

EB-2014-0351

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, (Schedule B) (the "Act");

AND IN THE MATTER OF an Application by Paul Babirad on behalf of Jim Babirad under section 38(3) of the Act for an Order of the Board determining the quantum of compensation the Jim Babirad is entitled to have received from Enbridge Gas Distribution Inc.

**NOTICE OF APPLICATION AND PROCEDURAL ORDER NO. 1
January 15, 2015**

On November 20, 2014 Paul Babirad on behalf of Jim Babirad filed an application with the Ontario Energy Board (Board) under section 38(3) of the Act. The Applicant has requested an order of the Board for compensation for storage rights in Crowland natural gas storage pool (Pool) operated by Enbridge Gas Distribution Inc. (Enbridge). The applicant is a landowner within the Pool since 1962. The application states that he has not received any compensation for storage rights from Enbridge.

The Board will hold a hearing to consider Mr. Babirad's application. At the end of this hearing, the Board will decide what, if any, compensation will be allowed.

I am making provision for Mr. Babirad to file further evidence in support of his application, if any. This procedural order sets the schedule for a written discovery process and written submissions by the parties. The Board may change and add further steps as required during the course of the proceeding. If either Mr. Babirad or Enbridge thinks an oral hearing is needed, they should write to the Board to explain why.

A copy of the application is attached as Appendix A to this Notice.

Participants

Paul Babirad on behalf of Jim Babirad and Enbridge are deemed parties in this proceeding.

I consider it necessary to make provision for the following procedural matters. Please be aware that this procedural order may be amended, and further procedural orders may be issued from time to time.

IT IS THEREFORE ORDERED THAT:

1. Mr. Babirad shall file any supporting evidence which is in addition to that filed with the application by **February 17, 2015**.
2. Enbridge shall file any responding material with the Board and copy Mr. Babirad by **February 27, 2015**.
3. Enbridge and Board Staff may file any questions that are relevant to the application or to any supporting evidence filed by Mr. Babirad with the Board and copy Mr. Babirad by **March 6, 2015**.
4. Mr. Babirad and Board Staff may also file any questions that are relevant to any materials filed by Enbridge with the Board and copy Enbridge by **March 6, 2015**.
5. Mr. Babirad shall file responses to any questions from Enbridge and Board Staff with the Board and copy Enbridge by **March 27, 2015**.
6. Enbridge shall file responses to any questions from Mr. Babirad and Board Staff with the Board and copy Mr. Babirad by **March 27, 2015**.
7. Unless the Board orders otherwise, Enbridge and Board Staff may file a written submission with the Board and copy Mr. Babirad by **April 10, 2015**.
8. Unless the Board orders otherwise, Mr. Babirad may file a written reply submission with the Board and copy Enbridge by **April 20, 2015**.

All filings to the Board must quote the file number EB-2014-0351 and be made electronically in searchable / unrestricted PDF format through the Board's web portal at <https://www.pes.ontarioenergyboard.ca/eservice/>. Two paper copies must also be filed. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming

conventions and document submission standards outlined in the RESS Document Guideline found at <http://www.ontarioenergyboard.ca/OEB/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

E-mail: boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (Toll free)
Fax: 416-440-7656

DATED at Toronto, January 15, 2015

ONTARIO ENERGY BOARD

By delegation, before: Kristi Sebalj

Original signed by

Kristi Sebalj
Registrar

**Appendix A to
Notice of Application and Procedural Order No. 1
Application**

Board File No. EB-2014-0351

DATED: January 15, 2015

Ms. Kirsten Walli
Board Secretary,

My name is Paul Babirad and I am writing on behalf of my father Jim Babirad who owns 40 acres of land on top of an Enbridge natural gas pool referred to as "Crowland" in the Niagara Region of Ontario. There is no executed agreement for storage rights between Enbridge and my father. Mr Babirad has owned this property from 1962 to present and has never received any compensation for the use of storage/pore space from Enbridge.

As such, we are formally applying to the OEB to determine compensation payable. This application is under section 38.3 of the OEB Act :

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. 1998, c. 15, Sched. B, s. 38 (1).

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. 1998, c. 15, Sched. B, s. 38 (2).

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. 1998, c. 15, Sched. B, s. 38 (3).

Background Evidence

In 1965 my parents, Jim and Theresa Babirad, granted Enbridge "in fee simple all mines, minerals and mining rights and the right to work the same" for a one time payment of \$800. A copy of the original document is attached to this application. The signed indenture effectively severed the property into a surface estate and a mineral estate. My parents retained ownership to the surface estate but sold to Enbridge the mineral estate for the sum of \$800.

We assert that the storage/pore space rights belong to the surface owner in situations where the land has been severed into a surface estate and a mineral estate. The underlying justification is the Common Law principle that the landowner owns everything from "heaven to hell" (*Cuis est solum, eius est usque ad coelum et ad inferos*). Unless the landowner has explicitly sold the rights to an asset of the property then the asset belongs to the landowner.

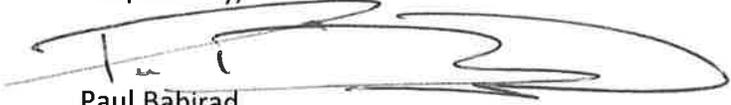
In this case my parents sold to Enbridge the right to extract all the minerals from underneath the land and Enbridge retains ownership of any physical structures (mines) it has built in order to extract the minerals. My parents did not sell the storage /pore space rights. The word storage does not appear in the signed indenture. The air/pore space that Enbridge has been storing natural gas in under my parents property is not a mine -- it is a naturally occurring geologic formation.

My parents sold to Enbridge the mineral estate for \$800. If oil, gold, natural gas or any other mineral was discovered under the surface of the property it would belong to Enbridge. But the pockets of air or pore space that naturally exist under the property was not sold and therefore belongs to the landowner. If Enbridge wanted to purchase the storage/pore space rights to the property they needed to have explicitly stated storage/pore space rights in the signed indenture as they do for the much more common landowner storage rights lease agreements.

Indeed recommendation #2 of the OEB's 1964 Crozier report states:

"The Board recommends that there be a requirement that, where storage rights are included in a production lease, the caption include, in bold type, reference to storage rights, and clauses dealing with storage be separated from those dealing with production."

Respectfully,



Paul Babirad

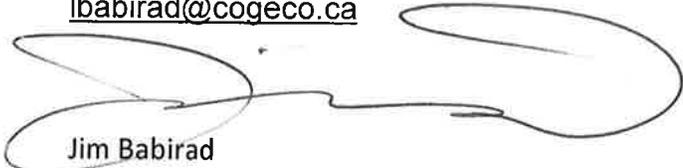
159 Innville Crescent

Oakville Ontario

L6L0B8

905-827-1836

lbabirad@cogeco.ca



Jim Babirad

3777 Miller Road

Port Colborne Ontario

L3K 5V5

905-835-2747

THIS INDENTURE

made in duplicate the *third* day of *August*
in the year of our Lord one thousand nine hundred and sixty five
in Pursuance of the Short Forms of Conveyances Act:

- between -

THERESA A. M. BABIRAD

THERESA BABIRAD

hereinafter called the Grantors of the FIRST PART

- and -

THE CONSUMERS' GAS COMPANY

A Corporation incorporated under the Laws of

~~Ontario having its Head Office in the City of Toronto~~

~~Office in the City of Toronto~~

Ontario having its Head Office in the City of Toronto
hereinafter called the Grantee of the SECOND PART

- and -

MARLENE M. BELL

^N
PERM E. HEINIGER

hereinafter called the Mortgagees of the THIRD PART

PH
Aug 3/65
[Signature]

WITNESSES that in consideration of

Eight hundred dollars (\$800.00)

of lawful money of Canada now paid by the said Grantee to the said
Grantors (the receipt whereof is hereby by them acknowledged), they
the said Grantors DO GRANT unto the said Grantee in fee simple ALL
MINES, MINERALS AND MINING RIGHTS AND THE RIGHT TO WORK THE SAME
in, under or upon the lands described in Schedule "A" annexed hereto.

TO HAVE AND TO HOLD unto the said Grantee, its successors, heirs and
assigns to and for their sole and only use forever,

SUBJECT NEVERTHELESS to the reservations, limitations, provisos and
conditions expressed in the original grant thereof from the Crown.



