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Ontario Court of Appeal Confirms that the Courts Have Some Residual Jurisdiction Over Natural Gas Storage Matters

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Cases commented on: *2195002 Ont. Inc. v Tribute Resources Inc*, 2013 ONCA 576

In this decision the Ontario Court of Appeal confirmed the conclusion reached in two separate applications before the Superior Court of Justice in Ontario related to a gas storage matter. For my post on these two decisions see here.

One decision, *Tribute Resources v 2195002 Ontario Inc*, 2012 ONSC 25 dealt with the jurisdiction of the Superior Court to consider the matter, the argument being that all gas storage issues should be litigated before the Ontario Energy Board (OEB) because of the preclusive clauses in the *Ontario Energy Board Act*, SO 1998, c.15 and the decision of the Ontario Court of Appeal in *Snopko v Union Gas Ltd*, 2010 ONCA 248, the subject of an earlier post here. A second decision, that of Justice Helen Rady in *21955002 Ontario Inc v Tribute Resources Inc* 2012 ONSC 5412, dealt with the substantive question of whether Tribute could claim storage rights on the basis of an oil and gas lease and a unitization agreement or whether its rights were confined to such rights as it held under a gas storage lease which lease the Ontario Court of Appeal in an earlier action held to have expired: *Tribute Resources v McKinley Farms*, 2010 ONCA 392, also the subject of a previous ABlawg post here.

The only decision under appeal here was that of Justice Helen Rady in 2012 ONSC 5412.

In its decision the Ontario Court of Appeal agreed with Justice Rady's main conclusion on the substantive and interpretive questions in 2012 ONSC 5412 to the effect that Tribute's gas storage lease (GSL) had been intended by the parties to completely replace any storage rights that Tribute might have been able to claim under the earlier agreements (the oil and gas lease and the unitization agreement) and thus, with the expiry of the GSL, the only possible conclusion was that Tribute's storage rights had come to an end. In reaching that conclusion the Court of Appeal relied on many of the same grounds as had Justice Rady including the entire agreement clause in the GSL, and the greater specificity of the GSL which made it clear that storage matters were to be governed exclusively by the GSL and not the earlier agreements. The Court of Appeal also relied upon the fact that the different agreements offered different ways for determining the payment for gas storage rights (at para. 54): "this difference in the payment provisions makes it clear that the 1998 Tribute Gas Storage Lease was intended to replace the earlier agreements and not merely to supplement them. Because of the difference in the payment provisions, the two sets of documents could not co-exist."

The decision on the jurisdictional issue 2012 ONSC 25 authored by Justice Bryant was not appealed (at para. 27 of this decision) and that matter was therefore not technically before the Court of Appeal in this decision. But 219 Ltd still ran a variant of that application taking the position that the Court of Appeal had no jurisdiction to consider the appeal since between Justice Rady's decision (rendered October 18, 2012) and the matter coming on before the Court of Appeal, the OEB, on the application of Tribute, had made an order designating the subject lands as a gas storage area under the Act (however the OEB stayed the associated compensation matters pending the outcome of this litigation). The Court of Appeal rejected that argument concluding that its jurisdiction was founded upon Justice Bryant's decision and when that decision was made there was no gas storage order in place. The Court commented more extensively as follows:

> [28] The jurisdiction of this court to entertain this appeal derives from s. 6 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 (the "CJA"). Under s. 6(1)(b) of the CJA, this court has jurisdiction to entertain an appeal from the application judge's decision because it is a final order of a Superior Court judge.
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> [29] The parties agree that the application judge had jurisdiction to render her judgment interpreting the relevant contractual documents. Her judgment is a final order and nothing in s. 38(3) of the Energy Act ousts this court's jurisdiction to entertain an appeal under s. 6(1)(b) of the CJA. Neither the decision of the application judge, nor this decision, address compensation under the Energy Act. The order of the OEB made some four months after the decision of the application judge cannot turn what was an order interpreting contractual rights into an order for compensation under the Energy Act.
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> [30] The questions of what, if any, effect this court's decision will have on the OEB's determination of the compensation issues now outstanding under the Energy Act and whether this appeal may now be moot are different issues than the jurisdictional issue raised by 219 Ontario.
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> [31] The fact that this court has jurisdiction to entertain an appeal from the application judge's decision does not determine the question of the effect, if any, of this court's decision on the compensation issues under the Energy Act.
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> [32] We make no comment on that subject, which will be a matter for the OEB to determine.

Thus, at least so long as there is no OEB designated gas storage area order in effect in relation to the subject lands at the time that a matter is heard by the ordinary courts, the ordinary courts of justice have the jurisdiction to determine the existence, validity and interpretation of natural gas storage rights arising by way of contract between the parties.