BORDEN
LADNER
GERVAIS

By electronic filing and by e-mail

Borden Ladner Gervais LLP
Lawyers • Patent & Trade-mark Agents
World Exchange Plaza
100 Queen Street, Suite 1100
Ottawa ON K1P 1J9
tel.: (613) 237-5160 fax: (613) 230-8842
www.blgcanada.com

PETER C.P. THOMPSON, Q.C.
direct tel.: (613) 787-3528
e-mail: pthompson@blgcanada.com

July 19, 2010

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

Dear Ms Walli,

Motion by Consumers Council of Canada ("CCC")
in relation to section 26.1 of the *Ontario Energy Board Act, 1998* and
Ontario Regulation 66/10 ("O.Reg.66/10")
Board File No.: EB-2010-0184
Our File No.: 339583-000072

Pursuant to the provisions of Procedural Order No. 4 and the commitment we made, as counsel for Canadian Manufacturers & Exporters ("CME"), at page 41, lines 26 and 27 of the Transcript of proceedings held on July 13, 2010, we enclose the following:

(a) Notice of Motion, and

(b) Supporting Affidavit of Vincent J. DeRose.

Please contact us if there are any questions about this material.

Yours very truly,

Peter C.P. Thompson, Q.C.

PCT\slc
enclosures
c. All intervenors
Consumers Council of Canada ("CCC")
Attorney General of Ontario ("Ontario")
All Licensed Electricity Distributors
Independent Electricity System Operator ("IESO")
Paul Clipsham (CME)

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EB-2010-0184

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 a motion by the Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1998,* and Ontario Regulation 66/10;

NOTICE OF MOTION

The Canadian Manufacturers & Exporters ("CME") will supplement the motion presented to the Ontario Energy Board (the "Board") on July 13, 2010, with this formal Notice of Motion returnable Monday, July 26, 2010, at the Board's offices at 2300 Yonge Street, Toronto, Ontario.

THE MOTION IS FOR:

1. An Interim Order either setting aside or staying the Assessments issued on April 9,2010, until such time as matters pertaining to the constitutional validity of Ontario Regulation 66/10 ("O.Reg.66/10") have been decided on their merits; and
2. Such further and other relief as CME may request and the Board may grant.

THE GROUNDS FOR THE MOTION ARE:

1. The Board's duty and obligation, as an independent quasi-judicial tribunal, fully empowered to determine questions of law and fact, to consider and decide questions pertaining to the constitutional validity of its own actions in response to O.Reg.66/10 (the "Constitutional Questions"), on their merits, before complying with that regulation;
2. The Board's failure to consider and decide the Constitutional Questions, on their merits, before issuing the Assessments;
3. The postponement in the issuance of the Assessments that would have transpired had the Board discharged its duty to consider the legality of its own actions by establishing,

on its own Motion, a process for considering the Constitutional Questions before responding to O.Reg.66/10;

4. Paragraphs 11, 12, 15 and 16 of the Written Argument of the Attorney General of Ontario ("Ontario") acknowledging the Board's duty and obligation to consider the Constitutional Questions, on their merits, and requesting that the Board decide matters of fact and law pertaining thereto after the AG of Ontario has adduced evidence pertaining to such matters;

5. The presumption of validity does not apply to actions taken by an independent quasi-judicial tribunal in response to enactments of questionable validity requiring the tribunal to perform particular actions;

6. The presumption of validity applies after the tribunal has discharged its duty aforesaid, but not before;

7. The public interest is better served by granting the stay in that, it eradicates the harm to the administration of justice and the inherent unfairness to utilities and consumers of the Board presuming its own actions in issuing Assessments to be valid, before considering the Constitutional Questions, on their merits;

8. Having regard to the acknowledgement by Ontario that the Board has yet to consider all matters of fact and law pertaining to the legality of O.Reg.66/10, the issuance of a decision setting aside the Assessments is mandatory, and is not discretionary;

9. In the alternative, if setting aside or staying the Assessments, until the Constitutional Questions have been decided on their merits, is discretionary, then the Board's failure to consider the legality of its own actions before acting weighs heavily in favour of the Interim Order requested;

10. The administration of justice is irreparably harmed when a quasi-judicial tribunal presumes that its own arguably illegal actions are valid, before deciding, on their merits, questions pertaining to the legality of such actions;

11. If the interim relief requested is not granted and the Assessments are subsequently determined to be constitutionally invalid, then the risk, facing utilities, is that Ontario might refrain from repaying the amounts paid by the utilities to Ontario (acknowledged by counsel for Ontario at Transcript page 77, lines 5 to 7, on July 13, 2010);

12. If the interim relief requested is not granted, then the out-of-pocket expense risks and harm to consumers from whom utilities recover the assessed amounts who cease to take service from a licensed utility before a decision in their favour on the Constitutional Questions has been rendered;

13. The inability of utilities to keep track of the consumers that actually pay assessed amounts, pending a decision on the Constitutional Questions on their merits, which will preclude re-payments to those who actually made them, if the Assessments are determined to be illegal as in the class action cases against Enbridge Gas Distribution Inc. ("EGD") and Union Gas Limited ("Union");

14. Without a stay, the Board's arguably illegal actions in issuing the Assessments will create a situation analogous to the Board's approval of Late Payment Penalty ("LPP") amounts for EGD and Union that gave rise to the eventually successful class action proceedings against those utilities;

15. If a stay is not granted, then the exposure all Licensed Electricity Distributors will face to class actions by consumers from whom they commence recovering the amounts assessed, with the class action claims exposure being the total amount of the Board Assessments of $53,615,310, plus substantial costs for class action counsel fees and costs, and the costs that the utility will incur in responding to the claims;

16. The irreparable harm caused by the inability of the Board to eliminate the class action risk all Licensed Electricity Distributors will face without a stay, or to assure that the utilities will receive from Ontario full indemnity for all amounts they are required to pay to

consumers, class action counsel and their own counsel in the event the Assessments are found to be constitutionally invalid;

17. The irreparable harm caused by the inability of the Board to assure that each and every consumer from whom the utilities recover the Assessments, in a total amount of $53,615,310, receives a full refund, in the event that the Assessments are found to be constitutionally invalid;

18. Compared to consumers, the superior ability of Ontario to tolerate a suspension of its recovery of assessed amounts pending a determination of the Constitutional Questions on their merits;

19. Government funded programs that have operated historically without the Assessments can continue to operate until the Constitutional Questions are decided on their merits;

20. The ability of the Board to wholly safeguard the interests of Ontario by including terms in the Interim Order requested to the effect that the amount O.Reg.66/10 requires the Board to assess against each Licensed Electricity Distributor, effective July 30, 2010, will be recoverable in full, if and when the Constitutional Questions are decided on their merits in favour of Ontario;

21. The Supreme Court of Canada Decision in R.V. Conway (2010) S.C.C. 22 at paragraphs 63 to 77 and 82 cited in paragraph 45 of the Amended Factum of the Consumers Council of Canada ("CCC") and Aubrey LeBlanc ("LeBlanc") and in paragraph 11 of the Written Argument of Ontario;

22. The Board's obligation under Section 1(1) of the *Ontario Energy Board Act, 1998* (the *"OEB Act"*) to protect the interests of consumers with respect to the prices of electricity service;

23. Section 21(7) of the *OEB*;

24. Rule 42.04 of the *Rules of Practice and Procedure* of the Ontario Energy Board (the *"Rules"*);

25. Such further and other grounds as counsel may advise and the Board permits.

The following documentary material and evidence will be relied upon at the hearing of the motion:

1. Amended Motion Record of CCC and LeBlanc (the "Moving Parties");
2. The Factums filed by CCC and LeBlanc, CME and other intervenors;
3. The Written Argument filed by Ontario;
4. The Transcript of proceedings and materials filed at the hearing held on July 13, 2010, including materials filed by counsel for Ontario and Union on July 14, 2010;
5. An Endorsement dated September 25, 2006, and Reasons for Decision dated December 8, 2006, of Mr. Justice Cullity of the Ontario Superior Court of Justice pertaining to the LPP class action brought against EGD;
6. The Board's EB-2007-0731 Decision dated February 4, 2008, pertaining to the amounts to be recorded in EGD's Class Action Deferral Account;
7. Reasons for Decision dated January 27, 2009, of Mr. Justice Cumming of the Ontario Superior Court of Justice in the LPP class action brought against Union;
8. Evidence filed by Union in EB-2010-0039 pertaining to its Deferral Account No. 179-111 re: LPP Litigation;
9. Affidavit of Vincent J. DeRose dated July 19, 2010; and
10. Such further and other material as counsel may advise and the Board permits.

July 19, 2010

BORDEN LADNER GERVAIS LLP
Barristers & Solicitors
World Exchange Plaza
100 Queen Street, Suite 1100
Ottawa, ON K1P 1J9

Tel (613) 237-5160
Fax (613) 230-8842

Peter C.P. Thompson, Q.C.

TO: **Ontario Energy Board**
Attention: Kirsten Walli, Board Secretary
2300 Yonge Street
Suite 2700
Toronto, ON M4P 1E4 Fax (416) 440-7656

AND TO: **The Attorney General of Ontario**
Constitutional Law Division
720 Bay Street, 4th floor
Toronto, ON M5G 2K1 Fax (416) 326-4015

AND TO: **All Parties of Record**

AND TO: **All Electricity Distributors**

AND TO: **Independent Electricity System Operator ("IESO")**

OTT01\4099184\1

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

AND IN THE MATTER OF a motion by the Consumers Council of Canada in relation to section 26.1 of the Ontario Energy Board Act and Ontario Regulation 66/10;

ONTARIO ENERGY BOARD

NOTICE OF MOTION OF CANADIAN MANUFACTURERS & EXPORTERS ("CME")

(Motion returnable July 26, 2010)

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street
Suite 1100
Ottawa, ON K1P 1J9

Peter C.P. Thompson, Q.C.
Telephone (613) 787-3528
Facsimile (613) 230-8842

Lawyers for Canadian Manufacturers & Exporters ("CME")

EB-2010-0184

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 a motion by the Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1998,* and Ontario Regulation 66/10.

AFFIDAVIT

I, Vincent J. DeRose, Barrister & Solicitor, of the City of Ottawa, in the Province of Ontario, make oath and say as follows:

1. I am a partner in Borden Ladner Gervais LLP ("BLG"), the solicitors for Canadian Manufacturers & Exporters ("CME"), and as such, have knowledge of the matters herein deposed.

2. Attached as Exhibits "A" and "B" to this Affidavit are an Endorsement and Reasons for Decisions in the Class Action proceedings in the Ontario Court of Justice brought against Enbridge Gas Distribution Inc. ("EGD") and Union Gas Limited ("Union") pertaining to Late Payment Penalty ("LPP") amounts the Ontario Energy Board (the "Board" or "OEB") permitted those utilities to recover from their customers. Exhibit "A" consists of an Endorsement and subsequent Reasons for Decision rendered by Mr. Justice Cullity in the Class Action brought against EGD. The Endorsement is dated September 25, 2006. The Reasons for Decision are dated December 8, 2006. Exhibit "B" consists of the Reasons for Decision dated February 10, 2009, rendered by Mr. Justice Cumming in the LPP Class Action brought against Union.

3. The Decisions in these proceedings evidence the inability of assuring that those who actually pay to utilities amounts that are subsequently found to be illegal receive a full refund of the amounts paid.

4. Paragraph 30 of the Endorsement of Mr. Justice Cullity, dated September 25, 2006, and paragraph 27 of the Reasons for Decision of Mr. Justice Cumming, dated February 10, 2009, describe this phenomenon.

5. These Decisions also evidence the substantial amounts awarded in Class Action proceedings to counsel for successful Plaintiffs.

6. Paragraph 31 of the Reasons for Decision of Mr. Justice Cullity, dated December 8, 2006, in EGD's case, reveals that the amount awarded to counsel for the successful Plaintiff was about $10,130,469.20. This amount exceeded the amount of $9M distributed to benefit the class of customers that had paid the illegal LPP amounts to EGD. The sum awarded to counsel for the successful Plaintiff was more than 110% of the amount paid to those who had made illegal LPP amounts to EGD.

7. Paragraph 28 of the Reasons for Decision of Mr. Justice Cumming, dated February 10, 2009, shows that the amount distributed to benefit the class that had paid the illegal LPP amounts to Union was $5,400,000. The additional amount awarded to class counsel was $2,750,000 or some 51% of the amounts distributed to those that had paid the LPP amounts to Union that were subsequently found to be illegal.

8. The Board has in its possession information which discloses the amounts paid by EGD and Union to their own counsel to respond to the Class Actions that were brought against them. In the case of EGD, the amounts it paid to its counsel to respond to the Class Action are an item recorded in the Class Action Suit Deferral Account ("CASDA") the Board established for EGD. The amounts recorded in that account were the subject matter of a Board Decision in EB-2007-0731 dated February 4, 2008, which is attached as Exhibit "C" to this Affidavit. This Decision, at page 22, indicates that, incremental to the settlement amount of $22M, the legal expenses EGD incurred to respond to the Class Action exceeded $1.5M.

9. In Union's case, the Class Action was settled without the extensive court proceedings that took place in EGD's case. Evidence filed by Union in its pending Application before the

Board under docket number EB-2010-0039 indicates that Union incurred $171,000 of legal and other costs related to its response to the LPP litigation. Attached as Exhibit "D" to this Affidavit are pages 14 and 15 of an Exhibit in those proceedings referring to these incremental expenses.

10. This Affidavit is provided to support CME's request for interim relief formalized in the Notice of Motion dated July 19, 2010, and to establish the following:

(a) The Class Action proceeding exposure all Licensed Electricity Distributors will face if an interim order is not granted setting aside or staying the Board issued Assessments until the questions pertaining to their legality have been decided;

(b) In such Class proceedings, the exposure of all Licensed Electricity Distributors to substantial amounts for the costs of successful Class Action counsel incremental to the amounts recovered from consumers that are eventually determined to be illegal;

(c) The substantial amounts that the utilities will need to incur to resist any Class Action claims brought against them; and

(d) The inability of either the Board or the Licensed Electricity Distributors to assure that those who pay amounts subsequently determined to be illegal actually receive a full refund of the amounts paid.

SWORN BEFORE ME at the City of Ottawa, in the Province of Ontario, this 19th day of July, 2010.

A Commissionner etc.

Vincent J. DeRose

OTT01\4121150\1

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

AND IN THE MATTER OF a motion by the Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1998* and Ontario Regulation 66/10.

ONTARIO ENERGY BOARD

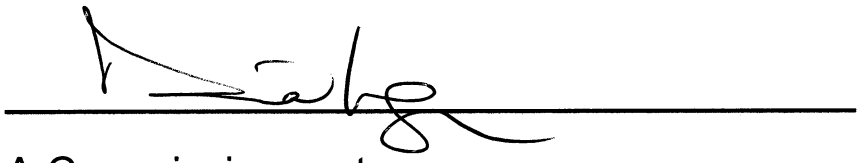
A F F I D A V I T
of Vincent J. DeRose
in support of Motion of
CANADIAN MANUFACTURERS & EXPORTERS
("CME")
(Motion returnable July 26, 2010)

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street
Suite 1100
Ottawa, ON K1P 1J9

Peter C.P. Thompson, Q.C.
Telephone (613) 787-3528
Facsimile (613) 230-8842

Lawyers for Canadian Manufacturers & Exporters ("CME")

This is Exhibit "A" to the Affidavit of Vincent J. DeRose, sworn before me this 19th day of July, 2010.



A Commissioner etc.

COURT FILE NO.: 94-CQ-50711
DATE: 20060925

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Gordon Garland - - Plaintiff - and - Enbridge Gas Distribution Inc. (formerly The Consumers Gas Company Limited) - - Defendant

BEFORE: Justice Cullity

COUNSEL: ***Michael McGowan*** and ***Barbara L. Grossman*** - - for the plaintiff

John Longo - - for the defendant

Sean Dewart - - for the plaintiff in his personal capacity

DATE HEARD: September 6, 2006

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

[1] The plaintiff, and class counsel, moved jointly for an order approving and implementing a settlement of this class action, approving the fees of class counsel and determining the amount of the representative plaintiff's compensation.

[2] For the reasons that follow, I am not prepared to grant the orders requested on the basis of the material filed. I will, however, not dispose of the motion until the parties have had an opportunity to consider whether they wish to amend the minutes of settlement.

[3] This protracted proceeding was commenced by a statement of claim issued on April 25, 1994. The plaintiff claimed a declaration that late-payment penalties charged by the defendant to its customers included interest at a rate proscribed by section 347 of the *Criminal Code of Canada,* together with an order for restitution.

[4] The litigation was strongly contested by the defendant. On two occasions the plaintiff was ultimately successful in the Supreme Court of Canada after motions for summary judgment had been granted against him in this court, and his appeals to the Court of Appeal had been dismissed.

[5] In the first of the decisions - reported at [1998] 3 S.C.R. 112 - it was held that the late payment penalties involved an interest charge within the meaning of section 347 and that they

fell within the scope of the section. In the second - [2004] 1 S.C.R. 629 - the plaintiff's claim for a restitutionary remedy based on unjust enrichment was upheld.

[6] While these decisions resolved the principal issues relating to the defendant's liability, they did not terminate the litigation. A motion to certify the proceedings had not yet been heard and there were difficult questions relating to the computation of a restitutionary award (referred to in the minutes of settlement as "damages") even if an aggregate assessment was ordered at trial. Mediation was conducted for the purpose of the certification motion in December, 2004. The possibility of settling the litigation as a whole was then raised and, for this purpose, it was agreed that the defendant would provide a random sample of its billing records together with an estimate of damages prepared with expert assistance. The plaintiff's experts were to review this data and the damages estimate and provide their own estimate. The defendant delivered extensive data and its estimate of damages by the end of January, 2005. The task of reviewing this with the assistance of an actuary and an economist was more complex than the plaintiff and his advisers had contemplated. His response was provided to the defendant on August 25, 2005. The defendant replied in December, 2005 and a further mediation was scheduled for April 18 and 19, 2006. No agreement was reached as a result of the mediation and the plaintiff proceeded to serve a notice of the return of the motion for certification. The motion was not proceeded with. Instead, another mediation was held and, after more discussions and negotiations between the parties, minutes of settlement dated July 19, 2006 were executed.

[7] The minutes of settlement are brief. They include an agreement for a payment of $19.175 million as damages and interest by the defendant, together with partial indemnity costs of $2 million, and a release of all claims against it. They also contain the parties' consent to a draft implementation order that is attached as a schedule. Finally, it is provided that the settlement is subject to court approval pursuant to the CPA and is to be null and void if such approval is not granted. At the hearing of the motion, the parties confirmed that their intention was that all the terms of the implementation order were to be considered as incorporated in the settlement so that, if any were not approved by the court, the settlement would not be binding upon the parties. I was told that the settlement should be considered to be a package that was to be rejected if its terms - including the provisions of the implementation order - were not approved in their entirety.

[8] The draft implementation order provides for certification of the proceeding under the CPA and the manner in which class members may opt out. Other orders that are to be considered as part of the package presented to the court for its acceptance, or rejection, in its entirety would require the settlement amount of $19.175 million, plus the $2 million of costs, to be dealt with as follows:

> (a) the defendant would pay $1,917,500 to the Class Proceeding Fund (paragraph 7 (b));
>
> (b) the defendant would pay $8,257,500 to class counsel in trust to be applied to legal fees, disbursements and GST and the class representative's compensation as more particularly described in paragraph 11 of the order (paragraph 7 (c));

(c) the $2 million of partial indemnity costs would be released from trust and applied to the fees and disbursements of class counsel (paragraph 9);

(d) the defendant would pay $9 million to the United Way of Greater Toronto ("United Way") (paragraph 7 (d); and

(e) the $9 million would be applied *cy pres* by the United Way to benefit the defendant's customers who qualify under the United Way's Winter Warmth Fund program (paragraph 8).

[9] Paragraph 11 of the order provides:

> 11. THIS COURT ORDERS that $_____ [amount *to be determined by the court at the fairness hearing*] of the $8,257,500 referred to in paragraph 7 (c) be paid to the plaintiff as compensation for serving as class representative, and the balance of the $8,257,500 be applied to the fees and disbursements of the solicitors for the class and applicable GST.

[10] Apart from the release of the defendant of all claims by class members who do not opt out, the order then approves the settlement "as set out in the minutes of settlement" and the fees of class counsel in the amounts indicated in paragraph 9 and 11, plus $825,000 previously paid pursuant to an award of costs to the plaintiff by the Supreme Court of Canada.

[11] Finally, under the heading "Jurisdiction of the court", the order provides in paragraph 15 as follows:

> THIS COURT ORDERS that the Honourable Mr Justice Winkler, or his successor as case management judge for this action, shall continue to oversee the case, and may, if need be, amend this order or make any case management order permitted by the Class Proceedings Act or the rules of court. Notwithstanding the foregoing, the court shall not make any changes to the distribution of funds under paragraph 7 (d) or paragraph 8 without the consent of the parties. Further, the court does not have jurisdiction to revive any claims released under paragraph 10 and may not require the defendant to pay any additional moneys or incur any additional expenses with the exception that the court has a discretion to award costs relating to future motions or proceedings in this action which are presently unforeseen.

[12] While I believe certain of the provisions of the settlement, and of the draft order, may be open to more than one interpretation, it was clearly the understanding of counsel for the parties that the amounts to be "applied" to the fees and disbursements of class counsel were the fees that the court was asked to approve. Class counsel were, moreover, equally firm in their

understanding - and urged me to accept - that it was intended that, unless the court approved such fees, the settlement would be null and void. In their submission, judicial approval of the fees was as much a precondition to the binding effect of the settlement as approval of any of the other provisions of the minutes of settlement and the draft implementation order.

[13] The jurisdiction of the court to determine the fees of class counsel is dealt with in sections 32 and 33 of the CPA. Section 33 is concerned specifically with contingency fee agreements. Such agreements are also governed by the more general provisions of section 32. These are as follows:

> 32 (1). An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,
>
> > (a) state the terms under which fees and disbursements will be paid;
> >
> > (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
> >
> > (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.
>
> (2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.
>
> (3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.
>
> (4) If an agreement is not approved by the court, the court may,
>
> > (a) determine the amount owing to the solicitor in respect of fees and disbursements;
> >
> > (b) direct a reference under the rules of court to determine the amount owing; or
> >
> > (c) direct that the amount owing be determined in any other manner.

[14] Mr Garland and class counsel initially entered into a retainer agreement that provided for a fee payable only in the event of success in the action and the calculation of the amount by applying a multiplier to a base fee as contemplated by section 33 of the CPA. After the minutes of settlement were executed in July, 2006, and approximately one week before the notice of this

motion was filed, the agreement was amended by the parties to provide for a fee of $11,082,500 (inclusive of disbursements, GST and the amount to be paid to the Class Proceedings Fund), minus the amount of the class representative's compensation as determined by the court. Such fee is obviously the same as that contemplated in the implementation order. I note that it includes the $825,000 that the defendant had agreed to pay – and had already paid - in satisfaction of the costs award made by the Supreme Court of Canada.

[15] As I have indicated, this motion was made by the representative plaintiff and class counsel jointly. Although the notice of motion requests approval of the settlement and of class counsel's fees, and not approval of the amended retainer agreement specifically, it includes section 32 of the CPA as one of the grounds for the motion. In my opinion, the mandatory requirements of section 32 (1) and that of a motion by the solicitor in section 32 (2) have been complied with. As the reference in section 32 (1) (b) to an estimate of the fee suggests, the legislative intention behind the section may have been directed primarily at retainer agreements made at the inception, or during the course of litigation - and not those made in circumstances such as these. However, I do not believe the words, or the policy, of the section require a restricted interpretation.

[16] I am, however, concerned by counsel's insistence that the binding effect of the settlement is conditional upon the approval of the fees referred to in the implementation order and subsequently inserted into the retainer agreement. This question was addressed at some length at the hearing of the motion and I had raised it previously with counsel at the time that approval of the notice of the hearing was being considered. In effect, the court has been presented with an ultimatum: approve the fees or the class gets nothing under the settlement. Independently of the *in terrorem* aspect of such an approach, and its tendency to interfere with a judicial exercise of the discretion under section 32, I continue to be surprised that, in insisting on such a condition, counsel would not recognise the inherent conflict between their own interests and those of the class their client seeks to represent. This is a matter that is quite extraneous to any settlement, or compromise, of the issues between the parties. The defendant's interest is not affected and, while it expressed concern about the maximum size of a possible fee, there was no suggestion that it was, or could reasonably be, concerned that the court might reduce it. The condition that would make the provision of any benefits to the class conditional on court approval of the fee requested can only benefit class counsel at the expense of the class. No other interests are engaged and the conflict of interest is, in my opinion, both apparent and unacceptable. In my judgment, it is an insurmountable obstacle to the court's approval of the settlement in its present form.

[17] Counsel's suggestion that the condition stands on the same footing as that which would deny a fee to counsel if the benefits to the class are not approved ignores the fact that the latter is not included for the benefit of class counsel. Its effect is that, when counsel were negotiating to obtain the maximum possible benefits for the class, their interests and those of the class were coincident and not in conflict. The inclusion of the extraneous condition relating to fee approval in "Minutes of Settlement" does not alter the fact that, when insisting on this, counsel were, in truth, negotiating with no-one else than themselves in two capacities: one personal and the other fiduciary.

[18] I do not accept that the authorities that emphasise the need for flexibility in the exercise of the court's powers under the CPA bear materially on this question. Similarly, while I believe counsel were undoubtedly correct in their submission that this case has unique features that may well justify an unusually large fee, I do not agree that such features have any bearing on the question under consideration. The fee sought by counsel may, or may not, be reasonable but I do not intend to consider the question if a decision that it is unreasonably high will deprive the class of any benefits under the settlement.

[19] I am not suggesting that the practice of having a motion for settlement approval followed by a separate motion to approve fees must always be followed. It is, in my opinion, more consistent with the structure of the CPA, but I see no compelling reason why the motions cannot be combined as long as the benefits to the class are not conditioned on the approval of counsel fees. In a case such as this where the fees are to be deducted from the settlement amount, I believe the court must, first, determine the fairness and reasonableness of the settlement amount as between the parties to the proceeding. It is only when such a determination has been made that the appropriate level of fees as between counsel and the plaintiff should be considered. The factors that should influence the court's determination of each of the questions are, of course, not identical.

[20] The facts of *Dabbs v. Sun Life Assurance Company of Canada* (1997), 35 O.R. (3d) 708 (G.D.) - on which class counsel relied - were, in my opinion, significantly different from those of this case. There, the court was considering a settlement agreement that provided for the defendant to pay class counsel's fees as determined by an arbitrator. The fees were to be over and above the amount provided for the benefit of the class. There was no cap on that amount and it would not be reduced, or affected, by whatever fees were awarded by the arbitrator. The provision for the fees was considered to be an essential term of the settlement. In finding that, in these circumstances, class counsel did not have a material conflict of interest when negotiating the provision for the payment of fees, Winkler J. emphasized:

> The payment of class counsel's fee is to be made by the defendant directly, is not from the same fund as the settlement moneys, and will not diminish the recovery of individual class members. (at page 715)

[21] The conflict in this case arises precisely because the fees are to be paid from the total settlement fund and will diminish the amount available for the benefit of the class. I might add that my opinion would be the same if the settlement simply provided for the defendant to pay a fixed, or capped, settlement amount of a specific sum, for a counsel fee of some other fixed amount and for the settlement as a whole to be conditional on the court's approval of the fee. As the provision for the counsel fee would discharge a liability that would otherwise be borne by the plaintiff and the class, the total settlement amount in such a case should, I believe, be the total of the two amounts and, as in this case, it would be reduced by the payment of the fee. Consistently with this analysis, any amount of the fee in excess of that approved by the court should augment the amount paid to, or applied for the benefit of, the class.