The said Grantors COVENANT with the said Grantee THAT they have the right to convey the said MINES, MINERALS AND MINING RIGHTS AND THE RIGHT TO WORK THE SAME to the said Grantee notwithstanding any act of the said Grantors.

AND that the said Grantee shall have quiet possession of the said MINES, MINERALS AND MINING RIGHTS AND THE RIGHT TO WORK THE SAME, free from all encumbrances.

AND the said Grantors COVENANT with the said Grantee THAT they will execute such further assurances of the said MINES, MINERALS AND MINING RIGHTS AND THE RIGHT TO WORK THE SAME as may be requisite.

AND the said Grantors COVENANT with the said Grantee THAT they have done no act to encumber the said MINES, MINERALS AND MINING RIGHTS AND THE RIGHT TO WORK THE SAME.

AND the said Grantors RELEASE to the said Grantee ALL their claims upon the said MINES, MINERALS AND MINING RIGHTS AND THE RIGHT TO WORK THE SAME.

AND the said Grantors in conveying to the said Grantee the said MINES, MINERALS AND MINING RIGHTS AND THE RIGHT TO WORK THE SAME retain to themselves, their successors, heirs and assigns all Surface Rights to the said lands, SAVE AND EXCEPT the right of ingress, egress and regress to a parcel of land measuring fifty (50) feet by fifty (50) feet located in the southeast corner of the lands described in Schedule "A" containing the site of an abandoned gas well identified as Consumers' No. 633 for a period of one year from the date hereof.

Mortgagees in consideration of the sum of one dollar (\$1.00) (receipt of which is hereby acknowledged) hereby consent to this Deed and postpone in favor of Grantee all right, title and interest Mortgagees hold upon the lands to the same effect and intent as if this Deed had been executed and registered prior to the Mortgage held by the Mortgagees.



IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals.

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SIGNED, SEALED AND DELIVERED)
IN THE PRESENCE OF

[Handwritten signature]

Thomas G. M. Baird ●
Trista Baird ●
Marglene M. Zell ●
Ken E. Heminger ●

SCHEDULE A

to

THE INDENTURE

dated the 3rd day of August, 1965

in the Township of Humberstone, County of Welland, Part of
Lot 16, Concession 4, described as follows:

- Commencing at the northeast angle of Lot 16.
- Thence southerly in and along the easterly limit 319.9 feet more or less to a point where the southerly limit of the Canadian National Railway, formerly the Great Western Railway Company, Right-Of-Way intersects the easterly limit which said point is also the point of commencement for the hereinafter described lands.
- Thence continuing southerly in the said easterly limit 1330.25 feet to a point.
- Thence westerly parallel to the northern limit of Lot 16, 1310 feet more or less to a point which said point is 10 feet east of the westerly limit of said lot.
- Thence northerly parallel to the said westerly limit of Lot 16, 1407.25 feet more or less to a point in the southerly limit of the Canadian National Railway Right-Of-Way.
- Thence southeasterly along the southerly limit of the Canadian National Railway Right-Of-Way 1320 feet more or less to the point of beginning
and containing 41 acres more or less.

PROVINCE OF ONTARIO
COUNTY OF Welland

I/WE Per E. Hemminger
of the City of New York
To Wit: in the County of New York of New York
U.S.A.

Strike out words and parts not applicable and initial.

In the within instrument named, make oath and say that at the time of the execution of the within instrument,

1. I was of the full age of twenty-one years;

If Attorney see footnote.

2. And that Theresa A. M. Balisad, Theresa Balisad and Marlene M. Bell,
who also executed the within instrument one of the full age of twenty-one years

3. I was legally married to the person named therein as my wife/husband;

4. ~~I was unmarried/divorced/widowed.~~

SWORN before me at the Town
of Port Colborne
in the County
of Welland
this 3rd day of August
A.D. 1965

Per E. Hemminger

A Commissioner for taking Affidavits, etc.
WILLIAM H. GIRLING, a Commissioner etc.,
Province of Ontario, Expiry 10 March, 1968

NOTE: If Attorney, substitute in space provided, "I am Attorney for..... (State name)..... one of the parties named therein and he/she was of the full age of twenty-one years."

Affidavit, Land Transfer Tax Act IN THE MATTER OF THE LAND TRANSFER TAX ACT.

PROVINCE OF ONTARIO
COUNTY OF York

I, George W. Carpenter
of the City of Toronto
in the County of York

To Wit: Grantee named in the within (or annexed) transfer make oath and say:

This affidavit may be made by the purchaser or vendor or by any one acting for them under power of attorney or by an agent accredited in writing by the purchaser or vendor or by the solicitor of either of them.

- I am Vice-President and Gen. Supt. of Gas Supply of The Consumers' Gas Company named in the within (or annexed) transfer.
- I have a personal knowledge of the facts stated in this affidavit.
- The true amount of the monies in cash and the value of any property or security included in the consideration is as follows:

(a) Monies paid in cash	\$ <u>800.00</u>
(b) Property transferred in exchange;	
Equity value \$	<u>NIL</u>
Encumbrance \$	<u>NIL</u>
(c) Securities transferred to the value of	\$ <u>NIL</u>
(d) Balances of existing encumbrances with interest owing at date of transfer	\$ <u>NIL</u>
(e) Monies secured by mortgage under this transaction	\$ <u>NIL</u>
(f) Liens, legacies, annuities and maintenance charges to which transfer is subject	\$ <u>NIL</u>
Total consideration	\$ <u>800.00</u>

All blanks must be filled in

- If consideration is nominal, is the transfer for natural love and affection? No
- If so, what is the relationship between Grantor and Grantee? -
- Other remarks and explanations, if necessary -

Sworn before me at the City
of Toronto
in the County
of York
this 13th
day of August
A.D. 1965

George W. Carpenter

A Commissioner, etc.
WILLIAM H. GIRLING
Province of Ontario, Expiry 10 March, 1968

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CANADA
 PROVINCE OF ONTARIO

I, William H. Keirling of the County of Welland in the City of Toronto of the County of York do hereby make oath and say:

TO WIT:

1. THAT I was personally present and did see the within or annexed Instrument and a duplicate thereof duly signed, sealed and executed by Theresa A.M. Babirad, Theresa Babirad, Ken E. Hemminger & Marlene M. Bell of the parties thereto.

2. THAT the said Instrument and duplicate were executed by the said parties at the Town of Port Colborne of the County of Welland in the Province of Ontario on this 12th day of August A.D. 1965.

3. THAT I know the said parties.

4. THAT I am a subscribing witness to the said Instrument and duplicate.

SWORN before me at the City of Toronto in the County of York this 12th day of August A.D. 1965.

Charles Rouse
 A Commissioner for taking Affidavits, etc.
 MY COMMISSION EXPIRES SEPT. 26, 1966

CANADA
 PROVINCE OF ONTARIO

I, _____ of the _____ of _____ in the _____ do hereby make oath and say:

TO WIT:

1. THAT I was personally present and did see the within or annexed Instrument and a duplicate thereof duly signed, sealed and executed by _____ of the parties thereto.

2. THAT the said Instrument and duplicate were executed by the said parties at the _____ of the _____ of the _____ in the _____ on this _____ day of _____ A.D. 19 _____.

3. THAT I know the said parties.

4. THAT I am a subscribing witness to the said Instrument and duplicate.

SWORN before me at the _____ in the _____ this _____ day of _____ A.D. 19 _____.

A Commissioner for taking Affidavits, etc.

31964B
 Dated 2nd August 1965

THERESA A. M. BABIRAD
 AND
THERESA BABIRAD
 TO
THE CONSUMERS'
GAS COMPANY

Deed of Land
 SITUATE
TOWNSHIP OF
HUMBERSTONE

Newman and Gilbert, Limited, Toronto



K 264 ✓

This Document is the Property of THE REGISTRY OFFICE For The Registry Division OF WELLAND

11-15

THIS SPACE TO BE RESERVED FOR REGISTRY OFFICE CERTIFICATES

I certify that the within Instrument is Registered in the Registry Office for the Registry Division of the County of Welland, at _____ o'clock on the _____ day of _____ A.D. 1965. Number 31964B

[Signature] Registrar