



ONTARIO ENERGY BOARD

OEB STAFF SUBMISSION
September 8, 2017

MR. ACHIEL KIMPE

**APPLICATION TO DETERMINE STORAGE RIGHTS
COMPENSATION IN THE BENTPATH DESIGNATED GAS
STORAGE POOL OPERATED BY UNION GAS LIMITED**

EB-2016-0030

INTRODUCTION

Achiel Kimpe owns land in the Bentpath Designated Gas Storage Area (the Bentpath Pool) operated by Union Gas Limited (Union Gas). Unlike most landowners in the Bentpath Pool, Mr. Kimpe has not entered into a gas storage rights agreement with Union Gas. Mr. Kimpe applied to the Ontario Energy Board (OEB) under section 38(3) of the *Ontario Energy Board Act, 1998* (OEB Act) for an order determining “just and equitable compensation”. The application was dated December 27, 2016 and received by the OEB on January 6, 2017.

The Bentpath Pool covers approximately 750 acres and was designated as a storage area by regulation on August 7, 1974. The OEB granted Union Gas the authorization to operate the pool by way of Order E.B.O. 64 dated August 19, 1974.

Mr. Kimpe’s property includes 50 acres inside the designated boundaries of the Bentpath Pool and 25 acres outside the boundaries. He has owned the property since before the Bentpath Pool was designated as a storage area. There are 15 landowners within the Bentpath Pool.¹

Even though Mr. Kimpe has no storage rights agreement with Union Gas, he has been receiving annual compensation payments from Union Gas since the Bentpath Pool started operating in 1974.² Union Gas states that these payments are calculated in the same manner as the amounts paid to Bentpath Pool landowners who have entered an agreement with Union Gas. Mr. Kimpe now asks the OEB to order Union Gas to pay him the difference between the amounts he has received and the amounts that he says he should have been receiving under his proposed calculation methodology.

The central difference between the two methodologies is that under Union Gas’ approach, landowners in the Bentpath Pool are compensated on a per acre basis. This is consistent with Union Gas’ approach to all of its designated storage areas in Ontario. All acres within the Bentpath Pool get the same rate.³ By contrast, under Mr. Kimpe’s proposed approach, only landowners whose land lies above the actual storage reservoir would be compensated,

¹ Union Gas Submission (EB-2016-0030), dated April 13, 2017, page 2 paragraph 5.

² Mr. Kimpe noted in his submission on page 3 dated August 21, 2017 that he endorses all the cheques saying “accepted as partial payment”.

³ In addition, Union Gas compensates landowners whose properties are bisected by the designated storage area boundary for their “outside acreage” (in Mr. Kimpe’s case, the 25 acres) at a lower rate per acre than the rate paid for “inside acres”.

and that compensation would be in proportion to how much of the reservoir (by volume, that is, cubic metres) is under their land. Land within the designated storage area but not directly above the reservoir – i.e., in the protective area around the reservoir – would not earn any compensation.

In accordance with Procedural Order No. 2, OEB staff's submission will focus on two areas:

- The methodology for calculating the amount of compensation as proposed by Mr. Kimpe.
- The appropriate time period to be covered by the OEB's decision on Mr. Kimpe's application.

For the reasons below, OEB staff cannot support Mr. Kimpe's application. Union Gas' current acre-based methodology reflects the standard industry practice in Ontario. The methodology is consistent with previous OEB decisions on just and equitable compensation for gas storage, and it has been accepted by the vast majority of landowners within the Bentpath Pool.

Should the OEB instead prefer Mr. Kimpe's proposed volumetric methodology, OEB staff submits that the OEB should not award retroactive compensation back to 1974 as requested by Mr. Kimpe; the order should be effective from the date Mr. Kimpe's application was filed.

COMPENSATION REQUESTED BY MR. KIMPE

Mr. Kimpe claims that he should receive 13.9% of the total compensation Union Gas pays to all Bentpath landowners. His rationale is that he owns 13.9% of the reservoir.⁴ He arrives at the 13.9% figure by reference to a 1970 Unit Operation Agreement in respect of the Bentpath Pool, which indicates that the actual cavern was 125.53 acres, of which 17.45 acres were under his land ($17.45 / 125.53 = 13.9\%$).⁵ Mr. Kimpe asks to be reimbursed for the difference between the amounts he was paid by Union Gas since 1974 and what he says he should have paid, as the owner of 13.9% of the reservoir, plus interest. The total amount claimed is \$121,237.05 as at March 3, 2017.⁶

⁴ For instance, in his December 27, 2016 application, Mr. Kimpe refers to "my 13.9% ownership in the Bentpath Gas Cavern."

⁵ Certain schedules of the Unit Operating Agreement were part of Mr. Kimpe's supporting evidence (see Attachment 1 in Mr. Kimpe's Application dated December 27, 2016). The UOA is also included in the submission of Union Gas dated April 13, 2017 as Schedule 2.

⁶ Letter from Mr. Kimpe to Union Gas dated March 3, 2017, included in Mr. Kimpe's materials filed with the

Incidentally, although Union Gas, in its materials filed on April 13, 2017 in response to Mr. Kimpe's application, does not dispute Mr. Kimpe's assertion that he owns 13.9% of the reservoir, it would appear to OEB staff that that assertion is not free from doubt. First of all, as mentioned above, the 13.9% was derived by dividing Mr. Kimpe's acres above the reservoir by the total acreage of the cavern, as shown in the Unit Operation Agreement. It therefore represents the proportion of the reservoir's two-dimensional area (in acres) belonging to Mr. Kimpe. It is not apparent that owning 13.9% of the acreage equates to owning 13.9% of the reservoir volume. Secondly, Union Gas provided an aerial photo showing the current area of the reservoir.⁷ By comparing the photo with the similar map that was attached to the Unit Operation Agreement,⁸ it would appear that the contours of the reservoir today are not the same as they were in 1970. Indeed it would appear that today, more than 13.9% of Mr. Kimpe's inside acreage is above the reservoir. In any case, the OEB does not need to resolve this factual issue. It does not matter whether 13.9% or some other portion of the reservoir is located under Mr. Kimpe's land. That is because, for the reasons that follow, the OEB has repeatedly endorsed the principle that every acre within the designated storage area should receive the same compensation, regardless of whether it encompasses part of the actual reservoir or not. The only boundary that matters for the purpose of determining compensation is the boundary of the designated storage area. The boundary of the reservoir is not relevant.

Although not included in Mr. Kimpe's calculation of the \$121,237.05 and not adverted to in his December 27, 2016 application, there are some references in the materials filed by Mr. Kimpe to compensation on a royalty basis. For example, in his responses to interrogatories, filed June 28, 2017, Mr. Kimpe says "I am now requesting compensation on a royalty basis of 1/8 on gas storage profits" – this appears to be in addition to the \$121,237.05. In the same document, Mr. Kimpe asserts that "a 1/8 royalty is the standard rate" for natural resource royalties. In his letter to the OEB dated August 21, 2017, Mr. Kimpe further explains that a royalty of 1/8 is "common in the gas & oil industry", and requests that the royalty take effect January 1, 2017. He also claims "a royalty of 1/8 in the event Union should sell or lease my storage space".

JUST AND EQUITABLE COMPENSATION UNDER THE OEB ACT

OEB on March 31, 2017.

⁷ Union Gas submission filed April 13, 2017, para. 5 and Schedule 1.

⁸ The map can be seen on p. 3 of Mr. Kimpe's December 27, 2016 application. It also appears on p. 12 of Schedule 2 to Union Gas's submission of April 13, 2017.

Under the OEB Act, landowners in a designated storage area are entitled to “just and equitable compensation”. The relevant provisions read as follows:

Authority to store

38 (1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose.

Right to compensation

(2) Subject to any agreement with respect thereto, the person authorized 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 any damage necessarily resulting from the exercise of the authority given by the order.

Determination of amount of compensation

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

In the 1964 “Crozier Report”, the OEB first set out principles for gas storage compensation. The Crozier Report expressly rejected the argument that landowners sitting directly above the reservoir should receive more than other landowners within the designated storage area:

The storage reservoir, however, underlies only a portion of the total designated area, being surrounded by a non-productive protective barrier (often referred to as the “walls of the warehouse”) which is essential to the operation of the reservoir. In the presently designated areas in Lambton County, this protective zone accounts for some 64% of the total designated acreage. The practice among both operators and landowners is to recognize the protective acreage as of equal value to the productive or “participating” acreage for storage purposes. This is entirely reasonable having regard to the value of the ensured closure around the stored gas and the prevention of damage to the reservoir by the control of drilling which is effected over the whole designated area.

The formula to be established must therefore represent the usefulness of the storage reservoir in terms of the capacity to hold gas in the formation and at the same time must be applied on an equal basis to all the acres in the designated area.⁹

The OEB has relied on the Crozier Report in subsequent cases on storage rights, including cases dealing specifically with storage rights in the Bentpath Pool. In its 1982 decision in EBO 64(1) and (2), the OEB established the quantum of compensation in the Bentpath Pool for the period from July 31, 1974 to December 31, 1982, and in its 2004 decision in RP-1999-0005, the OEB approved a settlement for compensation for the period from January 1, 1999 to December 31, 2008. In both cases, the approved compensation was based on acreage, with all acres within the designated storage area receiving the same amount of compensation, regardless of whether or not they lay directly above the reservoir.¹⁰

Mr. Kimpe suggests that the Crozier Report represents a “flawed policy”: “The acreage payment approach is completely at odds with reality (the only thing of value is the value of the CAVERN).”¹¹ Mr. Kimpe explains: “Acres outside the storage CAVERN are not in any way productive so it begs the question ‘why are Landowners with no CAVERN receiving storage compensation’, logic would dictate one must first have something to store in, in this case part / all of the underground CAVERN.”¹²

OEB staff does not agree with Mr. Kimpe’s assertion that only the reservoir has value. As the OEB explained in the Crozier Report, the “walls of the warehouse” are essential to the protection and operation of the reservoir.

Furthermore, as pointed out by Union Gas in its submission of April 13, 2017, it is standard practice for Union Gas, and indeed for the industry, to compensate all landowners within a designated storage area for storage rights based on the same rate per acre. In OEB staff’s view, Mr. Kimpe has not provided compelling reasons why his compensation should differ from the compensation Union Gas pays to other landowners in the Bentpath Pool. As the OEB noted in its 1982 decision concerning just and equitable compensation for Bentpath

⁹ Crozier Report, p. 8 (Schedule 6 to Union Gas’s submission dated April 13, 2017).

¹⁰ Mr. Kimpe was involved in both cases. More recently, in its 2013 decision in EB-2012-0314 denying an application by Mr. Kimpe for compensation for “residual gas” at a pressure of below 50 psia, the OEB referred approvingly to the Crozier Report. That case was not about acreage vs. volumetric compensation for gas storage.

¹¹ Letter to the Lieutenant Governor, March 23, 2016 (filed with Mr. Kimpe’s December 27, 2016 application), p. 6.

¹² *Ibid.*, p. 5.

landowners, “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.”¹³

Union Gas also says in its submission of April 13, 2017 that over 90% of landowners in the Bentpath Pool agreed to new compensation packages negotiated between Union Gas and the Lambton County Storage Association in 2007 (covering the period from 2009 to 2013) and 2012 (for the period from 2014 to 2018). Under these packages, “it was agreed that all landowners within the DSA should receive the same level of compensation.”¹⁴ OEB staff submits that, where the overwhelming majority of landowners in a designated storage area have agreed to compensation on a certain basis, that is indicative that the compensation is just and equitable. As the OEB said in another recent case involving a claim for compensation by a landowner under section 38(3) of the OEB Act, “the best available evidence of just and equitable compensation for storage rights in the Crowland Pool is the evidence on the record in this proceeding regarding the amount of compensation agreed to by other Crowland Pool landowners.”¹⁵

Turning to Mr. Kimpe’s request for royalty payments of 1/8 of Union Gas’s profits on what he says is his 13.9% ownership share in the reservoir, OEB staff cannot support this request for the same reasons OEB staff disagrees with Mr. Kimpe’s request for compensation based on the volume of the reservoir under his land: (1) it is not consistent with the Crozier Report and subsequent OEB decisions, including decisions concerning storage in the Bentpath Pool;¹⁶ (2) it is not consistent with Union Gas’s standard practice in the Bentpath Pool and elsewhere in the province; and (3) over 90% of landowners in the Bentpath Pool have agreed to compensation based on acreage. The same reasons also undermine Mr. Kimpe’s request for “a royalty of 1/8 in the event Union should sell or lease my storage space”.

RETROACTIVE PAYMENTS

Should the OEB disagree with OEB staff’s positions outlined above and order additional

¹³ EBO 64(1) & (2), p. 83 (Schedule 3 to Union’s submission dated April 13, 2017).

¹⁴ Union Gas submission, April 13, 2017, para. 35. Union Gas says in para. 37 that although Mr. Kimpe did not sign the amending agreements, he has been compensated as though he had.

¹⁵ Babirad Crowland Pool Decision EB-2014-0351, October 29, 2015, p. 8. In that decision, the approved method of compensation was based on acreage within the designated storage area, not on the volume of the reservoir under a landowner’s land.

¹⁶ The Crozier Report found there was an important “distinction between depletable minerals which, once removed from the property, are gone forever and porous rock formations suitable for storage which are not depletable assets,” which explains “why storage payments are in the nature of rentals and not royalties”, p. 18 (Schedule 6 to Union Gas’s April 13, 2017 submission).

compensation, OEB staff submits that such compensation should not be retroactive.

In the Notice of Application and Procedural Order No. 1 for this proceeding, the OEB explained that it would not consider compensation for any time periods already covered by a prior decision of the OEB: “Therefore, this hearing will only consider any storage rights compensation to which Mr. Kimpe may be entitled for the period from January 1, 1991 to December 31, 1999, and for the period from January 1, 2009 to present (the Relevant Time Periods).”

In its submission dated April 13, 2017, Union Gas urged the OEB to narrow further the Relevant Time Periods. Union Gas argued that the January 1, 1991 to December 31, 1999 period should not be considered. It elaborated in a response to an interrogatory from OEB staff:

The RP-2000-0005 Decision and Order stated that “the [Represented Applicants] have reached a settlement with Union covering all claims for compensation asserted in or which could have been asserted in the amended application”. Mr. Kimpe was a Represented Applicant in that proceeding, and his compensation is set out specifically at Appendix “A” to the Board’s Decision. Compensation for the period 1991 to 1999 clearly could have been asserted in the amended application. It is not appropriate for Mr. Kimpe to attempt to re-open the issue of compensation for that period in this application, which is now 25 years later.

OEB staff agrees with Union Gas on this point.

In addition, OEB staff notes that Mr. Kimpe applied to the OEB in 2012 for compensation from Union Gas for “residual gas” at a pressure of below 50 psia. The application was denied, as was a request for a review of the decision.¹⁷ Mr. Kimpe did not include in his 2012 application a request for the compensation methodology he now seeks.

The OEB Act does not impose a limitation period for claims for compensation under section 38. Nevertheless, in OEB staff’s view, the OEB should be cautious about allowing landowners without a gas storage agreement to sit on claims for many years without bringing them forward.¹⁸ That would expose the utility to indeterminate liability. In OEB

¹⁷ EB-2012-0314 and EB-2013-0073 (both of which are included in Union Gas’s submissions dated April 13, 2017).

¹⁸ Recently, in EB-2015-0334, the OEB awarded compensation to a landowner going all the way back to 1965. That case is distinguishable from Mr. Kimpe’s application, however, because the issue was not only the quantum of compensation but whether or not the landowner was entitled to compensation at all (Enbridge Gas

staff's view exceptions can certainly be made but in this instance, no explanation has been provided for why a request could not have been made until now.

CONCLUSION

In summary, OEB staff cannot support Mr. Kimpe's application. The OEB has consistently found that all landowners within a designated storage area are entitled to the same rate of compensation per acre, whether or not the actual reservoir is under their land. Mr. Kimpe has not shown why the OEB should depart from this approach.

In order to provide some finality and certainty to both Mr. Kimpe and Union Gas, it would be appropriate for the OEB to order that, going forward, in the absence of an agreement between Mr. Kimpe and Union Gas, Mr. Kimpe should be entitled to compensation on the same basis as though he had signed the storage rights agreement negotiated by the Lambton County Storage Association and Union Gas, as it may be amended from time to time.

OEB staff submits that if the OEB determines that Mr. Kimpe is entitled to more compensation than he has been receiving to date, the order should take effect no earlier than the date Mr. Kimpe's application was filed, i.e., January 6, 2017.

All of which is respectfully submitted.

Distribution Inc. argued that the landowner had signed away his rights in exchange for a one-time payment in 1965).