ENBRIDGE GAS DISTRIBUTION'S RESPONSE TO GORDON GARLAND'S PETITION OF THE ONTARIO ENERGY BOARD'S DECISION IN EB-2007-0731

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Executive Summary

EXECUTIVE SUMMARY

Timing and Jurisdiction

Gordon Garland is petitioning the Lieutenant Governor in Council (LGIC) in respect of a decision by the Ontario Energy Board (the OEB, or the Board) dated February 4, 2008 (the Decision). The petition is made under subsection 34(1) of the *Ontario Energy Board Act, 1998* (the OEB Act). Regardless of the merits of the petition, subsection 34(1) requires Mr. Garland to make the petition "within 28 days after the date the [OEB] makes an order". The 28th day following February 4, 2008 was March 3, 2008. Mr. Garland filed his petition, which relates solely to the OEB's February 4, 2008 Decision, on May 1, 2008. The Courts have stated that before the LGIC can exercise powers granted by statute, such as considering petitions, all preconditions in the statute must be met. The 28-day filing period is a statutory precondition. Here, because of Mr. Garland's failure to file the petition within 28 days of the Decision, the LGIC lacks jurisdiction to entertain it. If Mr. Garland's position is that his right to petition continues because the title of the OEB Decision did not include the word "order", then every other decision of the OEB that also is not titled "order", going back years, would be open to petition. This cannot be correct. The fact is that Mr. Garland, who was aware of the OEB's Decision shortly after it was issued, missed the deadline for filing a petition (by more than 8 weeks), and as a result the LGIC has no jurisdiction to consider it.

The OEB's Decision is correct

In the event that the LGIC decides to consider the petition, Enbridge Gas Distribution Inc. (EGD, or the Company) submits that the OEB's Decision was correct, and need not be reviewed. The Decision authorizes EGD to recover, over 5 years, costs prudently incurred in response to a class action lawsuit commenced by Mr. Garland which challenged EGD's application of late payment penalties (LPPs). The LPP was implemented in response to an Ontario Government Guideline and was approved by the OEB each year, as part of EGD's rates. EGD had no choice but to charge the LPP. The LPP was intended to, and did benefit EGD's ratepayers, because LPP revenues totalling more than $126 million were used to reduce gas distribution rates between 1981 and 2002. Conversely, the LPP was not designed to benefit EGD, because LPP revenues were not designed to increase EGD's total revenues. In these circumstances, it is fair and appropriate that ratepayers, who benefited from the LPPs, are responsible to pay the costs that resulted from EGD's defence of the LPPs. Effectively, ratepayers who have benefited by more than $126 million as a result of LPPs are now repaying a small portion of that benefit.

Background

(a) Ontario Legislative Guidelines, OEB Orders and the impact on ratepayers

With the goal of reducing the cost and administrative burden caused by slow and late paying utility ratepayers, the Ontario Minister of Energy issued the "Residential Guidelines for Credit Collection and Cut-Off Practices of Public Utility Suppliers" (the Guidelines) in the Legislature in 1978, directing utilities to impose a 5% LPP on those customers who did not pay their utility bill on a timely basis. Late payers cause utilities to incur carrying charges and administration costs. These costs are then passed along to all ratepayers, including those that pay on time. In compliance with this Ontario Government direction, EGD made application to the OEB for the authority to impose the LPP which is the subject of the petition. The OEB approved the LPP in 1980 and every year thereafter, typically with the annual support of ratepayer groups, until it was changed in 2002.

Ratepayers benefited materially from LPPs because proceeds from the LPPs were used to reduce distribution rates each year. As a result of LPP revenue, EGD reduced rates (primarily to the residential rate class) by over $126 million during the period 1981 to 2002. In addition, the LPP was intended to and did benefit ratepayers by reducing the administrative and carrying costs of late payers by discouraging such conduct. On the other hand, the LPP was never designed to benefit EGD.

Once the LPP was approved and made part of EGD's rate orders, EGD was legally obligated to charge the LPP to its customers. Failure to do so would have exposed EGD to administrative sanction. EGD was never in a position to unilaterally implement a new LPP. That process required the involvement of the Board and all stakeholders. The OEB specifically stated in 1998 that it did not want utilities to bring forward applications to change the LPP until the Garland lawsuit was concluded by the Courts.

(b) The Garland class action lawsuit

Mr. Garland's class action lawsuit, commenced in 1994, alleged that a 5% LPP may generate interest rates greater than permitted by the *Criminal Code*. Whether this occurs depends upon the date chosen for the accrual of interest calculations. While EGD was successful in several stages of the litigation, the Supreme Court of Canada (SCC) ultimately decided against EGD in 2004. The SCC, however, did not decide issues of specific liability, which is the role of the trial courts, and instead sent the case back to the Ontario Court to determine, following trial, whether EGD had any actual liability to the plaintiffs. It was at this stage, prior to trial, that the Garland lawsuit was settled through mediation. As a result of the settlement, no determination of liability and no judicial determination of what was the appropriate interest accrual date was ever made. Hence, there has been no judicial finding that any LPP was, in fact, collected contrary to the *Criminal Code.* Indeed, Mr. Justice Cullity, the judge who

approved the settlement, noted that if there had been a trial, the range of potential outcomes included a finding of zero liability for EGD.

The $22 million settlement that Mr. Garland and his class action counsel accepted through mediation is a fraction of the more than $74 million sought (plus interest and costs). The settlement, which was approved by the Court, specifically provides that the payments do not constitute any admission of liability. Through the settlement, EGD agreed to pay $9 million into the United Way's Winter Warmth Fund. The Winter Warmth Fund was launched by EGD, Toronto Hydro and the United Way in 2004, and provides eligible low-income customers with financial assistance for payment of natural gas and electricity bills. Mr. Garland personally received $95,000, and class action counsel were paid over $10 million for fees and disbursements. The balance of the payments were made to the Law Foundation Class Proceedings Fund and on account of taxes and other disbursements.

(c) The OEB's February 4, 2008 Decision

Last year, EGD made an Application to the OEB for permission to recover the $22 million settlement amount (and related defence costs) from ratepayers. The OEB decided to hold a public hearing and required EGD to publicly advertise notice of its Application in relevant newspapers across Ontario. Despite this public notice, Mr. Garland did not participate in the proceeding. Intervenors representing EGD's ratepayer classes, including residential and industrial customers, schools and "vulnerable" customers, responded and participated in the proceeding. Importantly, the Consumers Council of Canada (the Council), who represent most of EGD's residential customer base, supported recovery. The Council accepted that the grounds advanced by EGD supporting the Application were "essentially correct" and acknowledged two important facts:

> There are other additional factors which militate in favour of granting … the relief EGD seeks. One consideration is that ratepayers have benefited, over the years, from the LPP. The second consideration is that, to the knowledge of the Council, no intervenor has ever objected to the LPP.

The position taken by the Council, which represents the ratepayers that are most impacted by the relief sought by EGD, was clearly an important factor in support of the Board's Decision. Based upon the evidence and the submissions received from parties to the Application, the OEB, in its February 4, 2008 Decision, found, in accordance with longstanding regulatory principles, that the settlement and the costs of defending the Garland class action were prudently incurred and therefore recoverable from ratepayers. In coming to that conclusion, the OEB found that it was reasonable for EGD to have relied on the OEB's rate orders and for EGD to recover costs that "arise from defending Board approved charges which are ultimately found to be invalid". The Board further found that EGD did not act imprudently in not seeking to change the LPP earlier than it did.

Response to Mr. Garland's petition

The Application filed by EGD contained complete particulars of all historical matters, OEB rulings and the position of relevant parties over the years. The Garland petition alleges no new or changed factual circumstances. The petition does not question (or even mention) any of the facts relied upon by the OEB for the purposes of its Decision. The OEB decided to hold a public hearing and required public notification of the Application, inviting ratepayers and interested parties to participate. A variety of ratepayer groups who might be affected by the Application intervened and made submissions to the OEB. Mr. Garland did not. The OEB considered the evidentiary record, and the submissions of parties, and rendered its Decision on February 4, 2008. Mr. Garland does not object to the hearing process adopted by the OEB.

Mr. Garland's petition does allege, though, that the OEB Decision was "contemptuous of" and "inconsistent with" the 2004 SCC decision. This is wrong. The OEB, as it specifically noted in its Decision, was addressing different issues than those determined by the SCC. The SCC was looking at whether "Enbridge could rely on OEB orders as a defence against a claim that the LPPs were illegal", while the OEB was looking at "whether Enbridge can rely on the OEB orders as a justification for recovering costs which arise from defending Board approved charges which are ultimately found to be invalid". The SCC's decision contains no direction as to how the OEB should address the issue of the recovery of such costs.

Similarly, Mr. Garland's allegation that the OEB's Decision permits EGD to keep the "proceeds of crime" is factually unsubstantiated and legally incorrect, as seen from the undisputed factual record:

- in 1980, in satisfaction of the Guidelines, which were the policy of the Government of Ontario, EGD applied to the OEB for an order permitting it to implement the LPP; thereafter, the LPP was approved annually by the OEB, generally with the support of intervenors
- EGD at all times obeyed the OEB's rate orders and charged the LPP
- EGD followed the OEB's direction in changing the LPP at the appropriate time
- ratepayers benefited from the LPPs, because all forecast LPP revenues (the "proceeds") were credited to ratepayers by reducing gas delivery rates
- EGD's collection of LPP revenues did not increase its allowed rate of return (profit) because LPPs are designed for the benefit of ratepayers, not the utility
- no Court has ever found that EGD has any civil or criminal liability for any specific LPPs that it has collected
- the settlement of Mr. Garland's lawsuit specifically noted that there was no admission or finding of liability against EGD – EGD always asserted that it had no liability
- the amount of the settlement in no way relates to particular amounts of LPPs that had been collected by EGD, and instead is simply a compromise between the positions of the parties which, among other things, allowed EGD to avoid the costs of trial and inevitable appeals

It is clear, contrary to the allegation made by Mr. Garland, that EGD's settlement payment in no way represents the "disgorgement" (defined as repayment of ill-gotten gains) of LPPs that were improperly collected. Instead, it is a cost incurred by EGD as a direct consequence of defending its compliance with what it believed to be valid Board decisions setting the LPP.

Given that Mr. Garland's petition attacks the OEB for allegedly misinterpreting and misapplying the SCC's decision, it would have been far more appropriate for Mr. Garland to appeal the OEB's Decision to the Divisional Court. The Divisional Court is the body that is best-positioned to determine whether the OEB made legal errors and misapplied a decision of the SCC. Mr. Garland alleges no change in factual circumstances that would warrant a review of the Decision. Mr. Garland's petition relies solely upon allegations of legal error that have not been presented to or tested by the Divisional Court. Such a petition ought not to be entertained, otherwise the clear signal is that there is no need to resort to the Courts when legal issues arising from administrative tribunal decisions are raised.

Mr. Garland fails to acknowledge that the OEB is uniquely qualified to determine matters of this nature. Over many years, it has developed expertise in assessing and determining the just and reasonable rates that utilities may charge, taking into account the public interest, and the interests of both consumers and the energy industry. EGD submits, with respect, that the LGIC ought to consider the independence and expertise of the OEB when assessing petitions of OEB decisions, and only require a review of OEB decisions in the clearest of cases. This is not such a case.

Mr. Garland was quoted by CTV News on February 16, 2008 as stating that EGD was "essentially convicted of a criminal act" which is, of course, blatantly untrue. At around the same time, in the context of such mischaracterizations, the Premier is quoted by the Windsor Star on February 20, 2008 as saying that he would ask the Minister of Energy to help him better understand the history of events and the OEB Decision. EGD agrees with the Premier that it would be "counter-intuitive" should a party be allowed to retain the proceeds of a crime, but it is clear that this is not the case here and is not what the OEB Decision ordered for two simple reasons. First, there was no crime. There was no finding of civil or criminal liability. Second, the "proceeds" of the subject activity (i.e., the LPP revenues of over $126 million) were paid to ratepayers. LPPs were not charged and collected for the benefit of EGD shareholders, but rather in compliance with the policy of the Government of Ontario to benefit utility ratepayers generally. What is counter-intuitive would be a situation where a utility's owner, against whom there has been no finding of liability, is required to pay a penalty out of his or her own pocket as a result of an activity undertaken in the first instance at the request of the Government of Ontario solely for the benefit of ratepayers. Based on all of the facts, the OEB's Decision is both intuitively and legally correct.

EGD respectfully requests that the LGIC reject Mr. Garland's petition.

Tab 2

Mr. Garland's petition is out of time

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1. Parties have been invited to comment on a preliminary procedural question regarding the timeliness of Mr. Garland's petition.

2. Mr. Garland's petition was not made within the time limits prescribed by section 34 of the OEB Act, and as a result, EGD respectfully submits that the LGIC does not have jurisdiction to consider the merits of Mr. Garland's petition.

3. Section 34 states that, on the petition of any interested person or party filed within 28 days after the OEB makes an order, the LGIC may: (a) confirm the OEB's order; or (b) require the OEB to review all or any part of the order. The review power of the LGIC does not exist as of right, but instead only exists as a result of section 34 of the *OEB Act*. Thus, in order for the LGIC to be entitled to exercise this statutory power, the applicant must first satisfy any applicable statutory precondition which, in this case, is the requirement that the petition must be filed within 28 days after the OEB makes the subject order. If no petition is filed within 28 days of an order, then the LGIC has no jurisdiction to consider a petition in respect of that order.[1] For the LGIC to do so in such circumstances leaves it open to review by the Courts. The OEB Act does not confer jurisdiction on the LGIC to extend the 28-day time limit.

4. There is an understandable basis for the 28 day deadline to bring a petition in respect of a Board order. The rationale, which applies equally to the time limit for appeals to the Divisional Court, is that parties rely on the decisions of the Board to govern their future conduct, so there is a need for finality and certainty in respect of those decisions.[2] If decisions of the OEB remained open to challenge indefinitely, then all parties subject to regulation, and all stakeholders, would have no comfort that actions taken in compliance with Board decisions will later be regarded as appropriate. It is not in the best interests of all stakeholders that the actions undertaken and costs incurred by regulated utilities in reliance on Board decisions be the subject of uncertainty by reason of petitions and appeals after the prescription dates.

