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BY EMAIL and RESS

April 12, 2016
Our File: CO-2015-0102

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

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2015-0334 – Babirad Motion to Review – Reply Submissions

We are counsel to Jim Babirad. Pursuant to the *Decision on the Threshold Question and Procedural Order No.2*, please find enclosed the Reply Submissions and a Supplementary Book of Authorities of Jim Babirad.

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

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

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ONTARIO ENERGY BOARD

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

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

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

REPLY SUBMISSIONS OF JIM BABIRAD

1. Pursuant to the Ontario Energy Board’s Decision on the *Threshold Question and Procedural Order No. 2*, these are the reply submissions of Jim Babirad on his Motion to Review and Vary the *Decision and Order*, dated October 29 2015 in EB-2014-0351 (the “Decision”) regarding compensation to be payable from Enbridge for the period of 1965-2014 pursuant to section 38(3) of the *Ontario Energy Board Act* (“*OEB Act*”).

2. As detailed below, Jim Babirad seeks an order setting the compensation amount for 1965-2014 at the revised amount of \$13,577.22. This amount, revised from what was sought in the original application, takes into account the Board’s findings in the Decision regarding an appropriate rate per acre, as well as the revised amount of property for which Jim Babirad is properly eligible for compensation at this time.

Past Compensation Owed

3. Jim Babirad has a right to compensation for the use by Enbridge of his property for the storage of natural gas, not just on an on-going basis as determined by the Board in the Decision, but also for the previous period between 1965 and 2014. As the Board recognized in its *Decision on the Threshold Question and Procedural Order No. 2*, the Decision did not address the issue of past compensation.

4. ***Statutory Scheme Has No Temporal Limitation.*** Section 38 of the *OEB Act* stipulates that a landowner has the right to just and equitable compensation for the use of their property for gas storage. If no agreement can be reached between the storage company and the landowner regarding compensation, the amount of just and equitable compensation is determined by the Board. There is no temporal or other limitation period set out under section 38 of the *OEB Act*, or anywhere else, that would bar compensation. The right to compensation does not require an application to the Board by a certain date once a claim for compensation arises. It also does not require that compensation be paid only on a going-forward basis.

5. ***Laches Do Not Apply.*** Both Enbridge and Board Staff raise the doctrine of laches as an argument for why compensation for the period of 1965-2014 should not be ordered. Jim Babirad submits their position is incorrect on both the facts and law.

6. As a preliminary matter, Jim Babirad questions even the applicability of the *equitable* doctrine of laches to a *statutory* claim. Even in situations where there is an “equitable flavor” to the claim, courts have been reluctant to apply the doctrine of laches to a statutory claim.¹

7. Even if laches is applicable to a statutory storage compensation claim, the fact that almost 50 years had passed before the claim was brought is not in any way determinative; it is simply one factor, and needs to be considered within context.² Laches is a doctrine of equity, applied to ensure that equity and justice are achieved. As the Supreme Court has said, “[u]ltimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.”³

8. Unlike the traditional private law context, where only one party – the grieved party – can file an action, here both parties have the same ability to do so. The statutory scheme as set out both under the current iteration of the *OEB Act* and under the version in force at the time the

¹ See for example: *Intact Insurance Company of Canada v. Lombard General Insurance Company of Canada*, 2015 ONCA 764

² *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, para. 145

³ *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, p.77-78. Cited with approval in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, para. 146

original Board order granting leave to inject, provides that the party that injects and stores gas is required to compensate the landowner. That is, there is an obligation to compensate the landowner. The only issue is the amount. If no agreement on compensation can be reached, the quantum will be decided by the Board (or under the previous version of the *OEB Act*, a board of arbitrators⁴). Both the landowner and the storage company can avail themselves of that process. As the Board recognized in its Decision, "...either party can apply to the OEB to determine the amount of compensation".⁵ Enbridge very well could have brought its own application to determine the appropriate compensation, but it did not. The fact that it did not had no effect on their obligation to pay compensation.

9. Not only could Enbridge have brought its own application, but it should have. Unlike Jim Babirad, Enbridge is a sophisticated entity with intimate understanding of the storage rights regime in Ontario. The statutory scheme under the *OEB Act* is to protect the landowner's interests, as their consent is not required for an order of the Board allowing their property to be used for gas storage. In protecting the public interest, the Board should not deny Jim Babirad the compensation owed to him, regardless of the admittedly lengthy delay in bringing the application.

10. The key question for the Board, in determining if the delay in bringing the claim reaches the level of laches, is whether there is prejudice to Enbridge that reaches such a level as to require a bar to the claim for compensation as a matter of justice and equity. The cases on laches all make clear that the party raising the defence must prove that there is some reasonable injustice or prejudice, requiring equity to impose a bar on the claim.⁶

11. The *only* injustice or prejudice that Enbridge has even claimed is that it has not included costs for compensation payable to Mr. Babirad in its previous rate applications.⁷ While this is

⁴ 1964 *Ontario Energy Board Act*, section 21(3). See Appendix B to Enbridge Submissions, dated April 10 2015 (EB-2014-0351)

⁵ Decision, p.5

⁶ See for example: *Jacques v. Hipel Estate*, 2011 ONSC 5259, para. 34 (appeal upheld 2012 ONCA 371) *Martin v. Goldfarb*, [2006] O.J. No. 2768, p.53. *(K.) v. M. (H.)*, [1992] 3 S.C.R. 6, p.77-78. *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, para. 146. *Zurich Indemnity Co. of Canada v. Matthews*, [2005] O.J. No 1687, para. 43

⁷ Enbridge Submission, p.16, 19

true, the amount is simply not material, and does not rise to the level of any reasonable prejudice. The revised amount sought of \$13,577.22 by Jim Babirad is very material to him, but not to Enbridge. The amount represents less than 0.0005% of its approved 2016 distribution revenue requirement, which was approximately \$2.9B.⁸ This is significantly below any reasonable materiality threshold that would apply to a rate application. Further, in any single year between 1965 and 2014, the amount owed in that year to Jim Babirad would have been immaterial. There is thus no prejudice to Enbridge and, since the amount is negligible compared to Enbridge's overall revenue requirement, it cannot credibly be said to raise any issues of intergenerational equity as alleged.⁹

12. Further, it would be unjust to deny a compensation claim where there is also no evidence that the Board itself, in 1965 or otherwise, provided any information to Jim Babiard, or to members of the public in general about the process for bringing an application for compensation under section 38(3) of the *OEB Act*. To this day, it does not appear the Board has any material on its website directed at landowners, regarding the right to bring an application for compensation for use of their property for natural gas storage.

13. ***Laches Either Bars Claim Entirely or Not At All.*** Enbridge and Board Staff have taken the position that the doctrine of laches should impact what amount of compensation is just and equitable.¹⁰ Enbridge argues it should bar any compensation for the period between 1965 and 2014, while Board Staff argues that it should result in a denial of any interest being paid on the amount owed.¹¹ Jim Babirad submits both positions are wrong in law. The doctrine of laches, when it applies, is a defence to the claim itself, not something that is taken into account in determining the appropriate amount of compensation owed. As discussed already, the Board has granted part of the claim sought (2015 onwards) and cannot now bar some subset of it based on laches.

⁸ Decision and Interim Order (EB-2015-0114), November 10 2015, Schedule A, N1-1-1, Appendix A, p.2

⁹ Enbridge Submission, para. 16

¹⁰ Board Staff Submission, p.7

¹¹ Board Staff Submission, p.7-8

14. ***Indenture Status Already Decided.*** Enbridge argues that it thought it had reached an “amicable settlement” for \$800 for the storage rights by way of the Indenture, and that should affect the Board’s decision on past compensation. The status of the Indenture has already been decided: it is now not relevant to storage compensation. Thus, in law it can have no bearing on the amount of compensation owed for the period of 1965-2014. The Board, in the Decision, ordered compensation payable on a going forward basis¹², based on its conclusion that there was no storage compensation agreement in place.¹³ The Board heard all the arguments made by Enbridge before, and did not accept them. Either compensation is payable for past and future periods because no compensation agreement was in place, or no compensation is owed since he was compensated by way of lump sum payment of \$800. The Board has already decided that the latter is not correct.

15. The Board’s view of ordering compensation on an on-going basis was sound. Enbridge’s continued view that “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 payment of \$800 was for any other purpose other than to settle the compensation payable to Babirad as a result of the Leave to Inject, Store and Withdraw”¹⁴ is directly contrary to the Crozier Report, which was issued a year *before* the signing of the Indenture. The Crozier Report recommended that where storage rights are to be included in any agreement, they be set out in bold type and reference to storage rights be dealt with in separate clauses.¹⁵ The reason for this recommendation in the Crozier Report is clear. At common law, the pore space (i.e. the underground space where the gas is stored) resides with the surface, not mineral rights, owner.¹⁶ As with all common law, this can be modified by statute or contract. The Indenture did not do so. It does not even mention the word storage. There is no Ontario statute or regulation that alters the common law allocation of rights.

¹² Decision, p.7-8, 10

¹³ Decision, p.7

¹⁴ Enbridge Submission, para. 20

¹⁵ Crozier Report, p.40, See Tab C to the Enbridge Responding Materials (EB-2014-0351)

¹⁶ See the discussion regarding *Star Energy Weald Basin Limited v Bocardo SA*, [2010] UKSC 35, and the comments on its applicability to Canada, contained in the email from Dr. Nigel Banks to Paul Babirad in Babirad Reply Submission p.2-3 (EB-2014-0351)

Compensation Amount

16. Jim Babirad submits the just and equitable amount of compensation for the period of 1965-2014 is \$13,577.22 (See Appendix A for the full calculation).

17. As set out in Jim Babirad's initial written submissions on this motion, it would be consistent with the Decision for the Board to determine the level of past compensation payable by Enbridge by using the annual rate per acre previously paid per year to other Crowland Pool landowners and then applying interest on those payments to account for the time that has passed.¹⁷ Those amounts are identified in Elenchus Report submitted on behalf of Enbridge.¹⁸

18. Both Enbridge and Board Staff argue that the consideration of the amount of compensation should account for the severance of 24 acres land in 1975 to a third party from the original 41 acres.¹⁹ Jim Babirad agrees, and the appropriate acreage that should be compensated for usage is 17 acres (41-24). That amount is properly based not on the original ownership of the land in 1965 but actual ownership of the land currently.

19. In fairness to Enbridge, Board Staff's table of compensation owing, credits to Jim Babirad as compensation for 42 acres until 1975, is not appropriate. The right to past compensation more appropriately runs with land, and compensation should be awarded based only on the actual amount of land currently, not previously, owned. Jim Babirad is only owed past compensation for the period of 1965-2014 for 17 acres of land per year. It would be up to the current owners of the other 24 acres to bring their own application for compensation for that period, if they so wish. If the Board does agree with Board Staff's approach, then the amount owed would be \$20,329.09, still an immaterial amount for Enbridge.

¹⁷ The proposed methodology is 1 year Treasury Bill rate plus a credit spread of 1%. This methodology is very similar to what Board Staff had proposed in *Proposal Paper: Interest Rates for Regulatory Accounts of Utilities* (EB-2006-0117). See Appendix A of these submissions for a full explanation including notes of that document for information regarding the specific source of the data used.

¹⁸ *Elenchus Report* at p.15. See Tab X to the Enbridge's Responding Materials, February 27, 2015 (EB-2014-0351). Also included as Appendix B to Babirad Written Submissions, dated February 18 2016

¹⁹ For clarity, in 1965, the plot of land was 41 acres not the 42 or 40 acres as has been set out in various parts of the evidence. The original plot of land, in 1957, was 42 acres but 1 acre was expropriated by the County of Welland for a road allowance sometime before 1965, leaving 41 acres. This is consistent with the Indenture dated August 1965, which recognizes the plot of land to be 41 acres.

20. Neither Enbridge nor Board Staff took issue with the methodology for the amount of interest to be paid. Jim Babirad submits the methodology is just and equitable. In making its own calculations on the amount of interest to be paid, while not apparent from the spreadsheet attached as an Appendix to its submissions, Board Staff simply conducted a high-level estimate, not a specific calculation (See Appendix B for clarifying email from Board Staff). Jim Babirad has provided a full actual calculation of the amount of interest to be paid, and is filing concurrently with these submissions, the live excel spreadsheet.

Costs

21. Jim Babirad submits that he has acted responsibly in this proceeding and by bringing this motion, evident by the Board's *Decision on the Threshold Question and Procedural Order No.2*, and should be reimbursed his reasonably incurred costs in this proceeding. Jim Babirad is eligible for an award of costs on this motion in accordance with section 3.07 of the *Practice Direction on Cost Awards*. Jim Babirad was found eligible for costs previously in the original proceeding.²⁰

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 12, 2016

Original signed by

Mark Rubenstein
Counsel to Jim Babirad

²⁰ Letter from the Registrar, February 13 2015(EB-2014-0351)

A

Compensation (1965-2014)

	<u>Year</u>	<u>Acres</u>	<u>Lease \$/Acre (1)</u>	<u>Payment</u>	<u>T-Bill (2)</u>	<u>Interest (T-Bill + 1%)</u>	<u>Balance</u>
1	1965	17.0	\$1.00	\$17.00	4.01%	5.01%	\$17.00
2	1966	17.0	\$1.00	\$17.00	4.99%	5.99%	\$34.85
3	1967	17.0	\$1.00	\$17.00	4.92%	5.92%	\$53.94
4	1968	17.0	\$1.00	\$17.00	6.35%	7.35%	\$74.13
5	1969	17.0	\$1.00	\$17.00	6.71%	7.71%	\$96.58
6	1970	17.0	\$1.00	\$17.00	7.95%	8.95%	\$121.03
7	1971	17.0	\$1.00	\$17.00	5.05%	6.05%	\$148.86
8	1972	17.0	\$1.00	\$17.00	4.76%	5.76%	\$174.87
9	1973	17.0	\$1.00	\$17.00	5.48%	6.48%	\$201.94
10	1974	17.0	\$1.00	\$17.00	6.75%	7.75%	\$232.02
11	1975	17.0	\$1.00	\$17.00	6.16%	7.16%	\$267.01
12	1976	17.0	\$1.00	\$17.00	8.13%	9.13%	\$303.12
13	1977	17.0	\$2.00	\$34.00	7.57%	8.57%	\$364.80
14	1978	17.0	\$2.00	\$34.00	7.70%	8.70%	\$430.06
15	1979	17.0	\$2.00	\$34.00	10.80%	11.80%	\$501.48
16	1980	17.0	\$2.00	\$34.00	12.79%	13.79%	\$594.65
17	1981	17.0	\$2.00	\$34.00	13.06%	14.06%	\$710.65
18	1982	17.0	\$2.00	\$34.00	15.95%	16.95%	\$844.57
19	1983	17.0	\$2.00	\$34.00	10.28%	11.28%	\$1,021.73
20	1984	17.0	\$4.00	\$68.00	10.23%	11.23%	\$1,204.98
21	1985	17.0	\$4.00	\$68.00	10.27%	11.27%	\$1,408.30
22	1986	17.0	\$4.00	\$68.00	9.88%	10.88%	\$1,635.01
23	1987	17.0	\$4.00	\$68.00	7.85%	8.85%	\$1,880.90
24	1988	17.0	\$4.00	\$68.00	9.04%	10.04%	\$2,115.36
25	1989	17.0	\$4.00	\$68.00	10.58%	11.58%	\$2,395.74
26	1990	17.0	\$4.00	\$68.00	10.81%	11.81%	\$2,741.17
27	1991	17.0	\$4.00	\$68.00	10.09%	11.09%	\$3,132.90
28	1992	17.0	\$4.00	\$68.00	7.54%	8.54%	\$3,548.34
29	1993	17.0	\$4.00	\$68.00	7.09%	8.09%	\$3,919.37
30	1994	17.0	\$4.00	\$68.00	4.18%	5.18%	\$4,304.44
31	1995	17.0	\$4.00	\$68.00	8.85%	9.85%	\$4,595.41
32	1996	17.0	\$4.00	\$68.00	5.48%	6.48%	\$5,116.06
33	1997	17.0	\$4.00	\$68.00	4.28%	5.28%	\$5,515.58
34	1998	17.0	\$4.00	\$68.00	4.90%	5.90%	\$5,874.80
35	1999	17.0	\$4.00	\$68.00	4.83%	5.83%	\$6,289.42
36	2000	17.0	\$4.00	\$68.00	6.04%	7.04%	\$6,724.09
37	2001	17.0	\$4.00	\$68.00	4.91%	5.91%	\$7,265.47
38	2002	17.0	\$4.00	\$68.00	3.33%	4.33%	\$7,762.86
39	2003	17.0	\$4.00	\$68.00	3.55%	4.55%	\$8,166.99
40	2004	17.0	\$6.00	\$102.00	2.71%	3.71%	\$8,640.59
41	2005	17.0	\$6.00	\$102.00	2.83%	3.83%	\$9,063.15
42	2006	17.0	\$6.00	\$102.00	3.83%	4.83%	\$9,512.27
43	2007	17.0	\$6.00	\$102.00	4.10%	5.10%	\$10,073.71
44	2008	17.0	\$6.00	\$102.00	3.22%	4.22%	\$10,689.47
45	2009	17.0	\$6.00	\$102.00	1.39%	2.39%	\$11,242.57
46	2010	17.0	\$6.00	\$102.00	1.21%	2.21%	\$11,613.27
47	2011	17.0	\$6.00	\$102.00	1.64%	2.64%	\$11,971.92
48	2012	17.0	\$6.00	\$102.00	1.03%	2.03%	\$12,389.98

49	2013	17.0	\$6.00	\$102.00	1.17%	2.17%	\$12,743.49
50	2014	17.0	\$6.00	\$102.00	0.98%	1.98%	\$13,122.03
51	2015	17.0	\$0.00		0.46%	1.46%	\$13,381.84 (3)
End of year 2015							\$13,577.22

Total Compensation Owed: \$13,577.22

Notes

(1) Crowland landowners amount paid. See Elenchus Report, p.15 (Tab X to the Enbridge's Responding Materials, February 27, 2015 (EB-2014-0351). Also included as Appendix B to Babiard Written Submissions dated February 18 2016)

(2) Government of Canada Marketable Bonds, Average Yield (1 to 3) years. January average price. Used as a proxy for 1 Year for consistency as T-Bill data does not go back nearly that far (This is consistent with original application calculations)

http://www.bankofcanada.ca/wp-content/uploads/2010/09/selected_historical_v122558.pdf

(3) 2015 compensation paid per Board order. Interest: http://www.bankofcanada.ca/rates/interest-rates/lookup-bond-yields/?rangeType=dates&rangeValue=1&rangeWeeklyValue=1&rangeMonthlyValue=1&IP=lookup_bond_yields.php&sR=2005-11-30&se=L_V122558&dF=2014-12-30&dT=2015-11-30

B

Mark Rubenstein

From: Zora Crnojacki <Zora.Crnojacki@ontarioenergyboard.ca>
Sent: March 30, 2016 5:17 PM
To: 'Mark Rubenstein'; lbabirad@cogeco.ca; fcass@airdberlis.com; edith.chin@enbridge.com
Cc: BoardSec; Pascale Duguay; Maureen Helt
Subject: RE: EB-2015-0334 Paul Babirad
Attachments: Estimate Compensat OEB Staff.xlsx

Mark, please see the attached spreadsheet.

How we estimated the \$ figures in our submission?

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

Looking at the Appendix 3 of Babirad Motion Submission dated February 18,2016:

\$114,388.28 amount total without rolling forward

\$389,925.92 amount adjusted by T-bill rates and 1% credit spread

$389,925.92/114,388.28 = 3.4$


We used this coefficient of 3.4 to multiply (adjust) \$3,360 which results in \$11,453.57

All these figures are approximate. We did not verify the accuracy of T-bill rates Babirad used in his calculations. The intent was to get a "ball park" figure.

Regards,

Zora Crnojacki

Project Advisor
Applications Division
Ontario Energy Board
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416 440 8104

 please don't print this e-mail unless you really need to.

From: Mark Rubenstein [<mailto:mark.rubenstein@canadianenergylawyers.com>]
Sent: March-30-16 4:15 PM
To: Zora Crnojacki; lbabirad@cogeco.ca; fcass@airdberlis.com; edith.chin@enbridge.com

Cc: BoardSec

Subject: RE: EB-2015-0334 Paul Babirad

Zora,

Can Staff please provide parties a live copy of the spreadsheet used to create Schedule 1 so that the numbers can be verified? Thanks.

Mark

Mark Rubenstein

Jay Shepherd Professional Corporation

Tel: 416-483-3300

mark.rubenstein@canadianenergylawyers.com

From: Zora Crnojacki [<mailto:Zora.Crnojacki@ontarioenergyboard.ca>]

Sent: March 29, 2016 5:21 PM

To: 'lbabirad@cogeco.ca'; 'mark.rubenstein@canadianenergylawyers.com'; 'fcass@airdberlis.com'; 'edith.chin@enbridge.com'

Cc: BoardSec

Subject: EB-2015-0334 Paul Babirad

Please see OEB staff submission regarding the above noted case.

Regards,

Zora Crnojacki

Project Advisor

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