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March 29, 2016

VIA RESS, EMAIL and Courier

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

Dear Ms. Walli:

Re: **EB-2015-0334 – Motion to Review and Vary**
Enbridge Gas Distribution Inc. ("Enbridge") Submission

Enclosed please find Enbridge's submission pursuant to Procedural Order No. 2, dated March 3, 2016.

Please contact the undersigned if you have questions.

Yours truly,

[original signed]

Shari Lynn Spratt
Supervisor, Regulatory Proceedings

Attach.

cc: Mr. Mark Rubenstein, counsel to Jim Babirad
Mr. Jim Babirad

EB-2015-0334

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*, S.O. 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 a Motion to Review and Vary by Jim Babirad pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review of the Board's Decision and Order in proceeding EB-2014-0351.

REVIEW MOTION SUBMISSIONS BY ENBRIDGE GAS DISTRIBUTION INC.

Background

1. On October 29, 2015, the Board issued its EB-2014-0351 Decision and Order (the Decision) in respect of an application filed by Paul Babirad, on behalf of his father Jim Babirad, seeking an order determining compensation payable by Enbridge Gas Distribution Inc. ("Enbridge") under section 38(3) of the *Ontario Energy Board Act, 1998* (the "OEB Act"). Jim Babirad owns lands overlying a designated gas storage area in the Region of Niagara known as the Crowland Pool. In the Decision, the Board determined that Enbridge should pay compensation in the amount of $8.81 per acre for the year 2015, to be adjusted periodically by the same percentage increase and at the same time as Enbridge adjusts payments to all landowners in all of Enbridge's gas storage areas, including the Crowland Pool.

2. On November 18, 2015, counsel for Jim Babirad filed a motion to review and vary the Decision. Written Submissions in support of the motion were filed by Jim Babirad's counsel on February 16, 2016.

3. In its Decision on Threshold Question and Procedural Order No. 2 issued on March 3, 2016, the Board found that the motion meets the threshold test for a review motion on the ground that the Board's "failure to address the material issue of past compensation" is an "identifiable" error. The Board indicated that Enbridge may file written submissions no later than March 29, 2016 and that the scope of submissions is limited to "the issue of whether Mr. Babirad's claim for compensation from Enbridge for the period from 1965 to 2014 should be granted".

4. These are the written submissions of Enbridge filed in accordance with the Decision on Threshold Question and Procedural Order No. 2. This document references Enbridge's submissions at the EB-2014-0351 proceeding and are attached as follows:

Attachment A - February 27, 2015 responding material (main document)

Attachment B - April 10, 2015 submission (main document)

Attachment C - April 10, 2015 submission (Tab G)

Governing Legislation

5. Enbridge filed a written submission on April 10, 2015 in the EB-2014-0351 application (the "Enbridge EB-2014-0315 Submission") which set out the statutory provisions that govern a claim for storage compensation. For the purposes of the Board's consideration of the review motion by Jim Babirad, Enbridge will set out the statutory provisions again, in the following paragraphs.

6. The granting of authority to inject gas into, store gas in and remove gas from a designated gas storage area is provided for in subsection 38(1) of the OEB Act. Specifically, subsection 38(1) of the OEB Act states that:

> 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.[1]

7. The legislation in effect at the time of the leave to inject, store and withdraw order in respect of the Crowland Pool (the "Leave to Inject, Store and Withdraw Order") was the *Ontario Energy Board Act, 1964* (the "1964 Act"), which came into force on January 1, 1965. The wording of subsection 21(1) of the 1964 Act was the same as the wording of subsection 38(1) of the OEB Act.[2]

8. The payment of compensation by a person in whose favour a leave to inject, store and withdraw order has been made is provided for in subsection 38(2) of OEB Act. Paragraph (a) of subsection 38(2) states that the person authorized by a leave to inject, store and withdraw order,

> …shall make to the owners of …any right to store gas in the area just and equitable compensation in respect of …the right to store gas.[3]

9. The wording of paragraph (a) of subsection 21(2) of the 1964 Act was the same as the wording of paragraph (a) of subsection 38(2) of the OEB Act, except that the 1964 Act used the words "fair, just and equitable compensation", rather than "just and equitable compensation" (and except for a very minor difference in the use of the word "such" rather than the word "the").[4]

10. The determination of compensation payable under section 38 of the OEB Act is addressed in subsection 38(3). Subsection 38(3) states that:

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[1] OEB Act, S.O. 1998, Chapter 15, Schedule B, subsection 38(1).
[2] 1964 Act, S.O. 1964, chapter 74, subsection 21(1).
[3] OEB Act, subsection 38(2), paragraph (a).
[4] 1964 Act, subsection 21(2), paragraph (a).

> 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.[5]

11. The wording of subsection 21(3) of the 1964 Act was similar to the wording of subsection 38(3) of the OEB Act, except that subsection 21(3) provided for compensation to be determined by a "board of arbitration", as provided for in regulations that were in force at the time, rather than by the Board.[6]

Claim for Compensation

12. It is clear from the provisions of the governing legislation that the Board's jurisdiction under subsection 38(3) of the OEB Act is to award "just and equitable compensation". The Enbridge 2014-0351 Submission included submissions regarding just and equitable compensation in respect of the claim by Jim Babirad. Enbridge is aware, of course, that the Board has ruled on a number of occasions that a review motion is not intended to be an opportunity for re-argument of an application already determined by the Board. Enbridge will summarize the points that it has already made on the compensation issue, without attempting to re-argue those points.

13. Enbridge submits that, in considering "just and equitable" compensation under subsection 38(3) of the OEB Act, the Board should have regard to the points summarized under the following sub-headings that were the subject of argument in the EB-2014-0351 proceeding.

Inequity of a Retroactive Compensation Determination

14. Pursuant to the provisions of the OEB Act set out above, the claim by Jim Babirad for compensation under subsection 38(3) of the statute was triggered by the granting of the Leave to Inject, Store and Withdraw Order by the Board. The Leave to Inject, Store and Withdraw

[5] OEB Act, subsection 38(3).
[6] 1964 Act, subsection 21(3).

Order was issued on February 12, 1965 and, almost 50 years later, on November 20, 2014, the EB-2014-0351 application was filed with the Board.

15. During the period of almost 50 years that elapsed after the issuance of the Leave to Inject, Store and Withdraw order, the Board considered many applications by Enbridge (formerly The Consumers' Gas Company Ltd., or "Consumers Gas") for the approval of just and reasonable rates to be paid by gas distribution ratepayers. Because there was never any determination of a claim for compensation by Mr. Babirad over that period of almost 50 years, the costs of such compensation were not included in any of Enbridge's rate applications over the same period.

16. Enbridge understood that an "amicable settlement" of the compensation issue was reached in 1965.[7] It would be inequitable to make a retroactive award of compensation at this time, stretching back over a period of almost 50 years, because Enbridge has managed its affairs over that time period on the basis that there is no compensation owing to Jim Babirad. More specifically, issues of intergenerational inequity arise because compensation payable to Jim Babirad over the retroactive time period was not taken into account in rate applications made by Enbridge (Consumers Gas) during that time period.

Delay/Laches

17. Because the governing legislation provides for a determination of "equitable" compensation, it is appropriate to look to the equitable doctrine of laches for guidance as to the implications of such a long delay.[8] In a recent decision, the majority of the Supreme Court of

[7] Enbridge EB-2014-0351 Responding Material 20150227 (Responding Material), paragraph 31 and Enbridge EB-2014-0351 20150410 Submission, paragraph 41.
[8] Reliance on equitable defences is not precluded merely because the claim arises under a statute and, in this regard, it is appropriate to take into account that a particular claim made under a statute may have a "distinctively equitable flavor": see *Perry, Farley & Onyschuk v. Outerbridge Management Limited*, (2001), 54 O.R. (3d) 131, 2001 Carswell, Ont 1564 (Ontario Court of Appeal), at paragraph 35.

Canada said that the equitable doctrine of laches requires a claimant in equity to prosecute his claim without undue delay. The doctrine does not fix a specific time limit, but involves consideration of the circumstances of each case. In determining whether there is delay amounting to laches, the main considerations are acquiescence on the claimant's part and any change of position by the other party that arose from reasonable reliance on the claimant's acceptance of the *status* quo.[9]

18. The majority of the Supreme Court went on to quote from earlier decisions indicating that two circumstances are always important in cases where the doctrine of laches is at issue. The two important circumstances are, first, the length of the delay, and, second, the nature of the acts done "during the interval" which might affect either party and cause a balance of justice or injustice.[10]

19. In this case, the length of the delay is extremely long: it is almost 50 years. During most of this "interval", little or nothing was done by Jim Babirad to bring forward the issue of storage compensation, even though the Chair of the Board explained storage compensation rights several times to Jim Babirad during the designation proceeding in 1964.[11] A balance of injustice has arisen from the acts "done during the interval" - or lack thereof - because Enbridge has not been including any costs for compensation payable to Mr. Babirad in its rate proceedings before the Board. This is a "change of position" on the part of Enbridge that arose from reasonable reliance on acceptance of the *status quo* by Jim Babirad.

[9] *Manitoba Metis Federation Inc. v. Canada (Attorney General)* [2013] 1 S.C.R. 623, at page 687 ("*Manitoba Metis Federation*"), attached, at Tab "I", to the Enbridge EB-2014-0351 Submission.
[10] *Manitoba Metis Federation*, above, at page 687.
[11] Enbridge EB-2014-0351 20150410 Submission, paragraph 40 and Tab G

Compensation Previously Paid

20. After the Board granted the Leave to Inject, Store and Withdraw Order in 1965, discussions ensued between Consumers Gas and Jim Babirad.[12] These discussions culminated in an agreement under which a lump sum of $800 was paid to Theresa Babirad and Theresa A. M. Babirad who, at the time, were the owners of the property in issue.[13] In return, Consumers Gas received a conveyance of all mines, minerals and mineral rights associated with the property. The records of Consumers Gas indicate that an "amicable settlement" was reached as of the date of the conveyance of mines, minerals and mineral rights.[14]

21. At the time when Consumers Gas reached a settlement with the Babirads, the use of gas storage leases and the payment of annual storage rentals was not as clearly and consistently established in Ontario as it is at this time. However, none of the parties to the conveyance of mines, minerals and mineral rights could have been under any illusion that Consumers Gas intended to extract minerals from the Babirad property or that the payment of $800 was for any purpose other than to settle the compensation payable to the Babirads as a result of the Leave to Inject, Store and Withdraw Order.

22. When the time value of money is taken into account, the $800 paid by Consumers Gas in 1965 is a considerable amount of money in today's dollars. If any further compensation is awarded to Jim Babirad, the Babirad family will in effect receive double compensation, because the lump sum payment of $800 has already been paid and any further compensation would be in addition to the lump sum payment. It is not just and equitable for the Babirad family to receive double compensation for rights granted to Enbridge in respect of the Crowland Pool.

[12] Enbridge EB-2014-0351 20150227 Responding Material, paragraph 27.
[13] Enbridge EB-2014-0351 20150227 Responding Material paragraphs 28 and 29.
[14] Enbridge EB-2014-0351 20150227 Responding Material, paragraph 31.

Actual Babirad Land Ownership

23. The review motion in this proceeding was filed on behalf of Jim Babirad by counsel who does not represent any other Crowland Pool landowners. The evidence is clear that the property owned by Jim Babirad is not 40 acres, as stated in the EB-2014-0351 application,[15] because 24 acres were sold in July of 1975.[16] Any compensation awarded to Jim Babirad for a period prior to 2015 should be based on the actual amount of land that he has owned.

Conclusion

24. Enbridge submits that all of the points referred to in paragraphs 14 to 23, above, are relevant to the issue set out in Procedural Order No. 2, namely, "whether Mr. Babirad's claim for compensation from Enbridge for the period from 1965 to 2014 should be granted". Enbridge submits for the aforementioned reasons Mr. Babirad should not be granted further compensation for the period from 1965 to 2014.

All of which is respectfully submitted.

March 29, 2016

[original signed]

Guri Pannu
Counsel for Enbridge Gas Distribution Inc.

[15] EB-2014-0351 Babirad application, first paragraph.
[16] EB-2014-0351 20150327 Babirad Response to Enbridge Interrogatory #3.

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February 27, 2015

VIA RESS, Email and COURIER

Ms. Kirsten Walli
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 26th Floor
Toronto, ON M4P 1E4

Re: Ontario Energy Board ("Board") File No.: EB-2014-0351
Application under section 38(3) of the OEB Act – Gas Storage Compensation
Enbridge Gas Distribution Inc. Submission – Responding Material

In accordance with the Board's Procedural Order issued on January 15, 2015, enclosed please find the responding material filed by Enbridge with the Board for the above noted proceeding.

The submission will be available on Enbridge's website under the "Other Regulatory Proceedings" tab at www.enbridgegas.com/ratecase.

Please contact me if you have any questions.

Yours truly,

(Original Signed)

Bonnie Jean Adams
Regulatory Coordinator

Encl.

cc: Mr. Paul Babirad (via email and courier)

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 that Jim Babirad is entitled to have received from Enbridge Gas Distribution Inc.

RESPONDING MATERIAL OF ENBRIDGE GAS DISTRIBUTION INC.

Filed February 27, 2015

Background

1. The applicant, Jim Babirad, is the owner of property located at Part of Lot 16, Concession 4, in the City of Port Colborne in the Niagara region (the "Property").

2. The title abstract index for the Property indicates that ownership of the Property was transferred from Charles Kramer to James Babirad and Theresa Babirad on April 24, 1957. The records indicate that on March 4, 1959, ownership of the Property was then transferred to Theresa Babirad and Theresa A.M. Babirad. The records further indicate that on August 19, 1970, the Property was transferred to Theresa A.M. Babirad and James Babirad. A copy of the title abstract index records of the Property for the period of September 1946 to April 1995 is attached at Tab "A".

3. The respondent, Enbridge Gas Distribution Inc. ("Enbridge"), is an Ontario corporation with its head office in the City of Toronto. Enbridge carries on the business of selling, distributing, transmitting and storing natural gas within Ontario.

4. On November 20, 2014, Mr. Babirad applied to the Ontario Energy Board (the "Board") under section 38(3) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B for an order of the Board for compensation for storage rights in the Crowland Pool designated gas storage area. Enbridge has prepared this material in response to Mr. Babirad's application.

Background Documents on Gas Storage

5. In June of 1962, a committee appointed by the government of Ontario to provide impartial advice on oil and gas matters issued a report on underground natural gas storage in the Province (the "Langford Report"). A copy of the Langford Report is attached at Tab "B".

6. The Langford Report discussed the gas storage resources available in Ontario and, in this context, it high-lighted the features of "pinnacle reef" formations that make these formations particularly well-suited to the storage of natural gas. The discussion on this subject in the Langford Report included the following comments:

> Oil and gas reservoirs vary greatly in area, shape and volume and in their capacity to receive and to deliver gas. Porous rock that forms the storage zone may be hundreds of feet thick and a few hundred acres in area or it may only be ten to thirty feet thick but underlie thousands of acres. Thick, compact natural storage reservoirs are typified by the "pinnacle reefs" of Lambton County. These are domes of porous limestone formed from coral reefs that are overlain by impervious salt and anhydrite.[1]

7. The Langford Report also addressed pinnacle reef storage reservoirs in the context of development of additional gas storage in Ontario. The Langford Report stated that:

> It is impossible to predict accurately how much underground storage space can be developed in Ontario. It is, however, obvious that the pinnacle reefs in Lambton County offer exceptionally good storage characteristics and are most easily and economically converted to storage. Undoubtedly, these reefs

[1] Langford Report, page 18.

> are the first choice for development when more storage space is required.[2]

8. On May 4, 1964, the Board submitted a report (the "Crozier Report") to the Lieutenant Governor in Council in response to Order-in-Council OC-1354/62 dated April 17, 1962, requiring the Board to adjudicate, examine and report on issues relating to the storage of natural gas in Ontario. A copy of the Crozier Report is attached at Tab "C".

9. The Crozier Report drew a distinction between "two main types of storage pools" in Ontario. In this regard, the Crozier Report stated that "pinnacle reefs … are characterized by a dome-like shape with thickness at the apex of some 250 feet or more" and it described "lenticular" pools as "thin" and "flat".[3]

10. The Crozier Report identified the Crowland Pool as a lenticular pool that, at the time, was being developed by The Consumers' Gas Company, Ltd. (now Enbridge and referred to below as "Consumers' Gas").[4] The following comments are made in the Crozier Report about lenticular pools:

> Lenticular pools … rarely have a capacity as high as 10 million cubic feet per acre and therefore require the leasing of several times as much acreage as is needed for pinnacle reef pools to obtain equal total capacity. In addition to the wide difference in ratio between the acreage and capacity, account must be taken of greater unit development and operating costs associated with the wide-spread thin storage reservoirs as compared with the much more compact pinnacle reef types.[5]

11. The Crozier Report also contained findings regarding appropriate compensation for storage rights in respect of lenticular gas storage pools, including the following points:

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[2] Langford Report, page 27.
[3] Crozier Report, page 9-10.
[4] Crozier Report, pages 15-16.
[5] Crozier Report, pages 9-10.

> ~ The annual rental figures for lenticular pools are substantially lower than any of those mentioned in connection with pinnacle reef reservoirs. They are consistent with the lower capacities for holding gas in terms of millions of cubic feet per productive or participating acre.[6]
>
> ~ In respect of the Crowland Pool, owners of over 99% of the lands (other than railways and a municipality) had executed agreements providing for an annual storage rental of $1.00 per acre.[7] (The annual storage rentals for pinnacle reef pools referred to in the Crozier Report were a multiple of many times this amount.)
>
> ~ For lenticular pools, which have capacities not exceeding 10 million cubic feet per acre of productive area, the formula used in connection with pinnacle reef pools would not be appropriate.[8]
>
> ~ Rates already agreed upon in the Crowland Pool appear to be fair and reasonable.[9]

12. The Board has recognized that the pinnacle reefs of southwestern Ontario are some of "the best storage reservoirs in North America".[10] This can be seen in the Board's report to the Lieutenant-Governor in Council dated May 2, 1988 in respect of an application (E.B.O. 147) by Tecumseh Gas Storage Limited for the designation of the Dow-Moore 3-21-XXI Pool (the "Dow-Moore Pool") as a gas storage area (the "Dow-Moore Pool Decision"). The Dow-Moore Pool is located in the Townships of Moore and Sarnia in the County of Lambton. A copy of the Dow-Moore Pool Decision is attached at Tab "D".

13. In the Dow-Moore Pool Decision, the Board recommended that the Dow-Moore Pool be designated as a gas storage area. At the hearing of the application for designation, the Board was presented with evidence relating to the geology of the Dow-Moore Pool and its suitability for storing gas. The Board concluded that:

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[6] Crozier Report, page 16.
[7] *Ibid.*
[8] Crozier Report, page 29.
[9] *Ibid*.
[10] Dow-Moore Pool Decision, p. 7.

> The pinnacle reefs of southwestern Ontario constitute some of the best storage reservoirs in North America. They occur at depths of about 600 metres and are characterized by very high permeability and porosity; they achieve heights of approximately 120 metres; they are essentially sealed systems with relatively little or no gas leakage and therefore their performance can be readily defined by the natural gas laws relating pressures and volumes.[11]

14. Further, the Dow-Moore Pool Decision confirmed that pinnacle reef storage areas are considered to be a significant provincial resource. Specifically, the Dow-Moore Pool Decision stated that:

> The Province of Ontario recognizes that the depleted pinnacle reefs suitable for use as gas storage pools represent an important natural resource.[12]

15. The Dow-Moore Pool Decision also made mention of the Crowland Pool:

> Underground storage in southwestern Ontario is a key component of Consumers' Gas natural gas transmission and distribution system. Tecumseh has facilities, located to the southeast of the City of Sarnia, which provide storage facilities for the Consumers' Gas system….Consumers' Gas also operates two small underground storage reservoirs in the Niagara peninsula; Crowland and Leapfrog, which are used to meet local peak day requirements.[13]

16. The Dow-Moore Pool Decision included a map illustrating the pinnacle reef belt in southwestern Ontario, stretching from Sarnia north along the shore of Lake Huron.[14] The Crowland Pool is not situated within the pinnacle reef belt.

<u>The Petroleum and Natural Gas Lease</u>

17. As set out above, Property was owned by Charles Kramer before it was acquired by Mr. Babirad. On August 27, 1951, Mr. Kramer, entered into a lease with Crowland Gas Syndicate (the "Lease") whereby Mr. Kramer granted "for the term of ten years and so long thereafter as

[11] *Ibid.*
[12] Dow-Moore Pool Decision, p. 10.
[13] Dow-Moore Pool Decision, p. 7.
[14] Dow-Moore Pool Decision, p. 26

oil, gas or other material is produced from the land leased in paying quantities or the rental paid thereon, the exclusive right of mining and operating for petroleum, natural gas and other minerals, and the laying of lines for the conveying of oil, gas or water on and across said lands, and to conduct all operations necessary for the production, storage and transportation of oil, or natural gas…" A copy of the Lease is attached at Tab "E".

18. Well drilling records indicate that a natural gas well was spudded on the Property on August 4, 1953 and plugged shortly thereafter. A copy of the well drilling records, as maintained in the Ontario Oil, Gas and Salt Resources Library, is attached at Tab "F".

19. Crowland Gas Syndicate's interest in the Lease and well drilled thereunder was subsequently acquired by Consumers' Gas in 1962.

The Crowland Natural Gas Storage Pool

20. On April 25, 1962, the Board recommended to the Minister of Energy Resources that a permit be granted to Consumers' Gas to allow for the injection of gas for re-pressuring and testing purposes into the formation known as the Crowland Pool, for the purposes of delineating and assessing the suitability of the formation for the storage of natural gas. A copy of the Board's April 25, 1962 report to the Minister of Energy Resources is attached at Tab "G".

21. A note was prepared on August 1, 1962, describing a meeting between Mr. Babirad and William Pearson, an employee of Crowland Gas Syndicate. The note indicates that Mr. Babirad was seeking free gas in exchange for a lease. A copy of the note is attached at Tab "H".

22. On September 17, 1964, the Board heard an application by Consumers' Gas for a regulation designating the Crowland Pool as a gas storage area. On October 19, 1964, in its report to the Lieutenant Governor in Council, the Board recommended that the application be

granted and that the Crowland Pool be designated a gas storage area (the "Crowland Designation Decision"). A copy of the Crowland Designation Decision is attached at Tab "I".

23. In the Crowland Designation Decision, the Board noted that Mr. Babirad had attended the hearing to oppose the application. The Board further noted that Mr. Babirad was the joint owner with Theresa Babirad of the Property which was located within the Crowland Pool area proposed for designation. Mr. Babirad advised the Board that he had no objection to the proposed designation, but that he wanted to have the Property excluded from the designated area because he was uncertain regarding the manner and extent to which his interests would be affected by such designation.

24. In the Crowland Designation Decision, the Board decided that "in light of the uncontroverted professional opinion … that the boundaries of the pool had been decided upon with great care and were essential to safeguard the pool, the Board does not feel that it can accede to Mr. Babirad's request."[15] The Board recommended that a regulation be made designating Crowland Pool as a gas storage area. Subsequently, Ontario Regulation 299/64 was passed, and filed, giving effect to such designation.

25. On February 8, 1965, the Board issued Reasons for Decision in respect of an application by Consumers' Gas for authority to inject gas into, store gas in and remove gas from the Crowland Pool and to enter upon the lands in such Pool and use such lands for such purpose (the "Leave to Inject, Store and Withdraw Decision"). A copy of the Leave to Inject, Store and Withdraw Decision is attached at Tab "J". It appears from the Leave to Inject, Store and Withdraw Decision that none of the individual landowners or encumbrancers with interests in land that might be affected by the application appeared or were represented at the hearing of the application.

[15] Crowland Designation Decision, page 4.

26. On February 12, 1965, the Board issued its leave to inject, store and withdraw order in respect of the Crowland Pool (the "Leave to Inject, Store and Withdraw Order"). A copy of the Leave to Inject, Store and Withdraw Order is attached at Tab "K".

27. On May 6, 1965, William H. Girling, a Landman employed by Consumers' Gas, met with Mr. Babirad to discuss leasing the Property. Mr. Babirad advised that he intended to commence arbitration proceedings within two weeks. A copy of Mr. Girling's notes of that meeting is attached at Tab "L".

28. On July 27, 1965, Mr. Girling submitted a requisition to Consumers' Gas for a cheque in the amount of $800 to purchase the mineral rights in, under and upon the Property. The requisition noted that the Property is "situated within the designated area of the Crowland Pool". A copy of the requisition is attached at Tab "M".

29. On August 3, 1965, Consumers' Gas entered into an indenture with Theresa A.M. Babirad and Theresa Babirad (the "Grantors") in respect of the Property (the "Indenture"). The Indenture provided that in exchange for payment of $800.00, the Grantors did grant to Consumers' Gas in fee simple "ALL MINES, MINERALS AND MINING RIGHTS AND THE RIGHT TO WORK THE SAME in, under or upon" the Property. A copy of the Indenture is attached at Tab "N".

30. On September 8, 1965, Mr. Girling wrote to Mrs. Theresa A.M. Babirad enclosing a copy of the Indenture. A copy of the letter dated September 8, 1965, is attached at Tab "O".

31. On March 8, 1967, an internal memorandum was prepared by Brian J. Wallace of Consumers' Gas summarizing the status of a number of expropriations that Consumers' Gas had been involved in since 1954, including the expropriation of storage rights in respect of the Property. Consumers' Gas had assigned file number L-606 for its dealings with the Property.

The comment beside File L-606 in the memorandum indicated that an "amicable settlement" had been reached on August 3, 1965, which is the date when the Indenture was executed by the parties. A copy of the March 8, 1967 memorandum is attached at Tab "P".

32. On June 25, 2013, Terry Chupa, a land agent and land contracts manager with Enbridge, spoke with Mr. Babirad regarding the Property and the Crowland Pool. Mr. Chupa prepared a letter of the same date addressed to Mr. Babirad in which he summarized the information Mr. Babirad had provided during their conversation, including that:

(a) Mr. Babirad had not been interested in a lease for $1.00 per acre and eventually signed a lease for 20 years paid up front for an amount of $800.00 for the 40 acres of the Property;

(b) In 1984 Mr. Babirad had contacted Consumers' Gas about future payments given that the 20 year paid-up term had expired but was unable to resolve the issue and eventually gave up pursuing the matter further at that time; and

(c) At the time of the designation of the pool, Mr. Babirad had travelled to Toronto to meet with the Board and express his concerns with the application to designate the Crowland Pool as a storage area.

33. A copy of the June 25, 2013 letter is attached at Tab "Q".

34. In and around this time, Enbridge came to understand that at a time following the execution of the Indenture, the Property was subdivided and 24.03 acres were transferred to a third party. It is Enbridge's further understanding that Mr. Babirad retains ownership of the balance of the Property. An excerpt from the title abstract index records of the Property is attached at Tab "R".

35. On February 21, 2014, Mr. Chupa wrote to Mr. Babirad to provide a copy of the Indenture. Mr. Chupa noted that the Indenture granted in fee simple all mines, minerals and mining rights to the Property to Consumers' Gas forever for the complete and final compensation paid at that time. Mr. Chupa went on to state that the Indenture explained "why Enbridge's rights continue and why there are no further payments to be made." A copy of the February 21, 2014 letter is attached at Tab "S".

36. On February 26, 2014, Mr. Chupa wrote to Mr. and Mrs. Babirad, as well as parties believed to be the present owners of the subdivided portion of the Property, to provide a complete copy of the Indenture. A copy of the February 26, 2014 letter is attached at Tab "T". The prior correspondence had inadvertently only included the first page of the Indenture.

37. On June 16, 2014, Mr. Chupa wrote to Mr. Babirad and Paul Babirad to confirm Enbridge's position that it had acquired the gas storage rights to the Property through expropriation by virtue of the Leave to Inject, Store and Withdraw Order. Mr. Chupa advised that the $800 consideration paid for the Indenture to the Babirads was compensation for the expropriation obviating the need for any further ongoing annual compensation. However, in an attempt to resolve the matter, Mr. Chupa did offer two options for payment of annual storage rental payments in exchange for the Babirads entering into a standard form of gas storage lease with Enbridge. The Babirads did not accept this offer. A copy of the June 16, 2014 letter is attached at Tab "U".

<u>Assessment of Gas Reservoir Performance</u>

38. Enbridge considers the following factors to be important in assessing the value of a pinnacle reef gas storage reservoir compared to the Crowland Pool:

~ Injection and withdrawal rate;

~ operating cost;

~ proximity to compressor, transmission and related facilities; and

~ access to the gas market.

Some of these factors are mentioned in the Crozier Report and others are based on Enbridge's fifty years of experience in developing and operating a gas storage system.

39. Under the sub-headings below Enbridge will elaborate on these factors that must be considered, collectively and not just individually, when comparing the Crowland Pool to pinnacle reef reservoirs:

(a) Injection and Withdrawal Rate

The absolute injection/withdrawal rate for any storage reservoir is a measure of how quickly gas can be moved into and out of the reservoir - a higher rate being more desirable. When normalized to the Crowland gas withdrawal rate (i.e., Crowland = 1) the pinnacle reef pools range from two to thirty-six times higher. On average the withdrawal rate for Enbridge's pinnacle reef pools is fifteen times higher than the Crowland Pool.

A related metric is the productivity per well (i.e., reservoir capacity divided by well count). Again a higher rate is desirable. Applying this metric shows that the wells in Enbridge's lowest rated pinnacle reef pool (Black Creek) are twenty-six times more productive than each well in the Crowland Pool. On average this measure shows that each pinnacle reef well is sixty-eight times more productive than each well in the Crowland pool.

(b) Operating Cost

Ongoing operating costs are an important consideration and Enbridge's goal is to minimize the cost per unit of storage. Well count is a good indication of the overall cost

to operate and maintain an underground storage system. Not only does each well require ongoing inspection and maintenance to ensure mechanical integrity and operating reliability, there is a cost to operate and maintain the infrastructure, such as the lateral and gathering pipelines, surface facilities and, access laneways that support each well.

Using this measure, the Crowland Pool accounts for 14% of the total storage wells operated by Enbridge yet represents less than three-tenths of one percent of the total gas-storage volume. As a result, the Crowland Pool absorbs a disproportionate amount of the company's operating and maintenance budget. In other words, the operating and maintenance cost per unit of storage is significantly higher than for the Lambton area reservoirs.

(c) Access to the Province's Gas System Infrastructure and Gas Market

Except for the Crowland Pool, Enbridge's gas storage reservoirs are located in the Lambton/Kent area. Consequently, significant infrastructure, in the form of pipelines, compressor and meter stations, has been built over the past fifty years to develop the Enbridge gas storage system into what it is today. This provides an economy of scale that has not, and cannot be achieved at the Crowland Pool. For example, Enbridge's Corunna compressor station serves multiple pools, as do several pipelines. This ensures a relatively high utilization rate for these expensive assets.

Additionally, Enbridge takes advantage of its close proximity to the Union Gas Limited Dawn hub to obtain services such as gas dehydration, custody metering and compression – all of which allow the company to minimize the cost of operating the gas storage system. Dawn is also one of North America's major gas trading hubs and

provides ready access to the continent's gas infrastructure. The market access and liquidity offered by trading gas at Dawn is of immeasurable value.

It is important to understand that Enbridge operates the Lambton area storage reservoirs as an integrated system, meaning that the performance of any individual pool, although important, does not dominant the system. In fact, this range of performance allows the company to optimize system performance by matching reservoir performance to system demand.

The storage compensation paid by Enbridge for storage reservoirs operated as an integrated system is not based on individual characteristics of the reservoirs, but instead reflects the integrated nature of these operations. In contrast, the Crowland Pool is not operated as part of an integrated system. It is isolated and primarily used to support Enbridge's Niagara Region gas distribution system. It lacks any meaningful connectivity to the Province's gas infrastructure. The independent nature of the Crowland Pool means that system performance is dictated by a single reservoir leaving little opportunity for optimization.

Not surprisingly, the integrated nature of the Lambton area system combined with the economy of scale results in a cost (per unit of storage) to operate and maintain the system that is one-tenth that needed to operate the Crowland Pool.

40. On balance, the Crowland Pool does not possess enough of the attributes considered important in assessing the value of a gas storage reservoir. In particular, as indicated in the Crozier Report, the capacity-per-acre is substantially less than pinnacle reef storage. Additionally, factors such as the gas injection/withdrawal rate, operating cost and proximity to

infrastructure are all inferior to the Lambton County pinnacle reef storage. Given these facts, in today's market this reservoir would likely not be developed[16].

41. By any reasonable measure, the Crowland Pool is significantly outperformed by any pinnacle reef pool in respect of which Enbridge makes gas storage lease payments.

Board Decision Referred to by Mr. Babirad

42. The concept of mineral rights encompassing storage rights was raised in an application to the Board made on January 28, 2000, by a number of landowners in respect of a Union Gas Limited ("Union Gas") designated storage area known as the Century Pools Phase II development in Lambton County (the "Lambton Application"). The landowners applied for a determination of just and equitable compensation for storage rights. A hearing was held by the Board on June 12, 2003, to deal with the question of the status of certain applicants and prospective applicants in the Lambton Application (the "Lambton Status Hearing"). A copy of the transcript of the Lambton Status Hearing is attached at Tab "V".

43. One of the applicants discussed at the Lambton Status Hearing was Knox Dawn Presbyterian Church ("Knox Church").[17] The filing by Mr. Babirad in this case refers to the circumstances of Knox Church in the Lambton Application as an example that is very similar to the "current application". The transcript for the Lambton Status Hearing reveals that the point at issue regarding the status of Knox Church to claim compensation for storage rights was whether Knox Church held mineral rights, not surface rights.

44. Union Gas argued that Knox Church did not have standing in the Lambton Application for compensation for storage rights because it did not hold title to the mineral rights:

[16] Of particular note is the fact that despite the numerous sandstone reservoirs in the Niagara region none (with the exception of Crowland) have been developed into gas storage pools.
[17] Lambton Status Hearing Transcript at paras. 581-621.

> Mr. Wilson acquires the lands in 1903 and the mineral rights at that point are still with the Canada Lands Company, of course, because they reserved the mineral rights.
>
> Wilson then sells a corner of the lot to the Knox Presbyterian Church in 1915. In doing so, the mineral rights are still with the Canada Land Company. You can only sell what you possess, and Wilson doesn't possess the mineral rights. In 1919, the Canada Lands Company releases the mineral rights back to the Crown, by then the King. But in any event, in 1928, the Crown sells the mineral rights to Wilson. So now Wilson does have the mineral rights but the church, who had acquired the lands 13 years earlier, doesn't have the mineral rights.[18]

45. Counsel for Knox Church argued that, in 1928, when the Crown sold the mineral rights to Wilson, because the Crown did not own the property of Knox Church, the Crown could not have actually conveyed the mineral rights to Wilson:

> So what you have, then, is you've got a situation where either the mineral rights remained in the Crown; or if they were, as Union asserts, effectively conveyed to Wilson, he would have received them, subject to the beneficial interest of the church which they obtained as a result of their fee simple acquisition of the lands, free from all encumbrances, in 1915.
>
> So my submission is that for the purposes of standing on this application, that the church at least has a sufficient interest – a beneficial interest, if not a legal interest – and may well be a legal interest as well – in the mineral rights. And regardless of who Union has been paying $17 a year to, they should have status on this application.[19]
>
> (Emphasis added.)

46. On September 10, 2003, the Board issued a Decision and Order in respect of the Lambton Status Hearing (the "Lambton Status Decision"). A copy of the Lambton Status Decision is attached at Tab "W". The Board accepted the position advanced by counsel for

[18] *Ibid.* at paras. 595-596.
[19] *Ibid.* at paras. 612-613.

Knox Church that Knox Church had at least a beneficial interest in the gas storage rights and held that Knox Church had standing to participate in the Lambton Application.[20]

Compensation Agreed to by Crowland Landowners

47. Enbridge has reviewed its records and identified 74 landowners, as of 1962, with lands located within the area which was to be designated as the Crowland Pool. Enbridge entered into storage leases with 71 of the landowners. For those properties of less than 20 acres, the lease agreement provided compensation for storage at a flat rate of $20.00 per year.[21] For those properties larger than 20 acres, the lease agreement provided compensation for storage at the rate of $1.00 per acre, per year.

48. Thereafter, Enbridge periodically reviewed the annual payments made to the Crowland landowners to determine whether any increase was appropriate. At these periodic intervals, Enbridge made reasonable and appropriate adjustments to reflect the passage of time since the original agreements and all increases were applied uniformly to Crowland landowners receiving annual compensation payments.

Elenchus Report

49. Enbridge engaged Elenchus Research Associates Inc. ("Elenchus") to carry out an assessment of reasonable compensation for storage rights in respect of the Crowland designated gas storage area. Elenchus has provided a report dated February 25, 2015 (the "Elenchus Report") to Enbridge that addresses the subject of reasonable compensation for such storage rights. A copy of the report is attached at Tab "X".

[20] Lambton Status Decision at paras. 146-154.
[21] One lease agreement for the flat rate of $20 was entered into in respect of a 23 acre property. Enbridge was unable to determine any reason for this variance from the usual practice.

50. As a result of the lump sum compensation paid to the Babirads in or about July of 1965, and the conveyance of mineral rights to Enbridge by the Babirads, Enbridge believes that full compensation has been paid for the storage rights of Mr. Babirad in respect of the Crowland Pool.

51. In the event that the Board decides that full compensation has not been paid for Mr. Babirad's storage rights in respect of the Crowland Pool, Enbridge's view is that annual payments in the same amount as is now being paid to landowners currently receiving annual payments, adjusted in accordance with the conclusion reached in the Elenchus Report, would be just and equitable compensation for Mr. Babirad's storage rights.

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April 10, 2015

VIA RESS, EMAIL and COURIER

Ms. Kirsten Walli
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 26th Floor
Toronto, ON M4P 1E4

Re: Ontario Energy Board ("Board") File No.: EB-2014-0351
Application under section 38(3) of the OEB Act
Gas Storage Compensation
Enbridge Gas Distribution Inc. – Submission

In accordance with the Board's Procedural Order issued on January 15, 2015, enclosed please find the submission of Enbridge Gas Distribution Inc. ("Enbridge").

The submission will be available on Enbridge's website under the "Other Regulatory Proceedings" tab at www.enbridgegas.com/ratecase.

Please contact me if you have any questions.

Yours truly,

(Original Signed)

Bonnie Jean Adams
Regulatory Coordinator

Encl.

cc: Mr. Paul Babirad (via email and courier)

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 that Jim Babirad is entitled to have received from Enbridge Gas Distribution Inc.

ENBRIDGE GAS DISTRIBUTION INC.
WRITTEN SUBMISSION

Filed April 10, 2015

A. Facts

1. This proceeding was commenced by a filing received by the Board on November 20, 2014 (the "Babirad Application"). The Babirad Application states that Jim Babirad owns 40 acres of land on top of the Crowland Pool in the Region of Niagara. The Babirad Application also states that Mr. Babirad has owned this property from 1962 to present.

> Babirad Application filed on November 20, 2014, page 1, attached at Appendix A to Notice of Application and Procedural Order No. 1 dated January 15, 2015 ("Babirad Application").

2. In response to an Interrogatory, Mr. Babirad has indicated that the size of the property referred to in the Babirad Application was 42 acres (the "42 Acre Parcel"). The Interrogatory response goes on to say that, in July of 1975, the 42 Acre Parcel was subdivided and 24 acres were sold to a third party. It appears to be the case, then, that Mr. Jim Babirad owns approximately 18 acres of property (the "Property").

Babirad Response to Enbridge Interrogatory #3.

3. Enbridge Gas Distribution Inc. ("Enbridge") is a natural gas distributor and the operator of the designated gas storage area known as the Crowland Pool in the Niagara area.

Responding Material of Enbridge Gas Distribution Inc. ("Responding Material"), paragraphs 3, 26 and 39.

4. On September 17, 1964, the Board heard an application by The Consumers' Gas Company Ltd. ("Consumers Gas", now Enbridge) for a regulation designating the Crowland Pool as a gas storage area. On October 19, 1964, in its report to the Lieutenant Governor in Council, the Board recommended that the application be granted and that the Crowland Pool be designated as a gas storage area. The Crowland Pool was designated as a gas storage area by Ontario Regulation 299/64 and the Property is included within the lands that comprise the designated storage area.

Responding Material, paragraph 22 and Tabs "I" and "J".

5. On February 12, 1965, the Board issued an order granting authority to Consumers Gas to inject into, store gas in and remove gas from the Crowland Pool and to enter upon the lands in such Pool and use such lands for such purpose (the "Leave to Inject, Store and Withdraw Order").

Responding Material, paragraph 26 and Tab "K".

6. At the time of the designation of the Crowland Pool as a gas storage area, and at the time of the Leave to Inject, Store and Withdraw Order, the 42 Acre Parcel was not owned by Mr. Jim Babirad. The registered owners of the 42 Acre Parcel were Theresa Babirad and Theresa A. M. Babirad.

Babirad Response to Board Staff Interrogatory #1(a), under the headings "March 1959" and "1962-1965".

7. Subsequent to the granting of the Leave to Inject, Store and Withdraw Order, discussions ensued between Consumers Gas and Mr. Babirad about the 42 Acre Parcel. These discussions culminated in a payment of $800.00 that was made by Consumers Gas to the owners of the 42 Acre Parcel at the time, namely, Theresa A. M. Babirad and Theresa Babirad. The payment of $800.00 is referred to in an Indenture dated August 3, 1965 (the "Indenture"), as consideration for a grant made by Theresa A. M. Babirad and Theresa Babirad to Consumers Gas.

Responding Material, paragraphs 27 to 31 and Tab "N".

8. Pursuant to the Indenture, Theresa A. M. Babirad and Theresa Babirad granted to Consumers Gas in fee simple "ALL MINES, MINERALS AND MINING RIGHTS AND THE RIGHT TO WORK THE SAME in, under or upon" the 42 Acre Parcel. The Indenture stated that Theresa A. M. Babirad and Theresa Babirad retained to themselves all "Surface Rights to the said lands", except for a right of ingress, egress and regress to a specified part of the 42 Acre Parcel for a period of one year.

Responding Material, Tab "N".

9. The records of Consumers Gas indicate that the 42 Acre Parcel was "expropriated" on February 12, 1965, the date of the Leave to Inject, Store and Withdraw Order, and that an "amicable settlement" was reached on August 3, 1965, the date of the Indenture.

Responding Material, paragraph 32 and Tab "P".

10. More than 49 years later (November 20, 2014), Mr. Babirad applied to the Board under section 38(3) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B (the "OEB Act") for an order of the Board for compensation for storage rights in respect of lands within the Crowland Pool designated gas storage area.

Babirad Application.

B. Governing Legislation

11. The granting of authority to inject gas into, store gas in and remove gas from a designated gas storage area is provided for in subsection 38(1) of the OEB Act. Specifically, subsection 38(1) of the OEB Act states that:

> 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.

OEB Act, S.O. 1998, Chapter 15, Schedule B, subsection 38(1).

12. The legislation in effect at the time of the Leave to Inject, Store and Withdraw Order was the *Ontario Energy Board Act, 1964* (the "1964 Act"), which came into force on January 1, 1965. The wording of subsection 21(1) of the 1964 Act was the same as the wording of subsection 38(1) of the OEB Act.

1964 Act, S.O. 1964, chapter 74, subsection 21(1) attached hereto at Tab "A".

13. The payment of compensation by a person in whose favour a leave to inject, store and withdraw order has been made is provided for in subsection 38(2) of OEB Act. Paragraph (a) of subsection 38(2) states that the person authorized by a leave to inject, store and withdraw order,

> …shall make to the owners of …any right to store gas in the area just and equitable compensation in respect of …the right to store gas.
>
> OEB Act, subsection 38(2), paragraph (a).

14. The wording of paragraph (a) of subsection 21(2) of the 1964 Act was the same as the wording of paragraph (a) of subsection 38(2) of the OEB Act, except that the 1964 Act used the words "fair, just and equitable compensation", rather than "just and equitable compensation" (and except for a very minor difference in the use of the word "such" rather than the word "the").

> 1964 Act, subsection 21(2), paragraph (a).

15. The determination of compensation payable under section 38 of the OEB Act is addressed in subsection 38(3). Subsection 38(3) states that:

> 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.
>
> OEB Act, subsection 38(3).

16. The wording of subsection 21(3) of the 1964 Act was similar to the wording of subsection 38(3) of the OEB Act, except that subsection 21(3) provided for compensation to be determined by a "board of arbitration", as provided for in regulations that were in force at the time, rather than by the Board.[1]

> 1964 Act, subsection 21(3).

[1] In his response to Enbridge Interrogatory #12, Mr. Babirad said that Enbridge had suggested binding arbitration and that he had agreed, as long as he was allowed to choose the arbitrator. This reference to binding arbitration is consistent with the provisions of subsection 21(3) of the 1964 Act. However, as to the choice of an arbitrator, section 3 of O.Reg. 323/64 made under the 1964 Act states that the members of the board of arbitration shall be appointed by the Lieutenant Governor in Council. A copy of O.Reg. 323/64 is attached hereto at Tab "B".

C. Procedural History

17. On January 15, 2015, the Board issued its Notice of Application and Procedural Order No. 1 in respect of the application by Mr. Babirad. The Board's Procedural Order established a process for: (a) the filing of supporting evidence by Mr. Babirad and responding material by Enbridge; (b) questions and answers on the supporting evidence and responding material; and (c) submissions and reply submissions.

18. Procedural Order No. 1 stated that any supporting evidence in addition to that filed with the application was to be filed by Mr. Babirad by February 17, 2015. Mr. Babirad made the following filings in support of his application:

(i) an email received by the Board on November 18, 2014, requesting information on application procedure and briefly summarizing the Babirads' position on the application;

(ii) a document titled "Lambton v. Crowland" received by the Board on January 29, 2015, comparing storage compensation rates in Ontario;

(iii) a document titled "Who owns the Pore Space? Surface Estate vs. Mineral Estate" received by the Board on February 4, 2015, describing an article discussing property rights in underground resources;

(iv) an email received by the Board on February 11, 2015, requesting eligibility for a cost award;

(v) a document titled "Review of past Ontario Energy Board Cases" received by the Board on February 11, 2015, describing three prior Board decisions; and

(vi) a document titled "Addendum to Review of Past OEB Cases" received by the Board on February 12, 2015, describing a fourth prior Board decision.

19. In accordance with Procedural Order No. 1, Enbridge filed its Responding Material on February 27, 2015. In its Responding Material, Enbridge provided copies of documents from its files to show that, after the granting of the Leave to Inject, Store and Withdraw Order in

February of 1965, the issue of compensation arising from the Order was resolved in August of 1965.

20. Enbridge and Mr. Babirad filed responses to questions by March 27, 2015, in accordance with Procedural Order No. 1. This Written Submission by Enbridge is also filed in accordance with Procedural Order No. 1.

D. Issues

21. Subsection 38(3) of the OEB Act provides that, "failing agreement", the Board shall determine compensation payable under section 38. Paragraph (a) of subsection (2) of section 38 indicates that such compensation shall be just and equitable. Accordingly, the fundamental issues in this proceeding are as follows:

(i) Was there an agreement regarding compensation for the rights granted to Enbridge in the Leave to Inject, Store and Withdraw Order?

(ii) If there was no such agreement, what is just and equitable compensation for the storage rights granted to Enbridge?

22. In the event that the Board finds there was no agreement regarding compensation for the rights granted to Enbridge, the following issues arise in relation to the determination of just and equitable compensation by the Board:

(i) Has there been undue delay (or "laches") in the filing of an application for determination of storage compensation, such that it would not be equitable to allow the claim for compensation made in the Babirad Application?

(ii) Apart from the issue of delay or laches, how should the Board determine just and equitable compensation?

23. On the issue of how the Board should determine just and equitable compensation, the following are relevant considerations for the Board:

(i) the compensation agreed to by other Crowland Pool landowners;

(ii) assessment of gas reservoir performance; and

(ii) the expert assessment of compensation carried out by Elenchus Research Associates Inc. ("Elenchus").

E. Submissions

Agreement Regarding Compensation

24. On October 19, 1964, the Board recommended that the Crowland Pool be designated as a gas storage area and on February 12, 1965, the Board granted the Leave to Inject, Store and Withdraw Order. As a result of the Leave to Inject, Store and Withdraw Order, Consumers Gas held (and Enbridge still holds) storage rights in respect of the Crowland Pool designated storage area and the only remaining matter following the granting of the Order, insofar as the Babirads and Consumers Gas were concerned, was the determination of the appropriate compensation to be paid for storage rights in respect of the 42 Acre Parcel.

25. The evidence on the record in this proceeding reveals that discussions ensued between Consumers Gas and Mr. Babirad after the Board granted the Leave to Inject, Store and Withdraw Order. These discussions culminated in an agreement under which a lump sum of $800 was paid to the then owners of the 42 Acre Parcel, Theresa Babirad and Theresa A. M. Babirad, in return for a conveyance of all mines, minerals and mineral rights associated with the 42 Acre Parcel.

26. The only logical conclusion to be drawn from these facts is that, rather than agreeing on annual payments as compensation for the storage rights granted to Enbridge by the Leave to Inject, Store and Withdraw Order, the parties agreed on lump sum compensation that was evidenced by a conveyance of mineral rights.

27. Enbridge therefore submits that compensation for the rights granted to Enbridge (then Consumers Gas) was agreed upon with the owners of the 42 Acre Parcel at the time and that such compensation (a lump sum of $800) was paid. Thus, there is no issue of compensation to be determined by the Board under subsection 38(3) of the OEB Act.

28. Of course, at the time of the lump sum payment of $800 to Theresa Babirad and Theresa A. M. Babirad, a regulation had been passed designating the Crowland Pool as a gas storage area. It is illogical to think that anyone, least of all Consumers Gas, would expect to extract minerals from, and operate a mine on, property that is part of a designated gas storage area. The only plausible reason for the lump sum payment of $800 was for Consumers Gas to acquire (rather than lease) storage rights in respect of the 42 Acre Parcel from Theresa Babirad and Theresa A. M. Babirad.

29. According to case law and legal commentary, if the ownership of the mines and mineral rights associated with a property has been severed from ownership of the surface rights, the storage rights are held by the owner of the severed mineral estate, not by the owner of the surface rights. This so-called “English rule” applying to ownership of storage rights is confirmed by the 1922 decision of the Alberta Supreme Court, Appellate Division in *Little v. Western Transfer & Storage Co.*

> *Little v. Western Transfer & Storage Co.* 1922 CarswellAlta 81, [1922] 3 W.W.R. 356 [“*Little v. Western Transfer*”] attached hereto at Tab “C”.

30. In the *Little* case, the owner of the “coal and surface rights” of a property had entered into a lease of the coal rights, “together with the right to work the same”. The defendant was the lessee of these rights from the plaintiff Little and, after putting in a shaft on the Little property, and removing coal from under the Little property, the defendant also made tunnels into other properties, from which it conveyed coal through the tunnels and up the shaft on the Little

property. The Court said that the right of the defendant to move coal from other properties up through the shaft on the Little property depended on whether the defendant had acquired "property in the strata" below the surface, or whether the defendant had merely acquired a "privilege, servitude or easement", that is, a right to take away the coal.

> *Little v. Western Transfer*, above, at paragraph 23.

31. The Alberta Court followed English case law indicating that, where ownership of mines is granted separately from ownership of the land except for the mines, the effect is to carve out ownership in "superimposed layers", leaving the owner of the mineral rights with "the property and exclusive right of possession of the whole space occupied by the layer containing the minerals" and, after the minerals are taken out, the owner of the mineral rights is entitled to the entire and exclusive "user" of that space for all purposes.

> *Little v. Western Transfer*, above, at paragraph 29.

32. Canadian legal commentary confirms the proposition that, in Ontario, ownership of storage rights is vested in the owner of mineral rights. According to a paper on natural gas storage regimes in Canada published by the University of Calgary Institute for Sustainable Energy, Environment and Economy ("ISEEE"),

> The literature on the ownership of natural gas storage rights in Canada suggests that there is some uncertainty as to who owns pore space for storage purposes. Is this pore space owned by the owner of the mineral estate or is it owned by the owner of the surface estate? Given this uncertainty, governments in Canada have responded in several ways.
>
> First, some governments have responded by vesting natural gas storage rights in the Crown or the government. … Second, a single jurisdiction, Alberta, has chosen to enact legislation to clarify the ownership position … . … A third group of provinces has not seen the need to clarify the ownership rules for natural gas storage, although each seems to proceed on the assumption that storage rights follow mineral ownership and that, as a result, storage may be vested in the

Crown or a private owner depending on the background mineral ownership. This is the case in Ontario, Manitoba, and Saskatchewan.

> N. Bankes, and J. Guance, *Natural Gas Storage Regimes in Canada: A Survey*, ISEEE Research Paper, Institute for Sustainable Energy, Environment and Economy, University of Calgary, December, 2009, pages 121-122 attached hereto at Tab "D".

33. The conclusion reached in this paper about the law regarding storage rights in Ontario is reflected in the decision made by the Board in proceeding RP-2000-0005. In that case, a number of landowners applied for a determination of just and equitable compensation in respect of the Union Gas Limited ("Union Gas") designated storage area known as the Century Pools Phase II development. At a Status Hearing in the proceeding, the Board addressed, among other things, the status of Knox Dawn Presbyterian Church (the "Church") to claim compensation for storage rights.

> Responding Material, paragraphs 42 to 46 and Tabs "V" and "W".

34. It is clear from the transcript of the Status Hearing that the issue of the Church's status to claim compensation for storage rights turned on whether the Church held mineral rights, as opposed to surface rights. Union Gas argued that the Church did not have standing because it did not hold title to the mineral rights. Counsel for the Church argued that the Church held at least a "beneficial interest" in the mineral rights, if not a full legal interest, and that this was sufficient for the storage compensation claim. The Board determined that the Church had a "beneficial interest" which entitled it to obtain a storage compensation order. Given the respective positions of Union Gas and the Church, as revealed in the transcript of the Status Hearing, the "beneficial interest" referred to by the Board that underpinned the right to claim storage compensation was an interest in mineral rights.

> Responding Material, paragraphs 44 to 46; Tab "V", paragraphs 595-596 and 612-613; and Tab "W", paragraph 3.9.4.

35. In the context of carbon capture and storage ("CCS"), Canadian legal commentary again indicates that storage rights are held by the owner of mines and mineral rights. An article addressing the legal framework for CCS in Alberta says that, if it can be assumed that there is a single owner of the "mines and minerals" estate, it seems relatively clear that a CCS operator must obtain the consent of that owner in order to commence an operation. This statement is supported by a footnote stating: "The assumption here is that Alberta adopts the so-called English rule, pursuant to which storage rights are held by the owner of a severed mineral estate and not by the surface owner."

> N. Bankes, J. Poschwatta and E. Shier, *The Legal Framework for Carbon Capture and Storage in Alberta*, (2008), 45 Alta. L. Rev. 585-630, at paragraph 51 and footnote 88 attached hereto at Tab "E".

36. Based on this case law and commentary, the effect of the Indenture was that, unlike a lease of storage rights, Theresa Babirad and Theresa A. M. Babirad ceded the storage rights associated with the 42 Acre Parcel. The Indenture therefore confirms that, in return for the lump sum payment of $800, the Babirads were giving up any further entitlement to storage compensation.

37. The material filed in support of the Babirad Application refers to a paper included in a book published in England in 2014. The author of the paper says that "principle and authority tend towards a broader role than has been suggested by some writers for the rights of the land owner, and a lesser one for the mineral owner". In his own words, though, the author presents this point as one that he "argues". The paper is the expression of the opinion of a particular author and his opinion clearly is not consistent with the Canadian legal commentary discussed above.

B. Barton, "The Common Law of Subsurface Activity: General Principle and Current Problems", in D. N. Zillman *et al*, eds., *The Law of Energy Underground Understanding New Developments in Subsurface Production, Transmission and Storage* (Oxford: Oxford University Press, 2014), at page 21 attached hereto at Tab "F".

38. Enbridge submits that the argument made by the author of the paper referred to in Mr. Babirad's material cannot be applied in any practical way to provide a basis for storage compensation in the circumstances of this case. In other words, it is not a practical or realistic notion that the Babirads can accept lump sum compensation in return for giving another party the subsurface mines, minerals and mining rights in respect of their property and yet still be in a position to claim compensation for subsurface gas storage rights in respect of the same property. The Babirads cannot reasonably expect to be compensated for each of two mutually incompatible activities on the Property.

39. Further, regardless of an argument made by the author of a book published in England in 2014, the accepted proposition in Ontario has been that status to claim compensation for storage rights depends on ownership of mines and mineral rights, not ownership of surface rights. This is clear from the transcript and Board decision in the EB-2000-0005 proceeding and it is stated in the paper on Canadian natural gas storage regimes from the University of Calgary ISEEE. There was no reason for Consumers Gas to have acquired mines, minerals and mining rights other than on the basis of the accepted proposition that these were the rights that would underpin a claim for storage compensation. And, of course, the outright grant to Consumers Gas of the rights that would have underpinned a claim for storage compensation is consistent with the fact that the Babirads were paid lump sum compensation of $800, rather than annual payments of very much smaller amounts.

40. Moreover, the outright grant to Consumers Gas of the rights that would have underpinned a claim for storage compensation is consistent with the course of events since

1965. In response to Board Staff Interrogatory 1(a), Mr. Babirad has provided his chronology of events from April of 1957 to September of 2011. For its part, Enbridge has obtained from the Board's files a record from the designation proceeding in 1964 that sheds additional light on these events. The notes made by the Board Secretary during the designation proceeding reveal that:

> (i) Mr. Babirad stated that he was not opposed to the amount of compensation and that he had been approached about 5 times;
>
> (ii) Mr. Babirad stated that he was really waiting for a letter from the Energy Board explaining who was on the Board and what it was all about;
>
> (iii) on a number of occasions, Mr. Babirad repeated his unfamiliarity with the Energy Board and indicated he felt that the Board should have explained to him before the date was fixed just what the procedure was; and
>
> (iv) the Chairman explained several times the various steps following designation, what was being dealt with at these proceedings and Mr. Babirad's rights regarding compensation.
>
> Babirad Response to Board Staff Interrogatory #1(a).
>
> Hearing of Consumers' Gas Company Application for a Regulation Designating Crowland Pool 10 a.m. September 17, 1964; "Some Notes made by Secretary for portion of proceeding observed" attached hereto at Tab "G".

41. Mr. Babirad's response to Board Staff Interrogatory 1(a) questions why "Consumers Gas/Enbridge" did not contact him during the period from June of 1965 to June of 2013. There was no reason for Enbridge to contact Mr. Babirad about storage compensation during this period because a lump sum payment was made to acquire rights in respect of the 42 Acre Parcel and, as indicated in the records of Consumers Gas, an "amicable settlement" was reached at the time of the Indenture. The fact that almost 50 years passed after the date of the Indenture before an application was made to the Board in respect of storage compensation -- despite the Chair of the Board in 1964 explaining storage compensation rights several times -- supports the conclusion that an "amicable settlement" was indeed reached in August of 1965.

42. Enbridge therefore submits that there is no basis for the Board to determine compensation under subsection 38(3) of the OEB Act, because compensation was agreed upon in 1965.

Just and Equitable Compensation

43. As stated above, Enbridge's submission is that compensation for the rights granted under the Board's Leave to Inject, Store and Withdraw Order was agreed upon in a lump sum amount and was paid by Enbridge. In the event that the Board does not agree with Enbridge's submission in this regard, the Board's mandate is to determine just and equitable compensation under subsections 38(2) and (3) of the OEB Act.

44. Enbridge submits that, if any further compensation is awarded to Mr. Jim Babirad, the Babirad family will in effect receive double compensation, because the lump sum payment of $800 has already been paid and any further compensation would be in addition to the lump sum payment. It is not just and equitable for the Babirad family to receive double compensation for rights granted to Enbridge in respect of the Crowland Pool.

45. Before turning to the appropriate basis for determining just and equitable compensation, Enbridge will address the delay that occurred from the time of the Leave to Inject Store and Withdraw Order to the filing of the Babirad Application with the Board. Then, Enbridge will set out its submissions about considerations that the Board should take into account in the determination of just and equitable compensation.

(a) Delay or Laches

46. Under section 38 of the OEB Act and under section 21 of the 1964 Act, the jurisdiction of the Board to determine compensation (failing agreement) is or was triggered by the making of an order authorizing a person to inject gas into, store gas in and remove gas from a designated

gas storage area. In this instance, the Leave to Inject, Store and Withdraw Order triggering the jurisdiction of the Board to determine compensation was made on February 12, 1965. No application for the determination of such compensation was made for almost 50 years, until, on November 20, 2014, the Board received the Babirad Application.

47. During the period of almost 50 years that elapsed after the making of the Leave to Inject, Store and Withdraw Order, the Board considered many applications by Enbridge (formerly Consumers Gas) for the approval of just and reasonable rates to be paid by gas distribution ratepayers. Because there was never any determination of storage compensation payable in respect of the 42 Acre Parcel over that period of almost 50 years, the costs of such compensation were not included in any of Enbridge's rate applications over the same period. The claim for compensation made in the Babirad Application raises issues of intergenerational inequity because any (additional) compensation payable in respect of the 42 Acre Parcel stretching back over a period of almost 50 years should have been included for recovery from ratepayers in rate applications that were made during the same period.

48. The OEB Act provides for the determination of "just and equitable" compensation and the 1964 Act provided for the determination of "fair, just and equitable" compensation. Enbridge submits that nothing turns on the use of the additional word "fair" in the earlier legislation. Enbridge submits, though, that it is simply not "just and equitable" to determine compensation stretching back over a period of almost 50 years when the cost of any such compensation was not included in rate applications that were considered by the Board during that period.

49. Because the governing legislation provides for a determination of "equitable" compensation, it is appropriate to look to the equitable doctrine of laches for guidance as to the

implications of such a long delay.[2] This doctrine was addressed in a recent decision of the Supreme Court of Canada, where the majority of the Court said that:

> The equitable doctrine of laches requires a claimant in equity to prosecute his claim without undue delay. It does not fix a specific limit, but considers the circumstances of each case. In determining whether there has been delay amounting to laches, the main considerations are (1) acquiescence on the claimant's part; and (2) any change of position that has occurred on the defendant's part that arose from reasonable reliance on the claimant's acceptance of the *status quo* … .
>
> *Manitoba Metis Federation Inc. v. Canada (Attorney General)* [2013] 1 S.C.R. 623, at page 687 ["*Manitoba Metis Federation*"] attached hereto at Tab "I".

50. The majority of the Supreme Court of Canada went on to quote from earlier decisions indicating that two circumstances are always important in these cases. The two important circumstances are, first, the length of the delay, and, second, the nature of the acts done "during the interval", which might affect either party and cause a balance of justice or injustice.

> *Manitoba Metis Federation*, above, at page 687.

51. In this case, the length of the delay is extremely long: it is almost 50 years. During most of this "interval", little or nothing was done by the Babirads to bring forward the issue of storage compensation. A balance of injustice has arisen from the acts "done during the interval" -- or lack thereof -- because Enbridge has not been including any costs for (additional) compensation payable in respect of the 42 Acre Parcel in its rate proceedings before the Board. This is a "change of position" on the part of Enbridge that arose from reasonable reliance on acceptance of the *status quo* by the Babirads.

[2] Reliance on equitable defences is not precluded merely because the claim arises under a statute and, in this regard, it is appropriate to take into account that a particular claim made under a statute may have a "distinctively equitable flavor": see *Perry, Farley & Onyschuk v. Outerbridge Management Limited*, (2001), 54 O.R. (3d) 131, 2001 CarswellOnt 1564 (Ontario Court of Appeal), at paragraph 35 attached hereto at Tab "H".

52. In short, given the very lengthy delay that has occurred since the Leave to Inject, Store and Withdraw Order that triggered the Board's jurisdiction to determine storage compensation (failing agreement), Enbridge submits that it would not be "just and equitable" for the Board to allow the claim for compensation made in the Babirad Application.

(b) Compensation Agreed to by Other Landowners

53. Should the Board decide that it will proceed to determine just and equitable compensation, 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. There were 74 landowners who, as of 1962, owned lands within the area designated as the Crowland Pool storage area and Enbridge entered into storage leases with 71 of these landowners.

Responding Material, paragraph 47.

54. For properties of less than 20 acres, the agreement with Crowland Pool landowners provided for compensation for storage rights at a flat rate of $20 per year. For properties larger than 20 acres, the agreement provided for compensation at a rate of $1.00 per acre per year.[3]

Responding Material, paragraph 47.

55. The Crozier Report (May 4, 1964) indicated that owners of over 99% of the Crowland Pool lands (other than railways and a municipality) had agreed to an annual storage rental of $1.00 per acre. The Crozier Report went on to set out the following findings with regard to storage compensation generally for lenticular pools and, specifically, for the Crowland Pool:

[3] One lease agreement for a flat rate of $20 per year was entered into in respect of a 23 acre property; Enbridge has been unable to determine the reason for this variance from the norm.

> For these pools [lenticular pools], which have capacities not exceeding 10 million cubic feet per acre of productive area, the formula used in connection with pinnacle reef pools would not be appropriate. Acreage rentals so computed would work out to amounts less than $1.00 … . As stated earlier, the Board considers that a minimum of $1.00 per acre per year is reasonable … .
>
> …On this basis, rates already agreed upon in Dawn No. 3, Zone and Crowland Pools respectively appear to be fair and reasonable.
>
> Responding Material, paragraph 11.
>
> Crozier Report, at pages16 and 29, Responding Material, Tab "C", pages 19 and 32 of 70.

56. The storage compensation agreed to by most of the Crowland Pool landowners, and found to be fair and reasonable in the Crozier Report, has been periodically increased to reflect the passage of time since the original agreements. All increases have been applied uniformly to Crowland landowners receiving annual compensation payments.

> Responding Material, paragraph 48.

57. Enbridge therefore submits that, if the Board does not accept the submission that agreement was reached regarding storage compensation, the Board should look to the compensation paid to other Crowland landowners as a just and equitable standard for the amount of compensation to be paid in respect of the Property.

(c) Assessment of Gas Reservoir Performance

58. The designated storage areas in the Lambton area of Ontario are pinnacle reef reservoirs. From at least the time of the Langford Report in June of 1962, the features of pinnacle reef pools that make them particularly well-suited to the storage of gas have been recognized and indeed emphasized. In the Langford Report itself, it was said that pinnacle reef pools "offer exceptionally good storage characteristics and are most easily converted to storage" and that these reefs undoubtedly are "the first choice for development when more storage

space is required". The Board has referred to Ontario's pinnacle reef pools as "an important natural resource" and "some of the best storage reservoirs in North America".

Responding Material, paragraphs 5-15 and Tabs "B" and "D".

59. Enbridge's Lambton area storage reservoirs are located in proximity to the Dawn hub and are operated as an integrated system. The market access and liquidity available to Enbridge through its ability to trade gas at Dawn is of immeasurable value. The integrated operation of the Lambton area storage reservoirs enables Enbridge to optimize system performance by matching reservoir performance to system demand. The storage compensation paid for the Lambton area reservoirs is not based on individual characteristics of the reservoirs, but instead reflects the integrated nature of these operations.

Responding Material, paragraph 39(c).

60. The Crowland Pool is not a pinnacle reef reservoir; it is a lenticular, sandstone pool. It is not operated as part of a storage-transmission integrated system. It is isolated; it lacks any meaningful connectivity to the Province's gas infrastructure; and it is only used to support Enbridge's Niagara Region gas distribution system. The independent nature of the Crowland Pool means that system performance is dictated by a single reservoir, leaving little opportunity for optimization.

Responding Material, paragraph 39(c).

61. In its Responding Material, Enbridge explained a number of factors that are important in assessing the value of a pinnacle reef gas reservoir, as compared to the Crowland Pool. By any reasonable measure, the Crowland Pool is significantly outperformed by Enbridge's

pinnacle reef pools. The vast difference in capability and performance of the pinnacle reef pools compared to the Crowland Pool shows up in many areas, including the following:

> (i) when normalized to the Crowland Pool gas withdrawal rate, the withdrawal rate of Enbridge's pinnacle reef pools ranges from two to 36 times higher and, on average, the withdrawal rate for the pinnacle reef pools is 15 times higher than the Crowland Pool;
>
> (ii) as to productivity per well (reservoir capacity divided by well count), the wells in Enbridge's lowest rated pinnacle reef pool are 26 times more productive than those in the Crowland Pool and, on average, each well in the pinnacle reef pools is 68 times more productive than each well in the Crowland Pool;
>
> (iii) the Crowland Pool accounts for 14% of the total number of storage wells operated by Enbridge, but less than 0.30% of the total gas storage volume and this disproportionate number of wells means that the Crowland Pool absorbs a disproportionate amount of Enbridge's operating and maintenance budget; and
>
> (iv) the integrated nature of Enbridge's Lambton area system combined with the economies of scale provided by that system result in a cost (per unit of storage) to operate and maintain the system that is 10% of the cost to operate the Crowland Pool.
>
> Responding Material, paragraphs 38 and 39.

62. In short, the performance of the Crowland Pool falls significantly short of the performance of Enbridge's pinnacle reef pools when assessed using any reasonable metric that bears on the value of a gas storage reservoir. In today's market, the Crowland Pool would likely not be developed and, indeed, none of the numerous other sandstone reservoirs in the Niagara region have been developed into gas storage areas.

> Responding Material, paragraphs 40 and 41.

(d) Expert Assessment of Compensation

63. In response to the application made by Mr. Babirad, Enbridge engaged Elenchus to provide an independent expert opinion with regard to storage compensation for Crowland Pool landowners. Elenchus concluded that, if storage compensation paid to landowners in Lambton

County is used as a reference point, and this compensation level is adjusted to reflect the relative quality of the Crowland Pool as compared to Enbridge's Lambton County storage areas, the result would be storage compensation for Crowland Pool landowners that is less than the amount paid now. Elenchus also noted that applying performance metrics to determine storage compensation for Crowland Pool landowners would result in a lower level of compensation than the minimum rate recommended in the Crozier Report, adjusted for inflation.

Responding Material, paragraph 49 and Tab "X", pages 1 and 21 (pages 5 and 25 of 33).

64. Despite these conclusions about the storage compensation currently paid to Crowland Pool landowners, Elenchus took into account a broader range of considerations as it developed its recommendation for storage compensation. Elenchus used the principles in the Crozier report as a basis for further analysis and it considered the history of storage compensation payments both to Crowland Pool landowners and to landowners at other Enbridge designated storage areas. In seeking to achieve a fair balance of all of these considerations, Elenchus recommended that the current amount of $6.00 per acre per year paid to Crowland Pool landowners should be increased by 43.5% to $8.61 per acre per year to account for the fact that Crowland Pool storage compensation was not adjusted during the period from 2004 to 2014. Elenchus also recommended an additional increase of 2.36% to bring forward the 2014 amount of $8.61 per acre per year to a 2015 amount of $8.81 per acre per year.

Responding Material, Tab "X", pages 1 and 21 (pages 5 and 25 of 33).

65. Should the Board conclude, that there was not an agreement for payment of lump sum storage compensation to the Babirads (and subject to Enbridge's submissions, above, about

delay[4] and payment of double compensation[5]) Enbridge submits that storage compensation determined in accordance with the recommendations in the Elenchus report is just and equitable compensation to Mr. Babirad.

F. Conclusion

66. Enbridge therefore submits that:

(i) the Babirad Application should be dismissed because storage compensation in respect of the Property has been agreed upon and paid as a one-time lump sum payment and the Board's jurisdiction to determine compensation arises only "failing agreement";

(ii) even if the Board decides that it will determine just and equitable compensation, there should be no further compensation payable to Mr. Jim Babirad, because a lump sum payment of $800 was made in 1965 and any further compensation in addition to the lump sum payment would be double compensation;

(iii) given the very lengthy delay that has occurred since the Leave to Inject, Store and Withdraw Order that triggered the Board's jurisdiction to determine storage compensation (failing agreement), it would not be just and equitable for the Board to allow the claim for compensation made in the Babirad Application; and

(iv) should the Board nonetheless decide that it will proceed to determine just and equitable compensation in addition to the lump sum payment of $800 that has already been made, any such (additional) compensation should be determined by taking into account compensation agreed to by other landowners and the recommendations in the Elenchus report.

67. Enbridge submits further that it would be contrary to the evidence on the record in this proceeding to conclude that the Crowland Pool should be treated in a similar manner to Enbridge's Lambton area pinnacle reef storage reservoirs insofar as storage compensation is concerned. For this reason, and the other reasons set out above, the Board should reject any

[4] See "Delay or Laches", above.
[5] See paragraph 44, above.

arguments about payment of Lambton area storage compensation rates to Crowland Pool landowners.

All of which is respectfully submitted.

April 10, 2015

ORIGINAL SIGNED

Counsel for Enbridge Gas Distribution Inc.

Tab “G”

Hearing of Consumers' Gas Company Application for a Regulation Designating Crowland Pool
10 a.m. September 17, 1964.

Some Notes made by Secretary for portion of proceeding observed

Present - Board - Messrs. Crozier, MacTavish and Allcut.

Watching Briefs

Humberstone Township	J. H. Wilhelm - Clerk P. E. Pietz - Reeve
Crowland Township	G. R. Pearson - Reeve, also Warden of Welland County.
Michigan Central Railway	Mr. Finlayson.

Opposing

James Babirad - landowners in south-west corner of Pool

Following opening of the proceedings by the Chairman, the various persons present were asked to state their positions with respect to the application and all of those respondents present stated that at this time theirs was a watching brief.

However, Mr. James Babirad stated he opposed the application. He wants to have his property excluded from the Pool and also objected to having so little time in which to decide whether he required Counsel, etc. He was also concerned about his Mortgagee.
He requested an adjournment of the hearing for 90 days.

In reply to this Mr. Zimmerman stated that this did not come as any surprise to Mr. Babirad since they have been negotiating with him for a period of about two years and it appeared that the amount of money offered was the problem. He said Mr.Babirad should have gone to his lawyer to find out what his rights are, the same things he is asking the Board about now.
Mr. Zimmerman also stated that to exclude Mr. Babirad's property would damage the one edge of the Pool and objected to an adjournment of the hearing.

Mr. Babirad then stated he was not opposed to the amount of compensation and that he had been approached about 5 times.
He also stated he was really waiting for a letter from the Energy Board explaining who was on the Board and what it was all about.
He said that the real estate value of his property has changed as there is now a house on the property and when he was first approached there was no building on the land.
He said his Mortgagee was dearly opposed to him leasing the land out and he Babirad expressed concern as to hwat position his Mortgagee would take.

Mr. Zimmerman replied that the Mortgagee had been served with the Notice the same time as Mr. Babirad and that apparently he is not opposed or he would be present at the hearing.

Board then recessed to consider the request for adjournment. The request was denied and the Board Chairman suggested to Mr. Babirad that he follow the proceedings and at the conclusion of the evidence then put forward his case. On a number of occasions when Mr. Babirad repeated his unfamiliarity with the Energy Board, etc. and indicated he felt that the Board should have explained to him before the date was fixed just what the procedure was. The Chairman explained several times the various steps following designation, what was being dealt with at these proceedings, Mr. Babirad's rights regarding compensation at time of injection and indicated to him that he should be concerned with the subsequent hearings rather than the designation.

Mr. Zimmerman proceeded with the case and called his first witness, Mr. Girling.
Affidavits of service were filed as exhibits indicating that all but 4 of those served had been served by personal service; and the 4 were served by registered mail.
It was also pointed out that 3 landowners could not be found and consequently were not served. They are Messrs Bell, who can't be found; Mr. Patterson, deceased, whose interests were assigned and ultimately sold to Dell-Burn Gas which is now a wholly-owned subsidiary of the Applicant; Mr. Weiss, who can't be found.

The next witness called was Mr. Brian Wallace, P. Eng. He gave evidence respecting the history, studies, wells, etc. of the Pool and explained a number of exhibits filed regarding participating and non-participating areas, how and why the boundaries of the Pool were determined, the geological data, pressure studies, logging data of wells, etc.
Mr. Wallace stated that at the beginning 5 wells would be operated and possibly 7 later and that gas would be stored in and removed from the 5 operating wells.
Relevant questions were asked by the Board.
In connection with the matter of commercially recoverable gas, it was stated that 38 wells lie within the area and 21 of these lie outside and that there is no commercially recoverable gas.
Of the remaining 17 wells, one of these is abandoned.
The Applicnat will pay $100 per well for each of the 5 operative wells and for the remaining 16 in the participating area, the price is what the people have been receiving previously.

The matter of leases was developed with Mr. Girling as the Applicant's witness. An exhibit was filed of a map showing in colour the areas under lease. The green area represents the land leased under the new standard lease form which provides for storage rights. Company filed, on loan, the actual leases (Ex. 13) and stated that parcels 51, 46 (Knapper), 82 (Humberstone Township), Michigan Central has no lease nor has the C.N.R. Parcel is the property belonging to Mr. Babirad.

Amount of compensation and royalty payments were explained and discussed. It was stated that the first year provided a bonus and was at the rate of $1 per acre with a minimum of $50 to be paid to the landowner (regardless of acreage) and each succeeding year

it was 50¢ per acre with a minimum of $10.

The Applicant submitted exhibits as to estimated cost, feasibility study and the witness, Mr. Carpenter explained these and answered Board questions related thereto.

The hearing continued till about 5 p.m. but the balance of the proceedings were not observed by the Secretary.