[22] Counsel referred to a number of cases in which settlements providing for different levels of fixed counsel fees have been approved. This approach can be justified and permitted as a matter of convenience – and as facilitating settlement in some circumstances - but there is nothing to indicate that, in any of such cases, counsel insisted on the condition I am concerned with. In my experience, whenever the question has been raised, counsel have invariably responded that the settlement would be amended if the court found that the fee was unreasonably high. That was certainly the case in *Rose v. Pettle,* [2006] O.J. No. 1612 (S.C.J.), in which there was some overlap with class counsel in this case. Counsel provided the same assurance to Nordheimer J. in *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 4022 (S.C.J.), at para 59.

[23] The CPA was not enacted for the financial benefit of the legal profession. Class counsel have all of the fiduciary obligations and responsibilities that arise from their role as legal representatives. These are not affected by recognition that the risks they assume, and the importance of their role in advancing the objectives of the legislation, may properly influence the level of the fees that will be approved.

[24] In the course of the hearing I raised the question whether the condition relating to the fees of class counsel could not be deleted in an exercise of the power to amend conferred on me as the successor to Mr Justice Winkler as case management judge for this proceeding. The power is contained in paragraph 15 which I have set out above. While it is, in its terms, qualified only by the exceptions in the second and third sentences, I believe it is evident from the submissions of counsel - and, in particular, from their insistence that approval of the settlement was conditional on approval of the fees - that it was not intended to permit the court to rewrite the settlement prior to its approval. Paragraph 15 is, itself, part of the settlement that the court is asked to approve as a package and I do not believe it was intended to be exercisable unless, and until, this is done. The context suggests to me that the paragraph is probably intended to deal with changes in circumstances and unforeseen events following court approval. On this interpretation, it would be entirely speculative to consider on this motion questions relating to the scope of the power and the circumstances in which it might be exercised.

[25] I regret class counsel's insistence on the condition requiring fee approval because, in my opinion – and subject only to a few relatively minor points of detail - the total benefits provided by the settlement represent a fair and reasonable compromise of the issues between the parties and it is in the interests of the class members that they should be approved. Although, by virtue of the two important decisions of the Supreme Court of Canada, the plaintiff has already achieved a considerable degree of success in the litigation - and, in particular, has succeeded in establishing issues relating to liability as well as in effecting the termination of the illegal practices to which he objected - there remain the difficult problems relating to the computation of damages. These are not confined to those that arise from the size of the class, the impracticability of calculating restitution amounts on an individual basis, and the uncertainty whether, at trial, an aggregate award would be considered appropriate. There are also a number of novel and potentially disputable issues relating to the computation of interest and the calculation of excessive charges in each case. The effect of the decision of the Supreme Court of Canada in *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249 - with respect to a possible obligation of the defendant to compensate class members

only for the amount in excess of 60 per cent per annum - would also need to be determined. The process of litigating these issues was likely to be protracted and the possibility of future appeals could not be excluded.

[26] Examinations for discovery on the computation of damages have not yet been conducted, and further productions will be required if the matter proceeds to trial, but, as I have indicated, a significant amount of time has already been expended - with the assistance of Mr Garland, actuaries and economists - in examining and analysing the billing records of the defendant. Different ranges of damages were provided by the experts retained on each side. In the end result, counsel concluded that, depending upon the manner in which the calculation issues were determined, the range of a potential aggregate recovery at trial was between nil and $74 million. In the absence of precedents that were directly in point, the nature, and extent, of the variables were such that counsel were unable to provide any firm opinion of an amount that would most likely be recovered at trial, or a more precise range within which it would fall. The case is unusual in that, if the proceeding is certified, the remaining litigation risks would, for the main part, relate to the issue of damages.

[27] No objections have been received from class members to the reasonableness of the settlement. It is quite possible that the behavioural modification that has been achieved is more important to many of them than restitution of relatively small illegal charges imposed by the defendant. The negotiations were conducted at arm's length between parties represented by competent counsel. Class counsel are experienced in class proceedings as well as in civil litigation generally and have represented the plaintiff with skill and tenacity throughout this long proceeding.

[28] The total settlement amount of $21.175 million was arrived at after the issues relating to damages had been fully canvassed at the mediation sessions and after a recommendation had been made by the mediator, Mr Justice Winkler. On the basis of the material filed – and the complexity and uncertainty attaching to the issues relating to damages - I am satisfied that it is reasonable and in the interests of the class that it should be approved, and that it is not necessary to delve deeply into the course of the negotiations between the parties and their counsel. On this question, and in the circumstances of this case, I believe I should give considerable deference to the recommendation of class counsel and the supporting affidavit sworn by one of their solicitors.

[29] I am satisfied that weight should also be attributed to Mr Garland's support of this aspect of the settlement. He is an experienced policy and statistical analyst who was described by Mr Dewart as a "social activist". He was responsible for initiating the proceeding, although his damages are estimated to be in the vicinity of only $100, and he has been a constant source of encouragement – that may be an understatement - and assistance to class counsel. He has been far more closely involved with the proceeding than is customary for representative parties. His concern about the terms of a *cy pres* distribution led him to take the unusual step of retaining separate counsel who, I was informed, represented him in his "personal capacity" towards the conclusion of the negotiations. He took an active role in negotiating the settlement amount and, according to his evidence, he succeeded in increasing it significantly from an amount previously

under consideration. Class counsel acknowledged the assistance he gave them in analysing the issues relating to damages.

[30] I am also satisfied that this is pre-eminently a case in which a *cy pres* distribution would be the appropriate method of providing benefits to the class. The class is too large and the settlement amount too small to make a distribution of even an equal amount to each class member a reasonable, and an economically viable, alternative. The distribution proposed in the minutes of settlement would require the settlement fund - net of the fees of class counsel and the payment to the Class Proceedings Fund - to be paid to the United Way of Greater Toronto ("United Way") in trust to be invested and the income applied to form part of its Winter Warmth Fund program and, by so doing, to assist needy customers of the defendant to pay their gas bills.

[31] I have no doubt that, in principle, this would be an acceptable *cy pres* distribution. Before approving it, however, I would need to have more information about the manner in which the program is administered, and is likely to be administered in the future as the income from the settlement funds becomes available. In this regard, I note that:

> (a) at present, the defendant makes annual contributions to the Winter Warmth Fund program of $300,000 a year and the settlement provides that it will continue to do this for either two years after it gives notice of its intention to reduce or eliminate such contributions, or, failing such notice, for five years;
>
> (b) income from the amount earned from the investment of the settlement funds that is in excess of the "needs" of the Winter Warmth Fund program for the year is to be distributed to the regional United Way organisations to be used for such charitable purposes as they see fit; and
>
> (c) in the event that the Winter Warmth Fund program ceases operation "all available funds" shall similarly be distributed to the regional United Way organisations to be used for general charitable purposes.

[32] In my opinion, the following matters require clarification, or attention:

> 1. How are the needs of the Winter Warmth Fund program in each year to be determined. In particular, is it anticipated that it is likely to expend the entire amount available after the existing level of contributions from the defendant, and any other contributors, is augmented by the annual income from the investment of the settlement funds?

> 2. If it is contemplated that there may well be a significant amount of surplus, why should this be applied to charitable purposes generally, and not *cy pres*?
>
> 3. Is it intended that the United Way will be entitled to cease operating the Winter Warmth Fund program while the contributions of the defendant are continuing? For example, will the continuing contributions be "available funds" if the decision is made to terminate the programme within two years?
>
> 4. Why, in the event of the termination of the Winter Warmth Fund program, should future income from the settlement fund be applied to charitable purposes generally, and not *cy pres?* A provision, for example, that such income is to be applied *cy pres* by the United Way - or, failing its agreement to do so, by some other charitable organisation - would preserve the link between the class and benefits from the settlement fund. It would also provide an incentive for the board of directors of the United Way to maintain the Winter Warmth Fund program. The selection of substituted *cy pres* objects - and, if necessary, another organization to distribute income in accordance with them - could be made by the Advisory Committee proposed in the minutes of settlement with the consent of the Public Guardian and Trustee, or failing such consent, with that of the court.

[33] As the above comments may indicate, the *cy pres* element of the provisions of the settlement appear to me to be rather fragile. I cannot judge, at present, to what extent those who have difficulty in paying gas bills - as distinct from the community at large - are likely to benefit from the annual income from investments made with the net settlement funds. General charitable purposes are, of course, extremely diverse and they include many that would have no specific connection with the class members, or the issues in this litigation. They would include, for example, educational purposes, the promotion of health, prevention of cruelty to animals and other purposes considered to be beneficial to the community at large.

[34] I have the same concern with respect to the possibility that the Winter Warmth Fund program might be terminated by a decision of the United Way within three years and, perhaps, earlier.

[35] Finally, the provision for notice of the settlement to be published once in The Globe and Mail is, in my opinion, inadequate. If the settlement is approved, members of the class will be entitled to opt out and, in view of the release it contains, the requirement of notice cannot be considered to be a mere formality.

[36] Subject to those comparatively minor matters and the condition relating to the level of class counsel's fees, the settlement is, in my judgment, deserving of approval pursuant to section

29 of the CPA and, if it was otherwise acceptable, I would certify the proceeding under the CPA. Whether or not the defendant might successfully oppose certification in the absence of a settlement, the statutory requirements would, I believe, be satisfied in the context, and for the purpose, of implementing the settlement.

[37] For the reasons I have given, I do not intend to consider the quantum of the fees claimed by counsel - or of the amount of compensation requested by Mr Garland which, it is proposed, would be paid out of the amount that would otherwise be approved as counsel fees. I will comment only that, in my view, counsel are entitled to a fee commensurate with their time and effort, and the substantial success achieved by them, in this difficult, lengthy and expensive proceeding. This case has, as they submitted, unique features that may properly be taken into account in approving their fees in the event that a settlement is approved. I accept, also, that, in that event, the contribution made by Mr Garland throughout the proceeding, as well as in negotiating the terms of the proposed settlement, makes this one of the exceptional cases in which he should receive compensation for his contribution to the success of the litigation.

[38] In the end result, I will defer my decision on the orders requested in the joint notice of motion for 30 days to permit counsel to consider the views I have expressed, and to inform me, within that time, if any amendments to the minutes of settlement have been made.

CULLITY J.

DATE: September 25, 2006

COURT FILE NO.: 94-CQ-50711
DATE: 20061208

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
GORDON GARLAND Plaintiff	***W.A. Derry Millar*** -- for the Moving Parties, Fraser Milner Casgrain LLP and Michael McGowan Professional Corporation
- and -	***Barbara L. Grossman*** -- for the Moving Party/Plaintiff, Gordon Garland
ENBRIDGE GAS DISTRIBUTION INC. (FORMERLY THE CONSUMERS GAS COMPANY LIMITED) Defendant	***John Longo*** -- for the Respondent/ Defendant, Enbridge Gas Distribution Inc. ***Sean Dewart*** -- for Gordon Garland in his personal capacity
	HEARD: November 21, 2006

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

REASONS FOR DECISION

CULLITY J.

[1] In my endorsement released on September 25, 2006, after the initial hearing of the motion to approve a settlement of this proceeding, I deferred my decision to provide the parties with an opportunity to consider whether they wished to amend the minutes of settlement in certain respects, and to provide further information with respect to the proposed *cy pres* distribution to be administered by the United Way of Greater Toronto ("United Way"). Since then the minutes of settlement have been amended and my requests for information with respect

to the proposed *cy pres* distribution have been adequately addressed. Counsel have also dispelled the concerns I expressed with respect to the method of giving notice of the settlement, and the duration of the obligation of the defendant to continue to contribute to the Winter Warmth Program under paragraph 8 (f) of the proposed implementation order.

[2] Submissions on the amendments to the minutes of settlement were made at a hearing on November 21, 2006.

THE PROPOSED *CY PRES* DISTRIBUTION

[3] The amendments to paragraph 8 (c) (iii) and 8 (d), with a few minor suggestions I made at a case conference before the second hearing, have received the consent of the United Way. These relate to the distribution of surplus in any year, and the application of the funds if the Winter Warmth Program is terminated. Notwithstanding that it is prepared to accept the amendments, the United Way has expressed a preference for the original provisions of the two paragraphs which would provide the organisation with a greater degree of discretion. On this question, I am prepared to defer to the views of the organisation with respect to the most efficient method of benefiting members of the class and other members of the community in like circumstances. In consequence, I will leave it to the United Way to decide whether the original provisions, or those included in class counsel's factum after Schedule B, are to be included in the implementation order. I note that the United Way has indicated that it is not its intention to discontinue the Winter Warmth Program as long as there is a need in the community for such a program, and that - as the need for assistance from the programme far exceeds the current level of funding - it is not anticipated that, after 2007, there will be any surplus.

FEES OF CLASS COUNSEL

[4] In the endorsement, I declined to approve the settlement on the ground that it made the benefits to be provided to the class conditional on the court's approval of the amount requested as fees for class counsel. I indicated that, in insisting on this condition - rather than deferring to the jurisdiction of the court to reduce the fees - counsel were improperly preferring their own interests over those of the class.

[5] In an affidavit filed before the second hearing, Ms Dorothy Fong - one of the solicitors with the class counsel firms - stated that at no time did counsel insist that the condition I considered to be obnoxious was to be included in the settlement agreement. I must accept that clarification but it does not alter the fact that, in accepting the condition and insisting on it in this court, counsel were acting exclusively in their own interests at the expense of those of the class. I remain quite unconvinced by counsel's insistence that they had no option but to accept the mediator's recommendation in respect of their fees with the condition attached. The only interests affected were those of class counsel and the class, and neither the defendant, nor Mr

Garland, could possibly have had any objection to the deletion of the condition in the interests of the class. The fact that the mediator's recommendation was made on a take-it-or-leave-it basis has no relevance. Settlements are made between the parties and a mediator's interests are not involved if a settlement is ultimately reached that, in some particulars, departs from the mediator's recommendations. Subject to my acceptance of Ms Fong's point of clarification, I adhere to the views expressed in the endorsement.

[6] The matter is now moot because, as a consequence of my decision after the first hearing, the minutes of settlement have been amended to provide that, if the fees are reduced by the court in an exercise of its discretion, and the settlement is otherwise approved, the settlement will be binding and the amount payable to the United Way will be increased to the extent of the fee reduction.

[7] It remains now to consider whether the provisions relating to the fees in the settlement, and in the 2006 agreement, should be considered to represent fair and reasonable compensation for counsel for the work they have done throughout this protracted proceeding.

1. The fee agreements

[8] By way of background, the original retainer agreement between class counsel and Mr Garland provided for a fee based on a multiplier to be set by the court. There was a provisional agreement between the parties to a rather complex formula for determining the multiplier that the parties considered would be appropriate in different circumstances.

[9] On October 29, 1998, shortly before the release of the decision in *Garland #1*, the original agreement was amended to substitute a fee that would be determined as a percentage of the damages and interest recovered plus 50 per cent of all party and party costs. Under this agreement - which remained in force for eight years - the solicitors would be entitled now to a fee of $5,247,500, or approximately 52 per cent of the fee they are requesting.

[10] The 1998 agreement was intended to be superseded by the minutes of settlement executed on July 19, 2006 and the original retainer agreement was amended in accordance with the settlement on August 18, 2006. These documents contain the fee agreement that I am asked to approve.

2. Evidence

[11] At each of the hearings, a considerable amount of time was devoted to the circumstances in which Mr Garland agreed to the fees payable pursuant to the settlement. The relevant evidence was provided in instalments by Ms Dorothy Fong - a solicitor with one of the class counsel firms - in affidavits delivered prior to the first hearing, and before the second. Further

information was provided by Mr Dewart on the instructions of his client at the second hearing. After I had reserved my decision, a further affidavit was delivered by Ms Fong.

[12] In view of the decision I have reached on the appropriateness of the fee, it is unnecessary to refer to the evidence in detail. In summary, it appears that discussions between class counsel and Mr Garland on the question of the fee occurred in August and December, 2005 and that, from the outset, Mr Garland agreed that the 1998 fee agreement should be revisited. He did not agree with counsel's proposal for a fee that would reflect a multiplier of 5 - or, indeed, any multiplier - and he proposed a higher percentage of recovery than that in the 1998 agreement.

[13] At the time of these discussions, the parties were preparing for a mediation in an attempt to obtain a settlement of the proceedings. No agreement on an appropriate fee was reached between class counsel and Mr Garland, the question of the fee became part of the mediation and, ultimately, it was addressed in the settlement proposal put to the parties by the mediator, Mr Justice Winkler.

[14] Prior to the mediation, Mr Garland had decided to accept whatever the mediator recommended. After the mediator's proposal had been received, but shortly before the deadline for its acceptance or rejection had passed, Mr Garland retained Mr Dewart to advise him in his personal capacity. Mr Dewart was not retained to advise on the question of the fees. The principal reasons for his retainer were Mr Garland's concerns to obtain compensation for his own efforts in advancing the proceeding, and with respect to certain details of the proposed cy pres arrangement with United Way. Although Mr Dewart could not remember the contents of the 1998 agreement, he assured me that he had discussed it with Mr Garland and had satisfied himself that his client was aware of his rights under it and considered the mediator's proposal to be fair and reasonable. Mr Dewart stated that his advice with respect to the 1998 fee agreement was provided in the context of the leverage it might give Mr Garland on the matters that were his principal concern, and for which Mr Dewart had been retained.

3. Sections 32 and 33 of the CPA

[15] Sections 32 and 33 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 ("CPA") are central to any consideration of a motion to approve class counsel fees. The sections read as follows:

> 32 (1). An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,
>
> (a) state the terms under which fees and disbursements shall be paid;
>
> (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

(2). An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

(3). Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

(4). If an agreement is not approved by the court, the court may,

(a) determine the amount owing to the solicitor in respect of fees and disbursements;

(b) direct a reference under the rules of court to determine the amount owing; or

(c) direct that the amount owing be determined in any other manner.

33 (1). Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into or a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

(2). For the purpose of subsection (1), success in a class proceeding includes,

(a) a judgment on common issues in favour of some all class members; and

(b) a settlement that benefits one or more class members.

(3). For the purposes of subsections (4) to (7),
"base fee" means the result of multiplying the total number of hours worked by an hourly rate;
"multiplier" means a multiple to be applied to a base fee.

(4). An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

(5). A motion under subsection (4) shall be heard by a judge who has,

> (a) given judgment on common issues in favour of some or all class members; or
> (b) approved a settlement that benefits any class member. ...
>
> (7). On the motion of a solicitor who has entered into an agreement under subsection (4), the court,
>
> (a) shall determine the amount of the solicitor's base fee;
>
> (b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and
>
> (c) shall determine the amount of disbursements to which the solicitor is entitled,...
>
> (8). In making a determination under clause (7) (a), the court shall allow only a reasonable fee.
>
> (9). In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding.

[16] Section 32 is concerned with fee agreements - contingent or otherwise - in general. Section 33 is confined to a particular type of contingent fee agreement: one that contemplates, and permits, the solicitor to make a motion to the court to have his or her fees increased by a multiplier. The jurisdiction under the section appears to be premised and conditioned on the existence of such an agreement.

[17] Section 32 has a wider application. It does not, in its terms, authorize fee agreements. These were always permitted at common law and, since 1909, they have been authorized specifically in sections 15 - 32 of the *Solicitors Act,* R.S.O. 1990, c. S. 15 and their predecessors. Following the decision of the Court of Appeal in *McIntyre Estate v. Ontario (Attorney-General)* (2002), 61 O.R. (3d) 257, the sections were expanded to confirm that contingency fee agreements are permitted in civil proceedings in Ontario. This development was, of course, preceded by the enactment of sections 32 and 33 of the CPA.

[18] Some questions of statutory interpretation that arise under sections 32 and 33 have been considered in this court. In particular, in *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (G.D.) and *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (G.D.), it was held that contingency fee agreements that could be approved by the court were not limited to those that contemplated the application of a multiplier to a base fee. In *Nantais,* Brockenshire J. held that an agreement that provided for a

lump sum plus any award of party and party costs could be approved pursuant to section 32, and, in *Crown Bay*, Winkler J. followed that decision in approving an agreement for a fee calculated as a percentage of the settlement proceeds including costs.

[19] If the matter were one of first impression, I would interpret sections 32 and 33 as not intended to displace the general principles and statutory provisions that govern solicitor and client costs, except when a solicitor has moved for approval of an agreement that satisfies the conditions of one of those sections. I would then be inclined to interpret section 32 (4) as limited to cases where, on a motion by a solicitor pursuant to section 32 (2), the court declines to approve an agreement. In the absence of such a motion, the provisions of the *Solicitors Act* would apply including section 21 which applies to fee agreements in general and reads as follows:

> 21. Such an agreement excludes any further claim of the solicitor beyond the terms of the agreement in respect of services in relation to the conduct and completion of the business in respect of which it is made, except such as are expressly excepted by the agreement.

[20] The position at common law, and that under the *Solicitors Act,* are discussed in *Clare v. Joseph*, [1907] 2 K.B. 369 (C.A.) and *Fitch v. Fort Frances Pulp and Paper Co.* (1927), 61 O.L.R. 252 (App. Div.). In *Clare*, at page 376, Fletcher Moulton L.J. stated:

> Agreements between a solicitor and his client as to the terms on which the solicitor's business was to be done were not necessarily unenforceable. They were, however, viewed with great jealousy by the Courts, because they were agreements between a man and his legal adviser as to the terms of the latter's remuneration, and there was so great an opportunity for the exercise of undue influence, that the courts were very slow to enforce such agreements where they were favourable to the solicitor unless they were satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitor's part to benefit himself at his clients expense. But when it appeared that the agreement was favourable to the client, the courts often held a solicitor to his bargain, for there was no ground in equity why they should be suspicious of a bargain of that kind.

[21] In *Fitch*, Middleton J.A. commented:

> As we understand the decisions of the Court of Appeal in *Clare v. Joseph*, [1907] 2 K. B. 369, and in *Gundry v. Sainsbury*, [1910] 1 K.B 645, it is now established that the provisions of the Solicitors Act in question were intended to confer upon the solicitor the right to make an agreement with his client if he complies with the terms

> of the Act and to invalidate against the solicitor any agreement that does not comply with the provisions of the Act. But the statute does not take from the client the right to rely on any parol agreement which the solicitor may make.

[22] The interpretation of the CPA that I would prefer is, I believe, supported by the fact that section 32 of the CPA does not appear to deal with the possibility that a client, and not the solicitor, might wish to rely on a fee agreement.

[23] It is my understanding that the above interpretation is not consistent with the practice of the court and the understanding of the profession that has developed under the CPA. It appears to be accepted that a motion can be made under section 32 (4) even where the court has not been asked to approve a fee agreement: see, for example, *Hislop v Attorney General of Canada* (2004) 3 C.P.C. (6th) 42 (S.C.J.). On this interpretation – which I believe I should accept and apply - the section would, to at least some extent, replace the common law and statutory rules governing solicitor and client costs in other proceedings with a general statutory discretion. Given the recognition of an inherent jurisdiction to approve a bonus in *Desmoulin v. Blair* (1994), 21 O.R. (3d) 217 (C.A.) and *Walker v. Ritchie*, [2006] S.C.J. No.45, in cases where there is no fee agreement in existence, there may be no significant difference under either approach as to the powers of the court, and the facts that should influence its decision. Where, however, there is such an agreement the difference could be important if it is the client and not the solicitor who wishes to rely on the agreement. It has not, to my knowledge been held that – contrary to the provisions of section 21 of the Solicitors Act – the discretion under section 32 (4) would permit the court to approve a fee in excess of that provided in such an agreement.

[24] The scope of section 32 (4) bears directly on the degree of leverage class counsel will have when an attempt is made, as here, to renegotiate a contingent retainer agreement after the contingent facts have occurred. In such negotiations the question whether the court has power to override the agreement – may be crucial.

4. Negotiation of the 2006 fee agreement

[25] The question of interpretation is relevant to the extent to which Mr Garland was informed of the status of the 1998 agreement during the negotiations with class counsel with respect to the possible amendment of the agreement. While Mr Dewart informed me that he could not remember turning his mind to the provisions of the CPA when he was advising Mr Garland, Mr Millar was emphatic that section 32 (4) gave the court power to override the 1998 fee agreement and to approve a higher fee in the exercise of its discretion. It has been a concern to me that the evidence of the negotiations between Mr Garland and class counsel was more than consistent with the possibility that they were conducted on the basis that counsel had a right to request the court to override the provisions of the 1998 fee agreement pursuant to section 32 (4) of the CPA simply on the ground that a higher fee would be more reasonable. I consider that to be a doubtful proposition but, if it is correct, I cannot believe that a court should

be anything but extremely reluctant to relieve solicitors from the terms of retainers they had freely accepted, if the client wished to enforce them. In attempting to negotiate a fee greater than that they had bargained for in the 1998 contingency fee agreement, counsel were not seeking merely to negate the terms of the agreement – they were actually attempting to obtain additional compensation for the fact that contingencies contemplated in, and to be compensated generously under, the agreement had materialised. The possibility that the litigation would be protracted, and the time expended underestimated, were two of the contingencies. In my opinion, it would be inconsistent with the grounds on which contingent fee agreements are justified to accept the possibility that, on a motion by counsel in circumstances such as these, the court may override their provisions without the consent of the representative party. At the very least, the existence of such an agreement must surely be a highly important factor to be considered in the exercise of the discretion conferred in section 32 (4).

[26] I was particularly concerned with Mr Garland's understanding of the legal position when counsel attempted to obtain his agreement to replace the provisions of the 1998 fee retainer with, initially – according to Ms Fong's first and second affidavits - a multiplier of 4.8 to be applied irrespective of the amount recovered from the defendant. In their factum, counsel stated that there would have been no settlement if they had insisted on "their right to pursue a fee equivalent to a multiplier of 4 or 4.8." (Correspondence filed subsequently discloses that, as late as December 21, 2005, counsel were seeking Mr Garland's agreement to a multiplier of 5.)

[27] To some extent, but not entirely, my concerns were removed by the further affidavits filed before, and after, the second hearing and by the very helpful submissions of Mr Dewart who represented Mr Garland on each occasion. In particular, it is clear that, for at least several months while the parties were preparing for a mediation, Mr Garland had accepted that the manner of determining fees in the 1998 agreement would no longer provide fair and reasonable compensation for counsel.

[28] I continue to have some reservations about Mr Garland's understanding of the limited role of the mediator and his decision, made in advance, to abide by whatever recommendation was made - a decision that ultimately led him to agree to a fee of approximately twice the amount that, a few months earlier, he had considered to represent fair and reasonable compensation. His final acceptance of the mediator's recommendation occurred at a time when his principal concerns related to the compensation he wished to receive and other aspects of the settlement for which Mr Dewart was retained, and on which Mr Garland was evidently not prepared to rely on the advice of class counsel. I am concerned that the dynamics of the settlement discussions and the mediation of the issues with the defendant may have had a significant influence on Mr Garland's decision with respect to the fees. Having failed to reach agreement prior to the mediation, I believe that counsel should have insisted that the question be postponed until after issues with the defendant had been resolved, and the maximum amount it was to pay had been decided. Mr Garland could not subsequently have been compelled to enter into a new fee agreement that, in his opinion, would unduly reduce the amount to be distributed *cy pres*. If he had been given to understand, and was concerned, that, in the absence of a new agreement, the court could override the terms of the 1998 retainer agreement – a proposition

that I have described as doubtful – he was in my opinion under a misapprehension about the likelihood that it would do so without his consent, and about the responsibility of the court to protect the interests of the class.

