

July 14, 2008

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VIA DELIVERED

File 99999.99902

Clerk of the Executive Council
c/o Executive Council Office, The Cabinet Office
Room 4440, Whitney Block
99 Wellesley Street West
Toronto, ON M7A 1W3

Dear Sirs:

Re: Petition of Gordon Garland

We are counsel to the Consumers Council of Canada ("Council"). We have been instructed by our client to file a response to the Petition of Gordon Garland to the Lieutenant Governor in Council ("LGIC").

The Council represents the interests of the broad array of residential consumers of natural gas in Ontario. The Council has been an active participant, for many years, in proceedings before the Ontario Energy Board ("Board") dealing with the regulation of the natural gas utilities, including Enbridge Gas Distribution Inc. ("EGD"). The Council filed submissions in EB 2007-0731, which was the application by EGD for an order approving clearance of the so-called Class Action Deferral Account. That account contained the amounts, including both the judgment and legal costs, arising from a class action law suit, originated by Mr. Garland, challenging EGD's Late Payment Penalty ("LPP") as being a violation of section 347 of the *Criminal Code*.

Mr. Garland has filed this Petition from the Decision of the Board, dated February 4, 2008 granting EGD's application to recover the amounts arising from the class action suit from its ratepayers.

Mr. Garland argues that the Board ignored the finding of the Supreme Court of Canada that the charges or late payments contravened the *Criminal Code*, and that the Board wrongly allowed EGD to recover the costs of the class action from its ratepayers.

Mr. Garland's Petition raises two questions, one procedural and one substantive.

II. The Procedural Question

The Board's decision, from which Mr. Garland's Petition is taken, was issued on February 4, 2008. Section 34 of the *Ontario Energy Board Act*, 1998 requires that a petition be filed within 28 days after the date of the Board's order. Mr. Garland's Petition is, accordingly, filed more than one month after the statutory deadline.

The power of the LGIC to act on Mr. Garland's Petition is one granted by statute. The statute does not give the LGIC any discretion to extend the 28 day period within which a petition must be filed. The Council acknowledges that, once a petition is filed within the statutory time period, the LGIC has the power to control its processes by, for example, setting time lines for the filing of materials by others. However, the original time line, because it is fixed by statute, cannot be changed. Accordingly, the Council submits that the LGIC does not have the discretion to consider Mr. Garland's Petition.

Mr. Garland has offered no explanation why his Petition has been filed after the statutory time period. The Council submits that, even if the LGIC did have the discretion to extend the time period, it should not do so in this case. Not only has Mr. Garland provided no explanation for the late filing, which should be a rudimentary requirement for the granting of the relief he seeks, he has provided no justification for the LGIC not applying a statutory requirement which applies to everyone else.

III. The Substantive Relief

On EGD's application to the Board, seeking an order allowing it to recover the amounts arising from the class action law suit from its ratepayers, the Council made the following submissions:

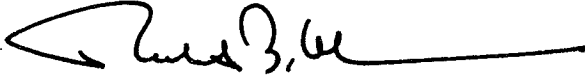
1. EGD should not be responsible for calculations based on an interpretation of the *Criminal Code* which was accepted by the Board;
2. EGD's shareholders should not be responsible for the consequences of following a Board order. Protecting a utility from any adverse consequences which might flow from following a Board order is fundamental to the integrity of the regulatory system, and to the protection of all affected parties, including residential rate payers. In addition, if a utility were at risk for following Board orders, then the utility could claim that it requires a higher return on equity to compensate for that additional risk. Were a utility granted a higher return on equity, all the rate payers, including residential ratepayers, would have to pay more for their utility service;

3. EGD was entitled to defend the Garland action. EGD could not, and should not, assume that Mr. Garland's claim was correct from the outset. If EGD were found to have acted imprudently in defending the Garland action, that would affectively preclude EGD, or any other utility, from undertaking, in good faith, the defence of actions, even when they are frivolous and vexatious. Being able to defend actions brought against it, without fearing the adverse consequences of doing so, is one way in which EGD can, among other things, protect the interests of its ratepayers;
4. Ratepayers have, historically, benefited from the late payment penalties. It is not unreasonable, therefore, to require ratepayers to pay the amounts arising from the Garland action.

The Council submits the submissions it made to the Board, summarized in the preceding paragraphs, were correct at the time they were made, and remain correct today.

The Council submits that Mr. Garland's Petition should be dismissed.

Yours truly,



Robert B. Warren

RBW/pvw

c: Tom McKinlay (Ministry of the Attorney General)
Gordon Garland
Joan Huzar
Enbridge Gas Distribution Inc., attention: Patrick Hoey
Aird, Berlis, attention: Dennis O'Leary
Ontario Energy Board

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