



Ontario Energy Board Commission de l'énergie de l'Ontario

DECISION AND ORDER

EB-2016-0030

MR. ACHIEL KIMPE

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

BEFORE: Paul Pastirik
Presiding Member

October 19, 2017

1 INTRODUCTION AND SUMMARY

On January 6, 2017 the Ontario Energy Board (OEB) received an application dated December 27, 2016 by Mr. Achiel Kimpe under section 38(3) of the *Ontario Energy Board Act, 1998* (OEB Act) for an order determining “just and equitable compensation” for the storage of gas under his land.

Mr. Kimpe owns land in the Bentpath Designated Storage Area (Bentpath Pool) which has been operated by Union Gas Limited (Union Gas) since 1974.

The Bentpath Pool covers approximately 750 acres and was designated as a storage area through O. Reg. 585/74 on August 7, 1974. The OEB granted Union Gas the authorization to operate the Bentpath Pool by way of Board 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. There are 15 landowners within the Bentpath Pool.

Although Mr. Kimpe does not have a storage rights agreement with Union Gas, he is compensated in the same manner as Bentpath landowners who do have such an agreement. That is, he is paid a certain amount for each acre he owns within the designated area, plus a lower amount for each acre he owns outside the designated area. Mr. Kimpe asks to be compensated instead based on the amount of the volume of storage reservoir under his land relative to the total volume of storage in the Bentpath Pool reservoir. In addition, Mr. Kimpe requests certain royalty payments.

For the reasons below, the OEB has determined that the methodology used by Union Gas to calculate Mr. Kimpe’s compensation, which is used to calculate compensation for all other landowners in the Bentpath Pool and is consistent with previous OEB decisions, is just and equitable, and that Mr. Kimpe’s application should therefore be denied.

2 THE PROCESS

On March 31, 2017, the OEB issued a Notice of Application and Procedural Order No.1, which established a schedule for written evidence and interrogatories. The OEB received no intervention requests; the only parties were Mr. Kimpe, Union Gas and OEB staff. After reviewing the evidence filed by Mr. Kimpe and Union Gas, the OEB determined in Procedural Order No. 2 to proceed by way of a written rather than an oral hearing. (Mr. Kimpe and Union Gas were given an opportunity to request an oral hearing instead, but neither of them did so.) All three parties filed written submissions.

3 COMPENSATION TO MR. KIMPE

Storage Rights Compensation under the OEB Act

Under the OEB Act, landowners in a designated storage area are entitled to “just and equitable compensation”. Under section 38, if an agreement on compensation cannot be reached between the landowner and the operator of the storage pool, either party can apply to the OEB to determine the amount of compensation.

Mr. Kimpe’s Request

Although Mr. Kimpe does not have a storage rights agreement with Union Gas, Union Gas has been compensating him as though he did. That is, Union Gas calculates Mr. Kimpe’s compensation at the same rate per acre it pays landowners who have signed an agreement. Mr. Kimpe confirmed that he has been cashing those compensation checks, but advised that he writes a disclaimer on the back: “accepted only as a partly payment on account”.

Mr. Kimpe contends that compensation should be based on the volume of gas stored under each landowner’s land, rather than on an acreage basis. He claims that 13.9% of the storage reservoir is located under his land, therefore he is entitled to 13.9% of all compensation paid by Union Gas to all Bentpath landowners. Moreover, he argues that he should retroactively recover the difference between the amounts he was paid by Union Gas since 1974 and what he says he should have been paid, as the owner of 13.9% of the reservoir, plus interest. In March 2017, Mr. Kimpe calculated that retroactive amount owing as \$121,237.05.

In addition to such compensation on a volumetric basis, Mr. Kimpe asks for “compensation on a royalty basis of 1/8th on [Union Gas’s] gas storage profits” effective January 1, 2017. Mr. Kimpe also claims “a royalty of 1/8th in the event Union should sell or lease my storage space.”

Union Gas Position

Union Gas objects to Mr. Kimpe’s request. Union Gas submits that calculating compensation on a per-acre basis is consistent with prior decisions of the OEB and the principles set out in the OEB’s “Gas Storage Report to the Lieutenant Governor in Council” dated May 4, 1964 (the Crozier Report). Moreover, Union Gas says the methodology proposed by Mr. Kimpe would be a departure from Union Gas’ practice of compensating all of its landowners at the same rate per acre, and would be unfair to

other landowners. In response to Mr. Kimpe's claim for royalty payments, Union Gas argues that royalties are inappropriate because storage landowners do not own the rights to the gas resource and have not contributed to the development of the storage pools.

OEB Staff Position

OEB staff does not support Mr. Kimpe's application.

Like Union Gas, OEB staff argues that Mr. Kimpe's proposed approach is not consistent with the standard practice for Union Gas and indeed the industry's standard practice to compensate landowners based on the same rate per acre, regardless of whether their land lies directly above the reservoir.

OEB staff noted that 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.

OEB staff adds that the fact that over 90% of landowners in the Bentpath Pool have agreed to compensation based on the same rate per acre is indicative that the compensation is just and equitable.

Findings

The OEB finds that Mr. Kimpe as well as all other landowners who own land in the designated storage area of the Bentpath storage pool are entitled to just and equitable compensation for the land that they own.

The current methodology was first set out by the OEB in the 1964 Crozier Report. The Crozier Report expressly rejected the argument that landowners owning land directly

above the reservoir should receive more than other landowners within the designated storage area:¹

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.

In subsequent proceedings (EBO 64(1) and (2) and RP-1999-0005), the OEB approved reasonable compensation based on acreage within the designated storage area. The impact to all owners within the designated storage would be the same. This has been an industry wide accepted practice to compensate all landowners in the designed storage area based on the same rate per acre. This has also been widely accepted by the majority of the landowners. The OEB is of the view that this should continue and that this methodology should not be changed.

For these reasons the OEB also does not agree with Mr. Kimpe's request for royalty payments similar to those payments made to landowners that own land above producing oil and gas wells. In that case the oil and gas on their land is being produced and sold. In this case, the gas that is being stored is not owned by the land owner. In effect, the space is being rented from the landowner and the landowner is compensated with a per acre rate for that space. The OEB therefore denies Mr. Kimpe's request for royalty payments and agrees with how he has been compensated to date.

¹ The Crozier Report, page 8.

4 COSTS

On February 16, 2017 Mr. Kimpe asked for cost award eligibility for “any assistance he may get and his own expenses” in connection with this proceeding. Union Gas did not file an objection to Mr. Kimpe’s cost award eligibility request.

The OEB finds that Mr. Kimpe is eligible for an award of costs.

Consistent with other recent applications by individual landowners for compensation under section 38 of the OEB Act, including one in which Mr. Kimpe was the applicant,² the OEB will grant an honorarium of \$1,000 to Mr. Kimpe plus any reasonable disbursements he may claim. The awarded costs should be paid to Mr. Kimpe by Union Gas.

Union Gas shall pay the OEB’s costs of and incidental to this proceeding upon receipt of the OEB’s invoice.

² EB-2014-0351, October 29, 2015; EB-2012-0314, February 21, 2013.

5 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Mr. Kimpe's application is dismissed.
2. Union Gas shall pay to Mr. Kimpe an honorarium in the amount of \$1,000 and any approved disbursements by **December 8, 2017**.
3. Mr. Kimpe shall file his claim for disbursements in accordance with the OEB's *Practice Direction on Cost Awards* with the OEB by **November 16, 2017** and copy Union Gas.
4. Union Gas may make a submission regarding Mr. Kimpe's disbursements claim by **November 23, 2017**.
5. Union Gas shall pay the OEB's costs of and incidental to this proceeding upon receipt of the OEB's invoice.

DATED at Toronto, October 19, 2017

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary