File No. EB-2019-0166

ONTARIO ENERGY BOARD

IN THE MATTER OF THE *Ontario Energy Board Act*, S.O. 1998, C.15, Schedule B, and in particular Section 21(2) thereof;

AND IN THE MATTER OF the *Assessment Act*, R.S.O. 1990, c. A31, and in particular Section 25(3) thereof;

AND IN THE MATTER OF an Application by Lagasco Inc. for an Order determining whether or not the natural gas pipelines owned and operated by Lagasco Inc. in Haldimand County are gas transmission pipelines

UPDATED REPLY SUBMISSIONS OF THE APPLICANT, LASGASCO INC.

(November 2, 2020/February 25, 2021)

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February 25, 2021

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PART I - REPLY OVERVIEW

1. The responding submissions filed in this proceeding, including those of OEB Staff, fail to confront the applicant's case on its merits, and seek to direct the Board away from the critical private and public issues that it must consider to determine Lagasco's application.

2. In carrying out its responsibilities in relation to gas, the Board is required by statute to be guided by certain objectives, including "to facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas".[1] The Board must have full regard for this mandate in exercising its jurisdiction under the *Assessment Act* to resolve pipeline classification disputes. Indeed, it can be presumed that the Legislature delegated this classification jurisdiction to the Board precisely *because* of its mandate and its specialized expertise in the energy industry.

3. This case concerns the correctness of a pipeline classification that results in pipelines being **assessed and taxed at more than fifty times their true market value**. This is undeniably an absurdity, and clashes head-on with the Board's statutory mandate, as well as with the Board's duty as a tribunal to interpret and apply the relevant provisions of the *Assessment Act* fairly and purposively. It is not an option for the Board to close its eyes to the disastrous consequences of the municipal assessment decisions which would effectively spell the end for the Ontario oil and natural gas industry. This has the potential to lead to the premature abandonment of oil and gas wells in the province and a failure to maximize the utility of an important provincial resource.

4. Nor can the Board fulfil its statutory function simply by pointing to its earlier decision in the *Tribute* matter, and saying, "our hands are tied". The Board's hands are not tied. The Board is

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[1] *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sched B, s 2.

not bound by *Tribute*; it can and must come to a different conclusion in the face of new evidence that merits a different result, including the expert evidence and the evidence of market value absurdity. **There is also clear evidence in this case that MPAC has neither sought nor received from the applicant *annual* pipeline designations which are a mandatory prerequisite to the classification of "pipe lines" under s. 25 of the *Assessment Act***. MPAC has acknowledged that its policy, contrary to the mandatory language of subsection 25(2) of the statute, is to assess pipelines in perpetuity once they have been added to the assessment rolls, even in the face of protests by the pipeline owner that the pipelines are not assessable.[2] **MPAC's approach is contrary to the express language of subsection 25(2) of the *Act*, which *requires* a designation by the pipeline owner "[o]n or before March 1 of *every year*…" (emphasis added).**

~~5. Given the importance of the issues to the oil and gas industry in Ontario, and the public interest, Lagasco once again reiterates its request for an oral hearing by videoconference.~~

PART II - REPLY FACTS

A. Identification of The Pipelines

~~6.~~5. In response to the submission of the Municipalities that Lagasco's definition of the Pipelines is "very confusing", Lagasco states or reiterates the following points as clarification:

(a) The Lowrie Affidavit is focused on the pipelines in Haldimand County, which were employed as a representative example—Exhibit "A" does not, and was not intended, to depict pipelines in every municipality.[3] In its responses to

[2] Affidavit of Ryan Ford sworn January 26, 2021 (**Reply Ford Affidavit**) at ¶5 and ¶9.
[3] Lowrie Affidavit at ¶3 and ¶10.

interrogatories, Lagasco more comprehensively addressed pipelines in other municipalities.

(b) The pipelines in Haldimand County are a subset of the oil and gas assets that Lagasco purchased from Dundee, which included 55 roll numbers in total, but not all of which are pipelines (e.g., some relate to onshore facilities).[4]

(c) Of the 55 roll numbers acquired from Dundee, Lagasco has specifically identified a subset (26 roll numbers) as being pipelines similarly situated to the Haldimand County pipelines.[5] These 26 roll numbers are the "Pipelines" at issue. Of the $30 million total purchase price for all of the assets of Dundee, only $900,000 was attributed to the Pipelines.[6] This was not a fiction dictated by Lagasco; it was agreed upon by the court-appointed Monitor, Dundee and the Court.

(d) MPAC has assessed the 26 Pipeline roll numbers (which have an actual value of $900,000) as having a collective value of nearly $47 million—imposing unreasonable and unsustainable financial hardship on Lagasco.

(e) In its evidence in this proceeding, MPAC has disputed that two of the roll numbers identified by Lagasco relate to an oil well and a compressor station, rather than a pipeline. To address this hypothetical, if their assessed value is deducted ($381,000 + $618,000), the assessed value of the 24 remaining Pipelines is $45,830,000—which is still more than **50-times** the price at which they were purchased in an arm's

[4] Lowrie Affidavit at ¶10.
[5] Exhibit "B" to the Lowrie Affidavit; Written Submissions of Lagasco dated October 8, 2020 at ¶9.
[6] Lagasco Interrogatory Responses to OEB Staff, Question 3(e).

length transaction, and indeed, more than the entire purchase price for all of Dundee's assets.

B. Designation of Pipelines by Owner as "Transmission Pipelines"

~~7.~~6. A critical fact is that Lagasco has not, at any point, designated the Pipelines at issue as "transmission pipelines", in accordance with section 25(1) of the *Assessment Act*. This fact does not appear to be in dispute; rather, MPAC and the Municipalities seek to take the position that a previous owner of the pipelines "likely" reported such a designation around the time of the Pipelines' installation, at various dates as early as 1957.[7] However, and critically, there is no evidence of any such designation by the "then owner", and the logic for implying that a designation was made is circular: they are assessed because they are designated, and they must have been designated because they are assessed. The key fact is that there is not actually any evidence of such a designation, which is an essential ingredient for finding that the Pipelines are transmission pipelines.

7. The new evidence submitted with respect to the pipelines of TAQA North Ltd. (**TAQA**) exemplifies an instance in which MPAC added pipelines to the assessment rolls more recently (in 1993 and 1998),[8] but again has *no record* of the owner making a designation in accordance with the *Assessment Act*. To the contrary, there is affidavit evidence from someone who has been involved with the pipelines since their construction affirmatively denying that a designation was ever made, and hypothesizing that MPAC must have learned about the pipelines from someone else. MPAC has maintained that the information must have come from the pipeline owner, but its

[7] Submissions of the Municipalities dated October 20, 2020 at ¶23; Submissions of MPAC dated October 20, 2020 at ¶11 and 61.
[8] Reply Ford Affidavit at ¶4.

affiant, Mr. Ford, has only been involved with assessments since 2012.[9] Mr. Ford refers to having reviewed "file documentation" and having failed to find evidence of a third party supplying pipeline information, but this is meaningless given that **MPAC has refused an interrogatory with respect to those file documents**, and has indicated that its general policy is to destroy records after only 3 years.[10] OEB Staff's revised submissions highlight that TAQA withdrew an appeal to the Assessment Review Board, but this too is not meaningful, as the ARB does not have jurisdiction to reverse a pipeline classification.

8. A further fallacy of this logic is that it presupposes that the definition of "pipe line" has remained unchanged since 1957, when in fact it has not. Importantly, in the 1960 consolidation of the predecessor *Assessment Act*, the definition of "pipe line" did not require a designation by the owner; it instead assigned responsibility to the Ontario Energy Board:

> **41**. (1) In this section
>
> > (c) "pipe line" means a pipe line for the transportation or transmission of gas that is **designated by the Ontario Energy Board** as a transmission pipe line and a pipe line for the transportation or transmission of oil, and includes, […]
>
> (2) The Ontario Energy Board shall designate as transmission pipe lines all gas pipe lines in Ontario that in its opinion are transmission pipe lines.
>
> (3) On or before the 1st day of March in each year the Board shall notify the clerk or the assessment commissioner of each local municipality of the length and diameter of all transmission pipe lines located in the municipality.[11]

9. Therefore, there is actually no rational basis for "presuming" a designation by the owner.

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[9] Reply Ford Affidavit at ¶12.
[10] MPAC Responses to OPI Interrogatories.
[11] *Assessment Act*, RSO 1960, c 23, s 41, online: http://digitalcommons.osgoode.yorku.ca/rso/vol1960/iss1/26.

