

PIPE DOWN AND PAY UP (Newsletter Summer/Fall 2003)



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... that essentially, was the message conveyed by the Nova Scotia Utility and Review Board in its April 19th 2002 decision in the case of Allan Myers and Darlene Myers v. Sable Offshore Energy Inc.

It had been a long time coming; but for courageous couple Allan and Darlene Myers, the Nova Scotia Utility and Review Board decision was well worth the wait. This was a David and Goliath contest: in one corner the Myers from Guysborough County facing off against Sable Offshore Energy Inc., a subsidiary of multi-billion dollar giant Exxon Mobil. Six years ago this would not have been such an unequal battle. Property owners, Mr. and Mrs. Myers wouldn't have had to dip into their savings to fund the court costs. However in 1996 the law was changed in Nova Scotia: petty minded civil servants employed by the Province and the City of Halifax were repeatedly criticized by the courts for their failure to follow Expropriation Act provisions which attempted to level the playing field by affording property owners, professional representation. City of Halifax lawyers attempted to bring property owners to their knees by refusing to abide by the Act while they dragged two virtually identical cases each through three levels of appeals at enormous cost, before being rapped on the knuckles for wasting the Courts' time ... and taxpayers' money. Stung by the court decisions, Provincial civil servants amended the Expropriation Act to ensure that any property owner would have to fight unaided until the court proceedings were complete and they had won their case. Our gutless politicians rubber stamped the amendment. Today it requires considerable courage, fortitude and money to face City Hall, the Province or large corporations such as Sable Offshore Energy Inc. It is a tribute to the Myers, and individuals like them that there are those still willing to stand up and fight.

Synopsis

Mr. and Mrs. Myers owned land in North Riverside, Guysborough County, Nova Scotia. Their property lay across the path of two pipelines, both subsequently to be laid in the same easement through their land. Sable Offshore Energy's natural gas liquids line was laid in the same trench as Maritimes and Northeast Pipeline's natural gas line. The former however, fell under Provincial jurisdiction and became the subject of this Nova Scotia Utility and Review Board hearing under the Expropriation Act. In addition to their pipeline easement, Sable Offshore Energy Inc. required an above ground valve installation site. During the summer of 1997 the Myers were approached by Mr. Kevin MacDonald, a former forestry technician hired by Sable Offshore to negotiate pipeline easements for them. According to the Myers, Mr. MacDonald assured them that the fenced valve site would only be 8 ft. square and was going to be located close to the river. In reality the site proved to be 60 ft. x 100 ft. and was located instead at the entrance to their property. In order to compute compensation for their pipeline easement Sable Offshore commissioned a "baseline appraisal" from Mr. Vernon Murray a former Provincial employee, now a self employed appraiser in Antigonish. The purpose of a baseline appraisal is to establish the "average" land value along the pipeline route: it ignores "injurious affection", usually the most substantive part of any claim. Property owners who objected to the baseline figure received individual attention, Sable Offshore would then commission Mr. Murray to undertake a site specific appraisal which considered all heads of claim including injurious affection. This was done for the Myer's property and Mr. MacDonald based Sable Offshore's offer on it. Mr. Murray's appraisal was not tendered as evidence by Sable Offshore at the subsequent Utility Board hearing and Mr. Murray was not called by them to give evidence. Instead, Sable Offshore commissioned another appraisal report, this one authored by Mr. Peter Constable, the owner of MacKay Appraisals in New Glasgow. Mr. Constable was uncertain whether he had the necessary qualifications to undertake and sign the appraisal himself so he enlisted the assistance of Mr. Ralph Taylor to supervise the assignment. Mr. Taylor, a former Provincial employee, now a self employed appraiser, signed the appraisal report as the Supervisory Appraiser for the assignment. He too was not called by Sable Offshore to give expert testimony in support of the appraisal at the Utility Board hearing.

The Utility Board awards costs, including professional fees for legal and appraisal advice, to the expropriated party as of right provided that their award is equal to or greater than 85% of the offer tendered by Sable Offshore. This is an attempt, albeit after the fact, to level the playing field: it is recognition in law that the poor property owner usually faces a financially superior opponent. *Sable Offshore's negotiator Kevin MacDonald admitted during testimony that he "probably did not suggest" to the Myers that they seek independent professional advice and did not recall advising any of the property owners that the Expropriation Act entitled them to requisition an independent appraisal from an appraiser of their choice.* In any event, the Myers rejected Sable's offer and dipped into their savings to retain Mr. Alan Hayman, Q.C. of Burchell Hayman Parish as their legal counsel, and Mr. Lee Weatherby of our firm to prepare an appraisal and provide expert testimony.

At the commencement of the Utility Board hearing, Sable Offshore's case suffered something of a setback when Peter Constable, their only appraiser to give evidence, discovered that he had confused metric measurements with imperial: one metre as one foot, etc. ... an error which had escaped Mr. Taylor, his Supervisory Appraiser's attention too. Mr. Constable's appraisal and his evidence in support thereof discounted the presence of any injurious affection or other heads of claim and identified the land alone as the only compensable loss .. and this at the princely sum of \$1,100 (Imperial dollars) ... corrected at the commencement of the Hearing to \$3,620 (Metric money) ... an opinion with which the Board declined to concur: adopting instead the opinion advanced by the Myer's expert, our Lee Weatherby ... and awarding the Myers their appraisal and legal costs.

Background

Allan and Darlene Myers owned 40 acres of land with 3,937 ft. of water frontage at Bowles Point on the Milton Haven River in Guysborough County; a beautiful property, possessing wildlife and a fish habitat. The property was improved with a cottage, the building of which had commenced in 1997, and which was about 75% complete. The cottage was insulated and used regularly. In the summer of 1997, Sable Offshore Energy Inc. began negotiating with property owners in the area to acquire easement rights for the construction of one or more pipelines between Goldboro and Point Tupper. Sable successfully negotiated the acquisition of easements from most private landowners with the exception of five properties, including that of the Myers. On January 8th, 1999 the Minister responsible for the Provincial Pipeline Act issued a vesting order, effectively expropriating an easement across the Myer's property. On February 8th, 1999, Maritimes and Northeast Pipeline Limited Partnership (M & NP) issued a notice to Myers under the National Energy Board Act that they too would be constructing a pipeline, to be located within the same easement as the Sable Offshore pipeline. Sable Offshore subsequently paid the Myers \$42,650 in compensation for their pipeline easement and agreed to pay additional compensation for the above ground shut off valve and related apparatus. On the same day M & NP paid the Myers \$25,866 in compensation for their easement.

Heads of Claim

The various heads of claim and the Board's decision thereon were as follows:

(1) Post hearing evidence on a gas leak was not admissible, even though the leak occurred after the hearing but before the decision was issued, primarily because the Board felt that the possibility of such a leak had been considered when the Myer's expert prepared his report.

(2) No evidentiary weight was placed on the monetary settlements agreed by Sable with the other property owners primarily because, (1) there was no evidence of similarity between the properties and the "pattern of dealing approach" was therefore not applicable, (2) there were not a great number of settlements, (3) there was no previous local experience of expropriation for gas pipelines, (4) the owners may not have acted knowledgeably because Sable Offshore did not advise them of their rights under the Expropriation Act.

(3) This was a partial taking and the "Before and After" test was the most appropriate way to determine the market value of the interest taken and the injurious affection to the remaining land.

(4) The economic value of the waterfront had to be considered in assessing compensation. The Myers' appraiser, Lee Weatherby of Turner Drake had assigned a "basic" land value and "waterfront benefit" in order to compute the market value. The Board concurred with his approach.

(5) Sable was not entitled to deduct the payment for the M & NP easement from their compensation to the Myers. Sable had advanced the argument that since their line was in the same easement as the Maritimes & Northeast Pipeline's gas line, the compensation paid by the latter should be deducted from Myer's claim against Sable ... something akin to the proposition that you should fly free if there are other passengers on the plane. The sheer logic of this argument was not readily apparent to the Board (nor we suspect to anybody other than Sable) and they declined to adopt it. The Board did point out that the M & NP line fell under Federal jurisdiction, related to a different activity, and had a different ultimate purpose (it carried natural gas, while the Sable Offshore line carried gas liquids). However the Board went further and determined that even if such had not been the case, it would not have been appropriate to treat them as if they were a single easement ... because they were not! The M & NP easement permitted the company to install one further pipeline; the Sable easement more than one pipeline.

(6) Appraisal costs incurred before the hearing could not be paid in advance of the hearing, notwithstanding the financial grief it caused the expropriated party, because the Province had foreclosed such an opportunity when it repealed Section 35 of the Expropriation Act.