



Ontario Energy Board Commission de l'énergie de l'Ontario

DECISION AND ORDER

EB-2014-0351

JIM BABIRAD

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.

BEFORE: Cathy Spoel
Presiding Member

October 29, 2015

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1 INTRODUCTION AND SUMMARY

Paul Babirad, on behalf of his father Jim Babirad applied on November 20, 2014 under section 38(3) of the *Ontario Energy Board Act, 1998* (OEB Act) to the Ontario Energy Board (OEB) for a determination of the compensation Jim Babirad may be entitled to for storage rights under his land in the Crowland natural gas storage pool (Crowland Pool). The Crowland Pool is operated by Enbridge Gas Distribution Inc.(Enbridge). It is located in the Niagara Region.

Jim Babirad does not hold a storage rights agreement with Enbridge for the Crowland Pool. In 1965 Consumers Gas (now Enbridge), entered into an indenture with the previous owners of Jim Babirad's land (Indenture). According to the Indenture, Mr. Babirad's predecessors granted all the mineral rights under the property to Consumers Gas for a one-time payment of \$800. Enbridge's position is that this payment represents full compensation for storage rights to Jim Babirad.¹

Enbridge retained an expert to prepare a report (the Elenchus Report) which concluded that an increase in compensation to all Crowland Pool landowners, including Jim Babirad, was appropriate as no increases in compensation have been made to the landowners of the Crowland Pool since 2004. The Elenchus Report recommended that Jim Babirad be entitled to the same percentage increase for compensation that Enbridge implemented from 2004 to 2015 for all other landowners of storage pools operated by Enbridge. Although Enbridge submitted that it opposes additional payments for storage rights to Jim Babirad, Enbridge stated that, if the OEB orders additional compensation, the annual payments to Jim Babirad should be the same as to other Crowland landowners and adjusted as proposed by the Elenchus Report.

The OEB has determined that the compensation scheme as set out in the Elenchus Report is fair and reasonable. The OEB has determined that Enbridge is to pay Jim Babirad 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, including the Crowland Pool.

¹ EB-2014-0351 Enbridge Gas Distribution Inc. Submission-Responding material, February 27, 2015, page 17, paragraph 50.

2 THE PROCESS

The OEB proceeded by a written hearing including interrogatories, interrogatory responses and submissions of the parties. There are no intervenors. Paul Babirad, on behalf of his father, Jim Babirad, Enbridge and OEB staff actively participated in this proceeding.

Paul Babirad requested and was granted eligibility for a cost award although the active participant in the proceedings was Paul Babirad, as he was acting on his father's behalf, the decision refers throughout to the applicant as Jim Babirad.

3 STRUCTURE OF THE DECISION

This Decision and Order provides an introduction of the application, a brief description of the OEB's review process, a description of the Crowland Pool's geology and operational performance, an overview of storage rights compensation in Ontario, the compensation as requested by Jim Babirad and the position of Enbridge, and in conclusion a section with the OEB's order.

4 THE CROWLAND POOL

The OEB notes that most storage capacity in Ontario is operated by Union Gas Limited (Union) and Enbridge with the majority of natural gas storage pools being pinnacle reefs located in Lambton County (Lambton Pools). An exception is the Crowland Pool, which is the only Ontario pool with a lenticular type of geological formation and is located in the Niagara Region. Lenticular pools generally have a lower capacity and operational performance compared to pinnacle reef storage pools. The operational performance of a storage pool depends on the type of geology and a combination of factors including: injection/withdrawal rate, operating cost per unit of storage, proximity to compressor, transmission and related facilities, and access to a gas transmission network connecting the storage pools to the gas market. As a result, storage rights landowners in Ontario's pinnacle reef pools receive higher annual per acre compensation than landowners in the Crowland Pool.

The Crowland Pool was designated as a natural gas storage area in 1965 upon recommendation of the OEB issued in 1964. The OEB granted to Consumers Gas authority to operate the Crowland Pool as a storage facility. In 1965 Consumers Gas, entered into an Indenture with the predecessors of Jim Babirad. According to the Indenture, Jim Babirad's predecessors granted all the mineral rights under the property to Consumers Gas for a one-time payment of \$800. Enbridge's position is that this payment represents full compensation for storage rights to Jim Babirad. Enbridge's evidence is that the Crowland Pool has a comparably lower performance and is more expensive to operate than pinnacle reef pools. Enbridge's Lambton Pools are clustered geographically and benefit from operational costs synergies and connection to provincial storage-transmission network². The Lambton Pools are located close to and connected to the Dawn Market Hub providing a high market accessibility. The Crowland Pool on the other hand is located away from the provincial storage-transmission network and lacks market accessibility.

Findings

The OEB finds that the operational and economic performance of the Crowland Pool is lower compared to other storage pools in Ontario due to its geological characteristics, isolated location, higher relative operating costs and lack of direct connection to the provincial gas storage-transmission infrastructure.

²EB-2014-0351 Enbridge Gas Distribution Inc. Submissions - Responding Material, February 27, 2015.

5 STORAGE RIGHTS COMPENSATION IN ONTARIO

The legal basis for storage rights compensation in Ontario is set by sections 38(1) and 38(2) of the OEB Act. Section 38(1) states that just and equitable compensation for operational damages and for storage rights must be offered to owners of rights to store gas and that the compensation is subject to negotiation and agreement between landowners and storage operators. Pursuant to section 38(3), if the negotiations fail and an agreement cannot be reached between the landowner and the operator, either party can apply to the OEB to determine the amount of compensation.

There have been several storage rights compensation proceedings before the OEB. Most of these proceedings were on applications filed by individual landowners and by a group of landowners (Lambton County Storage Association (LCSA)). In 2004, the OEB accepted a settlement agreement between the LCSA landowners and Union, which set the compensation for all components of storage rights starting in 2004.³

The method for determining storage rights compensation has been similar across the pools operated by both Enbridge and Union over the years. The compensation for storage rights is paid annually per acre of land within the pool.

There were two reports issued by the Ontario government in the early 1960s, the Langford Report and Crozier Report, which set some general principles for storage rights compensation in the province. The Crozier Report distinguished between pinnacle reefs geology and lenticular geology storage pools, and noted that pinnacle reef storage pools have superior performance compared to lenticular pools. One of the principles of the Crozier Report is that storage rights compensation payments should be based upon the capacity and the performance of a storage reservoir. Therefore the Crozier Report supported higher compensation for pinnacle reef pools than for lenticular pools such as the Crowland Pool.

Findings

The principles for storage rights compensation in Ontario set out in the Crozier Report have been applied since its release. The OEB notes that the industry approach to storage rights compensation in Ontario has been applied consistently across all of Enbridge's and Union's Lambton Pools over the years. Compensation has been paid annually per acre of land and has been adjusted periodically by the same percentage for all pools. There are relatively few OEB decisions under section 38(3) as most

³ *OEB Decision and Order, RP-2000-0005, March 23, 2004*

landowners have been able to reach agreement with the storage companies through negotiation.

6 COMPENSATION TO JIM BABIRAD

Jim Babirad does not have a storage rights compensation agreement with Enbridge. It is for this reason he is eligible to apply to the OEB for compensation determination. Until 2013, there were no negotiations around storage rights compensation for Jim Babirad's property. In 2013 negotiations commenced and continued until 2014. Jim Babirad and Enbridge were not able to reach agreement.

Enbridge maintains that the mineral rights included storage rights while Jim Babirad disagrees with this position. Enbridge's position is that the \$800 paid to Jim Babirad's predecessors represents full compensation in respect of the Crowland Pool in perpetuity. However, Enbridge submitted that it would agree with the compensation scheme in the Elenchus Report should the OEB decide that Enbridge is to pay to Jim Babirad any compensation in addition to the \$800 Enbridge paid in 1965.

The Crozier Report recommends, among other things, that the payments for storage rights compensation should be based on the capacity and performance of storage pools. Both Jim Babirad and Enbridge referred to this principle in their submissions. However, the interpretation of the principle differed. Jim Babirad agreed that the capacity per acre of the Crowland Pool is lower compared to the pinnacle reef pools. He further submitted that Ontario pinnacle reef pools are not homogeneous in terms of capacity and performance and that therefore the compensation per acre cannot be the same across pinnacle reef pools, so compensation should be assessed on a pool by pool basis.

Jim Babirad submitted that he is entitled to receive compensation comparable to the compensation awarded to the pinnacle reef landowners in the LCSA OEB proceeding (RP-2000-0005) and other Enbridge pinnacle reef landowners.

OEB staff referred to the Elenchus Report in its submission noting that the payments to Crowland landowners are to be increased for 2015 from the current \$6/acre by 43.5% to make them equivalent to increases to other Enbridge's pool storage rights compensation. Elenchus also recommended that Enbridge further adjust compensation by 2.36% which Enbridge implemented in their payments to its other landowners in 2015. Elenchus recommended the 2015 payment to Crowland landowners be \$8.81/acre. The recommendations are based on a comparison of the Crowland Pool performance and quality to other Enbridge pools and comparison of historical increases that Enbridge made to storage rights compensation payments.

Enbridge submitted that the lower performance of the Crowland Pool warrants lower compensation in comparison with the higher performance Lambton Pools. In addition to working capacity per acre, Enbridge submitted that pool performance depends on

injection/withdrawal rate or deliverability, operating cost, proximity to compressor and transmission and ease of access to gas market. Enbridge's position is that Lambton Pools significantly outperform the Crowland Pool.

Findings

The OEB notes that industry practice in Ontario has been to compensate landowners for storage rights annually per acre of the property within the boundaries of a designated storage pool.

The OEB finds that 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.

The OEB agrees with the practice to pay higher compensation to landowners in pinnacle reef storage pools based on higher pool performance compared to the lenticular Crowland Pool. The OEB disagrees with Jim Babirad's proposal that Crowland Pool landowners be paid the same compensation as Lambton Pool landowners. While the OEB agrees with Jim Babirad's position that capacity and deliverability are relevant in determining the performance of a pool, the OEB agrees with Enbridge that additional factors, such as operating cost, proximity to a compressor and transmission and ease of access to gas market should also be considered. Therefore, the OEB finds that it is reasonable for the Crowland Pool landowners to receive lower compensation than the Lambton Pools landowners. This is consistent with the recommendation of the Crozier Report which found that as the capacity of lenticular pools is much lower than the capacity of pinnacle reef pools, using the same formula for storage rights compensation would not be appropriate and that the rates agreed upon for Crowland Pool appeared to be "fair and reasonable".

The OEB disagrees with Jim Babirad's suggestion that compensation for all storage rights should be determined on a pool by pool basis. The OEB notes that Enbridge operates Lambton Pools as part of an integrated storage business. For that reason, the OEB finds that equal compensation to landowners across all of the Lambton Pools is fair regardless of differences in individual Lambton Pools performance.

The OEB finds that periodic compensation increases in the same percentage and at the same time interval to all Enbridge's pools landowners, including the Crowland Pool, are fair and equitable.

7 COSTS AWARD

The OEB, by way of letter dated February 13, 2015, confirmed Paul Babirad's cost award eligibility. However, the OEB noted that individual parties, including applicants, that represent their own interests may be eligible for an honorarium at the discretion of the OEB.

The OEB also noted that fees are not generally permitted to be claimed by individuals under the Board's Cost Award Tariff. The Board's Cost Award Tariff is not intended to apply to applicants or individual participants, but rather to consultants or experts that are acting on behalf of another party. The Board will grant an honorarium of \$1,000 to Paul Babirad plus any eligible disbursements he may claim that are in accordance with the OEB's Practice Direction on Cost Awards.

8 ORDER

THE BOARD ORDERS THAT:

1. Enbridge shall pay Jim Babirad compensation in the amount of \$8.81 per acre for the year 2015 and adjust this amount periodically by the same percentage increase and at the same time as Enbridge will adjust payments to all landowners in all of Enbridge's storage pools, including the Crowland Pool.
2. The OEB grants an honorarium of \$1,000 to Paul Babirad. Enbridge shall pay the honorarium to Jim Babirad by **November 15, 2015**.
3. If Paul Babirad wishes to seek an award of costs for disbursements incurred in this proceeding he shall file his claims in accordance with the OEB's Practice Direction on Cost Awards with the OEB and with Enbridge by **November 30, 2015**.
4. Enbridge may make submissions regarding Paul Babirad's disbursements by **December 14, 2015**.
5. Enbridge shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

DATED at Toronto October 29, 2015

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary