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BY EMAIL and RESS

November 18, 2015
Our File: CO-2015-0102

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2014-0351 – Babirad Application For Compensation – Motion to Review

We are counsel to Jim Babirad. Enclosed, please find a Notice of Motion to review and vary the Ontario Energy Board's Decision and Order, dated October 29, 2015 in EB-2014-0351.

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

cc: Paul Babirad (by email)
Enbridge Gas Distribution Inc. (by email)

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ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Jim Babirad under section 38(3) of the *Ontario Energy Board Act, 1998* for an Order of the Board determining the quantum of compensation that Jim Babirad is entitled to receive from Enbridge Gas Distribution Inc.

AND IN THE MATTER OF Rule 42 of the Rules of *Practice and Procedure of the Ontario Energy Board*.

NOTICE OF MOTION

Jim Babirad will make a motion to the Ontario Energy Board (“the Board”) at its offices at 2300 Yonge Street, Toronto, on a date and at a time to be fixed by the Board.

PROPOSED METHOD OF HEARING:

Jim Babirad has no preference in the method of hearing this motion.

THE MOTION IS FOR:

1. A review and variance of the Decision and Order dated October 29, 2015, in EB-2014-0351 (the “Decision”), in which the Board did not award compensation to be payable to Jim Babirad by Enbridge Gas Distribution Inc. (“Enbridge”) for the period of 1965-2014;
2. An order determining the amount of compensation due to Jim Babirad by Enbridge for the period of 1965-2014, based on the record in the EB-2014-0351 proceeding;
3. An order that Jim Babirad satisfies the “threshold test” in Rule 43.01 of the Board’s *Rules of Practice and Procedure*;
4. An order that Jim Babirad is eligible for an award of costs on this motion in accordance with section 3.07 of the *Practice Direction on Cost Awards*; and
5. Such further and other relief as the Applicant may request and the Board may allow.

GROUNDS OF THE MOTION ARE:

Background

1. Paul Babirad, on behalf of his father Jim Babirad, applied to the Board on November 20, 2014 pursuant to section 38(3) of the *Ontario Energy Board Act, 1998* (“*OEB Act*”) for a determination of compensation owed to him from Enbridge for storage rights as there is and never was a storage rights compensation agreement. Jim Babirad owns property under which Enbridge operates a natural gas storage pool, pursuant to a Board order made in 1965.¹ The pool is part of the Crowland gas storage pool.
2. Jim Babirad sought compensation comparable to compensation owed to the pinnacle reef landowners in a previous proceeding.²
3. Pursuant to the *Notice of Application and Procedural Order No.1*, the Board provided parties with an opportunity to file evidence, interrogatories, and make written submissions. The Board also deemed Jim Babirad eligible for an award of costs pursuant to the *Practice Direction on Cost Awards*.³
4. With respect to the issue of eligibility for compensation, Enbridge took the position that no compensation was due as \$800 had been previously paid by it (then Consumers Gas) in 1965 in the form of an indenture for a mineral estate which provided a lump sum compensation in fee simple for “all mines, minerals, and mining rights and right to work the same in, under or upon”.⁴
5. In Enbridge’s view, the payments for the mineral estate included the storage rights.⁵ Jim Babirad disagreed, and provided significant arguments for why the compensation for those mineral rights did not include compensation for storage rights, including the plain wording of the indenture.⁶
6. Evidence was also provided on what compensation should be owed to him since 1965.⁷

¹ Decision and Order (EB-2014-0359), October 29 2015 [“Decision”], p.1

² Decision, p.7

³ Letter from the Registrar, February 13 2015

⁴ Babirad Application, Attachment, filed November 20, 2014

⁵ Decision, p. 7

⁶ See for example, Babirad Submission, 'Who owns the Pore Space? Surface Estate vs Mineral Estate', filed February 4 2015

⁷ Evidence of Babirad, 'Lambton vs Crowland', Appendix C, filed February 4, 2015

The Decision

7. In its Decision, the Board found as a fact that Jim Babirad does not hold a storage rights agreement with Enbridge.⁸ This made Jim Babirad eligible for compensation. The Board ordered Enbridge to pay Jim Babirad compensation for storage rights beginning in 2015.⁹
8. While Jim Babirad sought compensation comparable to what was provided to pinnacle reef landowners in a previous proceeding, which was a much higher amount, the Board ultimately determined that Enbridge should pay \$8.81 per acre for the year 2015, to be adjusted periodically going forward by the same percentage increase at the same time as Enbridge adjusts payment to all landowners in all its storage pools.¹⁰ This was consistent with a report it filed by Elenchus Research Associates Inc. (the “Elenchus Report”).¹¹ Jim Babirad does not challenge this aspect of the decision.
9. The Decision makes no findings, let alone any reference, to the request for compensation for the period before 2015.

Errors of Law

10. The Board erred in law by not setting rates that are just and equitable, as it did not include an order for compensation from the period of 1965-2014. The Board cannot make a finding that Enbridge owes Jim Babirad compensation going forward, yet not make an order that amounts were owed for the period between the Board’s order granting Enbridge leave to store gas in 1965, and 2015. In fact, the Board, in the Decision, did not even mention compensation for the 1965-2014 period at all.
11. There is no temporal or other limitations period set out under section 38 of the *OEB Act* which would bar compensation, nor would denying compensation be consistent with the purposes of the compensation scheme. What is legally required of the Board, upon an application, is to determine a compensation amount that is just and equitable, to be paid to the owner by entities that have the right to store gas in a designated storage area pursuant to a Board order. That Board order was made in 1965. Jim Babirad is an owner. Enbridge is storing gas under his property. The conditions were therefore satisfied, and a compensation amount must be established.

⁸ Decision, p.7

⁹ Decision, p.8,10

¹⁰ Decision, p.10

¹¹ Decision, p.1, 6-7

12. By providing an order that Enbridge must compensate Jim Babirad going forward, the Board recognized that he had a right to compensation under the *OEB Act*. Section 38(2) and (3) are clear that if there is no agreement on compensation, the Board shall order just and equitable compensation to the owner upon an application. If Jim Babirad did not have the right to compensation because of the previous lump sum payment, as was alleged by Enbridge, then the Board did not have the authority to order compensation for any period of time. Once the Board determined that compensation was payable for any period, compensation was in law payable for the entire period.
13. The Board further erred in law by providing inadequate reasons for failing to require Enbridge to pay past compensation. While a tribunal is not required to respond to every argument or line of possible analysis provided by parties in its reasons, they must provide sufficient reasoning to allow for a substantive review to be conducted. Here, that is not the case. The Board does not even mention this important element of the application. There are no reasons at all regarding this issue. Past compensation is owed to Jim Babirad, even based on the methodology underlying the Report which the Board endorsed, and the compensation is a material sum.

Threshold Test Has Been Met

14. The motion satisfies the “threshold test” set out in Rule 43.01. The error in law is a ground for review and it raises material questions as to the correctness of the Board’s Decision. It is an identifiable error, which resulted in the Board failing to properly address a material issue, and the review could result in the varying of the Decision. This motion does not seek to re-argue the issue. It only seeks to review and vary the Decision to require the Board to consider the evidence and arguments of the parties, and make a specific finding regarding compensation owed for the period of 1965-2014.

15. The OEB’s *Rules of Practice and Procedure*.

16. Such grounds as counsel may advise and the Board may permit.

THE FOLLOWING DOCUMENTARY MATERIAL AND EVIDENCE WILL BE RELIED UPON AT THE HEARING OF THE MOTION:

1. The Record in EB-2014-0351;
2. Further submissions and material filed in support of this motion; and
3. Such further and other material as counsel may advise and the Board may permit.

November 18, 2015

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