annual $700 rental cheques. I haven't accepted them for 17 years.

220 Every other landowner in the Waubuno Pool has received compensation for their residual gas. There is no term in my oil and gas grant that precludes me from coming before the Board to claim compensation for the same thing that everybody else in the pool has received.

This has been a long stalemate. I'm just done. It's a long-standing dispute. No agreements other than the original lease were made; legal, casual, verbal, or implied. Nothing. No choices made. We didn't choose. Just stuck at an impasse. 221

Union has a copy of my father's death notice in their files. I think they know -- I think I know what they were thinking. Union offered my parents a settlement, the same as they offered the other landowners of the Waubuno Pool. My parents did not accept the offers. They felt Union had too much the upper hand and were pressing too hard. They felt that landowners, mainly farmers, needed to work together with the help of their own experts to assure that a fair and equitable settlement was reached. Time has proven their instincts to be correct, as evidenced by this hearing today. 222

I thank you most sincerely for your patience and attentiveness. 223

[Applause] 224

MS. SPOEL: Thank you, Mrs. Lang. 225

I think before we proceed, this would be a good time to take a short break. I have about approximately 10 to 11. Let's resume at -- we'll resume at about five past 11, if that's acceptable. 226

--- Recess taken at 10:50 a.m. 227

--- On resuming at 11:05 a.m. 228

MS. SPOEL: Mr. Sulman, I think it's back to you, in our order of presentation here, to respond to Mrs. Lang's comments. 229

REPLY ARGUMENT TO MRS. LANG'S PRESENTATION ON STANDING BY MR. SULMAN: 230

MR. SULMAN: Thank you, Madam Chair. 231

I would suggest that we go to our document brief again, the black binder exhibit, and turn to tab 15. What we've tried to do there is put in one place for you the -- for all of us, the documents, that is, the agreement of lease that Mrs. Lang referred to from 1951. You'll find that at the top -- at the top it's tab 15.1, and behind that you'll find 15.2, which is the unit operation agreement that Mrs. Lang referred to. Just so we've got those documents before us. 232

I think Mrs. Lang had - maybe I can deal with one issue first - indicated that in our index, the appendix to the chart, we had not listed her with regard to residual gas. We can correct that and put residual gas and then list beside it "challenged", if that's of any assistance. But I don't -- just to clarify that, she brought that up. We have not done that. I think we have an N/A or something beside it, or 233

we may not have it at all. Oh, we don't have a column where she's listed. So we can do that, but I can put on the record that, yes, we obviously oppose or challenge the residual gas.

234

That brings me to the first point. I did a little history lesson at the beginning of our general comments, and I knew it might come in handy later. Residual gas that we're talking about, the question, what is residual gas. Residual gas, in our submission, and in experience in the natural gas industry, is really -- you're not going to find it in the agreement of lease and you're not going to find it in the unit operating agreement that are under tab 15 and 16. Residual gas is a term of art. And everybody doesn't agree on what residual gas is, but let's -- I'll tell you from our perspective and experience what residual gas is.

235

It's, in effect, a proxy or in lieu of gas that -- when a pool has gone into production, gas that is not produced down to an abandonment pressure of 50 pounds per square inch. Other gas, in theory, which could also be called residual gas, remains in that pool, this is the Waubuno Pool in this case. All the other pools you're hearing about, there's gas below 50 pounds per square inch. It's not economically producible and the industry, a common practice in the industry, there's general agreement that gas is not produced down to that level. And when you go to storage, what "residual gas payments", and I put those in quotation remarks for the record, it's a payment in lieu of the gas that would otherwise have been produced down to 50 pounds had production continued, okay? That's the one payment.

236

And what Mrs. Lang is saying is, I want to be paid down to O, I want all the gas that could possibly be in there. And even down to 0, I'm not sure that's all the gas that could possibly be in the little holes that are in the reefs that make up storage poles. Do you want me to -- if you have a question, I'd be happy --

237

MS. SPOEL: I'm just wondering, Mr. Sulman, whether a -- I'm hearing -- dealing with standing, or the status to bring this application is the place to get into a discussion of differing views of what residual gas is and whether or not there's anything -- I understand your position. I think you're coming to the position that there's nothing for Mrs. Lang to be compensated for. But I wonder whether that's a matter that deals with the substance of the hearing, which certainly would be a legitimate issue for you to raise, or whether that's a matter that deals with standing. Because, of course, we're not hearing any evidence today, and I'm not sure that we have a record that would allow the Board to make that kind of a determination based on the documents we have before us now. And if it's something that's going to require more, then I think it's not really a matter -- not necessarily a matter for standing. Just because someone gets standing doesn't necessarily mean at the end of the day they're going to get compensation. It's not an automatic thing. The question is are they even allowed to talk to us about compensation. That's the question for a standing hearing. And if there's a difference of views, then I think those are more appropriately debated within the real context of the application.

238

MR. SULMAN: I'm not going there, and certainly with that direction I won't. All I wanted to explain was what residual gas is. But what I was about to say is in 1951 it was not a term of art, and this is a 1951 agreement. You don't -- and as Mrs. Lang points out, there is no payment for the words "residual gas" because they weren't a term of art in 1951. As I explained, that's in the very early years of the storage development industry in Lambton County, well, in the world. It is -- you won't find it

anywhere in her agreement; you won't find it in the unit operation agreement that she says is, and we agree, the backbone of a lot of storage operations.

239 Her position is that she was treated differently, that she's unique and treated differently. I wanted to first point out that the agreement of lease that Mrs. Lang has is the same form of agreement of lease that the Waubuno Pool owners all have. And it's not unique to Waubuno Pool. In fact, there are other pool owners, and I won't ask you to turn them all up, but Sandersons, who are also -- and the estate of Arthur Sanderson, likewise has an agreement, that is, the same terms, same agreement. That's found in, I believe, tab 4 of our documents. In tab 5 of our documents you find Christopher Robinson who has the same form of lease that Mrs. Lang has. These are not particularly unique. They started in 1950s, that form, and carried through into the 1960s.

240 And so we agree that what occurred is Mrs. Young, Mrs. Lang's mother, Isobel McBean Young, signed an agreement of lease. I think that -- so now I'll give you our interpretation of what happened after that.

241 Mrs. Lang's mother, Mrs. Young, has an agreement -- Mrs. Lang's position is that it's a rental agreement, and a rental agreement only. That is not the Union Gas position. It is an agreement covering both rental -- both oil and gas production and storage, which it says clearly, and I'll read that to you in a moment; and it also has methodology for the payment of -- for gas itself.

242 So let me sort of walk you through that and try to explain where that leads you. So we take the position this agreement of lease covers all those issues, and it is an agreement under what is now section 38. Unfortunately, back in 1951 they didn't number these paragraphs, so I would take you down about -- almost a quarter of the way on the page, and it looks like there's a little bullet. I'm not sure whether that -- I think that's probably the perforations from the registration office at the time. But it says, it's the first little perforation that says: "The rights hereby granted ..." Can you all find that one?

243 "The rights hereby granted shall continue for a term of 20 years from the date hereof and so long thereafter as any of the said substances is or are produced in paying quantities...or so long as any of the part thereof are used for underground storage of gas as aforesaid."

244 And It goes on to say:

245 "In order to provide for the storage gas underground and for the purposes 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."

246 You see, this is prior to the Langford report that I referred to. Prior to that mandatory regulation of designating storage areas, there was a regulation that was passed by the Ontario government, assuming that we have the same -- had the same system back then as we had then, it was probably an order in council, that recognised all those existing storage areas and designated them on block. But back in 1951 that wasn't the case.

247 "Should the lands above described at any time be included in any such storage area and notice be given notice as aforesaid them 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 part thereof... 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 any extension thereof."

248 That's the portion that deals with the rental payment for storage. Now, it's a little unique here because it was supposed to be $100, but you look down further and you can see some handwriting; I guess that's the only way to describe it. "This lease shall be nul and void." You can see that probably three-quarters of the way down the page. It scratches out the 100 and makes 200. So when Mrs. Lang says that she was being paid $700 - and I say paid; she isn't cashing cheques of late, but she's been paid $700 - that's 200 of that $700, and that's the rental portion. Okay.

249 Now, what also happens is there's a payment on gas flow, and that's down where you see -- a little over halfway down where there's a zero and then 500 mcf per day. And what happened was that Mrs. Lang - Mrs. Young, first, and then subsequently Mrs. Lang - Mrs. Young was being paid $500 per year based on well flow, a producing well flowing over 5,000 Mcf per day. Do you see that portion?

250 MS. SPOEL: Yes.

251 MR. SULMAN: Okay. The well stopped flowing when it went out of production a long, long time ago, when this went to storage in 1960.

252 MS. LANG: 1960.

253 MR. SULMAN: But she continued to be paid for gas. That's what the flow of gas is. That's what the well flow -- well producing is. That's for payment of gas, based on gas volumes. They were continued to be paid at $500 a year. Not for the rental of the lands, as you saw before, but rather based on gas flow, which stopped. Yes?

254 MS. SPOEL: Sorry, I'm just looking back at my notes, and my notes from Mrs. Lang's presentation, I think she concedes or conceded that the lease payment included the right to store gas as well as to produce it.

255 MR. SULMAN: Right.

256 MS. SPOEL: So I don't think there's an issue there. I think her issue is whether or not she ever received any compensation for the residual gas. The fact that it includes -- and again, this may be a legitimate question, but I don't know that -- perhaps it would be helpful if you could direct your remarks to the specific issue of, does this cover any residual gas, not does it cover storage. Because she has conceded that it does, in fact, cover storage.

257 MR. SULMAN: That's right. The $200 is the rental for storage; the $500 -- residual gas is a proxy, that's why I went through that, residual gas is a proxy for gas that is not being produced. That's all residual gas is. We could call it anything; we could call it brown cow. But it's called residual gas. All it is is a proxy. Whatever term of art we want to apply, it's a proxy for gas that is not produced because you go to storage.

258 This is a payment for gas, and she's continuing to be paid for gas not produced when it went to storage, and it was paid right from 1960 -- well, it was paid before that and was continued to be paid after it was not produced, on an ongoing basis -- well, it's still paid. It's just not accepted any more.

259 MR. SMITH: Is it, in essence, your position that that is the payment for residual gas?

260 MR. SULMAN: Yes. There wasn't any residual gas known in the industry in 1951. All you do is get paid for gas that isn't produced, okay? That's what residual gas --

261 MR. SMITH: Was that ever acknowledged in some way?

262 MR. SULMAN: I'll get to that, and I'll correct something that you heard earlier.

263 Then the unit operation agreement was offered to every other landowner. And once again, they don't call it residual gas because, once again, there's a complicated formula on page 2 of document 50.2 under that tab. And I won't walk you through that because not only would that take a long time, but it's not the clearest statement in the world. But it never, at any point, says "residual gas". All this is is, again, a payment on a royalty basis for gas produced for the lands which can't be produced any more because it's going to go to storage.

264 The other landowners in the pool were paid on that methodology. She's being paid on the methodology under the prior agreement, once again, not called residual gas under either one.

265 I would point out at this point, Mrs. Lang is asking to be paid down to 0 pounds per square inch. You will recall she said, I want -- and she said, I want to be treated like the other landowners in the pool. As you can see, there is an agreement, and the abandonment pressure is 50 pounds per square inch. So she wants to be paid a little bit better than the others, it appears.

266 That's not a major point. I just want to clarify that they were paid under that paragraph -- once again, it wasn't called residual gas, and that is their payment for what is now called residual gas. Residual gas, we have to put in our mind, is only a proxy or an amount paid in lieu of gas that could otherwise be produced down to an abandonment pressure, and that's 50 pounds per square inch generally in the industry.

267 So our position is that, yes, her predecessor was paid down to that -- was paid what is now called residual gas.

268 And once again I'll come back to my general comments and tie this into it. It's a contractual arrangement that was reached between Isobel Young and Union Gas of Canada Limited. Both parties have changed names by now, but the predecessor title to both.

269 The contract is still valid, and in fact that's what one of the paragraphs I read you, so long as the underground storage is being used, this contract is valid.

270 Now, when we said that she chose, Mrs. Young chose, well, I guess we could frame it differently. Mrs. Young entered into an agreement with Union Gas of Canada Limited. She was offered another agreement, which is the unit operating agreement, which would have had a different methodology and formula for the payment of residual gas, but she chose not to do that. And people have the right to contract and make their own decisions.

271 She was offered -- let's move us a little forward. Mrs. Lang spoke about her dealings with Mr. Lowe and, she said, Mr. John Hunter. I'll take you back to my general argument. That's the period of time subsequent to the Bentpath decision when Union Gas was pursuing amending agreements, general amending agreements. And she was -- by this time, Mrs. Lang owns the property and Mrs. Young has passed away, I believe, by the mid-1980s. And that's what she was offered again, and once again chose, did not choose, chose not -- chose not to accept an amending agreement, I guess, is one way to put it, which would have had her being treated the same as others in the pool. But she did not chose to accept that agreement.

272 So she has the original agreement, that is, Mrs. Lang has the original agreement that her mother entered into that is still valid, still in place. And before I -- before we think, in 1951, you didn't get paid much. I won't -- do you have a question?

273 MS. SPOEL: I just want to try and clarify this again, Mr. Sulman.

274 Your position, I understand it, is that because payments were made under the -- that your bottom line, it seems to me right now, is that the 1951 agreement, because she's never voluntarily entered into another -- never been able to voluntarily enter into another agreement with Union Gas, that she is now precluded forever from doing anything other than trying to negotiate with you; she may not ever come to this Board in respect of that agreement because of an agreement signed in 1951. Is that your position?

275 That agreement, seems to me, regarding storage rights, not the gas payments but the storage rights -- sorry, not the production payments, to be in perpetuity, and that therefore she can never reopen it. Is that essentially Union's position on this?

276 MR. SULMAN: Unless there's a provision within the contract to reopen a contract, you don't have an inalienable right to reopen contracts because you don't like the provisions or things change; that's right.

277

MS. SPOEL: And is there any issue in your mind about the question of whether it's a valid contract given that portions of it seem to be in perpetuity? Is there a question?

278

MR. SULMAN: The vesting -- I mean perpetuity -- I've had a case on the rule against perpetuities under these agreements. It's a vesting issue, and it had already vested, it vested within the 21-year period, so there's no issue on that. Most of the natural gas contracts are in perpetuity, but they've already vested. So I don't know whether that's where we're going. A rule against perpetuity takes me back to about -- I don't want to remember how long that takes me back, but it's first year law school. And I don't think that's an issue.

279

It's our position that this is a valid contract. It deals with storage rights. That's the only agreement for storage rights. There's been others -- well, it doesn't matter. Whatever without-prejudice negotiations that have gone on in the 52 years since this agreement was entered into are somewhat irrelevant to us here today because there's a valid agreement. They didn't reach another agreement.

280

MS. SPOEL: Just so I make sure I'm clear. Union's position is that if there is a valid agreement, it doesn't matter when it was entered into, it doesn't matter what the terms are, there is no way that a landowner ever has the right, or an owner of those rights, ever has the right to come to this Board to seek some other arrangement. They only have the opportunity to do so if they can negotiate -- the only other opportunity to change the arrangements if they can negotiate it voluntarily with Union Gas. Am I correct in that? I just want to make sure I understand your position.

281

MR. SULMAN: That is -- that's correct, and that's exactly the position of the other large storage company who has never entered into amending agreements. They still rely on all these --

282

MS. SPOEL: They're not a party here today, so what their position is is not really -- they may or may not be right or wrong, but they're not here today. I'm asking what Union Gas's position is with respect to these old agreements; that your position is that it cannot ever be the subject of an application before this Board. If someone wants to change it, it has to be done through negotiation with Union Gas. And even if those negotiations fail, there is never going to be an opportunity to reopen it.

283

MR. SULMAN: Unless there is a -- now, there are some agreements that have provisions in them that allow that.

284

MS. SPOEL: I'm talking about one like this, Mrs. Lang's in particular and others like it, where there is -- where it says it continues, just for those words, continues for as long as the storage conditions; that your position is that there is no opportunity to reopen that unless it is done so on a voluntary basis.

285

MR. SULMAN: That's right. That's exactly our position. A contract's a contract.

286

MS. SPOEL: Thank you.

287 MR. SULMAN: And I would point out that the decision that Mrs. Young made in 19 -- well, I guess in 1951, and I won't go into this in much detail, but it is a -- it was in fact -- it was a business decision that people are allowed to make. Individuals have the right to enter into contracts or not enter into contracts. And for at least 40 years, this was an excellent deal; it was more than the other people in the pool were getting paid. It was only subsequent to that that one seeks to change the deal.

288 And people are allowed to make -- that's the whole essence of our position, is that people have freedom of contract. They enter into those contracts. If they benefit from the contracts, then they can't at a later point in time say, Gee, I did, really well, better than everyone else under the contract; and now I'm not so I'd like another shot at it, please. That's our position with regard to the sanctity of contracts. They're entered into freely, and they're in place.

289 So that's our position with regard to Mrs. Lang's contract. We believe that there is a residual gas payment in it already. It's not called that; we clearly admit that. In 1951 the term of art wasn't used, and it wasn't used in the unit operation agreements.

290 Now, Mrs. Lang referred to and read you an excerpt from a letter she said came from Mr. Lowe back in 1993.

291 MS. LANG: 1993.

292 MR. SULMAN: And here's what she read to you. She said, "As a consequence" -- I think maybe she went further, started with:

293 "An offer equivalent to that, accepted by the other landowners, was extended in 1960 and rejected by your parents."

294 That's the unit operation agreement. And then she read:

295 "As a consequence, the ownership of the residual gas still resides with you under the provisions of the petroleum and natural gas lease and grant."

296 You recall her reading that to you. But what she didn't read was the next sentence, which says:

297 "This gas cannot be retrieved until the resumption of production at the conclusion of storage operations."

298 It's quite true that there is gas below 50 pounds. That gas remains the gas of the landowner. And if storage operations cease, they can remove the gas. And that's all Mr. Lowe was saying in that letter. You have to put it in the full context of the full paragraph. Of course in his letter he also went on to explain the fact --

299 MS. SPOEL: Mr. Sulman, I think we're straying into the evidence here. I mean, if she doesn't have standing, what Mr. Lowe said or didn't say, or what his letters say or didn't say, frankly, is completely irrelevant.

300 MR. SULMAN: I'm only responding to --

301 MS. SPOEL: I understand that. Mrs. Lang made a presentation, we've heard it. But let's try and -- we'd like to get this done today. Let's try and stick to the status issues, not the evidence that may or may not be relevant if she does, in fact, end up having standing.

302 MR. SULMAN: Thank you, Madam Chair. I think it's my obligation to respond and give you the full picture when there's a partial quote given to you. Otherwise you might interpret that residual gas -- that Union had admitted that residual gas was owing to her. That's not what he said, okay? So now you have the full picture; I don't need to go further than that.

303 I think in conclusion it's simply that you have our position: A contract is a contract and it's in place. And it covers - and that's the important part - it covers the concept of residual gas, although those terms of art didn't exist. That's our total position on Mrs. Lang.

304 I should tell you, because Mrs. Lang is here, not only did she do a wonderful presentation, but the relationship with Mrs. Lang has been, for the most part, a very cordial one. There's agreement to disagree, but I don't think it can be characterised as anything other than a rather cordial, professional relationship, from any of the documents that I can see. I don't think they agree, but it hasn't been anything but that.

305 Is that relatively fair?

306 MS. LANG: Yes.

307 MS. SPOEL: Thank you, Mr. Sulman.

308 MR. SULMAN: Okay, thank you.

309 MS. SPOEL: I'm glad to hear that you can relate cordially -- Union Gas can relate cordially with people with whom it's having disagreements with. The Board appreciates that.

310 MR. SULMAN: I didn't say everybody. They try, they try. And remember, this is -- and I would point out, this is not a snapshot in time; this is a 50-some-odd-year relationship.

311 MS. SPOEL: Okay. I think that our proposal next is to -- that it's Mr. Vogel's opportunity to respond to Union's position on the general standing issues. Is that correct?

REPLY ARGUMENT ON STANDING BY MR. VOGEL:

MR. VOGEL: Thank you, Madam Chair, Mr. Smith.

In response to Union's challenge...

MS. SPOEL: Can I just have a moment, please. Thank you.

MR. VOGEL: In response to Union's challenge, the LCSA applicants have delivered a volume of reply evidence which includes the principles that LCSA submits that the Board should apply in determining entitlement to standing of the individual LCSA applicants on this application.

Before I review those principles with you, I should perhaps address Mr. Sulman's comments to you suggesting the relevance of the Bentpath decision to this hearing.

As you've heard from Mr. Sulman, Union's position seems to be that any landowner who has entered into an agreement with Union, where that agreement doesn't specifically include provision for periodic review, either by negotiation or by this Board, that the Board doesn't have jurisdiction to review any of those agreements; and he relies on the Bentpath decision that he's referred you to.

I won't take you back there. But if you do review the whole of that decision, what you'll observe is that the attack that was made by the landowners in the Bentpath decision, and what was considered by the Board in that decision, was strictly limited to certain common law pleas advanced by the landowners and their solicitor in that proceeding. Specifically, as Mr. Sulman told you, there was a plea raised of non est factum, that is, the landowners saying, I didn't understand what I was doing. The Board also addresses in its decision an issue of an unconscionability, but those are common law pleas.

The attack here - this is important - goes beyond whatever attack was made in the Bentpath decision, and it's not based on those common law pleas. The attack which is being made on the agreements here is based on certain minimum threshold requirements that, in my submission, the Board has prescribed in other proceedings, and specifically the 1964 reference and in the Bentpath decision itself. So it's based on minimum threshold requirements that the Board has prescribed in those proceedings for what constitutes just and equitable compensation. And giving the words of section 38 their plain and ordinary meaning. And you'll see, in reviewing the Bentpath decision, that was not a position advanced or argument made by the landowners in that proceeding and was not considered by the Board in that proceeding.

What I'm proposing to do with you this morning is to outline briefly the three principles that I submit to you, on behalf of the LCSA applicants, are relevant to your determination of standing in this proceeding, and then I propose to discuss each of those principles with you.

322 The first principle that I submit to you is that for the purposes of section 38, it is not, as Mr. Sulman suggested, any agreement which would prevent the Board from exercising its jurisdiction, but it is only an agreement which meets the minimum threshold requirements for just and equitable compensation that have been prescribed by this Board in other proceedings.

323 The second principle, I submit to you, that is relevant to standing in this proceeding is that under the Board's own Rules of Practice and Procedure, those rules contemplate that persons who have a substantial interest in a proceeding will be entitled to participate in that proceeding. And therefore my submissions to you today will be that those landowners who have a substantial interest in the outcome of this proceeding, either because this proceeding will, in practicable terms, as Mr. Sulman have told you -- may, in practicable terms, as Mr. Sulman told you, determine what compensation they receive; or even for those landowners who are party to a -- what Mr. Sulman has described as an amending agreement which may expire, as, Madam Chair, you pointed out, before the termination of this proceeding. Anywhere where a landowner is going to be substantially affected by the result of this proceeding, I submit to you that under the Board's Rules of Practice and Procedure that landowner should have status.

324 The third principle I submit to you that applies to the Century Pools Phase II pools, which are Bluewater, Oil City, and Mandaumin, is that the Board has already determined, with Union's agreement in the Century Pools Phase II application, that all of the compensation issues in Century Pools -- Century Pools Phase II and relevant to the Century Pools Phase II landowners would be determined on this section 38 application and therefore all of those Century Pools Phase II landowners should have standing on this application.

325 So those are the three principles that I submit the Board should, in its consideration, apply to the standing challenges that Union has raised here. And if I can just deal, then, with each one of those in the order that I've given them to you.

326 The first principle being under section 38, then, that it's only an agreement which meets these minimum threshold requirements for just and equitable compensation which would preclude the Board exercising its jurisdiction to review those agreements.

327 I take you to the volume of authorities that have been filed on behalf of LCSA. If you turn to tab 1 in those authorities, you'll find there reproduced section 38 of the *Ontario Energy Board Act*. And looking at the plain wording of section 38 of the *Ontario Energy Board Act*, and specifically section 38(2) dealing with compensation, the statutory right to compensation in section 38(2), which you'll see under both (a) and (b), is just and equitable compensation both for storage rights and for damage resulting from storage operations.

328 As Mr. Sulman emphasised in his submissions to you, the first part of 38(2) is critical. It is "subject to any agreement with respect thereto," "with respect thereto". With respect to what? It's with respect to just and equitable compensation under sub (a) and (b), okay? That wording is critical. "Subject to any agreement with respect thereto," the answer to that question, what can only be the just and equitable compensation that's referred to in sub (a) and (b).

329 So my submission to you is that it's clear that it is only an agreement with respect to just and equitable compensation which is relevant to the statutory right of compensation that is set out in section 38.

330 Similarly, if you look at section 38(3), again it says "failing agreement". Well, failing agreement on what? Compensation payable under this section is what subsection (3) says. And the compensation payable under this section is just and equitable compensation under subsection (2).

331 So my submission to you is that it's only an agreement that this Board is satisfied provides for just and equitable compensation, that is, an agreement for the purpose of section 38(3) that would preclude a determination of the Board of that issue.

332 And that, Madam Chair, Mr. Smith, of course begs the question, what is just and equitable compensation? And that's what this whole application is about.

333 LCSA, on this application, has taken the position that the compensation which is being paid currently is not just and equitable compensation, either in respect of storage rights or in respect of the damages. And it's asserted, LCSA, the applicants, have asserted a right of participation in Union's profit pools and damages which take into account things that aren't presently taken into account with respect to damages, including affect on farming operations and productivity and social impacts.

334 I don't propose to go into those issues today, Madam Chair. But for the purposes of determining standing on this application, in my submission, it is sufficient for the Board to determine that the leases and amending agreements upon which Union relies to challenge standing don't meet the minimum threshold requirements that have been prescribed by the Board in these other proceedings.

335 And I think the most efficient way of me dealing with this is, if you could turn to paragraphs 5 and 6 in the volume of reply evidence.

336 Firstly, in section 5(d), which is at page 4 in the reply evidence, there's reference in that subparagraph to the 1964 reference. Again, I'm not going to take you to that decision; you're probably familiar with it, or it's certainly available to you. But the Board determined on that reference, as a fundamental principle of compensating for storage rights, that the compensation payable to landowners should be reviewed at periodic intervals so that the landowners would receive the benefit of what the Board describes in that decision as the increasing "use and usefulness" of storage.

337 So one of the principles of storage operation -- of storage compensation, going right back to this 1964 reference, is that compensation paid to landowners should be reviewable at periodic intervals to ensure that they receive the benefit of an increasing use and usefulness of storage. If you have the opportunity to review that decision, you'll see that that that use and usefulness of storage is one of the principles that's specifically set out there.

338 Secondly, in paragraph 5(e) I've made reference again to the Bentpath decision, and the provision in that decision for fair, just, and equitable compensation to include taking into account changing circumstances.

339 The relevant portion of that decision, I think the best way to do this is in paragraph 6, I've excerpted for you the relevant portion of that decision. And what the Board addresses there is uniform treatment of landowners and the requirement there for adjustments over time as part of just and equitable compensation.

340 You'll see that the Board there is referring to, in the first paragraph, uniform treatment of landowners, and then in the second paragraph it goes on to say:

341 "...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."

342 And then goes on to talk about the same compensation to all landowners.

343 So in response, then, to Union's position that it's only those landowners whose leases or amending agreements expressly contain some provision entitling this Board to review compensation, my submission to you is that that agreement, that type of agreement in itself does not comply with the minimum threshold requirements prescribed by the Board for reviewability and for equivalence.

344 For Union to take the position before you, Madam Chair, today that this Board does not have jurisdiction to review agreements unless there's some express provision in it authorising the Board to review, and that an agreement, you know, going back to 1950 is binding and non-reviewable by this Board, in my submission, does not meet the minimum threshold requirement for just and equitable compensation prescribed by the Board in the '64 reference and the Bentpath case for reviewability and for equivalence.

345 MR. SMITH: Could I, before we lose it, just go back to paragraph D that you referred to, the 1964 reference. You mentioned the decision involving -- or calling for review of compensation at regular intervals, or words to that effect. I don't see those words in your quote here. Are they in the decision? The quote doesn't seem to refer to regular intervals.

346 MR. VOGEL: I have a copy of it; I can certainly produce it for you. But the Board -- what the Board does on that reference is it sets out certain principles which should apply to the compensation of landowners for storage, and one of the principles that it talks about is giving the landowners the benefit of the increasing use and usefulness of storage. And the way the Board says that can be accomplished is by a periodic review which will effect that purpose.

347 MR. SMITH: Thank you.

348 MR. VOGEL: My final submission to you is that the silence of some of these agreements that are the basis of Union's challenge with respect to its right of periodic review of compensation, either by negotiation or by arbitration before the Board, my submission to you is that that silence should not be interpreted, as asserted by Union, as somehow prejudicing the right of these landowners to come before the Board where the agreement itself doesn't meet these minimum threshold requirements for just and equitable compensation.

349 And in fact if there is no provision in these agreements expressly authorising application to the Board, in my submission, such a provision should be implied, it should be implicit in the agreement. And the basis for that submission really comes from cases in the expropriation law area which say that, in interpreting the statutory restriction on the landowners rights which results from expropriation, the court should strictly interpret what rights have been given to the expropriating authority in favour of the landowner.

350 I'm not going to talk to you about a lot of law today, but if you want the principle, it's at tab 2 in the volume of legal authorities.

351 And if you look at -- this is a case called -- it's a leading case out of the Supreme Court of Canada in a case called Dell Holdings Limited. And I put it to you that expropriation -- that Union's position with respect to the storage rights is, in essence, an expropriation, although not accomplished under the *Expropriation Act* and therefore the same principles should apply.

352 If you look at paragraph 20 of the report of that decision, the Supreme Court of Canada, in enunciating the principles that should apply, said:

353 "The expropriation of property is one of the ultimate exercise of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected."

354 So if there is any ambiguity, I submit there's not, but if there were any ambiguity in this statute, section 38, and how it should be applied with respect to what agreements are being talked about, in my submission, it should be interpreted in a manner favourable to the landowners and in favour of granting them the status that they seek in this proceeding.

355 The second relevant principle there that I refer you to is in paragraph 27, which says:

356 "The words of the section should be given their natural and ordinary meaning in the context of the clear purpose of the legislation to provide fair indemnity to the expropriated owner for losses suffered as a result of the expropriation."

357 My submission to you was the taking of fair -- the natural and ordinary meaning of the words in section 38; and the purpose of section 38, which is to ensure that landowners get fair and equitable

compensation, that the words should be interpreted according to their natural and ordinary meaning to give effect to that statutory right of compensation.

358 Now, as Mr. Sulman also mentioned in his submissions to you this morning, it is the fact...

359 Before I move on to that, the other submission I would make to you with respect to this issue of statutory interpretation is that to interpret section 38, as Mr. Sulman has submitted to you, that is, that any agreement would preclude the Board from exercising its jurisdiction to determine whether it was just and equitable compensation that was being paid, in my submission, to interpret the agreement in that way is contrary to the very public policy which is being expressed in the section, which is to ensure that landowners get fair and equitable compensation. And that as a matter of law, this Board should not interpret section 38 in a manner which is contrary to public policy. And to the extent that the agreements were in contravention of that public policy, they should not be given effect.

360 The support for that submission is at tab 3 in the materials, in the authorities. It's a case called Still and M.N.R., which is a decision under the Federal Court of Appeal.

361 Specifically, at paragraph 48, you'll see in the last portion of paragraph 48 in that decision, the court states the principle as:

362 "...where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all of the circumstances of the case, including regard to the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claimed, to do so."

363 If, in fact, it was necessary to interpret the agreements as Mr. Sulman has submitted to you, and I suggest to you it's not, but if it were, my submission to you would be that the Board should not give effect to the agreement for that purpose, because it's contrary to the very public policy establishing section 38, which is to ensure that landowners do get fair and equitable compensation.

364 As Mr. Sulman did note in his submissions to you, Union has, in fact, regardless of the form of landowner agreement, recognised this threshold prerequisite established by the Board in their reference and the Bentpath decision for reviewability and equivalence by paying landowners, regardless of their type of agreement, by paying these landowners equivalent compensation.

365 And as Union stated in its evidence, as Mr. Sulman expressed to you this morning, that's not because they are recognising the contractual obligation to do so. Why is it? Because they recognise that threshold prerequisites that have been prescribed by this Board in the '64 reference and the Bentpath decision that say fair and equitable compensation requires reviewability; fair and equitable compensation requires equivalence. In my submission, that's why Union has adopted that practice.

366 The result of that has been that -- turning back to the reply evidence, if you turn to tab A in the reply evidence, you'll find a letter which is dated September the 23rd, 1998, which Union extended to all of the landowners in all of its Lambton County Pools, and it wrote to them at that time, on the expiry of one of the forms of the many agreements, asking each of the pools in Lambton County to appoint a representative to undertake negotiations on behalf of the landowners within that pool, and certainly including landowners in some of the pools to which Union now objects, like the Edy's Mills Pool.

367 And at that time, in connection with those negotiations under tab B, you'll see the form of agreement that Union entered into with this representative group of landowners, representing the interest of all of the landowners in all of these pools, that it was going to undertake these negotiations with them as a joint bargaining unit, and specifically said that it was not going to enter into individual agreements with individual landowners. That negotiation, of course, resulted in what you'll find at tab C, which is the offer of settlement that Union made to the landowners which was rejected by the LCSA and which has resulted in us being before you today.

368 So the situation, in my submission to you, is that for many years Union has, in fact, paid equivalent compensation to landowners in response to what the Board had to say in the '64 reference and the Bentpath case. And Union extended this invitation under the 1990 amending agreement to all of these landowners to undertake these negotiations with it; agreed to deal with them as a joint bargaining unit.

369 Union acknowledges that in the form of amending agreement under which these negotiations were conducted, there is a clause there which says, if you're not successful, you may apply to the Board; that's acknowledged in Union's evidence which is before you. And so my submission to you is it's only now, after the negotiations were not successful, that Union is purporting to rely some of these old agreements and old amending agreements to deny the opportunity of landowners coming before this Board where, for many years, they've been -- acknowledged a requirement to treat them with equivalence and have, in fact, expressly undertaken negotiations with them or their representatives under those forms of amending agreements.

370 And my submission to you is, then, that Mr. Sulman mentioned the word "estoppel" this morning, my submission to you is that there is a form of legally recognised estoppel which does come into play here, and that Union should be estopped from taking the position which it does where these landowners have continued in their participation in LCSA and brought this application.

371 The document of estoppel, a convenient statement of it you'll find in the references at tab 4, Halsbury's Laws of England. And if you look at paragraph 955 in that excerpt there, you'll find a statement of the doctrine, it's called estoppel in pais, which is estoppel through conduct. The doctrine is:

372 "Where a person has by words or conduct made to another a clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such repre-

sentation and thereby altered his position his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be."

373 Well, my submission to you is that Union asked these landowners to participate in their negotiations as part of the joint bargaining unit. It represented to them that it would not enter into individual agreements. And the agreement under which the negotiations were conducted provides expressly for application to the Board in any event that negotiations failed, and that's why these landowners are before you. And Union should be estopped at this point from taking a position to the contrary.

374 Mr. Sulman's primary basis, it appears, for the submissions that he made to you this morning are, A, sanctity of contract and, B, interference with the storage industry. And he has submitted to you that that is why the Board should interpret these agreements, so that if there isn't express in them for any application to the Board, the Board should not allow landowners to come before the Board.

375 In my submission, that rings hollow, those reasons ring hollow, given the fact that Union, by its own admission, has been paying equivalent compensation regardless of the form of agreement to these landowners for years. So there isn't going to be this opening of the flood gates to hundreds of applications, and there isn't going to be this kind of disruption in the industry that Mr. Sulman suggested to you which would result from all of the landowners being treated equivalently, because historically, going back to the Bentpath decision and even before that as noted by the Board in the Bentpath decision, Union has been doing that in any event.

376 So those are my submissions with respect to the application and the first general principle which should apply in connection with this standing hearing.

377 The second principle, then, is that under the Board's Rules of Practice and Procedure, those rules contemplate that persons who do have a substantial interest in the outcome of the proceeding before the Board will be entitled to participate in those proceedings and therefore the landowners who have a substantial interest in the outcome of this proceeding should be allow the to participant.

378 The basis for that submission, as I've said, are the Board's own rules. If you look under tab 5, I have excerpted certain portions of the Board's rules which clearly indicate the determination of status - now, this is dealing with intervenors, but, in my submission, the same principles apply - dealing with the interest of intervenors -- or dealing with the application for intervenor status in Rule 27. It's clearly that the interest of the intervenor which is to dictate whether or not somebody is an intervenor, and further over at Rule 29, in making a decision about intervenor status, the Board is to determine whether somebody has a substantial interest in the proceeding.

379 So clearly the criteria with respect to participation in proceedings before the Board is interest-based. It is whether or not the person who is coming before the Board, who wants to make a case to the Board, has a substantial interest in the outcome of the Board.

380 And under their general rule, Rule 1.01, which is at the first page of that excerpt, of course, the Board, in applying these rules, is to do so "to secure the most expeditious, just, and least expensive determination on its merits of every proceeding before the Board."

381 For your further reference by way of analogy, I have reproduced for you under tab 6 what is the equivalent rule from the Ontario Rules of Civil Procedure, Rule 5.02(1), which establishes the criteria under which people are required to participate in court proceedings; that is, where "claims to relief arising out of" the same occurrence or "series of transactions or occurrences." You'll note that we're dealing, by and large, with standard form contracts in this case. "Common question of law and fact" arise and "convenient administration of justice."

382 Well, here, Madam Chair, you have a situation whereby the criteria, or because of the criteria established by the Board in these earlier proceedings, Union has adopted this practice of many years of paying equivalent compensation. And my submission to you is that where this proceeding is going to determine what those people, regardless of what contract they may or may not be party to, where those people are going to -- their compensation may well be affected by the result of this proceeding; or where, for any other reason - and we'll get to that and we'll get to it in good time - that they can show they have a substantial interest in how this proceeding is determined, that they should be entitled to come before the Board and participate as applicants on the proceeding, particularly where the claim being advanced for those people is identical - identical - to the claim which is being advanced on all those other applicants, hundreds of them, to whom Union does not object.

383 MS. SPOEL: Mr. Vogel, you referred to intervenors. Is there any difference in your mind whether the various challenged parties have applicant status or intervenor status in the case?

384 MR. VOGEL: There is, Madam Chair, and the distinction is this:

385 What is at stake on this application is just and equitable compensation, and whether the agreements, as presently constituted, are providing just and equitable compensation or whether there should be a fresh approach taken, as suggested in the amended application, to compensation for landowners.

386 An intervenor would not be entitled legally to the benefit of any order the Board might make in response to this application; therefore, it's critical, if those landowners are to receive just and equitable compensation, that they be joined as applicants in this matter.

387 The third principle, as I indicated to you, applies only to the Century Pools Phase II pools, Bluewater, Oil City, and Mandaumin. And essentially the principle is set out in paragraph 11 of the -- or the basis for the application of that principle is set out in paragraph 11 of the reply evidence, and it amounts, really, to this: that in Century Pools Phase II, the Board already determined, with Union's agreement, that all of the compensation issues in Century Pools Phase II would be determined on this application. Therefore, I've submitted to you that, on the proper application of this principle, all Century Pools Phase II landowners should have standing on the application.

388 The basis for this submission is if you turn to tab F in that volume, what you'll find there is a notice of motion that Union brought in Century Pools Phase II, and this was in response to the evidence which had been filed by LCSA in that proceeding. If you look at the grounds for the motion on page 2, Union's position at that time, this is a position that Union took in Century Pools Phase II. Paragraph 5:

389 "Landowners' claims to increased compensation would be more properly and fairly dealt with in a separate proceeding."

390 Paragraph 6:

391 "For example, landowners who have an interest in these matters who are not parties to these proceedings should properly have an opportunity to participate in any proceedings that deal with the appropriate levels of, and basis for storage compensation."

392 So that was a motion that Union brought. There was then a cross-motion brought by LCSA, and that's at the next tab, tab G. And if you look at the order that was requested at that time on page 2 of that document, LCSA was requesting that the Board determine fair and equitable compensation for all of the LCSA landowners on the Century Pools Phase II application, under paragraph 1; or, alternatively, adjourning those compensation issues to be heard together or consecutively with this pending application that we're on here today. So that was the cross-motion in response to Union's motion that LCSA brought in Century Pools Phase II.

393 We then appeared before the Board on February 2nd, 2000. And Union was represented by other counsel at the time, not Mr. Sulman. And you'll see that in dealing with that alternative, that is -- this is on page 10 of the transcript there:

394 "...compensation issues" in Century Pools Phase II "to be heard together consecutively with the Lambton County Storage Association's pending application..."

395 This is Union's counsel, Mr. Leslie, who says, "we agree with that alternative." Now, there is no qualification there; there are no conditions being proposed. What was proposed is that the compensation issues which had been raised by LCSA on behalf of all of the Century Pools Phase II LCSA landowners, the proposal that was before the Board at that time in response to a suggestion which actually came from Union was that those should be set over to this application for hearing. And Mr. Leslie said, "we agree with that alternative." Okay? No conditions, no qualifications, depends on status, depends on anything else. It didn't depend on anything. What he said was, "we agree with that alternative."

396 In fact, if you look over the page, he continues on with his submissions. That's, in fact, "what our proposal," he's referring to the Union proposal, "contemplates that you will do that. You will consolidate the compensation issues in these proceedings with the larger application that Mr. Vogel has brought so that they can be dealt with at one time."

That's on page 45.

And so in addressing those positions, at page 52, you'll see that the Board said that:

"...the issue of the amount of compensation to be paid to landowners affected by the" Century Pools Phase II "proceeding be dealt with, together with the LCSA's pending section 38(3) application for fair and equitable compensation for all LCSA's landowners..."

Again, no qualification, no conditions. It was those landowners in Century Pools Phase II who are entitled to have those compensation issues determined here, and that's why they are before you.

In terms of what compensation issues we were talking about, the next page is the document which was filed as an exhibit reflecting the agreement between the parties in Century Pools Phase II. And if you return to page 8, paragraph 10, of that exhibit, you'll see that the compensation issues from Century Pools Phase II which were put over to this application to be determined by this Board were the per acres payment, the storage wellheads, the inside/outside acres, the payment of residual gas/oil down to O, market price for residual gas, and permanent roadways, et cetera.

So all of the issues that are raised and advanced by LCSA in the amended application were directed by order of the Board to be heard in this application.

Again, at the hearing of Century Pools Phase II, the transcript is at the next tab, tab J, that's what the parties put to the Board and that's what the Board directed at that time. You'll see on page 11, the Board was advised of the settlement of some of the issues and then "compensation issues in accordance with the Board's direction last week have been not resolved as part of this hearing, but rather are to be addressed in the context of LCSA's pending section 38 application."

And in the decision with reasons, which is at tab K, the Board deals with that and says in paragraph 1.2.8:

"The Board ordered that the issue of the amount of compensation to be paid to landowners affected by this proceeding be dealt with together with the LCSA section 38 application for fair and equitable compensation for all LCSA landowners within Union's territory."

So my submission to you is throughout that whole Century Pools Phase II proceeding, there was never any condition or qualification stipulated by Union or imposed by the Board or understood by the parties that there would be any restriction on what Union agreed to, in fact proposed itself and agreed to; and the result of that, in my submission, is that all Century Pools Phase II landowners have the right to participate on this application before this Board with respect to all of the compensation issues on Century Pools Phase II, which are the ones that are listed in the settlement document which was filed with the Board at that time.

So those are my submissions in general with respect to the principles that the Board should apply to these standing issues. I do have additional submissions with respect to the individual applicants, and I certainly will apply these general principles to the individual applicants in those submissions. 407

But other than any questions that the Board may have, those are my submissions at this time. 408

MS. SPOEL: Thank you, Mr. Vogel. I don't think we have any questions at the moment. 409

What I suggest we do - it's approximately 12:30 now - is take a lunch break until 1:45. Maybe we should make it 1:30. Is that adequate time, if we have an hour? 410

MR. VOGEL: That's fine for us, yes. 411

MS. SPOEL: We'll make it 1:30. Is that acceptable for you? 412

MR. SULMAN: I think 1:45 would be more appropriate. It might even shorten the afternoon, because these submissions you've heard so far, may be more likely than what -- when we deal with the specific properties. Because we've laid out our positions now and I think we're sort of following the properties, saying this applies to this, this applies to this, this applies to this. 413

MS. SPOEL: I was hoping that we might be able to use lunch break to try to consolidate things a little bit. So perhaps we will take -- we'll go to 1:45 and we'll start promptly at 1:45. 414

MR. VOGEL: If you want to know from our side of the table where we're going with this, you may have seen tab N in the reply evidence. In tab N, I've taken these same principles and applied them in a chart form to each of the individual applicants which Union has raise the objection. So as Mr. Sulman says, the argument this afternoon may be somewhat for foreshortened because, really, it's all in the chart. 415

MS. SPOEL: Thank you, Mr. Vogel. That's very helpful. 416

We'll rise now until 1:45 and resume promptly then. Are there any other matters before we break? 417

MR. VOGEL: No, Madam Chair. 418

MR. SULMAN: No, thank you. 419

MS. SPOEL: Thank you. 420

--- Luncheon recess taken at 12:30 p.m. 421

422 --- On resuming at 1:45 p.m.

423 MS. SPOEL: Thank you. Please be seated.

424 Mr. Sulman, I think we're back to you on the individual issues.

425 MR. SULMAN: Thank you, Madam Chair.

426 **ARGUMENT BY MR. SULMAN AND RESPONSE BY MR. VOGEL ON INDIVIDUAL APPLICANTS BY POOL, STORAGE RIGHTS, AND RESIDUAL GAS STANDING:**

427 MR. SULMAN: I hope I'm following the procedure properly. It's a little unique. So if I'm not, just stop me.

428 I would suggest that what we are doing, then, is turning to the Bentpath East Pool, and doing it on a pool-by-pool basis. I'll complete Bentpath East and then Mr. Vogel will speak to Bentpath East, and then I'll move on to Bickford. I'm going to do it in alphabetical order, by pool. I think I'm going to do it by alphabetical order, then, of the individuals in the pool so it makes it sort of easy to follow.

429 I know that -- well, I'll start from there, and I'll tell you who they are as we go along. It will all unfold on the transcript, I'm sure.

430 So Bentpath East Pool, the applicants from Bentpath East Pool are Douglas and Judith McLachlin, and I -- while I'm not sure that it's helpful to you, you can maybe comment on this, Madam Chair, Mr. Smith, whether it's helpful to you to get the reference on the transcript for the actual location in the prefiled evidence, not for this -- thank you. I won't do that each time if it's of no assistance. I find it difficult to figure out what set of coloured binds it is in so...

431 MS. SPOEL: I think the best thing would be to go through, and if we actually need to look at specific documentation at the time, we'll ask you where we can find it; otherwise we'll be spending the whole afternoon flipping back and forth. I think just carry on and we'll try and -- we'll let you know if we need more.

432 MR. SULMAN: Okay. What I have done, that's why I assembled the document brief so we wouldn't have to go into those big binders, and what I'll do is give you a reference, if it's in Mr. Vogel's reply evidence, rather than going into those big binders; or if it's something that we've pulled forward from the binders, to make it more convenient. Maybe that's the easy way to do it.

433 So McLachlin in the Bentpath East Pool, it's Douglas and Judith McLachlin. That reference is at tab O of the reply evidence, and it is an amending agreement that we've talked about earlier today. The amending agreement is dated April 10th, 1996. It's a 10-year agreement, and that amending agreement does not allow for renegotiation of rental rates until 2006.

434 The references, for purposes of the record, are -- you've got the amending agreement; it's made the 16th of September, 1996, at least that's what it appears. And paragraph 2, it's a 10-year term, just for purposes of the record.

435 So our position is that there is an outstanding agreement, pursuant to section 38. I won't repeat that every time. And it does not allow for Board-ordered compensation in that amending agreement, which is of fairly recent nature. There is no negotiation or arbitration set out in it.

436 But what it does have is what I'll refer to as a favoured-nations clause. And perhaps this is the part where you may want to turn it up. It is at paragraph 1, and you can see it's the second sentence at paragraph 1. "If all or any part..." that would be the last part of the fourth line after the words "current payment".

437 "If all or any part of the Lands are included in a designated gas storage area during the term hereof the current payment will be adjusted to the then current payment for identical rights of other storage pool landowners."

438 So the McLachlins in Bentpath East Pool have a valid and subsisting agreement in place, therefore don't, in our submission, have a right to be here as an applicant. You've heard other suggestions on -- while they may have an interest, it's our submission on this one that they ought not to be an applicant because it brings with it, as we discussed earlier, certain burdens and benefits. But they could well be an observer in this proceeding.

439 And in the alternative, if you were to adopt part of what my friend said earlier today in referring you to the rules, the best they could be would be an intervenor, but not an applicant. An applicant, at the end of the day, means that you would be ordering their compensation, and that's not where this group falls. They may well have an interest, they may well be affected, but they have a favoured-nations clause and they are in a good position. No matter what happens here, they will get at least that amount.

440 So that's our position on the McLachlins. And at best they could be, in my submission, an observer. But in the alternative, should you find that they should have some higher status than that, they could be an intervenor. And that's -- I said this might be a bit briefer. That's our submission on the McLachlins.

441 MS. SPOEL: Now, I guess according to our procedure, it's over to you, Mr. Vogel. Perhaps as we go through these, Mr. Sulman, if you don't mind, if there are any others, as you go through pool by pool, if there are any others where your argument is going to be the same - there may be other agreements in here with identical wording; I can't say I've been through them in sufficient detail to be able to say whether there are or not - you can indicate that it's the same argument as with respect to the McLachlins, or whichever others there are, so we don't need to --

442 MR. SULMAN: Actually, I think we'll find that when we get to roadway agreements and we will find that probably when we get to Mandaumin.

443 MS. SPOEL: Thank you.

444 MR. SULMAN: There's a lot similar. But others are unique.

445 MR. VOGEL: Thank you, Madam Chair.

446 As I pointed out before the lunch break, LCSA's position, responding to Union's challenge, is summarised at tab N in the reply evidence, and that's probably the most efficient way of dealing with this.

447 What you'll find at tab N is a schedule that we put together indicating the challenged landowners, the basis for Union's objection, and you'll see in the right-hand column LCSA's response to that.

448 So dealing with Bentpath East and Douglas and Judith McLachlin, and applying the general principles that I submitted to you this morning, as Mr. Sulman has acknowledged, the relevant lease and amending documents here, while they don't contain a specific provision authorising application to the Board, neither do they contain a specific provision precluding application to the Board.

449 My submission to you, based on the principles I enunciated this morning, is that these people have a statutory right to just and equitable compensation. And looking at their lease and amending document that Mr. Sulman just took us to, the lease and amending document don't provide for periodic review by negotiation or Board review of compensation, and don't provide for equivalence during the term of the agreement to be adjusted to what landowners are receiving -- other landowners are receiving from time to time.

450 So, in my submission, you don't have here an agreement that meets those minimum threshold prerequisites that the Board has defined for just and equitable compensation and therefore you don't have an agreement which would preclude the Board's consideration of that issue under section 38.

451 With respect to the application of the second principle, as Mr. Sulman has pointed out to you, in paragraph 1 of the amending agreement it does say that, on designation, these landowners are to be -- "receive compensation adjusted to the then current payment for identical rights of other storage pool landowners." So in the amending agreement itself, there is provision for these people to be compensated identically to other landowners. That, in my submission, gives them a substantial interest in the outcome of this proceeding and accordingly, under the second principle that I enunciated, they have a substantial interest in the outcome and should be granted standing here.

452 Those are my submissions with respect to the McLachlins.

453 MS. SPOEL: Thank you, Mr. Vogel.

454 MR. SULMAN: I wonder -- I guess I should ask when I do the next one if there are any questions at the end, and then I'll go on from there. Is that how you --

455 MS. SPOEL: Well, I think you can take it that if we have specific questions --

456 MR. SULMAN: I'll hear them.

457 MS. SPOEL: -- you'll hear them.

458 MR. SULMAN: Okay. I'll proceed, then, to Bickford. The Bickford Pool, the only parties that we are -- the only parties that we're objecting to standing on are the William G. and I think it's Joy Evleen or Evleen Joy Robson. That, for purposes of reference, that is found at tab 2, that agreement is found at tab 2 of our document brief.

459 This is a gas storage lease agreement. It is not in Robson's name, but you'll find that throughout because obviously there are -- predecessors of title will have signed agreements. This is an agreement that's signed with the Director, the *Veterans' Land Act*, because it's the 1960s.

460 This agreement is a gas storage lease agreement. It does not provide for renegotiation of rates. It doesn't deny -- it doesn't say that you can't have -- it does not say that -- I forget how my friend has framed this because I'm just puzzled by it. But there is no provision in the contract for renegotiation of rates. I guess what his position is, neither does it deny that there can be renegotiation of rates. But contracts don't usually have provisions to the negative, because you'd be denying -- the mind boggles at how many things you might have to have a negative provision in for. So, no, it doesn't have that, and it isn't logical to have such a provision in any contract.

461 There was an amending agreement offered. There is no amending agreement accepted. So when that happens, you're back at the original agreement, and that's what the case is here. The only lease signed is the original document. There is no amending agreement.

462 Our position on that -- in that particular situation is that the contract is valid, and it's the only contract there is. You can try to negotiate with people, but it's the -- it's as simple as you can lead a horse to water, but you can't necessarily get an agreement signed -- a new agreement signed after negotiation. Sometimes negotiations don't result in agreements. You shouldn't be penalised for negotiating. Therefore, you fall back to the agreement that's there, and that's the gas storage lease agreement.

463 That's our position with Robson. There is no agreement between the 1960 agreement, and the contract is in place.

464 MR. VOGEL: The contract to which Mr. Sulman refers, you'll note, is dated October 17th, 1960. It's actually between the Director, the *Veterans' Land Act* and the company. It provides for an acreage rental of $5 per acre.

465 My submission again simply is that these people have a statutory right to just and equitable compensation. They're party to an agreement that doesn't contain provision for periodic review, either by negotiation or by the Board; doesn't provide for equivalence, the threshold prerequisites which have been defined by the Board. Therefore, it's not an agreement for purposes of section 38 which would preclude the Board considering those issues.

466 And for these people, and I didn't mention this specifically with respect to the McLachlins, and I won't keep repeating this, but all of these people, remember, have been receiving equivalent compensation over the years; all of them were part of this joint bargaining unit at Union's invitation; participated in those negotiations, and now wish to participate in the arbitration before the Board which results under the provisions of the agreement under which those negotiations took place.

467 My submission is, for all of those reasons, they should have standing.

468 MS. SPOEL: Thank you.

469 Mr. Vogel -- sorry, Mr. Sulman.

470 MR. SULMAN: The next pool we move to is the Booth Creek Pool. In Booth Creek, the first landowner -- landowners are Brenda and Daniel McLachlin. And that document is found at page 3 -- tab 3 of our document brief. Excuse me.

471 You'll see on the agreement it says "Sanderson, Donald and Audrey; that's because they are predecessor of title. We'll get to another Sanderson later, in fact the next group.

472 But it's my understanding that this document is the original document. I don't see an amending agreement filed under our tab. But I'm advised that the situation is the same here; that there is an amending agreement which does not allow -- and I won't go through the whole thing again. It's the same situation I just described. It's an amending agreement that has not expired. It will expire, but it has not expired. And when it expires, these parties will have certain rights.

473 Now, I have to go through this a little bit further. If you'll give me just a moment.

474 My friend has attached the amending agreement at tab P, so that would take us from -- what we did was there wasn't the original agreement and so to keep the record straight, we attached the original agreement with predecessor in title, the Sandersons. Then you turn to tab P of my friend's agreement -- documents, and you'll finding a amending agreement. And this amending agreement has not expired.

475 And this is a little unique. This amending agreement provides that there can be renegotiation of rates. But in the event that you do not reach an agreement, then there's an appendix I that you turn to, which is -- it's labelled page 6 in my friend's documents, the word "page 6", appendix I.

476 What it provides for is that either party can apply for an arbitration. Now, it does not -- this is not contemplated as an application to the Ontario Energy Board, as you'll find in some other documents, but rather an arbitration. So reading the strict words of the amending agreement, right now the amending agreement is in place so they're not -- these parties do not properly have standing before this Board. And even when they do, when the amending agreement does expire, they will have a right to arbitration, private arbitration. And that's what appendix I sets out, the terms of arbitration.

477 It reads:

478 "Failing a negotiated agreement, any dispute under Items 2, 3, 4 and 5 of the Amending Agreement Schedule of Payments concerning the establishing of prices for..." it says production of natural gas leases, but gas storage is what we're interested in here "...Wells and Acreage adjacent to a designated gas storage area held in common as described in Items 2, 3, 4 and 5 respectively, shall be submitted to arbitration."

479 The key to all this, in my view, and I know it's somewhat different than my friend's, is that individuals have the right to contract, and the Board has always recognised that, and they have different forms of contract. And here what is just and equitable to one may not be to another, and what they, in the freedom of their ability to contract because in individual circumstances, there's different things that people want. Here they have agreed to a private arbitration provision in the contract.

480 And so it's somewhat different than others that you'll see, but our position remains that they contracted, that's an agreement under section 38(2), and they have a private right to arbitration when it comes due, which it hasn't. This is a 19 -- filed in 1998. Well, it says it's the agreement dated November 18th, 1998, but effective as of the 6th of May, 1999, is how it's titled at the top of the amending agreement. So this is an agreement that has not expired. And when it does expire, the remedy is not before this Board but rather private arbitration.

481 So we take the position they have no standing.

482 MR. McCANN: Sorry to interject here. For the sake of clarity, is there an expiry provision in this amending agreement? Does it have an expiry term? I couldn't locate it.

483 MR. SULMAN: It doesn't appear to, it doesn't expire.

484 MR. McCANN: I'm sorry, but if you go to -- I'm not quite clear on paragraph 6, "Renegotiation of Rates" suggests that "On or before --" maybe I'm treading on your ground, Mr. Vogel, I don't know. It says:

485 "On or before December 31, 1998, items 2, 3, 4 and 5 above will be renegotiated between the parties. In any event that the parties cannot agree on compensation at that time, payments in the amount of the then current payment will continue until such time as settlement is reached or either party applies for an arbitration procedure."

I guess I'm just wanting to clarify, Mr. Sulman, what you mean when you say on the expiry of the agreement, the right to arbitration, or the possibility of arbitration arises. That isn't quite the way I read paragraph 6 of the amending agreement.

MR. SULMAN: Give me a moment.

MR. McCANN: Sure.

MR. SULMAN: So, again, renegotiation -- back again to answer, I guess, Mr. McCann's question. Paragraph 6 is what you're referring to, Mr. McCann?

MR. McCANN: That's correct.

MR. SULMAN: It suggested that the renegotiation of rates set out there may not be applicable in that it says "on or before December 31, 1998," and the agreement is in fact made effective as of 6 May 1999, okay? So that question of whether the rates stay in effect for the term to whatever date is irrelevant here since the date of the agreement is after December 31st, 1998.

MR. McCANN: Okay.

MR. SULMAN: But the question, I guess, should be does that preclude them from relying on appendix 1. And these people have been paid, as Mr. Vogel pointed out, have been paid a rate that's equivalent to other rates. Not the rate that's set out here.

MS. SPOEL: Mr. Sulman, if I can also interject here. It seems to me that in paragraph 6 there was an intention that the agreement would have an expiry date, because it says "Such new rates will remain in effect for the remaining term of the agreement to December 31," and then it's blank. And I assume that there was some intention to fill in some other year in that space, but this copy of the agreement doesn't seem to have that in there. Do you know what the status of this agreement is?

MR. SULMAN: Well, if I might rely on my advisers for a moment.

The status of the agreement is that the landowners are being paid under the agreement.

MS. SPOEL: Thank you.

Mr. Vogel.

MR. VOGEL: Thank you, Madam Chair.

500 Madam Chair, Mr. Sulman refers to this agreement as being a little unique. The fact of the matter is that with respect to what is almost 200 landowners and agreements relevant to those landowners before the Board on this application, the interesting thing about this agreement is it's the only one that purports to expressly exclude the right of arbitration before the Board and substitutes this private right of arbitration. You'll find that in paragraph 10.

501 You'll see in paragraph 10 that what the agreement is purporting to do is to exclude a right of arbitration under the *OEB Act*, and substitute for that right of arbitration this private right of arbitration in appendix 1. It's the only one of the agreements affecting some 200 landowners.

502 And I submit to you that what's interesting about that is if that's what the parties intended and that's what Union attended to accomplish, it could, as evidenced by this agreement, have negotiated that clause with landowners and inserted it specifically. Therefore, I again submit to you that you should not imply into agreements that don't contain this provision some agreement as submitted by Mr. Sulman, that absent an express right of arbitration, that the landowner does not have a right to arbitrate. If they wanted to exclude that right, or at least purport to exclude that right, they could have done it in the form that they have here. And they haven't done that in any other agreement that's before you.

503 The second thing I want to submit about the position of Daniel and Brenda McLachlin is, as you've noted it, and Mr. McCann has drawn to your attention, paragraph 6 clearly does evidence some intention that there be a renegotiation of rates which will apply for some period of time. What you have at best here, in my submission, is an agreement of uncertain term. It was intended to have some termination; it doesn't have a termination date and therefore you've got an agreement which purports to extend indefinitely.

504 So with respect to the principles that I had enunciated this morning, this is not an agreement, again, that provides for just and equitable compensation; doesn't provide for periodic review by negotiation or the Board; doesn't provide for equivalence to other landowners. These landowners have received equivalent compensation, were part of the joint bargaining unit, and they have a substantial interest in the outcome.

505 In my submission, although they have a private right of arbitration, they shouldn't be -- certainly the result of this proceeding would be, if not determinative, of considerable persuasive value in a private arbitration. And these people should not be forced to undertake a private arbitration in order to have exactly the same claim determined as it is being advanced by other landowners in this proceeding.

506 Mr. Sulman has suggested to you that I have somehow or another attacked the sacrosanctity of private contracts. I'm not doing that. I'm simply submitting to you that there's a minimum threshold that has to be met for a contract to preclude the Board's jurisdiction under section 38, and that minimum threshold is that it has to provide for -- that a contract that does not provide for reviewability, does not provide for equivalence with other landowners, doesn't meet what the Board has stipulated and therefore doesn't preclude you exercising your jurisdiction.

507 And on that basis, these people should have standing as well.

508 MS. SPOEL: Thank you.

509 Mr. Sulman.

510 MR. SULMAN: The next Booth Creek landowner is the estate of Arthur Sanderson. I don't need to go through it, but it can be found at tab Q of my friend's reply evidence. This is a gas storage lease which does not allow for any renegotiation of rights.

511 Booth Creek, of course, is a developed pool. There has been an offer of compensation from Union to the landowner and there has been acceptance of the offer and payments received at current rates. So having had an acceptance of an offer under -- of compensation under section 38(2)(b), then we are in a situation where these -- this party should not have standing at this hearing. That's it.

512 MS. SPOEL: Mr. Vogel.

513 MR. VOGEL: With respect to the estate of Arthur Anderson -- Sanderson, there is no gas storage lease agreement. There's this gas storage agreement that's contained at tab Q that Mr. Sulman has referred you to.

514 If you turn to paragraph 7 in that agreement, it appears to contemplate additional compensation being able on designation. It says that:

515 "...the clear annual rental...shall be paid and accepted on account of any compensation due by the Lessee...as a result of the making of such Order."

516 It's not fixed by the agreement. I suppose it leaves the landowner in a position where he's limited to his $5 an acre under clause 1 before and after designation, or the purpose of paragraph 7 is to provide for some sort of increase in the compensation on designation. But if that's the intention of paragraph 7, it doesn't do that, at least it doesn't affix that compensation.

517 In my submission, if compensation is to be payable -- if the compensation payable under this agreement is to meet those minimum requirements of reviewability and equivalence that I've submitted to you, it doesn't do that.

518 And similarly for these landowners, they have been compensated equivalently to other landowners. They were part of the joint bargaining unit and they should be entitled to participate on the arbitration which results from the failure of those negotiations.

519 And if this proceeding is to determine the compensation they are to receive in the future, then again they have a substantial interest in the outcome and they should be permitted to participate.

520 Those are my submissions with respect to the estate of Arthur Sanderson.

521 MS. SPOEL: Mr. Sulman, I think we're back to you.

522 MR. SULMAN: Sorry, Madam Chair, I was just flipping into Arthur Sanderson. And I think we're -- I thought maybe we were in agreement, and I was going to tell you that. But perhaps we're not. I was going to read the same paragraph my friend has highlighted that says there's a clear annual rental payment. Just so that you're not confused, that's what we're relying on also. We just said that offer was made and was accepted in accordance with that same paragraph.

523 The next Sanderson in Booth Creek is Frank Nelson Jr. and Anne Marie Sanderson. They have one of these 1969 agreements, the same form of agreement that Mrs. Lang has. It's found at tab 4. And then subsequent to that you'll recall Mrs. Lang telling you that people signed unit operation agreements. I haven't provided that to you, but they also signed a unit operation agreement. The reason we haven't provided it is it's not particularly relevant to the issue of storage -- storage compensation. When it then went to storage, the same thing happened as happened with the estate of Arthur Sanderson. The order is made under section 38, and Union then, in the procedure that's long established by the Board, makes an offer to the landowners prior to first injection, and that offer was accepted and they were then paid in accordance with that offer.

524 So they are receiving compensation pursuant to section 38 of the *Act* and hence there is no standing for them in this hearing. They have already accepted an offer of fair -- of just and equitable compensation and are receiving it, and that complies with the *Act*. There is already an agreement lease in place, already a unit operating agreement where now they are receiving payment under the *Act* in accordance with the offer made to them by an offer on designation, which we're obligated to do prior to first injection, make that offer.

525 MS. SPOEL: Mr. Vogel.

526 MR. VOGEL: Madam chair, just to shorten things here. If you refer to tab N, you'll see that there's a grouping for all of these Booth Creek landowners; you'll see Arthur Sanderson, Frank and Anne Marie Sanderson, and Wayne Robinson. My submissions with respect to those landowners are the same as I've already given you with respect to the estate of Arthur Sanderson.

527 The only additional thing I would add with respect to Frank and Anne Marie Sanderson is if you look at the 1969 -- March 1969 agreement of lease that Mr. Sulman took you to, I do draw to your attention, and this is at tab 4 in Union's volume of materials. If you look at the second last paragraph in that lease, you'll see that it says:

528 "This Lease shall be subject to the provisions of any statute, Dominion or Provincial, and any Regulation or Order pursuant to such statute or Regulation thereunder, now or hereafter in effect and applicable to the same."

529 I submit that express in this form of lease is what is implicit in all others, which is that Union's rights under this lease and its right to rely on these leases is subject to the provisions of federal and provincial statutes, including section 38 of the *Ontario Energy Board Act*.

530 In the submissions that I made this morning, it's subject, then, to your determination of whether or not an agreement does, in fact, provide just and equitable compensation so as to preclude the Board's jurisdiction under section 38.

531 MR. McCANN: Can I just ask one question of clarification here, I guess, of Mr. Sulman.

532 So with regard to Frank Sanderson and Miriam Sanderson, there's the agreement of lease which is at tab 4, there's a unit operation agreement which is not included because it's not relevant, but then is there something else, that is, a document that carries out the offer of compensation and indicates that it's been accepted? I'm just trying to get the...

533 MR. SULMAN: Yes, of course there is, and that happens -- we haven't filed all of those because that happens pursuant to statute.

534 But just let me correct that. Frank Sanderson and Miriam Sanderson, although the names seem familiar, they are the predecessors of title to Frank Nelson Jr. and Anne Marie who seek to be applicants here.

535 MR. McCANN: Sorry.

536 MR. SULMAN: But I need to do that because the offer letter that goes out then to Frank Nelson Jr. and Mrs. Anne Marie Sanderson in August 1999, which is what I was referring to, then pursuant to -- it reads:

537 "An order of the Ontario Energy Board EBO-207 authorised Union Gas Limited to inject, store, and remove gas from the Booth Creek Storage Pool," which complies with the statute.

538 And then it sets out the terms of the offer after that. We haven't filed all these because, frankly, some people are sensitive to it becoming -- and I'm not saying these people, but we have been told by some that they don't want everybody to know what their exact compensation is. I mean it's arithmetic. It's set it out. We try to honour people's wishes.

539 That's what the letter is. We can file it, but it's...

540 MR. McCANN: I guess I'm just trying to make clear in my own mind what constitutes the agreement, from Union's point of view, that would, in this instance, preclude access to section 38(2) and (3)? What's the totality of --

541 MR. SULMAN: You have the section 38 order; you then have to make an offer of compensation, fair -- just and equitable compensation, prior to first injection. That offer is done through a letter in which the offer is contained, and the parties then accept the offer by accepting the cheques. If they reject the offer, they'll send -- they won't take the cheques or they'll send a letter saying, I reject your offer. And they have continued to be paid since 1999.

542 MS. SPOEL: So in this case your position is that they -- that offer you've been referring to is the reason why they're precluded from having applicant status in this case, not the 1969 agreement.

543 MR. SULMAN: No. The 1969 agreement is the base agreement, the original -- it is the agreement of lease that gives Union the right to -- by contract, I've got to make that clear, by contract, enter on the lands and store. They don't need these contracts, by the way. They could do it by Board order.

544 MS. SPOEL: I understand that.

545 MR. SULMAN: But in '69 it was different, so that's the base. Then there's the unit operating agreement, and then, because there is no amending agreement in place that sets out an amount, they make the offer letter under section 38.

546 As I said earlier, there's two, and I think in our evidence it's said that there's two approaches to this: There's contractual -- everything comes under section 38. You have an agreement, and that's the contractual portion, and we still have contracts here. But you also have to fall under section 38; that's the offer under section 38. That in itself, on acceptance, is also an agreement.

547 And that's our position on this one, and I speak at it a bit lengthy because Robinson, which follows, will be the same.

548 MS. SPOEL: And is it your position -- if you have this contract, the 1969 contract which has no amending -- I think I just heard you say that there's no amendment possible to that agreement, why would you send out that offer that you've just referred to? Presumably you're not required to do so under section 38, if they've already got an agreement. Or is it something new?

549 MR. SULMAN: No. It's a little more complicated, but I will explain my understanding of it.

550 At the Booth Creek hearing, under oath, witnesses gave the Board their assurance and undertaking that they would make an offer to the Booth Creek landowners, pursuant to section 38 of the *Act*.

551 MS. SPOEL: But that -- am I correct in saying -- your position this morning was that if they had an agreement there was no jurisdiction of the Board to order that kind of compensation -- a change in the compensation, that it was out -- in effect, it was outside our jurisdiction. So would that -- and I haven't read the Booth Creek decision and I don't want to get into what the Board did or didn't do. But strictly speaking, from a legal point of view, would you then say that this was not something

that the Board could order you to do in the case of the Sandersons because they already had an agreement that didn't allow for -- to be reviewed under section 38?

552 I mean, just looking at the way you argued it this morning, this is why I'm confused, you're referring to this offer as being the section 38 offer, but I think your argument was this morning that in fact there was no place for a section 38 offer in a case like this where there was an existing agreement.

553 I'm sorry, I shouldn't have said a section 38 offer, I should have said a section 38 order relating to compensation. Obviously you can voluntarily offer any time you want.

554 MR. SULMAN: That's what this was. There's not an order in the Booth Creek Pool hearing that we make this offer, I don't believe. This was an offer that we made under section 38 to reach agreement, as it's defined under section 38. If you don't accept the offer, then you don't have agreement.

555 MS. SPOEL: Then in this case your position, I think, is that there is still an agreement; it's the 1969 agreement.

556 MR. SULMAN: The right to store -- enter on, store and inject, subject to designation, is in the 1969 agreement, that's correct. And what we have done -- drill wells, storage, all those items are in that agreement. What we have done, then, is try to reach agreement, as defined in section 38, and that's what's been done by the offer of first compensation.

557 MS. SPOEL: And was that offer accepted?

558 MR. SULMAN: Yes. That's our position, that designation occurs -- well, 1969 is the date of the lease. Designation occurs 30 years later. And as we said, the gas storage business evolved somewhat from then.

559 The offer is then made after designation, before first injection. And you'll find that that's the -- the procedure that's been followed in several of these matters. They aren't all before you because they're accepted, they aren't seeking standing.

560 But these -- in this particular case, there's an offer letter, which I'd be glad to provide, but that's the procedure, the time-honoured procedure. And there's been acceptance and the payments have continued -- have started that way and continued. That's the same situation in Robinson.

561 MS. SPOEL: Thank you.

562 MR. SULMAN: Had they not accepted, it might be a different situation. But I don't want to speculate on that. They did accept and there is agreement under the *Act*.

563 MS. SPOEL: Thank you.

564 Mr. Vogel.

565 MR. VOGEL: I'm not sure what I'm responding to at the moment.

566 MR. McCANN: I think it's back to Mr. Sulman for the next person in this pool.

567 MR. SULMAN: Right. That was just my response to a question that was asked.

568 Well, the next one is Robinson and I won't do all that again. It's the similar situation. An offer letter was made on June 7th, 1999, after designation. It is the same 1969 vintage agreement. This one, in fact, is 1968, the year before. It's found at tab 5 of our document brief.

569 Wayne Gordon Russell Robinson accepted that offer of first compensation; there is therefore agreement under section 38(2) of the *Act*. He did this in June of 1999 and he's been paid from that date forward. And so our position is that, having accepted and having had agreement under section 38, Mr. Robinson should have no standing at this hearing.

570 MS. SPOEL: Thank you.

571 Mr. Vogel.

572 MR. VOGEL: I think I have already referred you to tab N with respect to Mr. Robinson. There is no agreement that Union relies on that provides reviewability, equivalence. Mr. Robinson was treated as a member of the joint bargaining unit, participated in the negotiations, and should be entitled to participate here. He has a substantial interest in the outcome, if that's going to determine what he's paid. And on all of those bases he should be granted standing.

573 MR. SULMAN: Okay. Now we go to the Knox Dawn Knox Dawn Presbyterian Church. It's in Dawn Pool 156, Dawn 156.

574 I'm going to --

575 MR. SULMAN: The Clubbs? Sorry.

576 MS. SPOEL: No. Under Dawn 47-49, did I forget to delete Pete and Wilf Allaer, where it says "challenged"?

577 MR. SULMAN: The Allaers? I addressed those in the preliminary matters.

578 MS. SPOEL: Sorry.

MR. SULMAN: They were the --

MS. SPOEL: My mistake. I didn't cross it off on this chart.

MR. SULMAN: Okay. The Dawn 156 Pool. We have objected to Peter Club et al, but that's only a roadway agreement and we'll get back to those later.

In the Dawn 156 Pool, the next one I'm going to address, I think the only other one is Knox Dawn Presbyterian Church. Now, again, maybe the best way for me to do this, this is a little unique, maybe if I can walk you through -- I will point you to where the documents are, but I will try, without necessarily referring to them, to walk you through what the situation is here.

They are found at tab 6 of our materials, and you'll find, and I don't want to go into this in great detail, but these are not previously filed because -- I'll explain why in a moment, but they are not previously filed, the documents I'm going to refer to. There's an abstract of title, which wouldn't be much necessity to file it except to explain what's gone on, and some other microfiched documents. But maybe the easy way is for me to do this:

I gave a little history of Lambton County at the beginning, and it was in fact the Canada Land Company, and I can't remember whether it was Tiger Dunlop or who it was, got the Canada Land Company grant from the Crown to come over here and develop land and place immigrants from the United Kingdom on these lands. But that's how far back this goes; it goes back prior to Canada, prior to Confederation.

So the Crown, in 1846, granted the lands, in fact a large tract of land but the Knox Presbyterian Church, where it's located, is now part of that land. In 1846, I don't know whether it was Her Majesty or His Majesty at that time granted the Canada Land Company --

MS. SPOEL: Her, I think.

MR. SULMAN: Her. Was that Queen Victoria at that time?

MS. SPOEL: Yes.

MR. SULMAN: Okay. Very good.

So the Canada Land Company then granted --

MR. VOGEL: She would not take well to "His Majesty".

MR. SULMAN: She would not be amused.

593 The Canada Land Company then granted the land to the first purchaser named -- I don't know whether this is a Mr. or Mrs., but Ledgan, or maybe back in those times it was probably Mr. But the mineral rights were reserved to Canada lands -- the Canada Land Company. So the Canada Land Company granted the estate to Ledgan in 1846 but reserved unto itself the mineral rights.

594 Then there are several transactions that occur, and that is shown on the abstract of title that I've left you. In fact, it is Thomas Ledgan. So he acquired the land for it looks like 2,000 -- $200 or 200 pounds. And numerous owners conveyed the land and finally it ends up with Mr. Wilson in 1903.

595 Mr. Wilson acquires the lands in 1903 and the mineral rights at that point are still with the Canada Lands Company, of course, because they reserved the mineral rights.

596 Wilson then sells a corner of the lot to the Knox Presbyterian Church in 1915. In doing so, the mineral rights are still with the Canada Land Company. You can only sell what you possess, and Wilson doesn't possess the mineral rights. In 1919, the Canada Lands Company releases the mineral rights back to the Crown, by then the King. But in any event, in 1928, the Crown sells the mineral rights to Wilson. So now Wilson does have the mineral rights but the church, who had acquired the lands 13 years earlier, doesn't have the mineral rights.

597 So then Wilson -- by 1928 Wilson conveys to Winder, and I believe the storage rights that we now face -- and the lands surrounding the church are still held by Winder, but the church doesn't have any mineral rights.

598 Now, the issue, then, really is between Winder and the church, not the church and Union Gas, because the church simply doesn't have the mineral rights, if we follow the title. It is not the largest transaction that will ever be before you; I think the annual payments are $17, because it's a very, very small portion of land. But it's here. Everybody -- everybody has a fair opportunity at this point to come forward. And we have to address the abstract of title in the way it flows through.

599 So that's where we are, and that's why we say, Nothing personal, Knox Presbyterian Church, but since you don't have -- in that bundle of rights I spoke about at the beginning, you just didn't get the mineral rights, and that's how it goes.

600 I hope you don't want me to walk you through the microfiche and the -- I think the abstract title, although it's so ancient that it's -- it's very well handwritten, but it is handwritten, with a whole series of cross-outs. It eventually gets you to the point that I've tried to lead you through.

601 MS. SPOEL: Thank you.

602 Mr. Vogel, is the Knox Presbyterian Church one of your clients?

603 MR. VOGEL: Yes, it is. And the compensation today may be $17 a year, but they, with other LCSA landowners, are looking for just and equitable compensation.

604 And if I -- I'm not going to take you through all these documents, but I think you do have to look at them. You'll find a better copy, actually, of the deed to the church at tab W in the reply evidence.

605 Tab W is where Wilson conveys a portion of his property to the church. If you look at page 2 of that document, it's clear that what he is conveying there is a fee simple interest, and you'll see that it's free from all encumbrances. That's what he purports to convey - a full fee simple interest in that portion of his property, "free from all encumbrances," it says. And that's what the church acquires in 1915.

606 If you then turn back to Union's documents and take a look at what was quit-claimed to Wilson later. This is -- these pages aren't numbered so you'll have to bear with me here.

607 After the abstract of title, you'll find a copy of that conveyance we were just looking at. Then what you'll find, the next document there is the Canada Company's quit-claim of its interest in the mineral rights to the Crown. And then the next document is a document I'm taking you to which is the quit-claim from the Crown to Wilson.

608 If you have that, at the top it says "(Signed) W.D. Ross, Province of Ontario, George the Fifth," et cetera, and it refers, "WHEREAS by Indenture dated the 1st day of October 1919, the Canada Company did release and quit-claim..." Have you got that?

609 MS. SPOEL: Yes.

610 MR. VOGEL: Okay. If you look, then, in the second paragraph, it says, "AND WHEREAS Frank Wilson has proven his ownership of" the aforementioned lands, blah, blah, blah, we grant and release and quit-claim in those lands the mineral rights.

611 Okay. Well, what's quite clear is that by the time of this quit-claim from the Crown to Wilson, which is 1928, Wilson did not own the property of the Knox Church, because that property had been acquired in 1915. So Wilson can't purport to -- and the Crown couldn't have conveyed to him, and didn't purport to convey to him any more than the mineral rights in the property in which he was capable of proving his ownership, which could not have included the Knox property, the Knox Church property.

612 So what you have, then, is you've got a situation where either the mineral rights remained in the Crown; or if they were, as Union asserts, effectively conveyed to Wilson, he would have received them, subject to the beneficial interest of the church which they obtained as a result of their fee simple acquisition of lands, free from all encumbrances, in 1915.

613 So my submission is that for the purposes of standing on this application, that the church at least has a sufficient interest -- a beneficial interest, if not a legal interest - and may well be a legal interest as well - in the mineral rights. And regardless of who Union has been paying $17 a year to, they should have status on this application.

614 Those are my submissions.

615 MS. SPOEL: Thank you, Mr. Vogel.

616 Mr. Sulman, can we --

617 MR. SULMAN: Move on from that one?

618 MS. SPOEL: -- move on from that one?

619 MR. SULMAN: I was hoping to find the 1866 document for you that shows the reservation. But I --

620 MS. SPOEL: I don't think there's any -- I don't think there's any issue that the minerals were reserved and were later quit-claimed, and so on. We'll deal with how to deal with the church.

621 MR. SULMAN: There's a disagreement that there may be a trust imposed on Mr. Wilson, but that's as between he and the church, not us.

622 The next one, we'll leave Dawn 156. There is another Dawn 1 -- alphabetically, 167, but that is a roadway agreement and we'll come back to that later.

623 Alphabetically, the next pool is Edy's Mills, and that would be William E. and Laura E. McGuire.

624 The documents that we have provided are under tab 7. The McGuires and other Edy's Mills land-owners were parties to gas storage lease agreements with a company known as Ram Petroleums at the time. And they had a gas storage lease with Ram Petroleums. Ram Petroleums sold their interest in the Edy's Mills Pool to Union Gas, I should say assigned the leases -- sold their interest and assigned the leases to Union Gas. And subsequent to that the pool was designated and went into storage operation.

625 There are a couple of issues arising out of this matter. There is a gas storage lease in place, a lease agreement, dated 11th October 1989, between Laura and Bill McGuire and Ram Petroleums. And there is no amending agreement in place. The contractual right to payment that the McGuires have are under this agreement.

626 There is an issue, I believe, raised by my friend with regard to certain matters on the McGuires, and I'll have to -- I should address that right up front.

627 I believe it's page 9 -- page 10. It says that -- page 10, paragraph C, there's a couple issues.

"Edy's Mills landowners do not now receive and have never received storage operation royalties under the provisions in their leases."

I believe that is directed with regard to Union, they haven't received any storage operation royalties from Union. And there is an interesting -- because, as I said, these documents come from different companies, they have different provisions in them. Ram Petroleums -- because people can contract, have freedom to contract, and can make what deals they want.

On page -- this one is a little different, quite a bit different. I've got you to tab 7. You see the document general is the first page in, and then you go to the gas storage lease. If you turn into seven pages at the top, it has 7 marked on it, that's seven pages under this tab, at the bottom of it in the original document is page 6.

This is the provision in the gas storage lease that the McGuires have in the Edy's Mills Pool that provides for payment of storage operation royalties, which is something unique to the Ram document. And it reads, and that would be at 19(c):

"In the event that Ram delegates, assigns or conveys to any of the powers, privileges, rights or interests conveyed by this agreement, Ram shall pay to the Lessors, within thirty (30) days of receipt by Ram, their proportionate share, as set out in schedule 'B'" - which is somewhere attached, I hope; perhaps not because it's maybe private - "of 10% of the consideration received or receivable by Ram," which -- my understanding from the hearing, and having been counsel at the hearing, that was done by Ram. They paid out to -- out to the landowners on the delegation, sale, assignment to Union.

Then it goes on to say:

"Subclauses 19(A) and 19(B)," which are the provisions for a royalty, are no longer applicable, "will not be binding on the aforesaid third party while the delegation, assignment or conveyance remains in effect."

So the question my friend raises on the -- in his evidence, prefiled, on McGuires, saying that royalty has not been paid, that's true; it has not been paid in accordance with the contract. Ram contracted to do -- to make a payment. They made a lump sum payment on the conveyance. But royalty, under 19(A), which reads:

"In addition --" before we go on and find out what the payments are on a rental basis, having walked through all that, but that's what proceeds in the gas storage lease. Then 19(a) is an additional payment to these landowners in Edy's Mills Pool, 19(A), at the top of page 7.

"In addition, the Lessee agrees to pay the Lessor the Lessor's share, as set out in Schedule 'B' of 10% of the Earnings from storage operations under said lands. Earnings are to be calculated on a yearly basis and payment to the Lessor is to be made no later than 90 days after the end of the year. The

date of this Agreement is the first day of the year for the purpose of this subclause. Earnings are defined in subclause 19(B). This subclause does not apply to gas purchased under Clause 16."

638 Well, that's clear. And then it defines what earnings are, the gross proceeds from the sale of gas less the amount paid.

639 But that is the royalty clause that my friend says Union didn't pay, and we agree with that, it hasn't been paid. But it hasn't been paid because the contract provides that when Ram conveys it, that clause is not binding on a third party. And Ram paid a lump sum out to the landowners on conveyance. So he's quite right, that has not been paid.

640 MS. SPOEL: So has there been some other -- now, since that's not binding, as the contract says, it's not binding on a third party. Has Union, being the third party, made some other arrangement with these applicants?

641 MR. SULMAN: Oh, yes, they've paid annual rentals. That's what I -- at the outset I said there's a lease agreement. They are paid annual rental in accordance with the lease agreement. There's no other amending agreement. I'm just saying, to bring you up to date, other -- some other agreements have amending. This one doesn't. This one has that unique clause that is a royalty payment unique to Ram.

642 But when there's a complaint that Union hasn't paid it, that's quite true. But there's a reason; it's contractual and doesn't apply to Union.

643 The other issue that my friend raises on page 10, at (d) that:

644 "Prior to the designation and injection of the Edy's Mills Pool, landowners received significant oil production royalties pursuant to the provisions of their P&NG leases."

645 And after designation they haven't received it. I think he's referring to Union evidence, and the implication I get is that they should be receiving it and somehow because of Union they haven't. I'll let him explain that himself, but I will give you the answer because I don't have reply on this, is that that's correct. But Union doesn't hold the oil leases. They're still entitled to oil production; Union isn't preventing it. The oil leases are held by -- I'll explain it a little.

646 There is a sublease from Union -- because Union wasn't in the oil business by 1989, and they -- when they purchased the Edy's Mills Pools from Ram Petroleums, Ram still continued in the oil business, petroleums. And Union then sublet back to Ram all the rights to extract oil, crude oil, so that remained with Ram. And when my friend says that these people have not got revenues from oil, that may be true. But, once again, it's not a Union Gas issue, it's a Ram Petroleums issue.

647 And I have, for purposes of understanding that, and I don't want to do it twice, but under tab 8 -- I did attach it both times. But under tab 8, and it's found further at 8.3 - it's rather a thick document,

from 8.3 to 9 - that is a sublease agreement and it applies both to the McGuire property and to the Snopko property that we'll get to in a minute.

648 And what it provides for is that Ram Petroleums can produce oil on that site. And when they do, or if they do, then the McGuires and Snopkos anybody who's subject to -- has an agreement with them, and anyone who is named in schedule A, may have an opportunity to get oil revenues. But it doesn't come from Union Gas and we haven't cut them off.

649 And to be accurate, Ram Petroleums either doesn't exist any longer or doesn't hold this property. They have conveyed it to a company called Torque, T-o-r-q-u-e, and I don't know whether it's Inc., Limited, Development, I don't know what it is. But anyway, that is to address the question that my friend asks or raises on oil. We just don't have anything to do with it. It's not the proper subject matter of this proceeding. Certainly not for standing and not for -- ultimately I'll leave that in your capable hands.

650 MS. SPOEL: Thank you, Mr. Sulman, I appreciate that history there.

651 Is there anything else on this particular applicant, McGuires, or can I turn it over to Mr. Vogel?

652 MR. SULMAN: Only that the payments that are to be received are based on the Ram -- the formula -- based on the Ram lease.

653 MS. SPOEL: Thank you. So the successors in title, I guess, on this --

654 MR. SULMAN: The successors in title on this one.

655 MS. SPOEL: Thank you.

656 Mr. Vogel.

657 MR. VOGEL: Again to save time, Madam Chair, if I can refer you to tab N. And this is now on the second page of tab N. You'll see again a group there, William and Laura McGuire, Colin McMurphy, and Marie Snopko. I'll make my submissions with respect to those three because they're all identical, with an additional consideration with respect to Marie Snopko. So I think perhaps, in the interests of time, the best way of dealing with them is as a group.

658 In the agreements, what you'll see in the Edy's Mills Pools, in the agreements that Mr. Sulman has referred you to with respect to these landowners, again you have no express provision which would preclude an application to the Board. There's no such provision in those lease documents or amending agreements.

