



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

DECISION AND ORDER

EB-2015-0334

BABIRAD MOTION

Motion by Mr. Jim Babirad to review and vary the Ontario Energy Board's Decision and Order, dated October 29, 2015, in the EB-2014-0351 proceeding.

BEFORE: Christine Long
Presiding Member

Cathy Spoel
Member

Paul Pastirik
Member

May 5, 2016

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1 INTRODUCTION AND SUMMARY

Jim Babirad (Mr. Babirad) filed a Motion to Review and Vary (Motion) the Ontario Energy Board's (OEB) Decision and Order, dated October 29, 2015, in the EB-2014-0351 proceeding (2015 Decision).

In the 2015 Decision, the OEB determined that Mr. Babirad was entitled to compensation from Enbridge Gas Distribution Inc. (Enbridge) 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. The Motion is for a review and variance of the 2015 Decision in which the OEB did not award compensation to Mr. Babirad by Enbridge for the period from 1965 to 2014.

On March 3, 2016, the OEB released its decision on the threshold question of whether the Motion should be granted. The OEB decided to hear the Motion on the basis that the 2015 Decision did not address the material issue of past compensation between 1965 and 2014. The OEB provided for submissions but limited the scope to the issue of whether to grant Mr. Babirad's claim for compensation from Enbridge for the period from 1965 to 2014.

The OEB has determined that the compensation sought by Mr. Babirad is fair and reasonable. The OEB has determined that Enbridge is to pay Mr. Babirad compensation in the amount of \$13,577.22 for the period from 1965 to 2014.

2 THE PROCESS

The OEB proceeded by way of a written hearing. There were no intervenors. Mr. Babirad, Enbridge, and OEB staff filed submissions.

Mr. Babirad requested eligibility for an award of costs in relation to the Motion.

3 COMPENSATION PAYABLE TO MR. BABIRAD

Mr. Babirad requested compensation in the amount of \$13,577.22 for the 1965 to 2014 period which included a per acre rate and interest for the period. Mr. Babirad submitted a detailed calculation for this amount. Mr. Babirad argued that it would be consistent with the 2015 Decision for the OEB to determine the level of past compensation payable by Enbridge 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.

Enbridge disagreed that any past compensation should be paid. Enbridge submitted that it understood an “amicable settlement” of the compensation issue was reached in 1965 and that the case was closed. Enbridge submitted that it would be inequitable to make a retroactive award of compensation at this time for a claim going back almost 50 years because Enbridge has managed its affairs on the basis that there was no compensation owing to Mr. Babirad. Enbridge argued that little or nothing was done by Mr. Babirad to bring forward the issue of storage compensation, even though the Chair of the OEB explained storage compensation rights to Mr. Babirad during the designation proceeding in 1964.

Enbridge also argued that the OEB should apply the equitable Doctrine of Laches to this claim as the OEB’s mandate is to determine “fair and reasonable” compensation, which is akin to a claim in equity. Enbridge argued that the application of this doctrine should result in the dismissal of the claim due to the passage of time.

OEB staff submitted that given the significant delay in bringing this matter forward, 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.

Both Enbridge and OEB staff submitted that the consideration for the amount of compensation should account for the severance of 24 acres of land in 1975 to a third party from the original 41 acres. Mr. Babirad agreed with this position and submitted that the appropriate acreage for compensation is 17 acres (41-24) for all years because the right to past compensation more appropriately runs with land.

Findings

The OEB finds Mr. Jim Babirad is entitled to fair and reasonable compensation for land currently owned for the period 1965-2014.

The 2015 Decision determined that the Indenture entered into by Mr. Babirad's predecessors and Enbridge did not confer storage rights on Enbridge. As a result of that decision, the entitlement to compensation for storage has been established in the 2015 Decision. In submissions on the Motion, the OEB was asked to consider whether any factors negated Mr. Babirad's right to past compensation for storage.

Enbridge argued that Mr. Babirad (Sr.) had done little to bring forward the issue of compensation for storage despite his participation during the designation hearing in 1964¹. The OEB is not convinced based on the evidence provided by Enbridge in the form of notes from the designation hearing, that Mr. Babirad (Sr.) fully understood his right to compensation for storage. Therefore, the OEB will not make a determination against Mr. Babirad on that basis.

The OEB finds the Equitable Doctrine of Laches does not apply. Mr. Babirad's claim is one made under statute and as such the equitable remedy of laches does not apply. The reference to "fair and reasonable" is to the quantum of compensation, not the entitlement to it. Even though the OEB dismissed the doctrine of laches as being non-applicable, the OEB did consider whether Enbridge would suffer any prejudice as a result of the OEB's order that Enbridge pay past compensation to Mr. Babirad. The OEB is satisfied that when balancing the right of compensation owed to Mr. Babirad and the quantum of the compensation, Enbridge would not suffer undue prejudice.

The OEB agrees that compensation should be based on the 17 of acres of land currently owned by Mr. Babirad, and that the rate should be based on rates paid by Enbridge to other Crowland Pool landowners. The rate at which future compensation should be paid was determined in the 2015 Decision. The OEB finds that past compensation should be made on the same basis. Neither Mr. Babirad nor OEB staff disputed that the future compensation rate should be used to determine the past compensation rate.

The OEB finds that Mr. Babirad is entitled to interest on the past compensation amount. Having determined that the doctrine of laches is not applicable to the facts in this case, the OEB disagrees with OEB staff's position that interest is not applicable. Having established the right to past compensation, the OEB finds it would be inconsistent to then disallow the payment of interest due to the passage of time.

The total compensation to be paid to Mr. Babirad is \$13,577.52 for the use of his property for natural gas storage from 1965-2014.

¹ EB-2016-0334, Review Motion Submissions of Enbridge Gas Distribution Inc., March 29, 2016, at paragraph 19.

4 COST AWARD

Mr. Babirad sought eligibility for an award of costs in accordance with section 3.07 of the OEB's *Practice Direction on Cost Awards*. The OEB finds that Mr. Babirad is entitled to his reasonably incurred costs in accordance with the OEB tariff.

5 ORDER

THE BOARD ORDERS THAT:

1. Enbridge shall pay to Mr. Babirad compensation in the amount of \$13,577.22 pertaining to the years 1965 to 2014 by **May 31, 2016**.
2. Mr. Babirad shall file his claim for costs in accordance with the OEB's *Practice Direction on Cost Awards* with the OEB by **May 31, 2016** and copy Enbridge.
3. Enbridge may make a submission regarding Mr. Babirad's legal fees and disbursements by **June 14, 2016**.
4. Enbridge shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

DATED at Toronto May 5, 2016

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary