

File No. 1485  
Board Order # 1485-1

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February 15, 2008

**MEDIATION AND ARBITRATION BOARD**

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS  
ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF NE  $\frac{1}{4}$  of Section 5, TWP 110, P.R.D.  
and SW  $\frac{1}{4}$  of Section 9, TWP 110 P.R.D.

(The "Lands")

BETWEEN:

Diane and Larry Fay

(APPLICANTS)

AND:

Talisman Energy Inc

(RESPONDENT)

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**BOARD ORDER**

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## INTRODUCTION AND ISSUE

[1] Diane and Larry Fay are the registered owners of the Lands that are the subject of this application. Talisman Energy Inc. (Talisman) owns and operates a pipeline that runs through the Lands.

[2] In September 2004, the Fays applied for arbitration under section 12 of the *Petroleum and Natural Gas Act* (the *PNG Act*) of the rent payable under orders issued by the Mediation and Arbitration Board (MAB) in 1977. The orders were issued in proceedings between a predecessor to Talisman and the then owners of the Lands. The Board declined to schedule the matter for arbitration on the basis that proceedings before the Expropriation Compensation Board (ECB) with respect to the Lands were underway (Board Order No. 388 Interim). In February 2006, the ECB rendered a decision determining the compensation payable (*Talisman Energy Inc. v. Fay* (2006) E.C.B. No. 09/04/264). Talisman registered a statutory right of way in the Land Title Office (LTO) against the Lands in April, 2006.

[3] The Fays ask the Board to schedule the rent review for arbitration. The issue is whether the Board should proceed or whether, in the circumstances, the application is moot.

## BACKGROUND

[4] In 1974, the MAB granted right of entry orders with respect to the Lands to Houston Oils Limited (Houston) for the purpose of constructing and operating a pipeline. Houston constructed the pipeline and deposited a plan of pipeline right of way in the LTO in 1974. In 1977, the MAB issued compensation orders for the entry, loss of right or profit, temporary and permanent damage, and nuisance and disturbance, including orders for the payment of annual rent.

[5] In 1999, Houston's interest in the pipeline and pipeline right of way transferred to Talisman. In 2000, the Fays purchased the Lands.

[6] The Fays tried to renegotiate the rental provisions, and in August 2003 delivered a notice to renegotiate under section 11 of the *PNG Act*. Talisman took the position that the pipeline was not a "flow line" over which the MAB had jurisdiction. Talisman commenced proceedings under the *Railway Act* to expropriate a statutory right of way for the existing pipeline. Talisman served the Fays with the required notice, surveyor's affidavit, and appraisal in April 2004.

[7] In May 2004, Talisman filed an application with the ECB for determination of compensation. The Fays asked the ECB to dismiss the application on the grounds that compensation for the Lands was within the jurisdiction of the MAB. In August 2004, the ECB determined that it had jurisdiction.



[8] In September 2004, the Fays applied to MAB for a rent review arbitration. In February 2005, the Board issued an order declining to schedule an arbitration because the ECB proceedings were underway.

[9] In February 2006, the ECB rendered its decision determining the amount of compensation payable by Talisman to the Fays for the expropriation of the statutory right of way over the Lands. Talisman registered the statutory right of way in the LTO in April 2006.

[10] In September 2006, the Fays asked the Board to schedule the rent review for arbitration. The former chair sought submissions from counsel. The parties disagreed as to whether the Board had jurisdiction. In June 2007, the chair concluded the issue of jurisdiction should be determined by way of oral hearing.

[11] I was appointed chair of the Board in July 2007. By letter dated December 6, 2007, I asked counsel to participate in a pre-hearing telephone conference and set out a number of questions. Mr. Cosburn, for Talisman, provided an email response dated December 11, 2007. Mr. Carter, for the Fays, and Mr. Cosburn attended a telephone conference on February 11, 2008 and spoke to whether the Board should proceed with this application.

## **SUBMISSIONS**

[12] Mr. Carter submits that the ECB cannot make an order affecting MAB's jurisdiction. He submits there is an existing MAB order and that Talisman is doing an "end run" around the MAB's jurisdiction. He says the pipeline in issue is a "flow line", that MAB had jurisdiction to issue the entry order and order compensation in the first place, and continues to have jurisdiction. He says Houston initially invoked the jurisdiction of the MAB and Talisman cannot now "cherry pick" the forum they would rather be in.

[13] Mr. Cosburn submits that as a result of the expropriation there is no longer a live issue before MAB. He submits the ECB made a decision with respect to its own jurisdiction and that the issue of compensation is *res judicata*. He says that regardless of whether or not the pipeline was ever a "flow line", Talisman came to the conclusion that it was not a "flow line" and that expropriation of a statutory right of way was appropriate. He submits the application to the ECB was not to "cherry pick" the forum but because Talisman had determined that the pipeline was not a "flow line". He says if the Fays disagreed with the ECB's decision taking jurisdiction, their remedy was to seek judicial review of that decision.



## DECISION

[14] Having considered all of counsel's submissions, I have concluded that a rent review and the threshold question of whether the board has jurisdiction are moot.

[15] Registration of the statutory right of way conferred on Talisman an estate or interest in the Lands that they did not have when the original MAB order for the payment of rent was made. Compensation for the interest expropriated to Talisman has been determined. The interest was expropriated pursuant to the provisions of the *Pipeline Act* and *Railway Act*, and compensation determined by a Board that determined it had the jurisdiction.

[16] Mr. Carter argues that the ECB could not determine the MAB's jurisdiction, but neither can the MAB determine the ECB's jurisdiction. The ECB determined it had jurisdiction and it is not up to the MAB to determine the correctness of that decision. While the ECB could not determine the MAB's jurisdiction, it could and did determine its own jurisdiction. If the Fays disagreed with that determination, the appropriate remedy was judicial review. They did not seek judicial review and the expropriation has been completed.

[17] More importantly, Talisman no longer occupies and uses the Lands under the right of entry orders and its use and occupation of the Lands is no longer subject to the payment of rent. The underlying foundation for the MAB's earlier decisions has changed. A review of the rent payable under those orders, therefore, can have no practical effect. Talisman has a registered interest in the lands for which compensation has been awarded. Events have occurred which have changed the original relationship between the parties and their respective interests in the Lands and associated rights.

[18] There is no practical purpose in continuing with the application for rent review in the circumstances. I dismiss the application as moot.

Dated: February 15, 2008

FOR THE BOARD



Cheryl Vickers  
Chair