659 What is interesting about the Edy's Mills Pools, as Mr. Sulman has pointed out to you, is that these leases -- sorry, these gas storage agreements in -- gas storage lease agreements in Edy's Mills do expressly provide for both a fixed storage payment and for the royalty participation in storage operations that Mr. Sulman has pointed out to you in paragraph 19(A) of the McGuire agreement, at a rate of 10 percent.

660 Mr. Sulman's correct that the -- those royalty payments were suspended during the period of this assignment pursuant to the provisions in the lease. But what's interesting about this is that this is precisely the structure of compensation that is the subject of this application that has been brought to you by the LCSA applicants.

661 The LCSA applicants are applying for just and equitable compensation, which would include a fixed payment and a royalty payment. And my submission to you is that for the Edy's Mills landowners to ever obtain just and equitable compensation on that structure that their lease permits, the only way that that's ever going to happen is upon a review by the Board and a determination of just and equitable compensation for those landowners.

662 With respect to the position of the Edy's Mills landowners, it's dealt with in the reply at paragraph 10. And I'm not going to go through all of this in detail with you. But if you turn, in the reply evidence, to tab A, again which was Union's invitation to its landowners to negotiate as a joint bargaining unit, you'll see specifically included in the schedule which is attached to that letter, that that invitation included the Edy's Mills landowners. That's at the third page of that document, under tab A.

663 It specifically includes the Edy's Mills landowners. They were invited to negotiate as part of this joint bargaining unit. And, again -- which took place under the provisions of that 1990 amending agreement which provided for the arbitration before the Board.

664 So my submission to you is that upon the failure of the negotiations, they, as the other landowners who participated in those negotiations, should have the right to come before this Board.

665 What's -- I don't think I have to -- with respect to the situation concerning Snopko, you'll find excerpted under paragraph 10(b) in the reply evidence the paragraph that comes out of the Snopko lease that provides specifically for renegotiation of well payments.

666 "Pending agreement or determination by the Ontario Energy Board, payments shall continue at the then current rate."

667 So it specifically provides for arbitration by the Board in that lease of the well compensation payment. Again, that excerpt is contained at paragraph 10(b).

668 The relevance with respect to what's dealt with in 10(d) that Mr. Sulman referred to, the cessation of well production royalties, if it comes down a question of equities here in interpreting what the

statutory rights are of these landowners, these landowners in the Edy's Mills Pool have a lease which provides for royalty participation in storage operations that they never received. They're assured, and the excerpt from the evidence on the designation hearing is contained at tab D, they're assured during the course of that hearing that the dual use, that is, production and storage of the pool, will continue to produce both gas and oil.

669 The evidence of Union led at that hearing was that delta pressured in the pool would, in fact, enhance oil production; and that if there were going to be damage issues arising from that after designation, that those would be capable of being dealt with under the former section 22, now section 38 of the *Act*.

670 Three weeks after designation, oil production ceases, and the related royalties. So those landowners, not only don't they get their storage royalties, they also are done out of their production royalties. And whether that's Union's responsibility or not, in terms of equities and the right of these landowners to come before this Board to have just and equitable compensation determined, in my submission, they not being party to an agreement which expressly excludes that right, they should have that right.

671 And those are my submissions with respect to Edy's Mills.

672 MS. SPOEL: Thank you, Mr. Vogel.

673 Mr. Sulman, what I'd like -- I thought we'd take a break shortly. But I'd like, if I could, to get through the storage -- there's only a few left, I think, of the storage issues. Or are they lengthy?

674 MR. SULMAN: I think we're halfway through. But if you'd like, we could stop after -- I haven't spoken at all to Edy's Mills yet, I have only spoken to McGuire.

675 MS. SPOEL: I understand that.

676 MR. SULMAN: We could finish Edy's Mills if that would be --

677 MS. SPOEL: That would be helpful.

678 MR. SULMAN: I will be brief on one of them, McMurphy, which is Edy's Mills, Colin McMurphy. His situation is the same as McGuire, so I need make no further submissions on that. I've explained that one.

679 But Snopko is a little more complicated. And where shall I start? Snopko is the same as McGuire and McMurphy with regard to storage compensation, but there are other issues. Snopko has that same agreement with regard to oil production, and I want to agree with my friend on the question of what was said at the Edy's Mills Pool -- he's extracted it for you.

680 And I believe it was -- it was probably -- I'm not sure who it was that was counsel at the time. But someone asking the witnesses, the Union Gas witnesses -- in fact, we're probably in the same -- we were in the Sarnia Holiday Inn at the time, and I know I was counsel to Union Gas. And they asked:

681 "Q. Well, perhaps then from your perspective as a geologist," they were asking Mr. Egden, who was the geologist on the panel, "are you comfortable that the dual use of this pool is safe and efficient? Can it be done that it continues to produce both gas and oil?"

682 And Mr. Egden's answer is:

683 "A. I think that I have no reservations at all about gas and oil production or storage operations in the same pool."

684 And Mr. Faye has said:

685 "Q. No, when the pool is pressured and delta pressured, will the increased pressure assist, enhance the rate of oil production?"

686 And we still say the same thing today. There's no argument on that issue. My friend has put it in there, but every once in awhile I'll confirm we agree on something.

687 But that's not the issue. We don't have -- equities or no equities, we don't have any control over that. That oil production may have ceased, but it was not Union's oil production. And we had no play in it at all and, as you can see, we still take the same position. It can continue today, could have continued then. But that's totally within the control of Ram Petroleums. And it's not that it wasn't an awareness of the Ram Petroleums involvement. In fact, Mrs. Snopko's agreement was with the former predecessor -- title to grants was in fact with Ram Petroleums. So that's not something that's within our control.

688 Roadways are an issue with Mrs. Snopko, and I'll deal with those when we get to that.

689 Wells. I think we're in agreement on that. I think we've got a couple of agreements. The well -- the way the well agreements work, and that is found in our tab 9, there are several documents in tab 9 but it's the last document just before document -- before tab 10. It's an amendment -- it's an amending agreement.

690 This is one of the more modern amending agreements with regard to certain issues. And this deals with roadways and pipelines, damages for the 1993 operations. And then you get to -- we're on page -- the second page of the amendment of gas storage lease agreement.

691 At the bottom it deals with future surface occupation compensation, which is another way of saying wells. You turn the page and you'll find that there's a payment, and then under (b) it says, "for each well on the Lessor's land, the sum of $400.00 per annum."

692 And that was negotiated, new well payments were negotiated in '94. But it says:

693 "If no agreement is reached, either party may make application under Section 21 of the *Ontario Energy Board Act* for determination of the amount of compensation for the well heads. Pending agreement or determination by the Ontario Energy Board payments shall continue at the current rate."

694 And that's what's happened from that date forward. There is no agreement on the new well payment subsequent. So we agree that because it's contractual, because there is a provision in the contract to come to the Ontario Energy Board, we agree that in fact with regard to the issue of well payments, Mrs. Snopko has a right to be -- Mr. and Mrs. Snopko, Marie Katherine and John Snopko, have a right to come before this Board on the -- and have standing on the issue of well payments and, our position is, well payments only.

695 MS. SPOEL: Thank you.

696 MR. SULMAN: I note that I signed this agreement, so it must be okay. In a much former life, it appears.

697 That, I believe, is all we have on Snopko until we get to the roadways. But with regard to storage payments, our argument is identical to that of McMurphy and McGuire in Edy's Mills.

698 MS. SPOEL: Thank you, Mr. Sulman.

699 Do you have anything more to add on these particular applicants, Mr. Vogel?

700 MR. VOGEL: No, I don't. I think I made my submissions. I will be making submissions with respect to Marie Snopko in the roadway agreement in response to submissions we have still to hear from Mr. Sulman.

701 MS. SPOEL: I think, in going through my copy of the chart, Mr. Sulman, that you've provided, table 1, it appears that the remaining issues all deal with Bluewater, Oil City, and Mandaumin Pools, the Century Pools; is that correct?

702 MR. SULMAN: That's correct.

703 MS. SPOEL: And the issues with respect to the storage lease agreements.

MR. SULMAN: That's correct, other than roadway agreements, yes.

MS. SPOEL: Yes. I understand that's a separate issue.

Perhaps this would be a good time to take a short break. I wonder if during the break counsel could discuss perhaps with Mr. McCann how we might get through the rest of this this afternoon. The Board is prepared to sit a little late; however, I don't know if the court reporter is available. My understanding, Mr. Sulman, is that you're not available tomorrow; is that correct?

MR. SULMAN: I apologise for that, but unfortunately --

MS. SPOEL: That's fine. We've made arrangements not to be available tomorrow. In reliance on that, we've made those arrangements. So perhaps you could discuss how we might finish this up, and whether facilities are available and so on.

MR. SULMAN: Might we have just a little longer on the break in order to have that discussion?

MS. SPOEL: Well, a couple extra minutes, perhaps.

MR. SULMAN: That's all I'm saying. Five minutes.

MS. SPOEL: Perhaps the rest of the break could be shortened. We'll resume in slightly over 15 minutes.

--- Recess taken at 3:20 a.m.

--- On resuming at 4:00 p.m.

PROCEDURAL MATTERS:

MS. SPOEL: Thank you. Please be seated.

Mr. McCann, I understand that the parties have discussed a way to proceed with the rest of this.

MR. McCANN: Yes, thank you, Madam Chair. We've had some discussions during the break, and I hope we can present this clearly and it will help us streamline proceedings and get us through this.

First of all, with regard to the rest of today, I think there's an agreement that Mr. Sulman will address the Century Pools II issues, all of those issues first; then Mr. Vogel will reply to all of them. Then we will move on to the roadways issues and Mr. Sulman will present all of the issues, and Mr. Vogel will respond to all of them. That's perhaps a little bit different from what we had contemplated in

the schedule. But I think it may be a little bit faster. We're all starting, I think, to be familiar with the overall context of this.

720 We've also discussed the remainder of the proceedings which would involve argument in summary. Now, I think it's -- we do need to be clear that this whole proceeding today really has been, in effect, argument. We haven't heard evidence today. So we're not quite talking about the usual situation of argument as a means of linking legal considerations to facts that have been proved in evidence.

721 So I think the expectation of the Board, and of everyone here, is that the arguments will be relatively brief and they will only -- they will be summary in nature. They will not deal extensively with matters that have already either been argued today, which will appear in the transcript that will be available shortly, or matters that appear in the evidence that has been filed.

722 So the expectation under which we're all trying to work is that the argument will be brief and therefore hopefully not too time-consuming for counsel, although the comment has been made that sometimes it takes longer to produce shorter argument. But we will try to do shorter argument in a short time.

723 And the schedule that we've agreed to is that Union Gas would file its summary argument, argument in chief I'll call it, by Wednesday, June the 18th, at noon. That's next Wednesday. The reply to that argument by the applicants would be by Friday, the 20th of June, at 5 p.m.

724 Now, I should say that I discussed a schedule and timing with Mrs. Lang which was a little bit different from this. This is a little bit shorter. So I apologise that I wasn't able to discuss the revised schedule, but I'm certainly happy to discuss it with you.

725 So Mrs. Lang, therefore, would also have until Friday, at 5 p.m. to provide -- that is, Friday, June the 20th, at 5 p.m. to provide any further reply that she should like to to Union's argument. And then if there is any reply to the reply, that would be provided by Union by noon on Thursday, the 26th of June.

726 And we didn't discuss this, but I guess if it should prove, after an examination of it, there's no need to -- you can determine that there's no need to reply earlier than that, you might let the Board and the parties know as a courtesy so that we could press on.

727 But that would then complete the argument on this standing phase of the matter and, I think, put the Board in a position, put the panel in a position where it could begin deliberation.

728 So I think that's agreeable to everybody, but I'll give Mr. Sulman and Mr. Vogel an opportunity to comment, if they care to. Thank you.

729 MR. SULMAN: I'm in agreement with the schedule. There's one thing we didn't discuss, and maybe -- that may or may not be helpful. The form of the filing. I was going to say it would be quite easy to

do electronic filing with the Board. Because we have a compressed schedule, we can't very well courier or we will never hit the time lines.

730 MS. SPOEL: I think, from our point of view, if you send it to us by e-mail or fax or whatever, that's just fine.

731 MR. SULMAN: That's what I thought with the Board and with Mr. Vogel. But I wasn't in discussions with Mrs. Lang. Now, I do have a suggestion there also. If we could electronically file or fax, as you say, to her son's law office, that might be easier. I don't know how else we're going to get it there.

732 MS. SPOEL: Perhaps you can discuss this with Mrs. Lang after. I'm sure there's some arrangement that can be made to get the documents to her in a timely fashion.

733 MR. McCANN: I see Mrs. Lang nodding assent, so I'm sure we can work something else.

734 Mr. Vogel, is that okay by your...

735 Now, can I just clarify one thing, Mr. Sulman. When you say "electronic filing", the Board has been working for some time, you know all about that, on electronic regulatory filing. What you mean here is e-mail or -- yes, okay.

736 MR. SULMAN: Not that. I meant e-mail.

737 MR. McCANN: That's fine. That's fine. I've been too immersed in that and I think in a funny way.

738 Mr. Vogel, is that...

739 MR. VOGEL: The schedule is satisfactory, Madam Chair.

740 I would just say that the landowners whom I represent are quite anxious to see this proceeding get on with the substantive issues, and so the more we can expedite our efforts and put you in a position where you can get on with your deliberations, the sooner the better, I would say.

741 MS. SPOEL: Thank you. We appreciate that.

742 MR. McCANN: Could I just have one second, Madam Chair.

743 MR. VOGEL: Madam Chair, while I have the opportunity, I might just ask, as a point of clarification, I assume from the description of the argument that you're not requiring from us detailed transcript references.

744 MS. SPOEL: No, I actually had that discussion with Mr. McCann. As far as we're concerned, this whole day is argument, and we would not expect -- in fact, if it's in the transcript, you've already said it and you don't really need to say it again. Similarly, if it's in your written argument that you prefiled, you don't need to say it again. If there are specific issues you want to highlight, as you might as sort of a summary at the end, we'd be happy to have that. But we do not see this as being some kind of particularly formal thing.

745 We would like to see the sort of argument that you would make orally if you had, you know, an hour over lunch or something to prepare, because we assume you came here today prepared to make all the arguments you were going to make. So we don't want to put you to any additional work, or your clients to any additional expense, in regard to doing written arguments, because I know it's time-consuming and can become a burden. And that's not our intention at all.

746 So if you've said it, you can assume that we heard it, and we'll read it again when we get the transcripts.

747 MR. VOGEL: Thank you, Madam Chair.

748 MR. McCANN: If I can just raise one more matter briefly.

749 It would be helpful, from the Board's point of view, if, when you're filing -- if you could also, in addition to the filing by e-mail, file nine copies with us in paper. Not necessarily, obviously, by the times we discussed today, but at some point thereafter.

750 Mrs. Lang, we can work out something with you.

751 But that would be very helpful, if you could do that. But not necessarily by the times we have set out. As soon as you can conveniently do it after that. Thanks very much.

752 MS. SPOEL: Okay.

753 Mr. Sulman, I think we're back to you to deal with the storage lease compensation issues with respect to the Bluewater, Oil City, and Mandaumin Pools.

754 **ARGUMENT BY MR. SULMAN AND RESPONSE BY MR. VOGEL ON INDIVIDUAL APPLICANTS BY POOL, STORAGE RIGHTS, AND RESIDUAL GAS STANDING; Continued:**

755 MR. SULMAN: Thank you, Madam Chair.

756 There are three pools and I'll start with Bluewater. The first landowner -- there are only two landowners.

757 The first landowners are David and Nancy Hicks. They have sought standing for storage lease agreement and for residual gas. Our position is that there is a storage -- let me get the -- gas storage lease agreement in place. It's found at tab 10 of our documents. And this one is -- in the continuing effort to have different forms, it appears. This one is between David W. Hicks, Nancy Hicks, and CanEnerco Limited, which is no longer in business, as I understand it. And Union is the successor in title to CanEnerco.

758 So the pool went to -- was designated and Union, as is its obligation under the *Act*, sent an offer letter. I'm talking about the offer letter before you. We actually filed the offer letter so you could see what goes on, and that is at tab 10, 10.2, directly behind the affidavit of land transfer tax.

759 But once again we've blocked out the -- blacked out the amounts for -- unfortunately, I think we blacked it out and one of the lines indicates that a certain portion of money was received prior to this date. But I don't know that much turns on that at this point. The letter is dated August 15th, 2000, but prior to that, the Hicks had already received a lump sum amount, and that's in the -- unfortunately in that blacked out line below.

760 I do have the other letter. You don't have to trust me on that. I have the other letter -- another letter that sets that out. But once again it blacks out the amounts. I'm not sure that's real helpful to you.

761 But in understanding what's gone on here, our position is that there's an existing gas storage lease with CanEnerco, now Union. The pool goes to storage. Author letter comes out. Landowners accept the offer of compensation in 2000. Payments are received and continue on that basis for a period of -- well, until now, and continue on a monthly basis.

762 With regard to residual gas, there, in fact, is a provision in the agreement for the purchase of -- once again, we're not going to find the words "residual gas". The residual gas payment is the part that's blocked out on the lower line. That's the lump sum. But it's found in the agreement itself at paragraph 17. Once again it doesn't call it residual gas, but it calls it the "purchase of any petroleums substances to be purchased." And the first petroleums substance is oil and the second is gas. But you know it's residual gas because it's the same theory I talked about before, about it being a proxy for the gas that could be produced. It's paragraph 17.

763 The residual gas is computed as follows: "12.5% of the current market value at the wellhead or pithead of all other petroleum substances commercially recoverable from the demised lands down to a reservoir pressure of 50 pounds p.s.i." and that is the -- once again, we don't see the words "residual gas"; you never well. But that is the amount -- that's what residual gas is.

764 And what has occurred, then, is the offer is then made under clause 18 which follows. I hope our copy -- the 18 doesn't come through real clearly. But the offer is made and the lessor, within 30 days of receipt of the offer, either disputes the amount or they are deemed to have accepted it. And if they dispute the amount, they give notice of dispute and come to the Board under the *Ontario Energy Board Act*.

765 MS. SPOEL: And so your position, Mr. Sulman, on this one is that there's a valid agreement in place that has not expired; is that --

766 MR. SULMAN: A valid agreement in place that's not expired; an offer made and received and accepted. And I will now lump the two together, the Hicks and Shand, both in Bluewater Pool, these are the -- there is found at tab L of the applicants' material, the proposed applicants' material, a notice. It's produced, I believe, by Mr. Vogel's office and it is a -- it's a notice that's one of rejection, just as I spoke about in clause 18. If they don't accept, they send a notice of rejection. There's no particular form. This has been prepared by the landowner's counsel to reject, so you've got some formal notice.

767 These are the only two landowners in the Bluewater Pool who did not sign such a rejection letter, okay? They are the only two we're objecting to because they accepted, they did not reject.

768 MS. SPOEL: So your position is that their agreement is valid because they -- I just want to make sure I have it completely clear -- because you made an offer of compensation to them and they chose not to reject the offer, a negative option kind of thing.

769 MR. SULMAN: Well, they followed the terms of the agreement which says if you don't send a rejection notice, then you're deemed to have accepted.

770 MS. SPOEL: Right. So your view is -- I'm sorry, I'm not trying to make this -- put any qualification on this. I just want to make sure I have it clear. Everybody else specifically rejected the offer and they did not and therefore they have a binding agreement. Is that --

771 MR. SULMAN: That's right. If everybody else rejects the offer --

772 MS. SPOEL: I just want to make sure I understand it.

773 MR. SULMAN: In addition to that, they have received payments under the offer letter --

774 MS. SPOEL: Okay.

775 MR. SULMAN: -- which ties back into the agreement.

776 MS. SPOEL: Yes, thank you.

777 MR. SULMAN: And I realise it's -- as I said at the beginning, there are a lot of different documents and every one of them has something a little different in the wording. But that's the way this one works under the CanEnerco form.

778 MS. SPOEL: Right. Thank you.

779 MR. SULMAN: That's it for both of the two Bluewater Pool landowners. That's -- just so it's clear, that is Hicks and the party here is Shand, Laura Shand. I think originally on title it would be Nagle, but it's subsequently Shand, and that's who the applicant is here.

780 Okay. That's those two. Now we move to Oil City. And once again, alphabetically, the first one I'll address is the estate of Ada Broadbent.

781 Mrs. Broadbent, and this is, once again, a little different again, Mrs. Broadbent has a gas storage lease agreement, and this one is between Mrs. Broadbent and McClure Oil Company. Union has subsequently acquired the interests of McClure Oil. This one is a little different here also.

782 Our position is that they have a storage lease agreement, so an agreement is in place, the contract is there. This agreement has a provision that --

783 MR. McCANN: Where do we find the agreement?

784 MR. SULMAN: I'm sorry, it's tab 12, if I didn't say it earlier. It's document brief tab 12.

785 So it has payments. On page 2 you'll see an addendum. It appears that they have a -- they've negotiated, and that's what it's about, negotiated an additional acreage rental clause that doesn't appear in other agreements, to be paid by now Union, formerly McClure, at a rate of no less than 5 and no more than $13 for each acre of land which, from time to time, may lay in a designated storage area. So they have that other provision they entered into with McClure in 1973.

786 This agreement is -- this actually has a -- because it's 1973, it has a clause that's very specific as to the steps you are to take when the gas goes -- when the gas production area becomes gas storage. And that's found at clause 16. So this one is a little different again.

787 Again, the printing is so small that even with these magnifiers, I'm having trouble reading it. But it says:

788 "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 in the manner hereinafter provided and until it has offered to purchase from the Lessor, as hereinafter provided, the Lessor's interest in such of the gas and oil and related hydrocarbons...contained in the demised lands as are liable on the withdrawal of the gas so injected to be co-mingled indistinguishably therewith as to their respective volumes, or as are liable to be rendered commercially unrecoverable by reason of such injection or the storage operations to be conducted by the Lessor hereunder."

789 That is another phrase that deals with residual gas, how you determine residual gas.

790 So our position is that there is, in fact, a valid lease, not providing for Board-ordered compensation for storage lease agreement. But there is a provision on page 2 that I told you about. Union has met that obligation of paying the amount that's on page 2, which is the not less than 5 and not more than $13.

791 And if you just give me a moment on this one. I'm advised that we're not objecting to this applicant's request for residual gas payment because it hasn't been paid, I guess, is the reason, the very practical reason. And that's on the estate of Ada Broadbent.

792 Oil City. Once again, it's the same situation again with Sterling, who is the next landowner. There is a gas -- and that is found at tab 13, right behind this one. It is the very similar gas storage agreement, but it's with Union Gas, not with McClure. And it doesn't have that $13 provision in it, it just has a $5 provision.

793 This is, once again, a situation where a gas storage lease is in place, an offer letter has been presented, and there's a notice of rejection from the Sterlings. So we take the position that this agreement doesn't provide for any Board-ordered compensation. They are tied to the offer -- we've made an offer and we take the position that they -- since there is a valid agreement, this gas storage agreement is not available for the Sterlings to be seeking additional storage compensation under this storage lease agreement.

794 I don't think there's any other issues on this -- well, once again, this is a residual gas request also. They haven't been paid for residual gas, apparently. And we agree with the standing for payment for residual gas and that will be a determination, as to the amount.

795 Hoffmuellers, also in Oil City. Once again, we agree that they have not been paid residual gas, and again their gas storage agreement does not provide for Board-ordered compensation. And they have been paid. So our position, again, is that they are not -- this is the same as Sterling. I'll address the roadways on each one of those as we come back.

796 Now, Mandaumin, this is where we get into something a little different throughout. The way to do Mandaumin -- in Mandaumin, I think the place to look is under my friend's tab M for Mandaumin, because you'll see there, the agreement that's at tab M for Mandaumin, in effect, is the same form that affects all of Mandaumin, so we can do that one fairly generically, I think. I don't think there's anything much different.

797 So this will affect the Elliots, the Feenstras, Halls, Lambton Wildlife, McCrie, William and Donald Moore, Noorloos, Vokes, and I believe there's a numbered company but I know it's Harris.

798 Now, you'll turn to tab M again and you'll see a document general between -- in this case it's Elliot, but my comments will apply to all those parties.

799 There's an amending agreement and it's a document general, and attached to that you'll see a schedule and then it leads over to a table of contents. And what this is about, you'll see fairly -- as time goes on and evolution occurs, that this is 1998 and this is a very -- one of the more very modern amending agreements. This is a comprehensive amending agreement that deals with many issues.

800 So as you turn through, you're at -- you see the topics in the table of contents. And I won't walk you through all of it, but this deals with all of those issues of residual gas, roadways, storage and payments.

801 So perhaps the best way to really get to the heart of it is to turn to the page numbered at the top 6. And at the top you'll see "New Production Royalties". And what this agreement has is a couple things that are unique.

802 To understand this, though, Madam Chair and Mr. Smith, this is a -- this was arrived at as part of a negotiated agreement between Union Gas and the landowners committee, with the advice of their counsel, Cohen Highley. So as we look through it, you can see that the future payments after designation are set out under clause 7(a) through (d). Residual gas, under clause 10, is set out. You'll see that it is consistent with what I described, I guess several hours ago, as the abandonment pressure of 50 p.s.i.a. as measured downhole. This is a -- being very modern, we've now got the term "residual gas", but that's the same -- if you look back, that's the same concept, same pressure, same payment, same based on mcf, the rate per mcf.

803 It's a little complicated in that it's got an inflationary component found at the top of the next page in terms of bank rate interest and how it's to be dealt with. But our position, therefore, is that this agreement covers all terms. It's an amending agreement. It's -- it complies with section 38. All the Mandaumin Pool landowners who seek to be -- seek standing here should be denied standing on the basis that they have an agreement in place. There's little point in negotiating agreements if they don't -- if they can simply come back after you have a comprehensive agreement, or any agreement.

804 Now, what you have interesting here is clause 20, which is found at page 9. And this one has another favoured-nations clause, as I would define it. It provides for periodic adjustment all right, but it provides:

805 "After designation, the minimum annual compensation rates specified in Clause 7 of this Agreement," and that's the one we looked at earlier, "shall be adjusted for the annual C.P.I. or by the methodology applied by the Lessee in the majority of the other Gas Storage Pools in Lambton County."

806 So these people have a -- that is, with regard to the compensation rates, not for residual gas but for storage compensation rates, so they have a favoured-nations clause; they have an existing gas agreement. They don't have any, in our respectful submission, right to standing here.

807 Now, this is, again, one of these issues where the question is, do they have substantive interest -- although they've got an agreement in place, our position is they have no right to be here as an applicant. Do they have a substantive interest because they have a favoured-nations clause? Our submis-

sion would be that they could be an observer, a different status than applicant. Or in the alternative, if observer doesn't give them the right -- sufficient rights to comment, then at best they could be an intervenor. But certainly not an applicant, because that would then require that the Board, at the end of the day, make an order for compensation for them directly when in fact they have a contractual right for that. And our position is that the Board ought not to interfere with that, going back into Bentpath. In any event, it should not interfere with a valid contract. And this valid contract provides for a favoured-nations clause.

808 So they may have an interest, they may have a substantive interest; all those Mandaumin owners may have that. But not -- they are covered by the favoured-nations clause, and their role ought not to be no more than, in our submission, observer. But should you see fit to give them greater rights, then intervenor would be the right title, not applicant.

809 So that is the Mandaumin Pool owners who -- with regard to storage rights. And the residual gas, I believe I've spoken to that in sufficient detail, and our position is that's dealt with and dealt with by contract.

810 If I can just have a moment before we leave the Mandaumin Pool landowners.

811 My friend may raise this, I don't know, but I guess I'll take that risk right now. The only issue that there may be with regard to residual gas is the issue is dealt with here in contract, it says how to obtain it. The only question that can arise out of residual gas is sometimes -- you've got agreement that the pressure is 50 p.s.i., you've got the rate at 2 cents mcf. Sometimes there's an argument as to, okay, that's fine, but what volume is there?

812 And we have evidence prefiled from Mr. Hessell -- Dr. Hessell, who, in my reading of the evidence, at page 1823, accepts the numbers that Union has presented for the remaining volumes.

813 So to put it all together in a ball, there shouldn't be any issues with residual gas, and there should be no standing for residual gas. So, in our submission, just no outstanding issues.

814 Maybe just if I can for the transcript, my note is that volume 1, tab 2(a)(ii) of the amended application is where you'll find the Hessell evidence. I know it's a bit overkill maybe to do that, but it's helpful on the transcript if we ever get beyond on this.

815 So that really, I think, covers off all the Mandaumin Pool owners, Bluewater and the Oil City. So with that, my friend. And then I'll turn to roadways after that.

816 MS. SPOEL: Thank you.

817 Mrs. Lang, did you --

818

MS. LANG: Excuse me. Mr. Vogel -- I mean Mr. Sulman, could you please confirm for me Union's standing regarding residual gas for Mrs. Lang at the Waubuno Pool. Remember we talked about this briefly. Just one word, do you challenge it or not?

819

MR. SULMAN: Yes, we do. That was the argument earlier. There isn't a column that -- you'll remember I said there wasn't a column that said that. But I said at the outset, yes, we challenge the residual gas.

820

MS. SPOEL: It was our understanding that Union Gas is challenging it. Thank you, Mrs. Lang.

821

MS. LANG: Thank you.

822

MS. SPOEL: Mr. Vogel.

823

MR. VOGEL: Thank you, Madam Chair. In the interests of time, Madam Chair, if I could refer you to tab N of the reply evidence and the chart.

824

Page 2 of the chart, you'll find two groupings of landowners for the Bluewater -- it's on page 2 of the chart at tab N, you'll find a grouping of landowners for the Bluewater Pool, which is David and Nancy Hicks and Laura Shand; and a grouping of landowners for the Oil City Pool, which is the estate of Ada Broadbent, Frederick and Patricia Sterling, and Heinz and Helga Hoffmueller. And in the interests of brevity, I will provide responding submissions with respect to these landowners as follows:

825

My submission to you is that the -- none of the agreements that Union relies on with respect to these landowners contain an express provision which would preclude those landowners from coming to this Board to have a determination of just and equitable compensation.

826

None of those agreements provide for the periodic review and the equivalence with other landowners that are the minimum threshold requirements for just and equitable compensation.

827

So for all of these landowners in the Bluewater and Oil City Pools, my submission to you is, there is not an agreement, for the purposes of section 38, which would preclude this Board from addressing the issue of just and equitable compensation for those landowners.

828

Secondly, with respect to the second principle I outlined this morning, given that this proceeding will determine the compensation these landowners receive in the future, my submission to you is they do have a substantial interest in the outcome of this proceeding and they are proper parties to this proceeding.

829

The third principle that I outlined this morning is also applicable to these landowners because they are Century Pools Phase II landowners, and that is that the Board, in any event, has already directed

that all of the compensation issues with respect to the Century Pools Phase II landowners be heard in the context of this application, and that's our request to you.

830 A couple of other things I'd like to add with respect to these landowners, however, is if you turn to the reply evidence in paragraph 11(h) -- sorry, this will be 11 -- yes, 11(h).

831 There's reference there to an affidavit earlier filed by Union in connection with this application, which was in respect of a motion that was heard by the Board in September of 2000. And there's a quotation from that affidavit contained in paragraph (h) in which Union acknowledges that:

832 "...this is a new designation and an 'agreement' as set out in (section 38) has not been reached."

833 This is an acknowledgement by Union, on an earlier motion in this application, in which they had acknowledged that there was no section 38 agreement with respect to the Century Pools Phase II landowners, Bluewater, Mandaumin, and Oil City Pools.

834 My submission to you is that any agreements that may have been made by Union, or payments that have been made by Union while this application has been pending have all been expressly on a without-prejudice basis; that is, without prejudice to the position that the landowners are asserting on this application.

835 There are two bases for that. One is the form of notice that Mr. Sulman referred you to, which is at tab L, which was delivered by most of the Century Pools Phase II landowners. And you'll see that in that form of notice which was delivered, in addition to the notification of dispute, you'll see in the last part of the notice that the landowners "accepts such payment and provides any documents as may be required by Union Gas in relation thereto without prejudice to the participation of the undersigned upon this application..."

836 So my submission to you is that certainly for the landowners who delivered this notice, any form of agreement or payment that was made from the time this application was pending, which was January 2000, was clearly on a without-prejudice basis. And in addition to that, in any event, there was an agreement with Union that all such payments would be on a without-prejudice basis.

837 There's an exchange of correspondence you'll find at tab S in the reply evidence, and you'll find an exchange of three letters between our office and Union in connection with payments being made by Union while this application has been pending.

838 The first one is dated October the 13th of 2000, in which I confirmed -- if you have that, I confirmed LCSA's position that:

839 "...all such payments and any future payments by Union to LCSA landowners are received by them without prejudice to their rights in the pending s.38 application."

840 And secondly, then, you'll see Union's response there, and basically Union agreed with that position, except that it wanted to ensure that any payments that it did make would be credited against any obligation it might eventually have as a result of this application. And that's set out in their letter there of November the 8th.

841 And concluding, then, with my letter of November the 17th, 2000, in which we confirmed LCSA's agreement on behalf of its members that storage compensation would be set off from amounts that Union may eventually be liable for as a result of this application.

842 So what you have there is an agreement by Union with LCSA and its members that any agreements that are entered into and the payments that are being made by Union pending the result of this application, going back to -- well, any payments that they've made while this application has been pending, are all on a without-prejudice basis.

843 So any agreements that Union may assert now as precluding Century Pools Phase II landowners from participating in this, those are without-prejudice agreements which couldn't affect their entitlement to participate here, and certainly can't affect their standing to participate on this application.

844 The only thing -- I might just mention, while I'm dealing with these landowners, and I assume that there's no dispute about this, the landowner Sterling, in Union's chart in their evidence, in Union's chart in their evidence with respect to -- Sterling is an Oil City landowner. You'll see that under compensation for roadway agreements, Union has indicated in the chart that it's not applicable to the landowner. I'm advised that, in fact, the Sterlings do receive roadway compensation, they're not being challenged, and I assume therefore that that's an error; that, in fact, Union is agreeable to them having status on that issue. But perhaps Union can respond to that in connection with roadways.

845 Those are my submissions with respect to the Bluewater and the Oil City situation.

846 With respect to the Mandaumin landowners, exactly the same arguments that I've just made, I submit, apply to the Mandaumin landowners.

847 Now, Mr. Sulman has referred you to the amending agreement at tab M in the reply evidence, and he pointed out some provision in that agreement for periodic adjustment of rates which is limited to inflation. In my submission to you, an agreement that provides for the periodic adjustment of rates limited to inflation is not the periodic review to determine just and equitable compensation which is being advanced here. These landowners aren't interested in continuing inflation adjustments only. They want just and equitable compensation. As I said before, that would include participation in the profit pools.

848 The position of the Mandaumin landowners is set out in paragraph 12 of the reply evidence. Perhaps the quickest way to do this is, if we just stay at tab M for a moment and you look at paragraphs 6, 7, 8 and 20, you'll see that all of those paragraphs deal with various aspects of compensation, and all of them provide for this annual C.P.I. adjustment, or by methodology applied by the lessee and the majority of other gas storage pools in Lambton County.

849 So my submission is that, again, these landowners do have a substantial interest in the outcome of this proceeding. Their compensation is being determined expressly in accordance with the other methodology applied to other landowners in Lambton County and therefore they should have status.

850 I wanted to address the residual gas compensation issue because there is an additional consideration with respect to these landowners.

851 The situation with respect to residual gas is this: If you turn to paragraph 23 in the amending agreement, which again is at tab M, paragraph 23(a) deals with the effect of this agreement. It says:

852 "The specific terms of this Agreement will serve to alter, adapt or amend the corresponding terms of the" other agreements.

853 So what was specifically addressed and included in the amending agreement is that its effect is to amend only the corresponding terms of the other agreements.

854 And you'll see, referring to paragraph 10, that to the extent this amending agreement deals with residual gas, it is only with respect to amendment of the formula. That's the extent to which there's -- there's an amendment of the formula which is contained in the original lease.

855 And if you -- the original leases in Mandaumin are all similar in form to the lease which was considered by this Board in the Sombra decision, which is included in the reference materials here.

856 If you look at tab 7 in the reference materials, you'll find the decision of the Board from 1995 in Sombra. And so considering an identical lease provision in the Sombra case, I refer you to page 9, paragraph 1.2.4. The Board there is considering an identical clause. So what you have is you've got a paragraph 17(a) which contains the formula, and then paragraph 17 -- maybe I can just find this for you. That clause is reproduced at page 4 of this decision, and it's identical to the ones that we find in the Mandaumin agreement.

857 So if you look at page 4 of this decision, you'll see that paragraphs 17 and 18 are set out. Those paragraphs are the same -- that's the same paragraphs , same numbers as you'll find in the Mandaumin leases.

858 What you can see in paragraph 17 is there's a subparagraph (a) which says that the purchase price shall be calculated on the basis of this formula, and then there's sub (i) and sub (ii), and then it says, "or (b) in the manner hereinafter provided," and then it goes on in paragraph 18 to say that if the landowner doesn't accept the formula valuation of residual gas, then they have the entitlement under paragraph 18 to apply to the Board.

859 So that's -- and dealing with that clause, which, as I say, is identical to the Mandaumin clause, paragraph 1.2.4, on page 9 of the decision:

860 "The Board concludes that the word 'or' in the context of Clause 17 of the Gas Storage Lease Agreements should be given its ordinary meaning and interpreted disjunctively."

861 And so over the page:

862 "...the purchase price can either be computed pursuant to the provisions of sub-Clause 17(a) or Clause 18."

863 "Clause 18 then provides that the Lessor may dispute 'the purchase price or the additional acreage rental or both," et cetera.

864 So you've got exactly the same clauses as the Mandaumin agreement. In my submission, the end result of all this is you've got an amending agreement which, by its express terms, only amends the corresponding term of the lease, which is 17(a), the formula calculation. So you've got an amending agreement that amends only the formula, it doesn't amend or otherwise affect or prejudice the right of the landowners, under 17(b) and 18, to apply to this Board for a determination of their residual gas compensation rates.

865 So my submission with respect to the entitlement of Mandaumin landowners to bring that issue to this Board is on the basis of the interpretation of exactly that clause in the Sombra decision, where the Board held it was disjunctive; and if they don't accept the compensation formula as it was amended under the amending agreement, those Mandaumin landowners are entitled to come here under the disjunctive provision of 17(b) and 18.

866 Finally, the only other submission I make with respect to the Mandaumin landowners is specifically with respect to the position of the landowner Feenstra. And in the reply evidence at paragraph 16, again, the right of the landowner to participate in this application which is before you today was addressed by the Board in the context of the Century Pools Phase II hearing. And there's an excerpt at -- in the reply evidence at page 19, paragraph 16, starting at the bottom of the page there:

867 "The Board agrees with Union and Board staff that the portion of the lands owned by Mr. Feenstra that have not been included in the proposed DSA are not required..."

868 But the Board went on to say:

869 "The Board notes the comments made by Board staff at the hearing that these lands may qualify as 'outside acreage' and that Mr. Feenstra may be entitled to additional compensation depending on the result of the LCSA Section 38 Application."

870 Well, if Mr. Feenstra isn't before the Board and participating, how can he possibly get the benefit of the additional compensation that the Board contemplated at the time that it made that ruling in Century Pools Phase II?

871 Those are my submissions with respect to Mandaumin.

872 MS. SPOEL: Thank you, Mr. Vogel.

873 Mr. Sulman, I think we're at the stage to talk about roadways.

874 **ARGUMENT BY MR. SULMAN AND RESPONSE BY MR. VOGEL ON ROADWAY COMPENSATION STANDING:**

875 MR. SULMAN: Thank you, Madam Chair.

876 MS. SPOEL: And to the extent, obviously, that you can group them by issue, and keep it as simple for us as possible, it would be most appreciated.

877 MR. SULMAN: Well, I think these are fairly -- some of these are fairly straightforward, so I will go through. I think we start back at Dawn 156.

878 It's as simple as this: If you look at tab R of the applicants' materials, and you see a form of roadway agreement. And I believe, I'm going to make sure I've got all of these in order here, but -- I guess I could go back as far as Booth Creek. The one that's before you here is Sanderson, Booth Creek. And they're all the same -- and these are Sanderson, Clubb; Hardy in Bluewater; Kabbes in Waubuno; and Hoffmueller in Oil City, I believe, are all the same form of lease.

879 And in our view this is relatively straightforward. The roadway agreement is made, in this particular case, effective -- I can't find the exact date, but the date of the signature. And unfortunately the way it's -- you'll soon see what I'm struggling with in a minute. I can see the date of registration. What I can't say is the date of --

880 MS. SPOEL: It appears to be sometime in April 2000, and for our purposes today that's probably close enough.

881 MR. SULMAN: It would be, except for we have to turn to page 2, paragraph 2, where the agreement is entered into in April sometime. But it stays at paragraph 2, page 2, partway down, after you get through the annual rental being fixed at $650, it then says, "and it shall be payable in advance on January 1st of each year, commencing on January 1st, 2000."

882 So my assumption is that this goes back to January 1st, 2000, retroactively, despite the fact it's signed in April.

883 But the key point is:

884 "The amount of the annual rental shall be adjusted prior to the sixth payment, to the then rent per acre being paid for roadway rights in the Booth Creek Pool, and prior to every sixth payment thereafter, the rate per acre under this Agreement, shall be identical to the rate per acre being paid in the Booth Creek Pool."

885 So what's happened is, this is an agreement that goes for a period of 6 years; we're only in year 3 of a 6-year agreement.

886 So with regard to the roadway itself, it is a 6-year agreement and we're only in year 3, so it hasn't expired. There's an agreement in place, is our position. I know there might be some suggestion that, yes, you've got a grant of easement here. But nothing in this grant of easement affects any other rights that you may have under any other agreements that you may have entered into. But as I understand it, the agreement that's entered into by Frank Sanderson is the one I went through with you earlier, hours ago, which was simply a gas -- I'll get the right term because they're all different -- this is an agreement of lease.

887 MS. SPOEL: Well, Mr. Sulman, I'm just trying to keep it as simple as possible because it's easier for us that way.

888 On these -- if Mr. Vogel should happen to make an argument that there's some other basis for it, you will have an opportunity, at least in your written argument, to respond to that. For our purposes right now, can I take it your position with respect to this roadway agreement, and any others that are identical, is that it's the simple case you put forward this morning; that where there is an agreement that has not expired, whether there's a term upon which it can be renegotiated, that if we haven't got to that point in time yet, there is no status for the applicants to reopen it before this Board, or in any other way. Is that --

889 MR. SULMAN: That's exactly right.

890 MS. SPOEL: Thank you.

891 MR. SULMAN: But I'm anticipating that other argument, because I'm going to try to keep my concise when we get to it. But you can see since I don't have reply, it may be a little longer.

892 That is exactly our argument, and that paragraph is exactly what we're relying on. This is an unexpired agreement, as are all the ones I listed for you, Sanderson, Kabbes, et cetera.

893 MS. SPOEL: Right.

894 MR. SULMAN: That's the first category of roadway agreements, but not all the roadway agreements.

895 Then we turn to a couple of other roadway agreements which are -- let me -- Snopko and Donorma Farms. If you give me a moment I'll find those.

896 Donorma Farms is found at tab T of my friend's reply evidence. Again, our position on this is quite straightforward also. This is a full and final release. It is between two willing parties, a farm corporation, Donorma Farms, and Union Gas. The amounts are negotiated, but they're blacked out. And in free negotiations they got whatever they got for the full and final release, and that's fair, that's what negotiation is about.

897 But there is -- if you will read the wordings of it, it is a full and final release, and I won't repeat the whole matter, but it's -- of all claims against -- "including land damages, we may have against Union Gas Limited, its successors, assigns, agents," et cetera, which may be "sustained by us for inconvenience, disturbance and disruption to the overall present and future crops, excluding present crop damage from, stockpiling of soil..." And this is all "in consequence of the location, access, drilling and construction of existing and future, (a) wells; (b) permanent roadways..." And it goes on to deal with pipes and pipeline.

898 It says:

899 "Notwithstanding the foregoing, Donorma Farms reserves its rights to compensation for gas storage rights, petroleum and natural gas rights and annual wellhead payments for the lands..." But that's separate and apart from the roadway damages that have been discussed before.

900 So it's a full and final release. The only things that are excluded are the compensation for gas, storage rights, petroleum and natural gas rights and wellhead payments. Everything else was covered off by the full and final release.

901 Now, in keeping with our theme of documents not all being the same because people have negotiated, this one found at U, tab U, is Mrs. Snopko's. It's very similar but not identical to the Donorma Farms. Let me just pause for a moment to find the exact line that is different.

902 This one is a little different and I will point you to the first paragraph starting with "I, Marie Katherine Snopko..." To that point is certainly is all identical to Mr. -- not Mr., but Donorma Farms Limited. But it reads:

903 "I, Marie Katherine Snopko," and she sets out what she owns, the property that she's referring to, "do myself, my heirs, executors, administrators, agents, assigns and tenants and for anyone claiming by, through, or under me, hereby release forever discharge and waive any and all claims, costs, damages, and compensation of any nature including land damages, excluding tile damage and surface restoration, I may have against Union Gas Limited, its successors, assigns, agents, contractors and employees for any reason which heretofore may have been sustained which occurred to the end of the 1993 calendar year...in consequence of the...permanent roadways," I guess, the topic here. I won't repeat the others.

904 The key here, what she said is, I release you to any damages that may have occurred by the end of calendar 1993 for permanent roadways. Our position is that the roadway was in, completed, and finished by the end of 1993, so this releases for all damages caused by the roadway, but it was already in place.

905 MS. SPOEL: Isn't that a matter of evidence as to whether or not there have been any damages since -- I mean if, and I have no idea what Mrs. Snopko's claim is, but if she were to come to claim that in fact there were damages subsequent to 1993, would she not have the right -- I mean this release would not preclude her from coming to us to say she has not been compensated for those damages should she allege and should we find as a matter of fact that there were -- I'm sorry, I forgot to put my microphone on.

906 If she alleged damages post 1993, I take it, Mr. Sulman, this wouldn't preclude her from having the status to bring that application.

907 MR. SULMAN: That is true insofar as crop damages, for instance, that are not excluded and they have been paid. And these people can come forward on an ongoing basis. They are not foreclosed from coming forward with actual damages that occur. But I think I understand your question. If she were to come forward and say, I have sustained greater damages to the roadway after '93, should she be precluded at this early stage.

908 MS. SPOEL: Correct. We don't have -- you know, you're not in a position to actually give evidence.

909 MR. SULMAN: I'm not.

910 MS. SPOEL: And she may or may not be here, but she's not giving evidence today either. So I'm just wondering, as a matter of status, whether she could be excluded at this stage, given the time-limited nature of her release.

911 MR. SULMAN: Well, I think I've made my comment. I can't go any further than that on it at this point.

912 MS. SPOEL: Thank you.

913 MR. SULMAN: Okay. Those are all the roadway agreements that are entered into.

914 MS. SPOEL: Okay, Mr. Vogel, roadways.

915 MR. VOGEL: Yes, Madam Chair.

916 Again, I refer you to tab N, which sets out the position of the LCSA applicants with respect to the two different types of roadway agreements.

917 Let me try and deal with this fairly summarily. The first group, or the first type of roadway agreements that Mr. Sulman has referred you to and on which Union relies to deny these landowners the opportunity to come before the Board to have their compensation reviewed is at tab R in the reply evidence.

918 And my submission to you is brief. It is that there is nothing in this agreement which would preclude -- which expressly precludes the landowner from coming to the Board, and from the Board considering the issue, of just and equitable compensation for roadways.

919 The form of agreement Union relies on does not provide for periodic review, either by negotiation or by the Board, it does not provide for equivalent compensation to these landowners through the term of the agreement and therefore, in my submission, it doesn't meet the minimum threshold requirements for section 38 agreement and therefore does not constitute the section 38 agreement. And the Board would not be precluded, on the basis of this agreement, from considering the issue of just and equitable compensation for roadways for these landowners.

920 Secondly, these landowners have a -- since, as Mr. Sulman pointed out to you in paragraph 2, it does provide for compensation adjustment at 6-year intervals identical to the rate then being paid in the Booth Creek Pool, so it does provide for these landowners to eventually have their compensation be determined by what's paid to other landowners, that gives them a substantial interest in this proceeding; therefore, in my submission, they are properly party to it and they should be permitted to participate.

921 More than that, however, I would like to submit to you that all of the agreements with all of these landowners, this first form of agreement with all of these landowners was entered into in the period between 2000 and 2002. And my submission is that's covered by the without-prejudice agreement with Union, which I've already reviewed with you under tab S, and that accordingly any payments made or agreements entered into with these landowners were on a without-prejudice basis and cannot affect their standing to participate in this hearing.

922 Further, with respect to this form of agreement, if you look at tab 9 -- sorry, section 9 in the agreement, what it says is:

923 "Nothing in this grant of easement or anything herein contained or anything done hereunder shall affect or prejudice either the Transferor's or the Transferee's rights and privileges which may exist as a result of any other agreements, contracts or arrangements between them or their predecessors in title."

924 That would obviously cover the without-prejudice agreement that I've submitted to you. But it is also with respect to Clubb and Kabbes, K-a-b-b-e-s. Both of those landowners were parties to the 1990 amending agreement that Union acknowledges contains a provision entitling the landowners to come to this Board.

925 So in my submission, it is not available to Union to rely on this agreement as precluding their right to apply to the Board because this agreement is expressly, in paragraph 9, without prejudice to the 1990 amending agreement that both those landowners had with Union.

926 With respect to the second form of agreement Union relies on in its challenge of landowner status on roadway payments, as you've noted, Madam Chair, this is in the form of a full and final release. And if we read what it says, this release -- and I'm referring now to this form of release at tab T in the reply evidence. It releases compensation for inconvenience, disturbance and disruption to the overall present and future crops, excluding present crop damage, et cetera, okay, so it's a limited form of release, okay? It's limited to compensation for inconvenience, disturbance and disruption to crops in consequence of the roadway construction. It does not address, for example, the land value component of roadway compensation.

927 And the claim which is being advanced in the amended application here is that it's for roadway compensation which consists of land rights, disturbance and crop loss. And the land rights component claimed in the amended is $15,000 per facility, so $15,000 for a roadway. That is not addressed in this form of release, okay? This release is expressly, by its terms, limited to the inconvenience, disturbance and disruption to crops.

928 I'd just very briefly refer you to the authorities again in respect of the proposition which I think is probably trite, that releases have to be construed strictly in accordance with their terms.

929 And if you look in the book of authorities at tab 8, there's a case there, a Supreme Court of Ontario case called Cloutier Brothers and Kenogami Lake Lumber Limited. And the proposition that I submit to you is a trite principle of law and it appears at paragraph 27, which the court in that case says:

930 "I am cognizant of those authorities in support of a proposition that a release or a hold-harmless agreement or indemnity agreement will be interpreted strictly and adversely to the beneficiary thereof."

931 So my submission here is, again, that that release must be interpreted strictly, according to its terms. It doesn't apply to, certainly, a significant portion of the claim with respect to roadway compensation which is being advanced on behalf of these landowners; and that that form of roadway agreement should not preclude those landowners coming before the Board. There's no express provision in it which would prevent them from doing so. And it doesn't, again, meet the minimum requirements for just and equitable compensation; no reviewability, no equivalence.

932 You've already addressed the issue with respect to the Snopko release at tab U, which only goes to 1993. And, Madam Chair, in addition to the fact that whether there have been damages beyond that being a matter of evidence, I do submit to you this: That the damages which are caused by roadways and for which landowners should be entitled to just and equitable compensation isn't limited to the crop loss. And as I've just submitted to you, the claim being advanced here is that there's a land rights component, an increasingly valuable land rights component, and various aspects of disturbance which are not included in the present compensation payment and not addressed in this release.

933 Accordingly, Snopko and the others who have signed these releases and are being challenged by Union should be entitled to participate as applicants in this proceeding.

934 Those are my submissions with respect to roadway agreements.

935 MR. SULMAN: Before we leave roadway agreements, I did not address Sterling. And my friend, you'll recall, before we started that, my friend raised the issue whether we might be in agreement on Sterling.

936 MS. SPOEL: Right.

937 MR. SULMAN: I have not been able to find out from my advisers whether there is, in fact, any roadway at Sterling. That's why we didn't address it. I will address that, I think it's more appropriate in argument, because then I will have the facts. The brief information that I have is that there is no roadway --

938 MS. SPOEL: I assume, Mr. Vogel, in fact, there is no roadway. Perhaps you two can sort it --

939 MR. SULMAN: I didn't finish. No roadway agreement. You started talking before I got any further. There's no roadway agreement with Sterling.

940 MR. VOGEL: My submission is that the evidence before you which the parties have filed, and my understanding is that in fact roadway compensation is being paid with respect to Sterling. And on the evidence which is before us, which is in the record, in my submission, the Sterlings have every right to participate. And they haven't been challenged on that issue by Union.

941 MS. SPOEL: Well, Mr. Sulman, if indeed you intend to challenge it, you perhaps can include it in your written -- your further submissions, and Mr. Vogel can respond appropriately.

942 MR. SULMAN: That's exactly my suggestion.

943 MS. SPOEL: Thank you.

944 Mr. McCann, is there anything further?

945 MR. McCANN: No, I don't think so. Except to thank all the people who have come out here today for their patient attention through a relatively long day. And of course we always thank our diligent and hard-working court reporters for their hard work in these matters.

946

MS. SPOEL: The Board would like to thank counsel and Mrs. Lang for your presentations today. It's been very helpful. We will look forward to receiving your further short submissions, and we'll get our decision out as soon thereafter as we can. Thank you.

947

MR. VOGEL: Thank you, Madam Chair.

948

MS. SPOEL: We're adjourned.

949

--- Whereupon the hearing adjourned at 5:15 p.m.