10. Moreover, and significantly, subsection 25(1) of the *Assessment Act*, which defines a pipeline as including one "that is designated by the owner as a transmission pipe line",[12] is followed by subsection 25(2), which details a recurring requirement, "On or before March 1 of every year" (emphasis added) to "notify the assessment corporation of the age, length and diameter of all of its transmission pipe lines".[13] The designation required by section 25(1) is contemplated as a component of the annual reporting requirement in section 25(2). This is indicated both by: (1) the absence of any other provision in the Act addressing whether designations can be changed or revoked; and (2) the fact that the designation and reporting obligations have always belonged to the same person (*i.e.*, in the 1960 version, the Board was responsible for both designation and reporting, and in the current version, the owner is responsible for both designation and reporting). Furthermore, the Ford Affidavit confirms that as a practical matter, standard procedure is for the designation and reporting of pipelines to occur simultaneously.[14] The legislation therefore contemplates that a designation by a pipeline owner (even if there was evidence of one) is not permanent or irrevocable. **The evidence is unequivocal that the annual designation requirement has not been met by MPAC in respect of Lagasco's pipelines (nor TAQA's). It is clear beyond argument that MPAC is not complying with the mandatory terms of subsection 25(2) of the *Assessment Act* in seeking, obtaining and acting upon *annual designations*, as the statute requires.**

11. Lagasco also disputes the contention of the Municipalities that notices of assessment and tax bills for the Pipelines have been received "without objection".[15] As noted in the Lowrie

[12] *Assessment Act*, R.S.O. 1990, c. A.31, s 25(1).
[13] *Assessment Act*, R.S.O. 1990, c. A.31, s 25(2).
[14] Ford Affidavit at ¶9.
[15] Submissions of the Municipalities dated October 20, 2020 at ¶24.

Affidavit, the prior owner of the Pipelines (Dundee), appealed the MPAC assessment notices for 2015 and every subsequent year of their ownership,[16] and it goes without saying that the current owner of the Pipelines (Lagasco) has objected to MPAC's assessment from the outset. The notion that Lagasco has acquiesced to MPAC's classification of the Pipelines is entirely unfounded.

C. Lagasco's Ability to Intervene in the Tribute Proceeding

12. The Municipalities' contend that "Lagasco was on notice of the Tribute proceedings while they were ongoing, and had the opportunity to take part in them, but elected not to do." To the extent that this submission is intended to demonstrate that Lagasco has acquiesced to the tax classification of the Pipelines, it is unfounded.

13. Lagasco acquired the subject Pipelines from Dundee as part of a transaction that closed on November 16, 2018.[17] Tribute commenced its application, in respect of *different* pipelines, more than three years earlier, on June 22, 2015.[18] Lagasco had not yet acquired the Pipelines, and had no basis for participating in the *Tribute* proceeding. It would be incorrect to imply any kind of acquiescence or estoppel based on Lagasco's non-participation in a proceeding in which it had no interest or standing. This application is Lagasco's first and only opportunity to challenge the classification of the Pipelines.

PART III - REPLY LAW & ARGUMENT

A. The Board Must Consider the Consequences of its Decision

14. The potentially absurd economic consequences of the Board's decision in this case, both for Lagasco specifically and more broadly for the Ontario oil and gas industry at large, are not

[16] Lowrie Affidavit at ¶8.
[17] Lowrie Affidavit at ¶3.
[18] The Board granted status to intervenors in a procedural order issued on August 13, 2015.

"irrelevant", as contended by MPAC and the Municipalities. To the contrary, they must be of paramount concern for the Board, both as a component of the statutory interpretation issues with which the Board has been entrusted, and as a component of the Board's core statutory mandate guiding the performance of all of its responsibilities.

15. First, there is no dispute that resolving this application involves an element of statutory interpretation.[19] The principles that guide statutory interpretation, which are well settled, do not permit the Board to ignore the practical consequences of the interpretation it is being asked to adopt. Several authorities have emphasized that practical consequences are a proper and relevant consideration of statutory interpretation:

(a) In *Re Rizzo & Rizzo Shoes Ltd.,* the Supreme Court of Canada found that a statutory interpretation was incorrect because the consequences that would result from the interpretation were "incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences".[20]

(b) In *Blue Mountain Resorts Ltd. v Bok*,[21] the Ontario Court of Appeal recognized that "consideration of hypotheticals or other examples is useful when interpreting the meaning of legislation". The Court rejected a statutory interpretation when its

[19] Submissions of the Municipalities dated October 20 at ¶38.
[20] *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27 at ¶27.
[21] *Blue Mountain Resorts Ltd. v Bok*, 2013 ONCA 75 at ¶38-44.

application on the facts of the case and in other hypothetical scenarios produced absurd results, incompatible with the objects of the Act.

16. As a tribunal with specialized expertise in the energy industry, the Board is uniquely qualified to appreciate the practical consequences of its decisions interpreting and applying the *Assessment Act* to resolve disputes under section 25(3). It is not only appropriate for the Board to apply that expertise, it is *expected*—if the Legislature had intended for classification disputes to be resolved without any appreciation of the industry to which they relate, by simply reading definitions out of a dictionary, then it would not have delegated jurisdiction to the Board in the first place, nor would it have imposed a privative clause in the statute.[22]

17. In addition to the basic principles of statutory interpretation that require the Board to consider the practical consequences of its decision on the energy industry in which it has specialized expertise, there is also the fact that the Board is explicitly mandated by the *Ontario Energy Board Act* "to facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas", and must be guided by that objective (among others) in the performance of all of its statutory responsibilities relating to gas.[23] As the Board is well-positioned to appreciate, the financial viability of the natural gas industry is not advanced by assessing and taxing gathering pipelines at more than fifty times their true economic value. The financial consequences to Lagasco, and on others in Lagasco's position, would be devastating. Notably, Tribute Resources Inc. (a publicly traded company), has been cease-traded, and the company that subsequently assumed ownership of the pipelines from Tribute (Clearbeach Resources Inc, along with Forbes Resources Inc.), recently made filings under the *Bankruptcy and*

[22] See *Dunsmuir v New Brunswick*, 2008 SCC 9 at ¶49 and 54-55.
[23] *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sched B, s 2.

Insolvency Act. Some of these Clearbeach gas pools are charged over 55% of gross revenue in municipal taxes, a business case that is not and can never be sustainable.

18. If gas gathering within Ontario is not financially viable, then the provincial gas industry as a whole will inevitably suffer and potentially fail, with negative consequences for the availability and pricing of energy to Ontario energy consumers. This, too, would be contrary to the Board's statutory mandate, another objective of which is to protect Ontario energy consumer's interest "with respect to prices and the reliability and quality of gas service". If the Board ignores the economic consequences of its decision, then it will be sabotaging the very industry it is mandated to preserve and protect.

B. The *Tribute* Decision Does Not Govern This Case

19. The *Tribute* case involved similar issues of statutory interpretation, but it was a different case, commenced by a different applicant concerning different pipelines, and, significantly, it was argued on the basis of different evidence. There is nothing that mandates the Board to come to a similar conclusion as *Tribute* in this case.

20. Tribunals are not bound to follow prior decisions, even where the issues are similar.[24] Tribunals are entitled to adjust their policies, or to alter their interpretation of a policy, if they have cogent reasons for doing so.[25] Notably, in the *Tribute* proceeding, OEB Staff supported the position that "gathering lines are not transmission pipelines within the meaning of section 25 of the

[24] *R v TransCanada Pipelines Limited* (2000), 137 OAC 201 (Ont CA) at ¶129, leave to appeal to SCC denied, 2000 CarswellOnt 4249; *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div Ct) at ¶20, aff'd 2018 ONCA 673 at ¶14, leave to appeal to SCC denied, 2019 CarswellOnt 5577.
[25] *Thompson Brothers (Construction) Ltd v Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2012 ABCA 78 at ¶39.

Assessment Act", and argued that MPAC had failed to establish the requisite designation by the owner that the pipelines were "transmission pipelines".[26] Without any cogent explanation, OEB Staff now takes the opposite position on each issue.

21. The Divisional Court's decision in *Tribute* was entirely a matter of deference, rather than a determination of the correct interpretation of the *Assessment Act*. As addressed in Lagasco's original submissions, the evidence in this case is materially different than in the *Tribute* case.

C. Section 25(1) Specifically Applies to Gas "Transmission" Pipelines

22. MPAC's submissions mischaracterize Lagasco as having "ignored" the component of the definition of "pipe line" that refers to *transportation*, rather than just *transmission*.[27] This is simply not correct—Lagasco's submissions explicitly address the meaning of "transportation" within the context of the Act, and how it can be distinguished from "gathering".[28] Lagasco's submissions do place greater emphasis on the term "transmission", but for good reason—the vast majority of the Pipelines at issue are gas pipelines, and the subsection 25(1) definition of "pipe line" applies exclusively to gas pipelines that have been "designated by the owner as a transmission pipe line". Under the following subsection 25(2), the Act only requires annual reporting "of the age, length and diameter of all of its transmission pipe lines". And then again under subsection 25(3), the Act only contemplates disputes over "whether or not a gas pipe line is a transmission pipe line…".

23. As Lagasco addressed in its previous submissions, "pipe line" might be interpreted as intending to include pipelines for the "transportation" of *oil* (albeit with potentially absurd

[26] Online: http://www.rds.oeb.ca/HPECMWebDrawer/Record/501210/File/document.
[27] Written Submissions of MPAC dated October 20, 2020 at ¶43.
[28] See e.g. Written Submissions of Lagasco dated October 8, 2020 at ¶34.

consequences),[29] and therefore the use of the term "transportation" would not be superfluous or redundant.[30] But at least in relation to gas, the Act repeatedly and exclusively chooses the term "transmission", and that choice must be understood to be intentional.

D. Validity of Regulations

24. MPAC's submissions question whether Lagasco is seeking a declaration of the invalidity of the regulations under the *Assessments Act*. To be clear, it is not. Lagasco has not sought such relief anywhere in its materials, and its submission is specifically that the regulations should be interpreted in such a way as to *avoid* exceeding the authority of their enabling legislation.

~~E. Renewed Request For an Oral Hearing~~

~~25. Lagasco respectfully renews and reiterates its request for an oral hearing of this matter, by videoconference, given the importance of the issues to the survival of the oil and gas industry in Ontario and to the public interest. The parties have advanced starkly different positions on the issues of law, and live engagement between counsel and the panel will assist the Board in resolving these differences. As addressed above, the consequences of this proceeding are of critical, perhaps existential, importance to the oil and gas industry in Ontario.~~

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF NOVEMBER, 2020 and 25th DAY OF FEBRUARY 2021

per _____

BENNETT JONES LLP

[29] Written Submissions of Lagasco dated October 8, 2020 at ¶39.
[30] Written Submissions of MPAC dated October 20, 2020 at ¶49-50.

SCHEDULE "A"

LIST OF AUTHORITIES REFERRED TO

1. *Assessment Act*, RSO 1960, c 23, s 41.

2. *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27.

3. *Blue Mountain Resorts Ltd. v Bok*, 2013 ONCA 75.

4. *Dunsmuir v New Brunswick*, 2008 SCC 9.

5. *R v TransCanada Pipelines Limited* (2000), 137 OAC 201 (Ont CA), leave to appeal to SCC denied, 2000 CarswellOnt 4249.

6. *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div Ct), aff'd 2018 ONCA 673, leave to appeal to SCC denied, 2019 CarswellOnt 5577.

7. *Thompson Brothers (Construction) Ltd v Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2012 ABCA 78.

SCHEDULE "B"

TEXT OF RELEVANT LEGISLATIVE PROVISIONS

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B

Board objectives, gas

2 The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:

1. To facilitate competition in the sale of gas to users.

2. To inform consumers and protect their interests with respect to prices and the reliability and quality of gas service.

3. To facilitate rational expansion of transmission and distribution systems.

4. To facilitate rational development and safe operation of gas storage.

5. To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.

6. To promote communication within the gas industry.

Assessment Act, R.S.O. 1990, c. A.31

Pipe line

25 (1) In this section,

"gas" means natural gas, manufactured gas or propane or any mixture of any of them;

"oil" means crude oil or liquid hydrocarbons or any product or by-product thereof;

"pipe line" means a pipe line for the transportation or transmission of gas that is designated by the owner as a transmission pipe line and a pipe line for the transportation or transmission of oil, and includes,

(a) all valves, couplings, cathodic protection apparatus, protective coatings and casings,

(b) all haulage, labour, engineering and overheads in respect of such pipe line,

(c) any section, part or branch of any pipe line,

(d) any easement or right of way used by a pipe line company, and

(e) any franchise or franchise right,

but does not include a pipe line or lines situate wholly within an oil refinery, oil storage depot, oil bulk plant or oil pipe line terminal;

"pipe line company" means every person, firm, partnership, association or corporation owning or operating a pipe line all or any part of which is situate in Ontario.

Notice

(2) On or before March 1 of every year or such other date as the Minister may prescribe, the pipe line company shall notify the assessment corporation of the age, length and diameter of all of its transmission pipe lines located on January 1 of that year in each municipality and in non-municipal territory.

Disputes

(3) All disputes as to whether or not a gas pipe line is a transmission pipe line shall, on the application of any interested party, be decided by the Ontario Energy Board and its decision is final.