[29] Mr Garland supports the motion to approve the fees determined pursuant to the settlement, and has not resiled from his opinion that a fee calculated in accordance with the 1998 agreement would not provide counsel with fair and adequate compensation. In view of his position on the motion, I do not think I could properly hold counsel to the terms of the 1998 fee agreement. In these circumstances, it appears that, under the existing practice of the court - and whether or not approval of the 2006 agreement might be withheld in the light of the considerations I have mentioned - the ultimate question to be decided is whether the fee I am asked to approve exceeds an amount that would fairly and reasonably compensate counsel for the services they have provided to Mr Garland and the class. Despite this, I have mentioned the above concerns because, in my judgment, the submissions made by class counsel at the first hearing, and those of Mr Millar at the second, did not give sufficient recognition to the nature and extent of the conflicts of interest that inevitably arise - and the implications of counsel's fiduciary responsibilities - when they are seeking to reopen a binding fee agreement during the course of settlement discussions with another party. I refer to the comments of the Ontario Law Reform Commission in its *Report on Class Actions* (1982), at pages 729-731. The interests of the class must be paramount when counsel are engaged in negotiations to settle the issues with an opposing party. In my opinion, they should not permit their personal interests – and particularly those that are adverse to the interests of the class - to be involved in the negotiations. This is simply an application of the long-established rule that a fiduciary is not permitted "to put himself in a position where his interest and duty conflict": *Bray v. Ford*, [1896] A.C. 44 (H.L.), at page 51.

[30] I should note that the comments made in the immediately preceding paragraphs, and earlier in these reasons, are intended to indicate my disagreement with legal submissions advanced by, and on behalf of, class counsel and my concern that they may reflect the approach taken by them when they were seeking to renegotiate the fee agreement with Mr Garland. They are not intended to reflect on their professional integrity, or to suggest that any collusion – or appearance of collusion – occurred or arises in the circumstances of this case: see the comments of Cumming J. in *Directright Cartage Ltd. v. London Life Insurance Co.*, [2001] O.J. No. 4073 (S.C.J.), at paras 63 and 64.

5. Approval of the fee

[31] Under the settlement, the gross amount recovered from the defendant will be $22 million. This amount comprises $19,175,000 for damages and interest, $2 million party and party costs and $825,000 in costs already paid by the defendant. If the provisions for fees in the settlement are approved, and if Mr Garland is to receive compensation out of the amount approved as the fees of class counsel, they project that the application of the $22 million would be as follows:

Cy pres distribution	$9,000,000
Class Proceedings Fund levy	$1,917,500
Repayment of disbursements to Class Proceedings Fund	$311,825.30
Disbursements and GST not paid by Class Proceedings Fund	$31,050.55
Counsel fees, (including costs and compensation for the representative plaintiff)	$10,130,469.20
GST	$609,154.95
	$22,000,000

[32] In determining the fee that would provide class counsel with fair and reasonable compensation, I have no hesitation in accepting their submissions with respect to the difficulty of the litigation, and the considerable success they achieved before the settlement discussions began in 2004. While managing to defeat motions for summary judgment at the final appellate level might not always be considered to be an overwhelming victory, there is no doubt that it was a highly significant - and, most probably, a crucial - factor in obtaining the settlement of the proceeding. Counsel's contribution to the success achieved was notable and in view of this, the degree of success, their perseverance and their initial acceptance of a contingent fee retainer, there is no doubt in my mind that they should fairly be compensated at a level significantly in excess of an amount that might be considered to be a reasonable base fee. Notwithstanding this conclusion, it was my initial impression that a fee that exceeded the amount to be applied for the benefit of the class, and that constituted 46% of the gross recovery, was too large.

[33] In the submission of counsel, it would be inappropriate - in the special circumstances of this case - to look merely at the amounts payable under the settlement in measuring the total financial benefits obtained for the class. In her first affidavit, Ms Fong referred to, and included as an exhibit, a letter from Professor Adonis Yatchew, of the Faculty of Economics at the University of Toronto. In the letter Professor Yatchew provided estimates of the present value of the amount saved by class members between 2002 and September 2006 and thereafter over various time frames ranging from 20-30 years. This saving resulted from the reduction of late payment penalties from 5% to 2% in the first of those years and the abolition of illegal penalties in October 2005. On the basis of his calculations, he concluded that the net saving to class members from the abolition of the payments was in the range $73 million to $107 million.

[34] I accept counsel's submissions, and Professor Yatchew's methodology, with respect to the savings achieved during the class period that ended on October 1, 2005. Only persons who incurred penalties during that period were members of the class. Other persons who would have incurred late payment penalties if they had not been abolished are not members of the class although they are undoubtedly persons that the action was intended, and effective, to benefit. Behavioural modification is one of the goals of class proceedings but members of the public who benefit from it - even those who but for the class-closing date would have been members of the class - are not thereby elevated to the status of class members.

[35] I have no difficulty in accepting on the facts of this case, that the degree of behavioural modification achieved is one of the factors that could properly influence the size of an acceptable fee, but I do not accept that a dollar value that might be placed on the benefit obtained by other customers of Enbridge can be transmuted into an amount recovered for the benefit of the class.

[36] The savings realised before October 2, 2005 were those of class members. When Professor Yatchew's estimates are adapted to accommodate the cut-off date for class membership, the present value of such benefits would be in the vicinity of $32 million. On the basis of what counsel submitted, and the evidence suggests, are reasonable assumptions, the value of the net benefit would be approximately one-half of that amount.

[37] The net savings in the period 2002 to October 1, 2005 were a direct result of the decisions of the Supreme Court of Canada and left class members with funds they would otherwise have paid to the defendant. While a reduction in the damages a person would otherwise have suffered from illegal activities might not ordinarily be considered to be tantamount to an amount recovered, I believe it might properly be so regarded for the purpose of attempting to measure the degree of success achieved, and the amount that would be fair and reasonable compensation for counsel whose efforts were instrumental in obtaining it. The position should be no different than if the defendant had not reduced the penalties in the period 2001 to October 2005 and an additional amount of $16 million had been provided for the class under the settlement.

[38] If the net savings to the class are added to the gross recovery under the settlement, the fee of $10, 130,469.20 requested would be approximately 26.7% of the resulting amount. On that basis – and even if I were to ignore the benefit to customers of Enbridge who were not members of the class - the fee is not excessive and will be approved. I would not have approved it if I had considered that the sole measure of the success achieved was the gross recovery of $22 million under the provisions of the settlement.

[39] The fee would represent an application of a multiplier of 2.78 to the amount that I would determine to be a reasonable base fee if section 33 were applicable. For this purpose, I have reviewed the dockets that record the time expended by counsel since the commencement of the proceedings on April 25, 1994. The time, and the work done, is certainly prodigious as is to be expected in view of the course of the proceedings. For most of that period, however, two firms acted as co-counsel and I am satisfied that - almost inevitably - some otherwise unnecessary duplication of work occurred. The dockets are replete with references to members of one firm reviewing e-mails and material from the solicitors in the other firm. I am also not satisfied that - with the knowledge that the fee would not be charged to their client - counsel were entirely successful in resisting the temptation to be less than completely scrupulous with their time as the parties began to move towards a settlement of the proceeding. In the two years immediately leading up to the settlement, $1,354,122 of time were docketed as compared with $2,682,385 in the preceding 10 years, which included the appeals to the Court of Appeal and the Supreme Court of Canada. I accept that the issues, and the research required, on the question of damages

were complex but I am not satisfied that all of the time docketed could properly be charged to a client. The determination of a reasonable base fee is difficult in a case like this. Although I do not doubt that the dockets record time actually spent, I am of the opinion that a reasonable base fee would be $3,632,857 - reflecting a reduction of 10 per cent from the amount recorded.

REPRESENTATIVE PARTY COMPENSATION

[40] In the earlier endorsement I described this as one of the exceptional cases in which a representative party should receive compensation for his contribution to the success of the litigation. The circumstances in which compensation should be allowed out of settlement proceeds were most fully discussed in *Windisman v. Toronto College Park Ltd*, [1996] O.J. No. 2897 (G.D.) and *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.). Although the amount requested in this case would reduce the fees approved for class counsel, Mr Dewart relied on the principles stated in these cases, and did not suggest that any other approach should be adopted.

[41] In *Windisman,* Sharpe J. awarded a representative plaintiff $4,000 out of the net recovery for the class. His reasoning appears in the following paragraph:

> Ordinarily, an individual litigant is not entitled to be compensated for the time and effort expended in relation to prosecuting an action. In my view, there is an important distinction to be drawn with reference to class proceedings. The representative plaintiff undertakes the proceedings on behalf of a wider group and that wider group will, if the action is successful, benefit by virtue of the representative plaintiff's effort. If the representative plaintiff is not compensated in some way for time and effort, the plaintiff class would be enriched at the expense of the representative plaintiff to the extent of that time and effort. In my view, where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for her class, the representative plaintiff may be compensated on a quantum meruit basis for the time spent. I agree with the American commentators that such award should not be seen as routine. The evidence here is that Ms Windisman took a very active part at all stages of this action. It seems clear that the case would not have been brought but for her initiative. She assumed the risk of costs and she devoted an unusual amount of time and effort to communicating with other class members, acting as a liaison with the solicitors, and assisting the solicitors at all stages of the proceeding.

[42] In *Windisman*, the gross recovery for the plaintiff class was $2.6 million including prejudgment interest. In *Sutherland*, the recovery was $2.25 million and the representative plaintiffs had requested $80,000 to be paid out of the amount recovered. In distinguishing *Windisman,* Winkler J. stated:

> In the present circumstances the work of the Representative Plaintiffs was unnecessary to the preparation or presentation of the case. Indeed, their work did not begin until after the settlement had been structured. Their work did not result in any monetary success for the class. If they were to be compensated in the manner requested they would be the only class members to receive any direct monetary compensation. The entire settlement is in the form of Cy-pres distribution. The representative plaintiffs are seeking some $80,000 in total which is to be deducted from the settlement. By way of contrast, in Windisman, the representative plaintiff took an active part at all stages of the proceeding, the case would not have been brought except for her initiative, she assumed the risk of costs, and devoted an unusual amount of time communicating with class members and assisting counsel. The class members received a direct monetary benefit due in part to her efforts.
>
> While the work of the representative plaintiffs is commendable, to compensate them for the work when the settlement funds for the entire class are being donated to research without a single penny finding its way into the hands of a class member would be contrary to the precept of the Cy-pres distribution in particular and to a class proceeding generally. Compensation for representative plaintiffs must be awarded sparingly. The operative word is that the functions undertaken by the Representative Plaintiffs must be "necessary", such assistance must result in monetary success for the class and in any event, if granted, should not be in excess of an amount that could be purely compensatory on a quantum meruit basis. Otherwise, where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is an appearance of a conflict of interest between the representative plaintiff and the class members. A class proceeding cannot be seen to be a method by which persons can seek to receive personal gain over and above any damages or other remedy to which they would otherwise be entitled on the merits of their claims. This request is denied.

[43] My understanding of the analysis in those cases is that compensation is to be awarded only where the representative's contribution is greater than that which would normally be expected of a representative party in the circumstances of the case. Such a contribution must have related to functions necessary for the preparation or presentation of the case and have resulted in a direct financial benefit of the class. It will often be indicated - and, perhaps, usually - by an extraordinary commitment of time and effort, or the application of special expertise.

[44] It may also be relevant, I think, if the contribution is referable to the representative's obligation to fairly and adequately represent the class rather than, for example, to time spent considering and communicating with counsel with respect to the legal issues and tactics and strategies in the litigation. Finally, I note that each of the learned judges would attribute importance to the initiative shown by the representative party in connection with decisions to commence and continue the proceedings. All these factors, in my opinion, must be weighed in the light of the benefit that the class received from the representative's contribution.

[45] In the light of the above considerations, Mr Garland has, in my judgment, made out a strong case for compensation. He took the initiative in seeking legal advice with respect to the legality of late payment penalties and in instructing counsel to commence the proceedings. He was instrumental in keeping the legal team together when members of the class counsel sought to withdraw from the proceedings on the ground of a business conflict, and he accepted a large part of the responsibility for communicating with class members personally or through interviews with representatives of the media. He also played an active part in the settlement negotiations and, in particular, in obtaining agreement to the nature and details of the *cy pres* distribution - one of the matters for which he found it desirable to retain separate counsel.

[46] The litigation was commenced, and continued, by Mr Garland in the public interest and, I am satisfied, that throughout it his primary concern has been to protect and serve the interests of the class. It was on this ground that he firmly opposed counsel's proposal to replace the method of calculating their fee under the 1998 fee agreement with the application of a multiplier to be applicable irrespective of the gross recovery.

[47] The more difficult question relates to the amount of the compensation that should be allowed. Mr Garland has kept track of his time over the past 12 years. His records - in the form of dockets - disclose that he has spent 1584 hours and incurred expenses of $464.93. His counsel, Mr Dewart, has estimated that, if Mr Garland had billed out his time to the clients of his consulting practice, he would have earned an additional income of between approximately $102,960 and $134,640. He seeks $95,000 in compensation to be paid out of the amount I have approved as the fees of class counsel.

[48] There is no precedent for an award of such an amount in this jurisdiction. That, of course, is not determinative as the extent of Mr Garland's special contribution may well be unprecedented. The largest award to my knowledge was the $15,000 approved for one of the plaintiffs in *Hislop* where the claims were said to have a potential value of $81 million but the duration of the proceedings was relatively short.

[49] On the basis of my review of Mr Garland's dockets, and the principles to which I have referred, I would have no difficulty in finding that an order for compensation of $15,000 could be justified. Without further elaboration, the dockets which record substantial amounts of time devoted to meetings, and phone calls, with class counsel are equivocal and insufficient to justify the addition of any further specific amount for the purpose of determining whether Mr Garland was providing necessary assistance to counsel. For that purpose, time recorded simply as spent thinking about the issues in the litigation is even less helpful.

[50] Class counsel have filed an affidavit strongly supporting Mr Garland's request for compensation for the contribution he made as a representative plaintiff - although they do not suggest an appropriate amount. Ms Fong refers to him in the affidavit as a valued member of "our team" and as "an active and effective class representative who always tried to keep the interest of the class at the forefront". She deposes, in particular, to the assistance he gave counsel and various experts in analyzing issues relating to damages, his advice during the settlement negotiations and in the formulation of the terms of the *cy pres* distribution and, generally, to the thoughtful comments he provided to them throughout the proceedings. She confirms, also, Mr Garland's insistence that the class counsel's fees should not unduly consume the settlement funds.

[51] Overall, I am satisfied that Mr Garland did contribute to the success of the proceeding to an extent that exceeded significantly what might properly have been expected of a representative plaintiff in the circumstances of this case. He appears to have been in close communication with counsel on every aspect of the proceeding and, while it is it is impossible to estimate precisely the value of the assistance he provided over a period of 12 years - and the extent to which it provided a direct monetary benefit to the class - I believe that $25,000 is an amount that would represent fair and reasonable compensation for his exceptional contribution. I am not prepared to approve an additional amount for the particular disbursements – relating for the most part to travel expenses – or for the prejudgment interest Mr Garland has claimed, nor for any part of the solicitor and client costs he has incurred in connection with his claim to compensation. On the state of the record – and without having heard submissions on the question - I am inclined to add the part of such costs that are reasonably applicable to the retainer of Mr Dewart for the purpose of finalising the details of the *cy pres* distribution. If class counsel wish to contest either the addition, or the quantum, of such costs, I may be spoken to for such purpose.

[52] In arriving at that result, I have not ignored the comments of Winkler J. with respect to the possible inconsistency between the concept of a *cy pres* distribution and an award of an amount of compensation to a representative plaintiff. I respectfully accept that the inconsistency – and an appearance of a conflict of interest - could arise if such compensation were to be awarded routinely. However, I do not think the problem arises here where the compensation is for the direct benefit Mr Garland has obtained for the class by his special contribution, and where I have approved, as fair and reasonable compensation to class counsel, the amount from which Mr Garland's compensation is to be paid.

CONCLUSION

[53] For the above reasons, and those in the endorsement of September 25, 2006, there will be an order certifying the proceedings and approving the settlement when the final amount of the compensation to be paid to Mr Garland has been determined.

[54] The forms of notice in Schedule A and Schedule C of the draft implementation order are approved subject to the insertion in the former of a reference to the compensation awarded to Mr Garland.

CULLITY J.

Released: December 8, 2006

COURT FILE NO.: 94-CQ-50711
DATE: 20061208

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

GORDON GARLAND

Plaintiff

- and -

ENBRIDGE GAS DISTRIBUTION INC.
(FORMERLY THE CONSUMERS GAS
COMPANY LIMITED)

Defendant

REASONS FOR DECISION

CULLITY J.

Released: December 8, 2006

This is Exhibit "B" to the Affidavit of Vincent J. DeRose, sworn before me this 19th day of July, 2010.

A Commissioner etc.

COURT FILE NO.: 43320
DATE: 20090210

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
LAURIE WALKER	)	***Michael McGowan, Dorothy Fong, Ian Leach, Kevin Ross*** and ***Paul Downs***, for the Plaintiff
Plaintiff	)	
- and -	)	
UNION GAS LIMITED	)	***Patricia Jackson, Lisa Talbot, Scott Ritchie*** and ***Michael Peerless*** for the Defendant
Defendant	)	
	)	**HEARD:** January 27, 2009

CLASS PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

REASONS FOR DECISION

CUMMING J.

The Motion for Certification and Approval of the Settlement

Background

[1] The putative representative plaintiff brings a motion for certification for the purpose of settlement approval, and for approval of the proposed settlement of this class action, commenced December 31, 2003, under sections 5,12,19,20,24,25,26,29, and 32 of the *Class Proceedings Act,1992* ("*CPA*"). A like but individual proceeding was commenced by another plaintiff against Union Gas in 1994 but settled. Assuming the settlement is approved, a motion is brought by Class Counsel for the approval of fees.

[2] Union Gas Limited ("Union") is a major natural gas utility, and operates the largest natural gas transmission and storage business in Ontario. Union has some 1.3 million customers.

The business of Union as a utility is regulated by the Ontario Energy Board ("OEB") under the *Ontario Energy Board Act*, R.S.O. 1998, c. 15, sch. B. The OEB approves and fixes the rates charged by Union to its customers, including late payment penalties charged as an incentive for customers to pay their bills on time.

[3] The class proceeding arose from the historical practice of the defendant, Union, of charging a 5% late payment penalty on its bills.

[4] The OEB periodically approves and fixes the rates charged by Union to its customers, including the late penalty payments or other late charges. These charges are deemed to be just and reasonable until modified. Indeed, utilities are obliged to carry out the terms of OEB orders. Other gas and electricity utilities have followed similar practices.

[5] Beginning in 1981, the OEB ordered Union to impose late payment penalties as an incentive for customers to pay their bills on time, thereby reducing the cost of carrying receivables, reducing the opportunity costs to Union of delay in payment, reducing the costs of working capital and reducing collection costs. Such reduced costs would otherwise be included in rates paid by all ratepayers. That is, the late payment penalty concept rests upon the notion that efficiencies are gained through cost reductions. The imposition of a late payment penalty has the overall effect of lowering the rates otherwise charged to all customers. The revenues collected through late penalty payments reduce the notional revenues which would otherwise have to be recovered in rates.

[6] The determination of late payment penalty charges was expressly considered by the OEB in its E.B.R.O. 461/467 Decision dated May 22, 1991. The OEB declared the delayed payment charge to be a rate-related charge pursuant to s. 19 of the *Ontario Energy Board Act*. In 1998 the definition of a "rate" in the *Ontario Energy Board Act* expressly provided that "rate" included "a penalty for late payment."

[7] The OEB orders governing Union from 1981 to 2002 provided that most bills were due 16 days after the bill was sent. For some commercial customers it was 12 days. The OEB orders approved the late payment (i.e. payment after 16 days from mailing) penalties of Union. However, in practice, Union allowed grace periods which ranged from 3 to 7 days beyond the 16 days.

[8] Section 347 of the *Criminal Code*, introduced in 1981, made it a crime to charge interest on "credit advanced" at levels exceeding an annual rate of 60%.

[9] This class proceeding alleges that Union's late payment penalties after 1981 to 2002 constituted "interest" in contravention of s. 347 of the *Criminal Code*. The proposed common issues are: (1) Is Union liable under the law of restitution for the alleged violation of s. 347 of the *Criminal Code*? and (2) Can the amount of restitution be determined on an aggregate basis? If so, in what amount?

[10] Figures for Consumers Gas, now Enbridge Gas Distribution Inc. ("Enbridge"), as to the payment patterns of customers from 1981 to 1991 suggest that some 65.7% of customers paid on

or before the due date, 27.9% paid within 10 days after the due date and 6.4% were more than 10 day slate in payment.

[11] On October 30, 1998 the Supreme Court of Canada gave its decision in respect of a summary judgment motion, reported as *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112. ["*Garland* #1"]. (As stated above, Consumers is now Enbridge). The Supreme Court of Canada, allowing the appeal, held that the late payment penalties charged by Enbridge constituted "interest" within the meaning of s. 347.

[12] In a second summary judgment motion the case against Enbridge was dismissed before the motion judge (the dismissal being upheld on appeal) on the basis that there had been no unjust enrichment. Union intervened in the hearing of the appeal before the Supreme Court of Canada which allowed the appeal, finding that there was a cause of action in unjust enrichment and ordered Enbridge to repay late payment penalties collected in excess of the criminal interest rate provision in the *Criminal Code*. *Garland v. Consumers' Gas Co.*,[2004] 1 S.C.R. 629. ["*Garland* #2"] The Court held that Enbridge's reliance upon the OEB orders provided a juristic reason for any enrichment until Enbridge was sued in 1994.

[13] This class proceeding against Union estimates that some $76.4 million in late payment penalties were charged from 1994 to 2002 in respect of an estimated 650,000 class members.

[14] Only customers of Union (and its predecessor entity) who had paid late payment penalties after April 1, 1981 are members of the proposed class.

[15] The late payment amount was reduced by the OEB May 1, 2002 from 5% to 2%. (and if paid 16 days after the bill *has been issued*). At a rate of 2%, with a credit period of 16 days, Union is in compliance with the *Criminal Code*.

[16] The change from 5% to 2% resulted in a reduction of revenue of some $4.788 million in 2002, necessitating an upward adjustment to Union's base rates for 2002 and 2003. In 2003 the late payment penalty was again amended by OEB order, to 1.9%, compound monthly.

[17] In June, 2006, after more than a decade of litigation, including the two summary judgment motions that were successfully appealed to the Supreme Court of Canada (with the Supreme Court in both instances over-ruling the lower court decisions of the Superior Court of Justice and the Ontario Court of Appeal with respect to the legal issues involved), a settlement was reached in the Enbridge case, involving a payment of $22 million. The settlement funds were largely allocated to lawyers' fees and costs with a $9 million *cy pres* endowment to the Winter Warmth Fund, being a mechanism for the supply of Enbridge's gas to needy families. None of the settlement funds were allocated directly to Enbridge customers who incurred late payment penalties.

[18] Following the settlement, the OEB, applying well-established regulatory principles for rate-setting, determined that the settlement costs incurred by Enbridge would be recovered in rates charged to customers: EB-2007-0731 dated February 4, 2008.

The certification motion

[19] The *CPA* is a procedural statute. Section 5 sets forth the test for certification. The Court must certify a class proceeding if all of the five criteria of s. 5(1) are met and if there is no other reason to refuse to make the order.

[20] The record before the Court sets forth an evidentiary base touching all the requirements of s. 5(1). The pleadings disclose a cause of action, there is an identifiable class of persons that would be represented by the representative plaintiff, the claims of the class members raise common issues, a class proceeding is the preferable procedure for the resolution of those common issues, and there is a representative plaintiff, Ms. Lauric Walker, who is fairly and adequately representing the interests of the class and who does not have, on the common issues for the class, any interest in conflict with the interests of the other class members.

[21] In my view, and I so find, certification is properly made for the purpose of settlement approval.

The proposed settlement

[22] The parties have been in negotiations over some period of time and have reached a tentative settlement after mediation, culminating in Minutes of Settlement dated December 16, 2008. Proper and appropriate notices have been given through the newspaper media in respect of this hearing. There has only been one objection, given in writing, with the basis of the objection being to the aggregate assessment and *cy pres* distribution.

[23] In my view, and I so find, the proposed settlement is in the best interests of the class and is fair and reasonable in respect of their interests. My reasons follow.

[24] The cost of the Enbridge case was ultimately borne by ratepayers, with no direct compensation to class members, and the settlement funds in large part went to lawyers and for costs.

[25] The $22 million settlement in the Enbridge case represented about 19.3% of the estimated late payment penalties collected by Enbridge from 1994 until it stopped charging the 5% penalty, plus prejudgment interest and costs. The proposed settlement in the class proceeding at hand represents about 8.8% of the late penalty payments collected from 1994 until the 5% penalty was abolished, plus prejudgment interest and costs.

[26] The lower proposed settlement percentage in the Union class proceeding is justified because there are a number of issues relating to liability and the quantum of damages which arguably distinguish this class proceeding from the Enbridge class action.

[27] The Court is satisfied that it is both administratively difficult and prohibitively costly to attempt to determine the late payment penalties incurred by individual customers of Union and allocate individual payments in restitution. It is efficacious and efficient to have a *cy pres* distribution as seen in the Enbridge settlement. Sections 24 and 25 of the *CPA* allow for a *cy pres*

distribution. *Garland v. Enbridge Gas Distribution Inc.* (2006), 56 C.P.C. (6th) 357 (Ont. S.C.J.) at 360.

[28] The proposed settlement provides for a payment of $9,227,500. allocated as follows, subject to Court approval:

Cy Press payment to the Winter Warmth Program	$5,400,000.
Class Proceedings Fund	600,000.
Disbursements inclusive of GST	200,000.
Notices to class	140,000.
Class Counsel's costs and fees	2,750,000.
GST on Costs and fees	137,500.
	$9,227,500

[29] The payment of the $5,400,000. by way of a *cy pres* distribution will be in three, equal installments to Winter Warmth program(s) operating within Union's service areas. The United Way of Chatham-Kent will act as Trustee under a Court-approved Trust Agreement, receiving three annual payments of $1,800,000. each. Any annual surpluses due to an amount of the *cy pres* distribution not being used by the Winter Warmth program(s) in the three year period will be used for Winter Warmth programs in subsequent years.

[30] Notwithstanding the ten years of expensive litigation, the Supreme Court of Canada's two decisions in *Garland* #1 and *Garland* #2 did not resolve the remaining legal issues in dispute. Given the subsequent settlement of the Enbridge case many novel legal issues remain unresolved from that situation. Several additional legal issues arise from the class proceeding at hand. If this class proceeding against Union is to proceed, all of these significant legal issues call for substantial and expensive additional expert evidence and data analysis considerably beyond that which has been done to date. These issues include:

- Whether credit was extended from the time gas was delivered to customers, or at some later date (in *Garland* it was conced0ed that if credit was advanced, which Enbridge denied, then the credit was extended from the "due date");

- Whether the effective interest rate for any credit was to be determined on the basis that credit was extended one bill at a time or annually on the basis that credit is extended throughout the year;

- Over what period is potential liability to be calculated, that is, from 1994 when actions were commenced against both Enbridge and Union, from 1998 when the Supreme Court of Canada rendered its first decision in the Enbridge case, or from 2003 when the current action at hand was commenced;

- Is Union potentially liable for all the penalties where the effective rate is in excess of 60% or only that portion of the late payment penalties reflecting the excess to 60%;

- Whether the factor that forecasted late payment penalties were included in rates in setting the rate base by the OEB had the effect of reducing the rates which would otherwise have been approved and charged should be taken into account to reduce the potential liability of Union (i.e. arguably there was no unjust enrichment); and

- Whether damages can properly be assessed on an aggregate basis under the *CPA* or must properly be the subject of individual assessment (with attendant significant complexities and costs in attempting to render individual determinations).

[31] The resolution of these issues would take considerable time, be at great cost and quite possibly would yield only uncertain and unsatisfactory results.

[32] Given these circumstances, and with the hindsight afforded by the history of the Enbridge *litigation*, the compromise resolution presented by the proposed settlement is from the perspective of all parties to the litigation, prudent, fair, reasonable, the most cost-efficient, and ultimately in the best interests of all parties affected by it. This is particularly evident when compared with the alternative of the considerable risks, uncertainties and costs of on-going litigation.

[33] Accordingly, the proposed settlement is approved.

The motion to approve Class Counsel fees and disbursements

[34] The approval of Class Counsel fees, GST, disbursements and class representative compensation are all subject to Court approval The Minutes of Settlement expressly provide in paragraph 14 that the Court may decrease the requested Class Counsel fees and make a corresponding increase to the proposed amounts of payment to the class.

[35] The proposed fees, exclusive of GST, are $2,750,000. Class Counsels' docketed time to January 16, 2009 totals 3,166.4 hours with a docket value at regular billing rates of about $1,256,348.30. Additional time will continue to be incurred until the settlement is implemented. Accordingly, expressed as a multiple of the docketed time, the proposed fee is equivalent to a multiplier of less than 2.19. Expressed as a percentage of the total amount being paid under the settlement, the fees are about $2,750,000./$9,227,500.= 29.8% of the total settlement amount. Disbursements to January 16, 2009 total $174,644.25.

[36] In my view, and I so find, the fees, GST and disbursements requested are fair and reasonable. They are approved.

[37] The representative plaintiff has spent more than 70 hours in the conduct of the litigation, as confirmed by counsel. This included a review of some 10 bankers' boxes of documents, cross-referencing documents and isolating bills, and traveling to Toronto for the meeting with the Class Proceedings Committee. In the circumstances it is fair and reasonable to compensate the

representative plaintiff in the amount of $5,000., the payment to be from the fees otherwise payable as Class Counsel fees.

[38] The requisite notices to the class as to these Reasons of Decision shall be published.

Peter A. Cumming J.

CUMMING J.

Released: February 10, 2009

COURT FILE NO.: 43320
DATE: 20090210

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

LAURIE WALKER

Plaintiff

- and -

UNION GAS LIMITED

Defendant

REASONS FOR DECISION

CUMMING J.

Released: February 10, 2009

This is Exhibit "C" to the Affidavit of Vincent J. DeRose, sworn before me this 19th day of July, 2010.

A Commissioner etc.

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2007-0731

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 Enbridge Gas Distribution Inc. for an order or orders approving the balance and clearance of the Class Action Suit Deferral Account;

AND IN THE MATTER OF an application by Enbridge Gas Distribution Inc. for an order or orders amending or varying the rates charged to customers for the sale, distribution, transmission and storage of gas commencing January 1, 2008.

BEFORE: Paul Vlahos
Presiding Member

Cynthia Chaplin
Member

DECISION

February 4, 2008

The Application

Enbridge Gas Distribution Inc. ("Enbridge" or the "Company") filed an application dated September 28, 2007 with the Ontario Energy Board (the "Board") under section 36 of the *Ontario Energy Board Act, 1998*, S.O.C.15, Sched. B, as amended. The application is for an order or orders of the Board approving the current balance in the 2007 Class Action Suit Deferral Account ("CASDA"), plus additional amounts to be incurred by the date of decision in this matter, and the disposition of that balance. The application also requested that the CASDA be continued in the event that the decision is not released before December 31, 2007. The balances in the CASDA are a result of the resolution of a class action lawsuit related to late payment penalties ("LPPs"), launched by Gordon Garland. Late payment penalties are charges to customers who do not pay their accounts in a timely manner. With Board approvals, all amounts recorded in CASDA since 2004 have been rolled forward into 2007 CASDA and there are no outstanding amounts in CASDA for 2004, 2005 and 2006.

The balance in the 2007 CASDA, as of August 1, 2007, was $23,537,600, along with interest totaling $682,400. In its reply argument, Enbridge reported that the balance of December 31, 2007 was $23,545,001, along with interest totaling $1,165,002.[1] Of this balance, approximately $22 million are the costs of the Court approved settlement, and the rest is Enbridge's legal expenses.

The Company proposed that the balance in the 2007 CASDA (as at the date of the decision in this proceeding) be recovered in equal amounts during each of the next eight years commencing January 1, 2008. The recovery would be accomplished by clearing portions of the 2007 CASDA each year during the 2008 to 2015 period, at the same time that other deferral and variance accounts are cleared each year, with the amounts to be allocated and recovered on the basis of customer numbers. The clearance would appear as a one-time adjustment each year to the customer's bills. The Company requested that interest continue to accrue, in the ordinary fashion, on the remaining balance in the 2007 CASDA until it is fully cleared in 2015.

[1] In its application, Enbridge indicated that there may be small additional amounts added to the 2007 CASDA related to Mr. Garland's appeal, which was to be heard in December 2007. The new balance includes approximately $8,000 related to the completion of Mr. Garland's appeals about his level of compensation.

In its prefiled evidence, the Company estimated that its proposal will result in the recovery of approximately $3.5 million per year over eight years, equating to approximately $1.90 per year per residential customer. In its reply submission the Company provided an updated estimate that its proposal will result in a recovery of approximately $3.6 million per year over eight years, equating to approximately $1.70 per customer. Given that the large majority of the Company's customers are residential customers in Rate 1, most of the recovery will come from that rate class.

The Proceeding

The Board assigned file number EB-2007-0731 to the application and issued a Notice of Application and Hearing dated October 26, 2007. The following parties intervened in the proceeding: Union Gas Limited ("Union"); the School Energy Coalition ("Schools"); the Vulnerable Energy Consumers Coalition ("VECC"); the Consumers Council of Canada ("CCC"); the Electricity Distributors Association ("EDA"); and the Industrial Gas Users Association ("IGUA").

The Board proceeded by way of a written hearing. Interrogatories were issued by intervenors and responded to by Enbridge. Submissions from intervenors and Board staff were filed by January 11, 2008 and reply submissions from the Company were received on January 25, 2008.

The full record of the proceeding is available at the Board's offices. The Board has chosen to summarize the record to the extent necessary to provide context to its findings.

Early History of the Company's LPP Charges

In 1975, as part of the Company's E.B.R.O. 302-II proceeding, the Company began charging a 5% LPP to customers whose bills were outstanding beyond a ten day grace period. This replaced the previous LPP of 10% that had applied to most customers. The decision of the Board in E.B.R.O. 302-II discussed the purpose of the LPP and referred to the LPP as "a well established and practical device in widespread use in Ontario and elsewhere to encourage prompt payment of utility bills".

In 1978, a new form of LPP was proposed for use by Ontario utilities. The proposal was made by a task force operating under the auspices of the Ministry of Energy. The task force developed a set of voluntary guidelines that were introduced in the Ontario Legislature on November 21, 1978. These guidelines were titled "Residential Guidelines

for Credit Collection and Cut-Off Practices of Public Utility Suppliers" (the "Guidelines"). On November 21, 1978, James Auld, the then Minister of Energy, presented the Guidelines in the Ontario Legislature expressing his view that the Guidelines would provide a balanced measure of protection, not only for individual customers, but also for the broader public interest.

The Company's proposed new form of LPP, in conformance with the Guidelines, was initially reviewed and accepted by the Board as part of its April 2, 1980 decision in the Company's E.B.R.O. 369-II rate proceeding. The LPP was a one-time charge equal to 5% of the customer's current month's gas charges (exclusive of charges for other items, such as water heater rentals). In that proceeding, and in subsequent proceedings, the Board accepted the new form of LPP charges and included the forecast revenues flowing from the LLP charges to reduce the Company's revenue requirement for purposes of setting distribution rates.

The Garland Class Action Lawsuit

In April 1994, Gordon Garland launched a proposed class action proceeding against the Company alleging that some of the LPPs collected from customers may have exceeded the *Criminal Code* limit on interest rates and that, as a result, the Company must refund those LPPs. The lawsuit sought damages in excess of $112 million.

In response, the Company filed a Statement of Defence and brought a motion for summary judgment in 1994. The Ontario Court of Justice granted the Company's motion, dismissing the action in February 1995.

Gordon Garland initiated an appeal in March 1995, and in September 1996 the Ontario Court of Appeal unanimously upheld the decision by the Ontario Court of Justice and dismissed Mr. Garland's appeal.

Mr. Garland sought and was granted leave to appeal to the Supreme Court of Canada. The Supreme Court of Canada heard the appeal in March 1998. In October 1998 a majority of the Supreme Court of Canada ruled that the Company's LPP charge did constitute interest for the provision of credit. The Supreme Court of Canada returned the matter to the trial court in Ontario for disposition.

The parties to the Garland proceeding agreed that the appropriate way to proceed was by way of a new summary judgment proceeding. Both parties brought cross-motions for

summary judgment to the Ontario Superior Court. The hearing dealt with the question of whether any of the Company's remaining defenses to the action were valid.

In its April 2000 decision, the Ontario Superior Court agreed with the Company's position and dismissed the Garland class action.

Mr. Garland appealed that decision, and in December 2001 a majority of the Ontario Court of Appeal upheld the decision by the Ontario Superior Court, dismissing the action. In that decision the Ontario Court of Appeal also noted that a new LPP needs to be designed which does not result in a contravention of the law but that it was appropriate for the Board to have waited for the court to address the issues in the Garland proceeding before requiring changes to the LPP.[2]

Mr. Garland sought and was granted leave by the Supreme Court of Canada to hear an appeal of the Ontario Court of Appeal's second decision. The appeal was argued in October 2003.

In April 2004, the Supreme Court of Canada ruled in favour of Mr. Garland and held that the Company was liable to refund any LPP amounts paid by Mr. Garland in excess of the *Criminal Code* limit since April 1994, the date on which Mr. Garland initiated his action.[3] The Supreme Court of Canada returned the matter to Ontario Superior Court for disposition. What remained at issue were the LPPs related to the April 1994 to January 2002 period. In the April 2004 decision, the Supreme Court of Canada ordered the Company to pay Mr. Garland's legal costs incurred from April 1994 through the completion of the second appeal to the Supreme Court of Canada. The plaintiff brought forward its cost claim and the parties agreed to settle the costs award for the amount of $825,000.

In late 2004, Mr. Garland brought a certification motion, seeking to have the action approved as a class action.

[2]Following a Board initiative and letter of direction on October 1, 2001, in its Decision and Interim Order in the RP-2001-0032 rate case, dated January 31, 2002, the Board accepted a Company proposal to reduce the LPP charge from 5% to 2%, effective February 1, 2002.
[3]Similar class action proceedings starting in 1994 have been brought against Union Gas, as well as Toronto Hydro and other electricity distributors in Ontario.

Settlement of the Class Action Lawsuit

In June 2006, a settlement was reached between the parties as to the basic monetary terms of settlement, involving payment of $22 million. The outstanding non-monetary issues were settled between the parties in July 2006 and were proposed to the Ontario Superior Court.

On September 25, 2006, the Ontario Superior Court indicated that it was not yet prepared to approve the proposed settlement without providing the Court with more discretion in certain matters. The parties agreed to the amendments requested by the Court and on December 8, 2006 the Court approved the settlement reached by the parties.

The total amount paid by the Company in connection with the settlement is $22 million, which includes the $825,000 already paid to the plaintiff's counsel following the April 2004 decision of the Supreme Court of Canada. A payment of $2 million was made on account of the plaintiff's costs in July 2006 after the settlement was reached. A further payment of $19.175 million was made after the settlement was approved by the Court.

The settlement funds were largely allocated to fees, legal costs and an endowment to the Winter Warmth Fund, as follows:

***Cy Pres* distribution to Winter Warmth Fund**	**$ 9,000,000**
Class Proceedings Fund levy	**$ 1,917,500**
Repayment of disbursements to Class Proceedings Fund	**$ 311,825**
Disbursements and GST not paid by Class Proceedings Fund	**$ 31,051**
Counsel Fees (including costs and compensation for the representative plaintiff)	**$10,130,469**
GST	**$ 609,155**
Total	**$22,000,000**

In July 2006, the Company informed the Board of the settlement reached and sought the Board's guidance as to how to proceed to apply for clearance of the CASDA.

By letter dated August 17, 2006, the Board stated that the final costs should be booked in the CASDA and recorded once the Ontario Superior Court approved the settlement (which occurred in December 2006). The Board further stated that the most efficient way to proceed would be by way of application by the Company to the Board (this application).

History of the CASDA

The Board first approved the CASDA in February 1995, in response to a request from the Company after Mr. Garland commenced his action. At the time, the account was intended to record the costs arising from the Company's defence of the class action, net of any award of costs by the Ontario Court of Justice in favour of the Company.

In E.B.R.O. 490 (fiscal 1996 rates case), the Board accepted the settlement proposal which included the continuation of the CASDA. In E.B.R.O. 492 (fiscal 1997 rates case), the Board again accepted the settlement proposal which included the continuation of the CASDA. The Board allowed the Company to clear amounts that had accrued in the 1996 CASDA (which included carry-forward amounts from 1995), stating that the amounts in the account had been prudently incurred.

In E.B.R.O. 495 (fiscal 1998 rates case), the Board accepted the settlement proposal which included the continuation of the CASDA. In E.B.R.O. 497 (fiscal 1999 rates case), the Board considered whether the amounts in the CASDA should be cleared to rates, but decided not to and continued the CASDA.

In the subsequent five separate rate cases covering the Company's fiscal years 2000 to 2004, the Board accepted the settlement proposals by parties to clear the CASDA balances to rates as well as authorizing the continuation of CASDA.

After the Supreme Court of Canada's second Garland decision, where the plaintiff brought forward its cost claim and the parties agreed to settle the costs award for the amount of $825,000, the Company applied to the Board, as part of its fiscal 2005 rate case, to expand the scope of CASDA to include the plaintiff's legal costs. The Board approved the Company's request but noted that any decision as to the recovery of such amounts in the CASDA would be made in a subsequent proceeding.

In EB-2005-0001 (fiscal 2006 rates case), the Board accepted the settlement proposal which included that all amounts recorded in the 2005 CASDA at December 31, 2005 would be transferred to 2006 CASDA, which would also include any further amounts attributable to the litigation and the judgment.

In EB-2006-0034 (fiscal 2007 rates case), the Board accepted the settlement proposal which stipulated that the 2005 CASDA amount and the 2006 CASDA amount would be included in the 2007 CASDA, to be addressed in a future proceeding (the subject of this proceeding).

Board Findings

For the reasons set out below, the Board finds that all costs (Enbridge's own legal costs, settlement costs and interest) in the CASDA are recoverable from ratepayers.

There is no dispute among the parties regarding whether Enbridge's own legal costs should be recoverable from ratepayers. These costs have been cleared through the CASDA historically and recovered in rates, primarily as part of settlement agreements among the parties.

The Board will not require supporting documentation for these legal expenses, as has been suggested by VECC in its argument. It was open to parties to request such information through the interrogatory process; none did so. During prior dispositions of this account there has been no suggestion that Enbridge's own legal expenses were unreasonable or inappropriate; there is no reason to conclude differently now. The Board will also not require an independent audit of these amounts as suggested by VECC. The Board does not think that the additional expense involved would be warranted. They are actual expenses incurred and, as observed above, there has been no suggestion in the past that the legal expenses were unreasonable or inappropriate.

What is at issue is whether the $22 million settlement costs, and associated interest expense, should be recovered from ratepayers.

The Board notes that the $22 million settlement was approved by the Ontario Superior Court following two hearings. Following the first hearing, the Court stated on September 25, 2006 that "the total benefits provided by the settlement represent a fair and reasonable compromise of the issues between the parties, and it is in the interests

of class members that they should be approved." The Court indicated that it wished more information on certain matters supporting the settlement. Having received that information, following the second hearing the Court approved the $22 million settlement amount on December 8, 2006. Enbridge has already paid this amount and there is no issue in the Board's view of the reasonableness of the amounts paid by Enbridge.

The issue for the Board is whether the Court-approved amount is recoverable from the ratepayers.

The following issues were raised in argument:

- Were the costs prudently incurred?
- Are the costs a form of forecast variance?
- Would recovery of these costs be retroactive ratemaking?
- Should any adjustments be made to the amount?
- What is the appropriate disposition (allocation and recovery period) of the account?

Were the Costs Prudently Incurred?

Enbridge argued that the costs are recoverable from ratepayers because they are the result of defending late payment penalties which were established by Board orders. In Enbridge's view, the costs were prudently incurred. CCC argued that Enbridge should bear the risk of imprudent decisions, but not where it acts pursuant to a Board order. CCC agreed that these costs should be borne by ratepayers.

Union and Enbridge also argued that the LPPs were for the benefit of ratepayers. The LPP charges were designed to recover the costs associated with late payments (collection costs and working capital requirements) and served to lower the rates that all customers would have otherwise paid. They noted that judicial precedents support the recovery of all litigation expenses (whether or not the litigation was successful) where the activity was reasonably undertaken for the benefit of ratepayers. They also noted that no party disputed that the LPP operated to the benefit of ratepayers and that in its absence the rates would have been higher.

Union further argued that "...having defined the late payment penalties to be in the public interest – as being, in other words, just and reasonable – and having required the utilities to charge them, it would be patently unreasonable for the OEB to deny recovery

of LPP litigation costs which arose solely and exclusively on account of those OEB ordered penalties."

VECC argued that the fact that the Board ordered the recovery of LPPs is irrelevant to whether Enbridge should be able to collect the settlement costs. Enbridge argued before the Supreme Court that it should not be liable for damages because the LPP charges arose through a Board order. According to VECC, the Supreme Court accepted this defence only for the period up until 1994 when the Garland claim was first made. In VECC's view: "for the period after 1994, the SCC [Supreme Court of Canada] held that EGDI [Enbridge] could not rely on Board orders as an excuse to retain revenue collected on the basis of a LPP because the claim, once filed in 1994, changed the legitimate expectation of the parties." Schools argued essentially the same position.

The Board does not agree that the Supreme Court's rejection of Enbridge's defence is applicable to the issue before the Board. The Court was addressing the question of whether Enbridge could rely on the Board's orders as a defence against a claim that the charges were illegal. We are concerned with a different question: whether Enbridge can rely upon the Board's orders as a justification for recovering costs which arise from defending Board approved charges which are ultimately found to be invalid.

IGUA argued that the ratepayers are not responsible for the wrongful acts and that the legal responsibility for committing the wrongful acts rests with the utilities, the Board and/or the province of Ontario. IGUA submitted that if legal responsibility is the guiding principle then only Enbridge's own legal costs should be recoverable from ratepayers. Enbridge responded that the ratepayer groups were also responsible in that they did not object to the implementation of the LPP – and in fact supported it.

The Board does not agree with IGUA that legal responsibility for the act in these circumstances is the determinative principle upon which to base its decision as to the disposition of the settlement costs. The issue before the Board isn't who is responsible for the wrongful acts; the issue is: are the costs recoverable from ratepayers?

CCC in fact submitted that under this line of reasoning Enbridge would have had to assume that the essential argument of Garland was correct and immediately changed the LPP accordingly. In CCC's view, if the Board finds Enbridge to have been imprudent, it would effectively preclude a utility from defending any future action.

From a ratemaking perspective, the costs can only be found imprudent if, in the circumstances at the time, Enbridge should have acted differently, thereby mitigating or eliminating the costs. The Board agrees with CCC that it was reasonable for Enbridge to defend the Garland action and notes that the associated legal costs incurred by Enbridge have been allowed in rates over the years.

Also, the LPP remained essentially unchanged for some time. As Union noted, after the Supreme Court's 1998 determination, the Board considered whether it should re-examine LPP and decided to await the Court's resolution of the Garland proceeding. Earlier court decisions found the charges valid, and there was no decision that the charges were invalid until the Supreme Court's second decision was issued in April 2004. VECC argued that EGD could have sought an alternative structure in 1994 when it was put on notice that the LPP might be criminal in nature. The Board agrees that Enbridge could have proposed a different approach, but that would be a conclusion reached by the application of hindsight – and hindsight cannot be applied in assessing whether these costs are prudent. The Board finds that Enbridge did not act imprudently in not seeking to change the LPP earlier than it did.

The Board concludes that the costs were prudently incurred.

Are the costs a form of forecast variance?

Schools and VECC argued that the settlement costs are essentially variances from forecast, and that they are therefore appropriately borne by shareholders because the return on equity provides compensation for these types of risks. In CCC's view, the circumstances in this case cannot be characterized as forecast error. CCC submitted that the issue before the courts was not the accuracy of the forecasts, but rather whether the formula was legal. The Board agrees with CCC and Enbridge: the costs are not related to the forecast of the LPP revenues being inaccurate; the costs are current costs of resolving litigation once the Supreme Court found the LPP charges to be illegal.

IGUA argued that the recovery of this "uninsured litigation risk" would essentially treat the return on equity as a guaranteed return. IGUA submitted that the Board should determine what portion of the equity risk premium is attributable to "uninsured litigation losses" and use that amount to determine what level of costs should be borne by shareholders. IGUA suggested an amount of 100 basis points and used that as the basis for its estimated $13.7 million disallowance.

The Board does not agree with IGUA. It may be that there are "uninsured litigation losses" which are appropriately borne by the shareholder, but in this case the costs arise directly from defending rates and charges which were set by Board order and which were subsequently found to be invalid. The Board does not accept that the equity risk premium compensates shareholders for the risk that they may not be able to recover costs arising from Board orders being found invalid. Rather, the Board agrees with CCC that the equity risk premium would have to be higher if shareholders were required to bear the risk that a Board order would turn out to be invalid. Or as Enbridge stated: "...no one would ever have thought that one aspect of legitimate regulatory risk would be the risk of non-recovery of a cost that was incurred as a result of the good faith compliance with Board orders implemented by the utility for the benefit of ratepayers."

The Board concludes that these costs do not represent a forecast error or forecast variance to be borne by shareholders.

Would recovery of these costs be retroactive ratemaking?

IGUA also submitted that changing current rates to adjust for over or under collection from prior periods is inappropriate retroactive ratemaking. Schools objected to the recovery on the grounds of intergenerational equity because the customers who benefited from the LPP are not the same customers who will be paying for recovery of the settlement costs. Enbridge argued that the costs are current costs; while the cause of action may be in the past, the costs of defending the proceeding and ultimately settling the matter are current costs.

The Board does not agree that recovery of the costs would result in retroactive ratemaking. Enbridge is not seeking to recover past costs or to change prior rates; it is seeking to recover costs arising from settling a dispute related to a finding that past Board orders were legally invalid, and it is seeking to do so at the first practical opportunity after the costs were incurred.

Should any adjustments be made to the account?

No party took issue with the amount of the settlement, but some parties argued that adjustments should be made to this amount. CCC argued that that the amount to be recovered should be adjusted if actual LPP revenue exceeded forecast. The Board concludes that this adjustment is not appropriate. Such an adjustment would require an

examination of all the related costs and revenues, because if the LPP revenues were higher than forecast, it is likely the collection costs and working capital requirements were higher as well. More importantly, though, the Board believes that those variations from forecast appropriately remain the risk of Enbridge.

IGUA submitted that if the costs were to be recovered, then account should also be taken of prior cost estimates which were in excess of actual costs, and those amounts should be returned to ratepayers as well. IGUA asserted that these excess earnings would be greater than the settlement costs. VECC also argued that EGD over-earned in the relevant years on a weather normalized basis and that "to isolate the forecast risk assumed by EGDI with respect to LPP revenue and shift it entirely to ratepayers retroactively, when clearly other forecasted cost/revenue items have benefited EGDI is self-evidently unfair."

Enbridge and its shareholders do bear the risks related to the cost and revenue forecasts underpinning the rates. The Board has already determined that the settlement costs do not represent a forecast risk and that the recovery of the settlement costs does not represent retroactive ratemaking. Therefore there is no justification for the adjustment proposed; such an adjustment would be retroactive ratemaking.

What is the appropriate disposition (allocation and recovery period) of the account?
No party objected to the proposed allocation on the basis of customer numbers. VECC however did argue that implementation issues should be determined after the Board determines the amount to be recovered. The Board believes that such an approach would cause an unnecessary delay; all the necessary information is available at this time. The Board accepts the proposed allocation method. This allocation method reflects the allocation of the LPP revenues and is therefore appropriate.

Enbridge proposed an eight year recovery period, with the amount collected as a one-time bill adjustment each year. CCC suggested the amounts should be recovered over the period of the incentive regulation mechanism, and Enbridge supported this approach as well in its reply submission. The Board agrees with that suggestion and will adopt it. The estimated impact for a five year recovery period would be about $2.70/year for a residential customer. The method of recovery is consistent with the way in which late payment revenues were collected from customers. The Board finds there is no significant ratepayer benefit in terms of reduced impact to extending the period of recovery to as long as eight years, and that there are benefits in terms of simplicity and

efficiency to aligning the recovery to the period of the incentive rate mechanism as well as reduced interest expense for the ratepayers.

For administrative ease, the Board leaves it to the Company to consider the commencement of the first charge and seek the appropriate order or orders when it has done so. The Board approves the continuance of the CASDA so that it will continue to be the mechanism to record the outstanding balance in the CASDA account until it is fully drawn down. The Board expects the Company to propose the same equal one-time recovery amount per customer per rate class.

A separate decision on cost awards for eligible intervenors will be issued once the steps set out below are completed.

1. Eligible intervenors shall file with the Board and serve Enbridge their cost claims within 15 days from the date of this Decision.

2. Enbridge may file with the Board and serve cost claimants any objections to the claimed costs within 30 days from the date of this Decision.

3. Intervenors may file with the Board and serve Enbridge any response to any objections for their cost claims within 45 days from the date of this Decision.

DATED at Toronto, February 4, 2008.

Original Signed By

Paul Vlahos
Presiding Member

Original Signed By

Cynthia Chaplin
Member

This is Exhibit "D" to the Affidavit of Vincent J. DeRose, sworn before me this 19th day of July, 2010.

A Commissioner etc.

Table 4

LPP Costs Incurred by Year
($ 000's)

Costs by Year	2009	2010	2011
Payment to Winter Warmth Fund	$ 1,800	$ 1,800	$ 1,800
Class Proceedings Fund	600	-	-
Class Counsel's Costs and Fees	2,750	-	-
GST on Costs and Fees	138	-	-
Disbursements Inclusive of GST	200	-	-
Notice to Class	140	-	-
Total	$ 5,628	$ 1,800	$ 1,800

Incremental to the amount shown above is $0.171 million resulting from Union's legal costs, publication costs and system maintenance costs related to the LPP charge.

Union's Proposal to Amend its LPP Deferral Account

Union informed the Board of the class action settlement as part of its EB-2008-0417 proceeding. As part of that proceeding, Union proposed an amendment to the scope of its LPP litigation deferral account that would allow it to record the amount of any judgment against Union resulting from the Class Action. The Board in its Decision (dated February 13, 2009) agreed with Union's proposal to amend the scope of the LPP deferral account:

> *"The Board finds Union's request reasonable, and accepts the proposed amendment to the Accounting Order for Deferral Account No. 179-113 to include the cost of any judgment against Union in respect of the LPP class action."*

lawsuit, including the amount of any judgment that might be made against Union. In its Decision issued in September 2004 (RP-2003-0063/EB-2004-0386), the Board approved the LPP deferral account to record the following:

1. Union's legal costs;
2. The costs of actuarial advice; and,
3. The costs of analyzing historical billing records in connection with Union's defense of the LPP litigation.

With respect to the amount of any judgment, the Board ruled that it would be premature to approve the inclusion of any judgment-related costs until such time as a Court order was made or expected. As a result, Union established the deferral account in accordance with this Decision and in turn cleared debits in this account in 2005, 2006, 2007 and 2008.

LPP Class Action and Settlement

Similar to Enbridge, the claim served on Union alleged that some of the LPPs it charged were contrary to the Criminal Code. Subsequent to the court approved settlement of the Enbridge case, in November 2008, Union entered into its own $9.228 million settlement. The settlement was approved by the Ontario Superior Court on February 10, 2009 with judgment entered accordingly. The allocation of the settlement amount is detailed in Table 4 below: