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BY EMAIL

March 29, 2016

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: Mr. Babirad - Motion to Review the Ontario Board's Decision and Order EB-2014-0351
OEB File Number EB-2015-0334**

Pursuant to the OEB Decision on the Threshold Question and Procedural Order No. 2 dated March 3, 2016, please find attached OEB staff's submission for the above proceeding.

Yours truly,
Originally Signed By

Zora Crnojacki
Project Advisor



OEB STAFF SUBMISSION

**Motion to Review the Ontario Board's Decision and Order
EB-2014-0351**

EB-2015-0334

March 29, 2016

Background

Mr. Babirad filed an application (EB-2014-0351) with the Ontario Energy Board, (OEB) under section 38(3) of the *Ontario Energy Board Act*, 1998 (OEB Act) requesting that the OEB determine the amount of compensation payable to Mr. Babirad for storage rights for a 42 acre parcel of land he owned in the Crowland natural gas designated storage area (Crowland Pool).

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.

In its Decision and Order on the application dated October 29, 2015 (Decision) the OEB determined that Mr. Babirad was entitled to 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 storage pools.

Mr. Babirad filed a Motion to Review and Vary (Motion) on November 18, 2015. The Motion is for a review and variance of the Decision for an order that compensation be payable to Mr. Babirad by Enbridge for the period of 1965 to 2014.

The OEB issued a procedural order setting out dates for the filing of submissions by Mr. Babirad, OEB staff and Enbridge. The procedural order made it clear that submissions should be limited to the issue of whether Mr. Babirad's claim for compensation from Enbridge for the period from 1965 to 2014 should be granted.

OEB Staff Submission

Background

On September 17, 1964, the OEB 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 OEB 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.

On February 12, 1965, the OEB 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).

Below is OEB staff's submission. The submission is set out under the following four headings:

1. Legislative Authority to Order Compensation
2. The Indenture and its Interpretation
3. Doctrine of Laches
4. Just and Equitable Compensation

Legislative Authority to Order Compensation

The OEB has the jurisdiction to regulate the storage of natural gas, to designate an area as a gas storage area, to authorize the injection of gas into that area, and to order the payment of just and equitable compensation to the owners of the property overlaying the storage area.

Section 38 of the OEB Act deals with the authority to store gas, the right to compensation for storage, and the determination of the amount of compensation. Specifically, the Act provides:

Authority to store

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

Right to compensation

(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),

- a. shall make to the owners of any gas or oil rights or of any right to store gas in the area just and equitable compensation in respect of the gas or oil rights or the right to store gas; and
- b. shall make to the owner of any land in the area just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the order.

Determination of amount of compensation

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

As such, it is clear that the OEB has the authority to determine just and equitable

compensation in the absence of an agreement.

The Indenture and its Interpretation

Subsequent to the granting of the Leave to Inject, Store and Withdraw Order, discussions were entered into between Consumers Gas and Mr. Babirad about a 42 acre parcel in the Crowland Pool.

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.

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.”

In the Motion, Mr. Babirad submits that the OEB’s Decision to award him compensation for gas storage rights for the period from 2015 and onwards should be taken to mean that the OEB decided the indenture executed in 1965 granting \$800 for the mineral rights to the land in question does not preclude a claim to compensation for storage rights to be determined by the OEB.

OEB staff agrees with Mr. Babirad’s submission on this point however submits that it does not necessarily follow that Mr. Babirad is entitled to compensation back to 1965. The OEB Act makes it clear that the right to compensation is limited to “just and equitable” compensation.

Doctrine of Laches

In its submission in EB-2014-0351, Enbridge stated that if the OEB finds there was no agreement regarding compensation for the storage rights granted to Enbridge, the following issues should be considered in relation to the determination of just and equitable compensation by the OEB:

(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 OEB determine just and equitable compensation?

The doctrine of laches was addressed by 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*¹

The majority of the Supreme Court of Canada set out two important circumstances that need to be considered in examining the delay: the length of the delay, and the nature of the acts done "during the interval", which might affect either party.

With respect to the length of the delay it is clear from the record that Mr. Babirad did not make any claim for compensation until 2014 at which time he was contacted by Enbridge. Mr. Babirad's evidence is that from June 1965 to June 2013 Consumers Gas/Enbridge never contacted him regarding renewing efforts to agree upon a valid storage lease agreement.² According to Mr. Babirad and Enbridge, there were no negotiations around storage rights compensation for the property until 2013 when negotiations commenced and continued through 2013 until 2014. The negotiations were not successful and Mr. Babirad filed an application with the OEB.

OEB staff notes that it is not clear from the evidence on the record why Mr. Babirad did not make a claim for compensation sooner to the OEB. Mr. Babirad was present at the OEB proceedings in 1965 designating the 42 acre parcel of land as part of the Crowland Pool. The report issued by the OEB designating the lands in the Crowland Pool as a gas storage area states that Mr. Babirad opposed the application. During that proceeding the OEB also noted that Mr. Babirad stated that he was not opposed to the amount of compensation and that he had been approached about 5 times. Mr. Babirad also stated in the designation proceeding that "he was really waiting for a letter from the Energy Board explaining who was on the Board and what it was all about."

¹ *Manitoba Metis Federation Inc. v. Canada (Attorney General)* [2013] 1 S.C.R. 623

² EB-2014-0351 Jim Babirad's Response to OEB Staff Interrogatory # 1(a)

The decision for the designation of the Storage Pool makes it clear that the “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 cents per acre with a minimum of \$10.“

OEB staff agrees with Mr. Babirad’s submission that there is no temporal or other limitations period set out under section 38 of the OEB Act that would bar compensation for the period from 1965. However, the doctrine of laches may assist the OEB to determine whether the claim from Mr. Babirad should be retroactive (in full or in part) or not. While Mr. Babirad did attend the storage designation proceeding and was made aware of the possibility of compensation, OEB staff submits that Mr. Babirad may not have been aware that he could file an application with the OEB to determine compensation if there was no agreement between the parties. However it is noted that it is now more than 51 years since the pool was formed. There is no information on the record that Mr. Babirad made any attempt to clarify his understanding or resolve this matter until 2013 when Enbridge approached him. This, in OEB staff’s view, has resulted in a significant delay. Nevertheless, OEB staff does not believe that the delay of Mr. Babirad’s application should be a bar in his claim for compensation for periods prior to 2015. Other landowners in the Crowland Pool have received compensation since 1965. However, OEB staff is of the view that the significant delay should affect the decision on whether interest should be payable on the compensation.

The doctrine on laches does not fix a specific limit. However, if the OEB decides that there has been a significant delay, it can impact the OEB’s determination of what is just and equitable compensation.

4. Just and Equitable Compensation

If the OEB agrees that Mr. Babirad is entitled to compensation for the period 1965 to 2014 then the OEB must determine what is just and equitable compensation.

Mr. Babirad provided an excerpt from the Elenchus Report³ with the rates Enbridge paid to Crowland landowners and stated that these would be acceptable to him. He further proposed that these amounts be rolled forward by T-bill interests and adjusted by 1% credit spread. Given the significant delay in bringing this matter forward, OEB staff is of the view that interest should not be paid for any compensation amounts that the OEB may grant for any period prior to 2014 when the application was filed.

³ Jim Babirad Submissions, February 18, 2016, Appendix B, Figure 11 showing annual payments for Crowland Gas Storage Leases from 1965 to 2014 per acre.

OEB staff also submits that there is a need for clarification on the record regarding the accurate acreage of Mr. Babirad's land in the Crowland Pool. According to Enbridge the total area of Jim Babirad's land was originally 40 acres. It was later severed and the ownership of 24.03 acres was transferred to a third party. Accordingly, Enbridge states that the current area of Jim Babirad's property is about 16 acres.

However, Mr. Babirad noted that the starting area of his land was 42 acres and 24.03 acres were transferred in 1975 to a third party. On this basis, his parcel area is 18 acres as of 1975 onwards. OEB staff notes that the actual area needs to be determined such that the compensation for each year can be calculated accurately.

Based on the evidence on the record, OEB staff approximated the amount of compensation for the period from 1965 to 2014 using annual rates per acre Enbridge paid to Crowland landowners⁴, acreage of Jim Babirad's property⁵, and T-bill rates and 1% interest credit spread provided by Jim Babirad⁶. According to this high level calculation, should the OEB grant the Motion, compensation to be paid by Enbridge to Jim Babirad for the period from 1965 to 2014 is about \$3,360 without interest and \$11,453 with interest. The spreadsheet with these high level estimates is included in Schedule 1 to this submission.

All of which is respectfully submitted

⁴ Jim Babirad Submissions, February 18, 2016, Appendix B, Figure 11 showing annual payments for Crowland Gas Storage Leases from 1965 to 2014 per acre.

⁵The assumption is that the initial area of the land was 42 acres until 1975 when it was severed by 24 acres. From 1976 onward the area was 18 acres. See EB-2014-0351 Jim Babirad's Response to OEB Staff Interrogatory # 1(a)

⁶ EB-2015-0344 Babirad Motion to Review Submission, February 18, 2016, Appendix 3 "Compensation" includes interests rates used in OEB staff calculation.

Schedule 1

Babirad Compensation Estimates

	Total Owing
No Interest	3,360.00
Approximately adjusted for T-bill Interest + 1% Credit Spread using interest rate in Babirad's App 3	11,453.57

Year	Acres	Rate\$/Acre	Payment	Outstanding Balance
1965	42.0	1.00	42.00	42.00
1966	42.0	1.00	42.00	84.00
1967	42.0	1.00	42.00	126.00
1968	42.0	1.00	42.00	168.00
1969	42.0	1.00	42.00	210.00
1970	42.0	1.00	42.00	252.00
1971	42.0	1.00	42.00	294.00
1972	42.0	1.00	42.00	336.00
1973	42.0	1.00	42.00	378.00
1974	42.0	1.00	42.00	420.00
1975	42.0	1.00	42.00	462.00
1976	18.0	1.00	18.00	480.00
1977	18.0	2.00	36.00	516.00
1978	18.0	2.00	36.00	552.00
1979	18.0	2.00	36.00	588.00
1980	18.0	2.00	36.00	624.00
1981	18.0	2.00	36.00	660.00
1982	18.0	2.00	36.00	696.00
1983	18.0	2.00	36.00	732.00
1984	18.0	4.00	72.00	804.00
1985	18.0	4.00	72.00	876.00
1986	18.0	4.00	72.00	948.00
1987	18.0	4.00	72.00	1,020.00
1988	18.0	4.00	72.00	1,092.00
1989	18.0	4.00	72.00	1,164.00
1990	18.0	4.00	72.00	1,236.00
1991	18.0	4.00	72.00	1,308.00
1992	18.0	4.00	72.00	1,380.00
1993	18.0	4.00	72.00	1,452.00
1994	18.0	4.00	72.00	1,524.00
1995	18.0	4.00	72.00	1,596.00
1996	18.0	4.00	72.00	1,668.00
1997	18.0	4.00	72.00	1,740.00
1998	18.0	4.00	72.00	1,812.00
1999	18.0	4.00	72.00	1,884.00
2000	18.0	4.00	72.00	1,956.00
2001	18.0	4.00	72.00	2,028.00
2002	18.0	4.00	72.00	2,100.00
2003	18.0	4.00	72.00	2,172.00
2004	18.0	6.00	108.00	2,280.00
2005	18.0	6.00	108.00	2,388.00
2006	18.0	6.00	108.00	2,496.00
2007	18.0	6.00	108.00	2,604.00
2008	18.0	6.00	108.00	2,712.00
2009	18.0	6.00	108.00	2,820.00
2010	18.0	6.00	108.00	2,928.00
2011	18.0	6.00	108.00	3,036.00
2012	18.0	6.00	108.00	3,144.00
2013	18.0	6.00	108.00	3,252.00
2014	18.0	6.00	108.00	3,360.00