5. The OEB's Decision, released February 4, 2008, is the order in this matter. No petition was filed within 28 days of this order. Mr. Garland's petition, which was filed on May 1st, 2008, 87 days after the OEB issued this order, relates solely to the determinations made by the OEB in its February 4, 2008 Decision. As a result, Mr. Garland is out of time to file his petition. It necessarily follows that the LGIC has no jurisdiction to consider Mr. Garland's petition.

6. EGD has several responses to Mr. Garland's apparent position that the OEB's February 4, 2008 Decision is not an order because it is titled "Decision with Reasons", not "order":

a) First, the OEB's Decision contains all of the determinations of the OEB. There is not now, and there never will be, any separate document titled "order" under docket number EB-2007-0731, which is the docket number given to the Application. There has been no further decision or order made by the OEB in the subject proceeding which could be the subject of any petition to the LGIC or any appeal to the courts. Given that the subsection 19(2) of the OEB Act provides that the OEB "shall make any determination in a proceeding by order", it follows that the Decision is the order. As set out in subsection 22.1(2) of the OEB Act, the fact that the OEB fails to issue a separate order reflecting its final decision in a proceeding does not affect the validity of the decision.

b) Second, although there is no definition of "order" in the OEB Act, a recent decision of the Ontario Court of Appeal contains a helpful discussion of the meaning of that term. In *Byers* v. *Pentex Print Master*, the Court referred to the usage of the term "order" in Ontario Courts and stated that an "order" includes a "judgment" and a "judgment" is a decision that finally disposes of an application or action on its merits.[3] In this case, there is no doubt that the OEB's February 4, 2008 Decision finally disposed of the fundamental question in EGD's Application, the question of whether EGD is entitled to recover the balance in the Class Action Suit Deferral Account (the CASDA) from ratepayers, finding that "all costs (Enbridge's own legal costs, settlement costs and interest) in the CASDA are recoverable from ratepayers". It is the OEB's determination of that question that Mr. Garland now attacks.

c) Third, the OEB itself views the Decision to be an order. This is made clear by the OEB's subsequent decision in the Application which addressed the costs to be paid by EGD to intervenors (to compensate them for the time their lawyers and experts spent on the case), where the OEB expressly referred to its February 4, 2008 Decision as "The Board's Decision and Order in this proceeding".[4]

d) Fourth, the OEB's general practice in cases where it requires a formal and separate order to be prepared to reflect the findings in its decision is to say so.[5] There was no such direction in the OEB's February 4, 2008 Decision. The only reference to a subsequent order mentioned in the Decision related to the timing of when EGD might begin to recover the balances in CASDA, not to the operative part of the Decision (which Mr. Garland now attacks), which was the determination that EGD is entitled to recover the balance in the CASDA from ratepayers.

e) Fifth, a review of the OEB website, which lists decisions rendered by the OEB, indicates that there are at least 11 instances in the last two years alone when the OEB finally disposed of a matter by issuing a decision without contemporaneously or subsequently issuing any

document which includes in the title the word: "order".[6] The fact that there was no document titled "order" in those matters does not mean that the matters are not finally determined. To conclude that these decisions are not also "orders" would mean that, for each of these 11 cases (and others from previous years), the deadline for petitions and appeals has not yet passed. That cannot be correct. If the LGIC is to decide that the deadline for Mr. Garland's petition had not passed, then every OEB decision that is not titled "order" remains open to petition to the LGIC or an appeal to the Court, even years later.

f) Finally, participants in OEB proceedings know that time limits for appeals or decisions run from the date of decision, and that many times separate orders are never issued. This can be seen from EGD's most recent experience with appeals and petitions of OEB orders. In the case of *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, the appellant successfully appealed a "decision" of the OEB related to EGD's rates to Divisional Court.[7] In another example, following the OEB's rehearing "decision" in the Natural Gas Electricity Interface Review proceeding, certain intervenors unsuccessfully petitioned the LGIC to have the matter referred back to the OEB.[8] The common thread in each of these appeal-type proceedings was that the OEB did not issue any document titled an "order" in either instance, yet both the Divisional Court and the LGIC apparently decided that decisions made by the OEB constituted "orders", because they assumed jurisdiction to consider the appeal and petition.

7. Mr. Garland was aware of the February 4, 2008 Decision shortly after it was issued. This is seen by his comments to the media quoted in the National Post on February 19, 2008, where he publicly attacked the Decision, stating at the same time that he would not appeal the Decision to the courts.[9] It is clear that as of mid-February, Mr. Garland had all of the information that he needed to prepare and file his petition. Despite this, Mr. Garland waited for close to three months, until May 1st, to serve his four page petition. By doing so, he missed the deadline for filing a petition.

8. For the foregoing reasons, EGD submits that the LGIC lacks jurisdiction to entertain Mr. Garland's petition.

ENDNOTES

[1] The requirement for the LGIC to satisfy any conditions precedent before actually exercising statutorily endowed powers was discussed by the Ontario Court of Appeal in *Border Cities Press Club v. The Attorney-General for Ontario*, [1955] O.R. 14 at 19:

> I agree with the learned Judge in Weekly Court, for the reasons stated by him, that the power conferred is conditional upon sufficient cause being shown, and that without giving the respondent an opportunity of being heard, or an opportunity to show cause why the letters patent should not be forfeited, the Lieutenant-Governor in Council would not have jurisdiction under the statute to make the order complained of. In exercising the power referred to, the Lieutenant-Governor in Council is not, in my opinion, exercising a prerogative of the Crown, but a power conferred by statute, and such a statutory power can be validly exercised only by complying with statutory provisions which are, by law, conditions precedent to the exercise of such power.

This line of reasoning was cited by the SCC in *Attorney General of Canada v. Inuit Tapirisat*, [1980] 2 S.C.R. 735 at 750. In a similar vein, the SCC stated, in *Thorne's Hardware v. R.*, [1983] 1 S.C.R. 106 at 111 that :

> The mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond judicial review: *Attorney General of Canada v. Inuit Tapirisat of Canada,* [1980] *2* S.C.R. *735* at p. *748.* I have no doubt as to the right of the courts to act in the event that statutorily prescribed conditions have not been met and where there is therefore fatal jurisdictional defect. Law and jurisdiction are within the ambit of judicial control and the courts are entitled to see that statutory procedures have been properly complied with: R. *v. National Fish Co.,* [1931] Ex. C.R. *75; Minister of Health v. The King (on the Prosecution of Yaffe),* [1931] A.C. 494 at p. *533.*

[2] There is a 30 day deadline for instituting appeals of Board orders to the Divisional Court, found in section 33 of the OEB Act.

[3] 2003 CanLII 42272, at para. 19.

[4] A copy of the OEB's decision on costs is included with these submissions as Attachment 3.

[5] This can be seen, for example, in the OEB's April 29, 2008 decision in a storage allocation case, where the Board concluded its reasons (found at http://www.oeb.gov.on.ca/OEB/_Documents/EB-2007-0724/dec_reasons_EGDI_Union_20080429.pdf) by stating that:

> Union and Enbridge shall each file draft rate orders that reflect the Board's findings in this Decision. The draft rate orders shall be accompanied by Proposed Rate Schedules and Tariff Sheets, and by the form of notice that the companies intend to send affected customers to inform them of the changes to the allocation methodologies and the transition mechanism. The Draft Rate Orders shall be filed within 30 days of the date of this Decision. Parties will have 14 days after that date to file any comments on the Draft Rate Order

[6] These cases, in which the OEB did not issue an "order", are described on the OEB website as follows:

EB-2007-0715	Today, the Ontario Energy Board (the Board) issued a Decision approving a third reliability must-run (RMR) contract between Ontario Power Generation (OPG) and the Independent Electricity System Operator (IESO) for OPG's Lennox generating station. A first RMR contract for Lennox was approved by the Board on March 13, 2006 and a second was approved on January 22, 2007
EB-2007-0063	Today the Ontario Energy Board (the Board) issued a Decision with Reasons approving costs associated with smart metering activities incurred by 13 utilities authorized by government regulation to undertake smart metering activities.
EB-2006-0205	Today, the Ontario Energy Board (the Board) issued a Decision approving a second reliability must-run (RMR) contract between Ontario Power Generation (OPG) and the Independent Electricity System Operator (IESO) for OPG's Lennox generating station. The first contract was approved by the Board on March 13, 2006.
EB-2006-0322 EB-2006-0340	Today, the Ontario Energy Board (the Board) issued its decision not to vary any aspect of its November 2006 decision on the Natural Gas Electricity Interface Review (NGEIR Decision)

EB-2005-0211	Today the Ontario Energy Board (the Board) issued a Decision with Reasons on an application by Union Gas Limited (Union) related to proceeds from the sale of cushion gas and whether there is any basis on the evidence to allocate all or part of the gain to customers.
EB-2006-0322 EB-2006-0338 EB-2006-0340	Today the Ontario Energy Board issued a Decision with Reasons on three Notices of Motions (Motions) to review certain aspects of the Natural Gas Electricity Interface Review (NGEIR) Decision. The Motions were filed by the City of Kitchener (Kitchener), the Association of Power Producers of Ontario (APPrO), and jointly by the Industrial Gas Users' Association (IGUA), the Vulnerable Energy Consumers Coalition (VECC) and the Consumers Council of Canada (the Council).
EB-2006-0034	Today the Ontario Energy Board (the Board) issued a majority Decision finding that the Board does not have the jurisdiction to develop a rate class using income level as a determining factor.
EB-2006-0018 EB-2006-0159 EB-2006-0279	Today, the Board issued a decision regarding three applications by Tipperary Gas Corp.
EB-2008-0099	On Friday, May 16, 2008 the Ontario Energy Board (the Board) issued a Decision on a Motion from the Association of Major Power Consumers in Ontario (AMPCO) in relation to the Board's March 19, 2008 Decision on Oshawa PUC Networks Inc.'s 2008 electricity distribution rates (EB-2007-0710).
EB-2007-0707	The Ontario Energy Board has issued a Decision today approving an issues list for its review of the Ontario Power Authority's (OPA) Integrated Power System Plan (IPSP) and procurement processes, concluding phase 1 of the proceeding. In phase 2, to be scheduled for mid-2008, the Board will use the issues list as the basis for its review of the OPA's application.
EB-2006-0243	Today the Ontario Energy Board issued a Decision relating to an earlier Decision that granted Natural Resource Gas Limited (NRG) leave to construct a 28.5 kilometer natural gas pipeline.

(see http://www.oeb.gov.on.ca/OEB/Hearings+and+Decisions/Decisions+and+Reports)

[7] *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, 2008 CanLII 23487.

[8] Petitions filed June 2007, in respect of OEB docket EB-2006-0332.

[9] See for example, the National Post article dated February 19, 2008 titled "Consumers Face Utility Hikes Over Lawsuits".

Tab 3

Response of Enbridge Gas Distribution

Submissions of Enbridge Gas Distribution in response to Mr. Garland's petition

A. Background Facts

1. Should the LGIC decide to consider Mr. Garland's petition on the merits, there is ample basis to conclude that the OEB made the proper decision, and that any reasonable regulator would have come to the same conclusion.

2. Contrary to the impression given by Mr. Garland's brief petition, the background and context to the Decision is highly relevant. EGD's Application to the OEB set out this history, going back more than 30 years, in a two-volume filing, a copy of which is included as Attachment 1. During the OEB proceeding, no party challenged or added to this factual record which establishes, among other things, that: (i) EGD acted at all times in accordance with the Guidelines issued by the Ontario Government and OEB rate orders in charging and collecting LPPs; (ii) as contemplated by the Legislature and the OEB, LPPs were designed to benefit ratepayers, not regulated utilities; (iii) ratepayers did in fact benefit from LPPs through rate reductions of more than $126 million; (iv) there is no evidence that EGD ever benefited from the LPP; and (v) no Court or other body has ever determined that any portion of the LPPs collected by EGD exceeded the legal limit on interest.

3. The relevant aspects of the record are set out in Appendix 1, which is titled "Background and Context to the Decision". Also important to an understanding of the Decision is an appreciation of the public interest mandate and role of the OEB in setting a utility's rates, which is described in Appendix 2, titled "The OEB's Ratemaking Role".

B. Response to Mr. Garland's petition

4. Mr. Garland's petition amounts to an attack on not only EGD but also on the OEB, an independent, respected and expert regulator which acts to protect the public interest. Given the inflammatory accusations in Mr. Garland's petition, it is appropriate to directly address the petition before setting out the reasons why the OEB's Decision is correct.

(i) The fundamental premise in Mr. Garland's petition is mistaken

5. The starting point for Mr. Garland's petition, as set out in his first paragraph, is that the OEB "chose to allow Enbridge to charge its customers the amounts that it illegally collected through late penalty payments and later disgorged to settle the class action lawsuit". Later in his petition, Mr. Garland asserts that the OEB's Decision "improperly permits Enbridge to keep the proceeds of its crime". Mr. Garland knows or certainly ought to know that these allegations are not true.

6. The Class Action Suit Deferral Account is an account approved by the OEB to allow EGD to record the costs of responding to Mr. Garland's lawsuit. It is the costs recorded in the CASDA that the OEB's Decision allowed EGD to recover from ratepayers. The CASDA is primarily comprised of the $22 million class action settlement payment. The settlement is described in Appendix 1, under the heading "Settlement of the Garland class action". The amount of the settlement includes substantial payment for Mr. Garland and his lawyers (totaling more than $10 million) and a sizeable endowment to the Winter Warmth Fund. The settlement was reached on the basis that all parties, including Mr. Garland who was personally involved throughout the settlement process, agreed that there was no admission of wrongdoing or liability by EGD. Thus, it is not proper for Mr. Garland to now assert that the settlement represents repayment of LPPs that had been illegally collected. There is no linkage between the amount of the settlement, and the amount of any LPPs that Mr. Garland alleged that EGD had collected in excess of the legal interest rate. Instead, the amount of the settlement represents a compromise between the positions of the parties.

7. Moreover, even if one could somehow conclude that the settlement payment represents LPPs collected in excess of the legal interest rate (which EGD strongly disputes), it cannot be said that the OEB's Decision allows EGD to retain "proceeds" of improper activities. The simple reason for this is that LPPs were designed for ratepayer benefit, not EGD's profit. Ratepayers received the benefit of forecast LPP revenues (the "proceeds") through lower distribution rates. The amount of revenue that EGD was allowed to collect in rates was unchanged. Thus, if EGD is not permitted to recover the balance in the CASDA, it will have been unjustly penalized for implementing the LPPs for the benefit of ratepayers, and it will have to absorb more than $22 million in costs simply because it obeyed rate orders by charging these OEB and Government-mandated LPPs.

8. For all these reasons, to assert that recovery of the balance recorded in the CASDA somehow equates to EGD retaining the "proceeds of crime", as Mr. Garland does throughout his petition, is inflammatory, misleading and plain wrong.

(ii) The OEB gave proper consideration to the Supreme Court's decision

9. Contrary to the submissions in Mr. Garland's petition, the OEB's Decision is not inconsistent with, and is certainly not "contemptuous of", the SCC's 2004 decision. The implication from Mr. Garland's petition is that the OEB failed to consider how the SCC's 2004 decision should impact on the disposition of EGD's Application. The fact is, however, that this issue was squarely before the OEB. A review of the arguments filed with the OEB in this matter discloses that five different ratepayer groups (the Council, VECC, the Council, Union Gas and EGD)[1] addressed how the

SCC's decisions in the Garland class action ought to impact upon or influence the determination of EGD's Application. In response, the OEB's Decision directly, and correctly, addresses the issue, stating as follows:

> 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. (at p. 10)

10. In any event, the SCC's 2004 decision does not have the meanings ascribed to it by Mr. Garland and it cannot be said that the OEB's Decision "dismisses" or "ignored" the findings of the SCC. Mr. Garland's misinterpretation and/or exaggeration of the findings of the SCC is seen, for example, in Mr. Garland's sensational and misguided allegation that the OEB Decision somehow results in EGD being repaid "proceeds of crime".

11. Another example of Mr. Garland's misinterpretation and/or exaggeration of the findings of the SCC is seen in Mr. Garland's frequent assertions that the SCC had made findings about EGD's "liability". The fact is that the SCC did not find that any particular LPPs had been collected in excess of the legal limits on interest rates. Instead, as set out in the final paragraph of its decision[2], the SCC's direction was to have the trial judge determine what LPPs had been collected in excess of the legal interest limit. That determination depended, in large part, on the start date chosen for accrual of interest calculations. Depending on the date used, the amount of LPPs at issue could have been zero. The parties recognized this fact as they negotiated the settlement. As Mr. Justice Cullity stated in his September 25, 2006 Endorsement assessing the settlement that had been reached:

> 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.[3]

12. The SCC expressly noted that the matters at issue in the Garland class action, which related to whether particular customers may have paid LPPs in excess of the legal limit, were essentially matters of private law, which fall under the Court's jurisdiction.[4] In contrast, the question of whether costs incurred by a utility in dealing with a lawsuit are recoverable from ratepayers is clearly within the OEB's specialized and expert jurisdiction. As such, it is not surprising that the SCC's decision contains no direction to the OEB about how the OEB should address any recovery of EGD's costs from ratepayers. With this in mind, the OEB was correct in finding that it must look

at different factors than the SCC when making decisions, in accordance with recognized regulatory principles, as to whether particular utility costs are recoverable from ratepayers.

13. If Mr. Garland believes that the OEB did ignore direction contained in the SCC's decision, a position EGD completely rejects, then Mr. Garland should have appealed the OEB's Decision to the Divisional Court. Without intending to convey any disrespect to the LGIC, an appellate court is the body that is best-positioned to determine whether the OEB misapplied a decision of the SCC. EGD submits that such attempts to make what are essentially legal appeals to the LGIC, without appealing to the Divisional Court, ought not to be entertained. Otherwise, the clear signal is that there is no need to resort to the Courts when legal issues arising from administrative tribunal decisions are raised.

(iii) Mr. Garland improperly ignores the entire record considered by the OEB

14. Mr. Garland's petition completely ignores the voluminous evidentiary record, and the arguments, that were considered by the OEB in reaching its Decision.[5] There is nothing in the petition to suggest that Mr. Garland, who did not participate in the OEB proceeding, has even considered the facts and background that the OEB itself recites in its Decision.

15. EGD respectfully submits that a petition which ignores or glosses over the relevant background and facts underlying a decision that is being attacked provides the LGIC with little basis on which to act. This is because any reconsideration of a decision of an inferior tribunal must begin with an examination of the facts and argument before that tribunal, in order to assess whether the decision being reconsidered was reasonable. Similarly, a petition that ignores the grounds for the Board's decision, as is the case here, gives scant basis for the LGIC to act.

C. Reasons why the OEB's Decision is correct

16. At a high level, there are three basic reasons why the OEB's Decision is correct. Each is discussed below.

(i) EGD's Ratepayers benefited from LPPs

17. As described in Appendix 1, under the heading "EGD's customers benefited from the LPPs", the benefit enjoyed by EGD's ratepayers as a result of the inclusion of LPPs as part of the rates that the Company must charge has been substantial. During the years from 1981 to 2002 (the period initially at issue in the Garland class action), a total of $126.7 million in LPP revenues was credited to ratepayers.[6] This meant that the total amount that EGD was authorized to collect in gas distribution rates from its customers over a period of more than 20 years was reduced by an average of more than $5 million per year, as a result of LPPs.

18. In contrast, the LPP was never designed to increase EGD's profit, since the proceeds from the LPPs were used to reduce gas distribution rates. As a result, with or without the LPP, the total amount EGD was entitled to recover from ratepayers was unchanged.

19. In these circumstances, it is fair and appropriate that ratepayers are responsible for payment of the costs caused by the LPPs. The dollar value of the benefits enjoyed by ratepayers over the relevant years far exceeds the costs now being recovered. Effectively, ratepayers who have benefited by more than $126 million as a result of LPPs are repaying a small portion of that benefit. On the other hand, as the OEB recognized, it would not be fair for EGD, who was not in a position to benefit from the LPPs, to absorb the costs incurred implementing, collecting and defending the LPPs.

(ii) EGD was legally required to charge LPPs

20. As described in more detail in Appendix 1, under the heading "The Ontario Government mandated the use of LPPs", the form of LPP used until 2002 by EGD, and most other Ontario utilities, has its roots in Ontario Government policy. In 1978, the Ontario Minister of Energy presented the "Residential Guidelines for Credit Collection and Cut-Off Practices of Public Utility Suppliers" (the Guidelines) to the Legislature, mandating a new form of LPP. The Minister noted his expectation that these Guidelines would be adopted by most of Ontario's public utilities. From and after 1981, EGD's LPP, and the LPPs of most other utilities in the Province, were changed to conform to the Guidelines.

21. EGD's LPP was and is part of its just and reasonable rates approved by the Board each year. The Company is not permitted to charge for the distribution and sale of natural gas, except in accordance with Board-approved rate orders.[7] Once a final rate order is issued, the Company is legally required to ensure that its charges are consistent with the provisions of those rate orders. If the Company fails to abide by its rate orders, it faces the prospect of sanctions, including substantial fines.[8] Accordingly, the Company was required to implement and charge its LPP.

22. As described in Appendix 1, under the heading "EGD's LPP was approved by the OEB each year", since 1981 the Company has included the LPP as part of the rates for which it seeks approval. From the time that Mr. Garland's class action lawsuit was served, no ratepayer group or any other person (including Mr. Garland himself), objected to the LPP or suggested that it should be changed. Instead, the Company's LPP was presented to and approved by the OEB each year, generally without debate and often as part of a settlement agreement with all interested stakeholders.[9]

23. EGD was never in a position to unilaterally implement a new LPP. The process would have required the involvement of the Board and all stakeholders. The evidence (set out in more detail in Appendix 1 under the heading "EGD's LPP was changed at the appropriate time") makes clear that EGD acted reasonably and diligently, and at all times in compliance with the directions from its regulator, in taking steps to change its LPP at the proper time, but not before:

    a) Upon receipt of the Garland Statement of Claim in 1994, the Company took the position that the LPP was valid and moved to vigorously defend the action. No participant in OEB proceedings expressed any disagreement with the Company's position. Two levels of Ontario Courts agreed. Neither the Board, nor any ratepayer group, opposed EGD's approach.

    b) Following the SCC's October 1998 decision, where some of EGD's defences were dismissed, the OEB stated that it did not wish to address whether the LPPs being used by Ontario utilities should be changed until after the Ontario Court had re-heard the matter and come to a decision.[10] The Ontario Superior Court of Justice subsequently (in April 2000) dismissed Mr. Garland's claim and found that the OEB was the appropriate forum to address issues related to the LPP. This dismissal was upheld by the Ontario Court of Appeal in 2001.

    c) In January 30, 2001, while most utilities in Ontario still employed an LPP similar to EGD's, the OEB convened a process to review its policy with respect to the setting of LPPs.[11] This resulted in a direction to utilities, in late 2001, to change their LPPs to remove any possibility that they could exceed the legal limit on interest.[12] In its November 2001 decision, Ontario's Court of Appeal specifically noted that the OEB had acted appropriately in waiting until that time to require changes to the LPP.[13]

    d) Shortly thereafter, with the Board's approval, the Company changed its LPP.

24. These circumstances demonstrate that EGD at all times acted in good faith in accordance with direction from the Government and the OEB in charging, collecting and subsequently changing the LPP. EGD was never in a position where it would have been permitted to act differently. This supports the conclusion that ratepayers, who were the beneficiaries of the LPPs, should pay back a portion of those benefits to cover the costs caused by the LPPs.

(iii) <u>A utility is entitled to recover prudently incurred costs</u>

25. Mr. Garland's petition asserts that the OEB mischaracterized the amounts recorded in the CASDA as "costs". This allegation is unfounded. The amounts recorded in the CASDA are expenses incurred by EGD in defending and settling Mr. Garland's lawsuit, which related to EGD's rates. As

such, the amounts recorded in the CASDA are costs incurred in connection with EGD's sale, distribution and storage of natural gas.

26. The OEB's Decision, which permits EGD to recover the balance in the CASDA from ratepayers, is entirely consistent with the long-established regulatory principle that a utility is entitled to recover its prudently incurred costs from ratepayers.[14] This principle ensures that a utility is able to earn a fair rate of return (profit). If the utility were forced to absorb prudently incurred costs, this would effectively diminish its profit below the amount that has been determined to be fair, appropriate and in the public interest.

27. The Ontario Divisional Court recently explained the approach to be used in determining whether utility costs are prudently incurred and recoverable from ratepayers:

> Expenditures are deemed to be prudent, in the absence of some evidence suggesting the contrary. However, costs that are found to be dishonestly incurred, or which are negligent or wasteful losses, are excluded from the legitimate operating costs of the utility in determining rates that may be charged. The examination of whether an expenditure was prudent must be based on the particular circumstances at the time the decision to incur those costs was made. That is so even if in hindsight it is obvious the decision was a bad one.[15]

28. This is the exercise that the OEB undertook in the Application, concluding that:

> 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 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. (at page 11)

29. The OEB's conclusion in that regard is well-founded and correct. Where activities are carried out, in good faith, for the benefit of a utility's ratepayers, and are later challenged in litigation, then it is appropriate that the costs (including any damages judgment) of the utility's defense of those activities (whether successful or not) be recovered from ratepayers.[16] This is particularly so when the activities in question are the implementation of aspects of rate orders approved by the utility's regulator, and where the relevant aspects of the rate orders actually benefited ratepayers by reducing rates. A utility's litigation costs, where its conduct is challenged, are no different in character from other costs of operation. In this case, Mr. Garland's lawsuit attacked the Company for having done nothing more than implement and enforce the LPP provisions of Board-approved rate orders. The decisions to implement the LPP, to contest the litigation, to change the LPP at the appropriate time and to enter into a reasonable settlement of the litigation are all reasonable decisions in light of the information known at the relevant times. As such, it is entirely appropriate that these costs be recovered in rates.

(iv) Additional reasons supporting the dismissal of Mr. Garland's petition

30. In addition to the foregoing substantive reasons why the OEB's Decision was correct, and need not be reviewed, EGD submits that the LGIC should consider the following.

31. In his petition, Mr. Garland accuses the OEB (which is not able to defend itself through the petition process) of reaching a decision that is "offensive" and "contemptuous". Mr. Garland fails to acknowledge the fact that the OEB conducted a full and fair public hearing process, soliciting submissions from any interested parties, before reaching its Decision. In so doing, Mr. Garland fails to acknowledge that the decisions of the OEB (as described in Appendix 2) are meant to protect the "public interest", and that this necessarily involves consideration of all relevant facts and arguments, and a balancing of a variety of considerations and interests.

32. In this case, the OEB received and considered submissions from "intervenors", ratepayer groups who are funded through rates and represent most of EGD's 1.9 million customers. These intervenors, representing EGD's residential and industrial customers, as well as schools and "vulnerable" ratepayers, are the ratepayer representatives who the OEB routinely relies upon to represent the interests of natural gas customers in Ontario. The issue now raised by Mr. Garland was similarly raised by several intervenors. It was only after considering the submissions of each of these intervenors that the OEB issued its Decision.

33. Mr. Garland fails to mention or consider the fact that the Consumers Council of Canada (the Council), the experienced and respected intervenor who represents the interests of most of EGD's 1.7 million residential customers[17] (who constitute the vast majority of EGD's ratepayers), acknowledged that it is appropriate for the balance in the CASDA to be recovered from ratepayers. As the Council stated in its argument, it "does not believe that EGD's shareholder should bear the risk of Board orders turning out to be invalid. If EGD's shareholder were to have to bear that risk, then the approved level of ROE [return on equity, or profit] would have to be increased."[18] Of course, for the Council to take this position is of great significance, because it is the constituency represented by the Council who will shoulder the vast majority of the rate impact resulting from the OEB's Decision.

34. Ultimately, none of the intervenors who participated in the OEB's proceeding (including the intervenors who opposed the relief sought by EGD) took any steps to challenge the OEB's Decision, either by requesting an OEB rehearing, launching an appeal to the Divisional Court or filing a petition to the LGIC. Other than Mr. Garland, none of EGD's 1.9 million ratepayers took any steps to appeal or petition the Decision.

D. Conclusion

35. As demonstrated plainly in these submissions, the OEB's Decision was correct, and clearly supportable in the circumstances. EGD requests, therefore, that Mr. Garland's petition be dismissed. In closing, EGD offers a few final thoughts as to why the LGIC ought not to direct that EGD's Application be returned to the OEB for reconsideration:

    a) A hallmark of administrative tribunals is their independence and expertise. As a result, Courts are very hesitant to interfere in the decisions made by such tribunals, doing so only in the clearest cases of error. EGD submits, with the greatest of respect, that the same principles ought to hold true when the LGIC considers whether to direct an administrative tribunal to reconsider a matter that it has already examined in detail, with the benefit of submissions from a range of impacted parties. Such a power should only be exercised in the clearest of cases. This is certainly not such a case.

    b) Similarly, EGD respectfully submits that the LGIC ought to proceed very cautiously in situations where a petition calls into question the decisions of independent administrative tribunals that are empowered by statute to make such decisions. This is particularly true in the present case, where the petition effectively attacks not only the OEB's recent Decision, but the rate orders made by the OEB over the course of many years, beginning more than a decade ago. To require the OEB to review its Decision in these circumstances could be perceived as seriously undermining the credibility of the OEB. It would certainly undermine the confidence of regulated utilities who rely on the Board to set and collect rates for service.

    c) Finally, EGD believes that it is appropriate for the LGIC to bear in mind the consequences of the OEB being asked to reconsider its Decision. In the unlikely event that the OEB reversed its Decision, there would be substantial impact on the entire public utility sector in Ontario because the shareholders (almost all of whom are municipal corporations) of all of the gas and electricity distributors that charged LPPs would then be required to fund the costs related to the ongoing class action litigation attacking their LPPs. Of course, if the OEB's Decision stands, utilities will still have to demonstrate the prudence of any litigation costs before the OEB would approve their recovery from ratepayers.

ENDNOTES

[1] These acronyms stand for the Consumers Council of Canada, who represent general residential customers (who constitute the bulk of EGD's 1.8 million customers); the Vulnerable Energy Citizens Coalition (VECC), who represent senior citizens and tenants; the Schools Energy Coalition (SEC), who represent the approximately 5000 public schools in the Province; and the Industrial Gas Users Association (IGUA).

[2] Paragraph 91 of the SCC's April 2004 Decision, which is reproduced as part of Mr. Garland's petition, can also be found in Attachment 1, at Exhibit C, Tab 1, Schedule 11 (at page 43 of 43).

[3] See paragraph 26 of Mr. Justice Cullity's Endorsement, which is found in Attachment 1, at Exhibit C, Tab 1, Schedule 23.

[4] See, for example, paragraph 70 of the SCC's April 2004 Decision, found in Attachment 1, at Exhibit C, Tab 1, Schedule 11 (at page 33 of 43).

[5] This material is publicly available on the OEB's and EGD's websites.

[6] The actual amount of these credits is set out in EGD's response to an Interrogatory in the Application, included in Attachment 1 as Exhibit I, Tab 1, Schedule 1.

[7] OEB Act, s. 36(1) (similar provisions existed in the predecessor legislation).

[8] OEB Act, s. 112.1-112.5 and 126 (similar provisions existed in the predecessor legislation).

[9] See Attachment 1, at Exhibit B, Tab 2, Schedule 5, pp. 1-3.

[10] A copy of the relevant pages from the transcript of the E.B.R.O. 499 proceeding is included in Attachment 1 as Exhibit C, Tab 1, Schedule 14.

[11] Copies of the Board's January 30, 2001 Notice and the Board Staff discussion paper in response are included in Attachment 1 as Exhibit C, Tab 1, Schedule 15.

[12] Copies of the Board's directive to electricity distributors and the Board's letters of October 1, 2001 to gas distributors are included in Attachment 1 as Exhibit C, Tab 1, Schedule 17.

[13] A copy of the Court of Appeal's decision is included in Attachment 1 as Exhibit C, Tab 1, Schedule 10.

[14] See *Enbridge Gas Distribution Inc. v. Ontario Energy Board*, 2005 CanLII 4941 (Ont. Div. Ct.), at para. 8, citing *State of Missouri ex. rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923) at 289; *British Columbia Electric Railway Co. Ltd. v. British Columbia (Utilities Commission)*, [1960] S.C.R. 837 at 854; *Transcanada Pipelines Ltd. v. Canada (National Energy Board)*, [2004] F.C.J. No. 654 (C.A.) at para. 32; *West Ohio Gas Co. v. Public Utilities Commission of Ohio (No.1)*, 294 U.S. 63 (1935) at 68.

[15] *Enbridge Gas Distribution Inc.* v. *Ontario Energy Board*, 2005 CanLII 4941 (Ont. Div. Ct.), at para. 9 – the Divisional Court's decision, the cited portion of which was approved by the Ontario Court of Appeal (2006 (CanLII 10734 (Ont. C.A.), at paras. 8 to 11), endorsed the approach that had been set out in EGD's 2002 rate case : EB-2001-0032, at paras. 3.12.1 to 3.12.5.

[16] If that were not the case, then a utility would cease engaging in any ratepayer beneficial activities that were in any way risky or controversial. There is ample precedent for the proposition that a utility is entitled to recover its costs for activities undertaken for the benefit of ratepayers, even where those costs involve subsequent litigation challenging the propriety of the activities. See, for example, *Mountain States Telephone and Telegraph Company* v. *FCC*, 939 F.2d 1035 (U.S. Court of Appeals, D.C. Cir., 1991); see also *Iroquois Gas Transmission System* v. *FERC*, 145 F.3d 398 (U.S. Court of Appeals, D.C. Cir., 1998).

[17] In the Council's request for intervenor status in the Application, it stated:

> The Council represents the interests of the broad array of consumers of natural gas in Ontario. The granting of EGD's application would have an impact on those residential consumers. It is appropriate that those consumers be represented in the application. The Council has represented the interests of residential consumers in a number of applications by EGD in which the treatment of the CASDA was considered.

[18] See the Council's Argument, found as Attachment 2, at para. 16.

Tab A

Appendix 1: Background and Context to the Decision

Background and Context to the Decision

(i) The Ontario Government mandated the use of LPPs

1. In 1978, a new form of LPP was proposed for use by Ontario's utilities.[1] The new form of LPP was a product of the efforts of a joint utility task force (including representatives of the Ontario Natural Gas Association, the Ontario Municipal Water Association, the Association of Municipal Electrical Utilities, the Ontario Municipal Electrical Association and Ontario Hydro) operating under the auspices of the Ministry of Energy. At the time, gas, electric and water utilities across the province operated under a myriad of billing, collection, credit and termination of service policies. The function of this task force was to review these practices and develop common guidelines that could be applied province-wide.

2. The task force developed a set of guidelines titled "Residential Guidelines for Credit Collection and Cut-Off Practices of Public Utility Suppliers", which were introduced to the Ontario Legislature on November 21, 1978 by James Auld, the Minister of Energy. Minister Auld stated in the Legislature that it was his hope and expectation that the Guidelines would be adopted by most of the public utilities in the near future. He also said that he would be communicating with the various utility organizations in the Province and asking them to encourage their members to adopt the Guidelines. The Minister concluded by 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.[2]

3. Shortly thereafter, the Company proposed a new form of LPP, which was in conformance with the Guidelines, and it was approved by the OEB in an April 2, 1980 decision.[3] This new form of LPP was a one-time charge equal to 5% of the customer's current month's gas charges. Other Ontario utilities, including Union Gas and most electricity distributors also adopted the late payment penalty recommended by the Guidelines.[4]

(ii) EGD's LPP was approved by the OEB each year

4. EGD's LPP has been part of the Company's Board-approved rate orders for every year when such orders were issued from 1981 to the present.[5] As such, the LPP is a part of the "just and reasonable" rates approved by the OEB for EGD each year.

5. Once a final rate order is issued, the Company is legally required to ensure that its charges are consistent with the provisions of the rate order. Indeed, if the Company fails to abide by its rate orders, it faces the prospect of sanctions, including substantial fines. Accordingly, the Company

was obligated to implement and charge its LPP, as soon as the rate orders including the LPP became effective.

6. EGD's rates have generally been set through the cost of service proceeding approach described in Appendix 2. Each year, the Company's prefiled evidence in support of its proposed rates discussed the inclusion and purpose of the LPP as part of EGD's rates.[6] In each rate case proceeding, it was open for intervenors, representing different constituencies of customers and other stakeholders, and for OEB Staff, representing the public interest, to challenge any aspect of the Company's filing. To the best of the Company's knowledge, the LPP was only ever challenged once in the Company's rate proceedings. Otherwise, the Company's LPP was presented and approved each year, generally without debate and often as part of a settlement agreement with all interested stakeholders.

7. In 1988, the objection of one of the Company's customers (Julius C. Olsen) to the LPP was addressed as an issue in an EGD rate case. The customer objected to the LPP and said that it became effective too quickly, as compared to other late payment penalties for credit cards. He further objected to the fact that the penalty was not based on a commercial interest rate. In response to the customer's complaint, the OEB determined that the LPP was valid, and was consistent with Government policy, stating:

> In the Board's view, the Company can hardly be criticized for voluntarily adopting and adhering to the Government's own guidelines, in respect to both the time allowed for payment and the penalty. … The Board takes the position that the guidelines ought to be followed unless there is good reason to change them. … The Company's late payment policy will remain unchanged.[7]

(iii) <u>EGD's customers benefited from the LPPs</u>

8. The LPP is intended to, and does, protect ratepayers, by acting as an encouragement to pay accounts in a timely manner. When this happens, the Company's recoverable costs for working cash requirements and bad debt exposure, as well as administrative costs, are reduced. This reduces the total revenue that EGD is allowed to recover in rates. In addition, the forecast LPP revenues are credited as an offset to the amount the Company can recover in distribution rates. As a result, the use of LPPs reduces distribution rates.[8]

9. The benefit enjoyed by ratepayers has been substantial. During the years from 1981 to 2002, a total of $126.7 million in LPP revenues was credited to ratepayers. This meant that the total amount that EGD was authorized to collect in distribution rates over that period was reduced by an average of more than $5 million per year. None of this benefited EGD.

10. As the LPPs are not intended for its benefit, EGD is indifferent to whether it receives its revenues entirely from distribution rates or in part from LPPs. Most ratepayers (those who pay their accounts in a timely fashion) are not indifferent. They benefit from the fact that their rates are lowered because of LPP revenues and because of reduced operating costs resulting from the Company not having to chase as many delinquent ratepayers.

(iv) Mr. Garland's class action

11. Mr. Garland launched a proposed class action proceeding against the Company in April 1994. Mr. Garland alleged that some of EGD's Board-approved LPPs collected from customers since 1981 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. The plaintiff's argument was that, depending on when a customer paid a bill, the effective rate of interest associated with the LPP could have been higher than 5%. For example, if a customer paid his or her bill only a few days late, then the 5% LPP would be applied, and on a notional annualized basis the effective rate of interest paid in some instances could be substantially more than the allowable maximum. In response, the Company filed a Statement of Defence, asserting a wide range of defences.[9]

12. After the pleadings were exchanged, the Company brought a motion for summary judgment in 1994. This motion, which sought the dismissal of the case, was granted by Mr. Justice Winkler (now Chief Justice of Ontario) in February 1995. Mr. Garland initiated an appeal of Mr. Justice Winkler's decision in March 1995. The Ontario Court of Appeal unanimously upheld the lower Court's decision and dismissed Mr. Garland's appeal in September 1996. Mr. Garland sought and was granted leave to appeal by the Supreme Court of Canada (SCC), which heard his appeal in March 1998. In October 1998, a majority of the SCC granted the appeal and restored Mr. Garland's claim. The SCC returned the matter to the trial court in Ontario for disposition.[10]

13. Following the SCC's 1998 decision, 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 defences to the action were valid. In April 2000, the Court issued its decision, which agreed with the Company's position and again dismissed the Garland class action. In his decision, Mr. Justice Winkler stated that "the OEB is the most appropriate forum to deal with the matters outlined in the plaintiff's cause of action". (at para. 78)[11] Mr. Garland appealed the April 2000 decision of Mr. Justice Winkler to the Ontario Court of Appeal, and in

December 2001 a majority of the Ontario Court of Appeal upheld the lower Court's decision dismissing the action.[12]

14. After the Court of Appeal's December 2001 decision, Mr. Garland sought and was granted leave by the SCC to hear an appeal of the Ontario Court of Appeal's second decision. In April 2004, the SCC 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, which is the date on which Mr. Garland initiated his action.[13] The matter was then returned to the Ontario Court (trial division) for determination of the outstanding issues.

15. Similar class proceedings have been brought against Union Gas, as well as Toronto Hydro and other electricity distributors in Ontario.[14] These other class proceedings were put on hold pending the final resolution of the legal and factual issues in the Garland proceeding.

(v) Settlement of the Garland class action

16. After the 2004 SCC decision, the Garland proceeding was referred back to the Ontario Superior Court for it to proceed to trial. Before a trial was held, the parties reached a settlement in early June 2006, involving payment of $22 million. This settlement, which resulted from a mediation process facilitated by Chief Justice Winkler (at the time a judge of the Ontario Superior Court), was later approved by the Court.[15]

17. The settlement, to which Mr. Garland is a party, clearly provides that no admission of liability is being made by EGD.[16] Indeed, contrary to the inflammatory language in Mr. Garland's petition, at no time has there ever been any finding that EGD has any civil or criminal liability for any specific LPPs that it collected.

18. The settlement represents a compromise between the positions of the parties, with each side recognizing that it might not ultimately prevail. At that time, the plaintiff was claiming entitlement to more than $74 million in damages (based on the plaintiff's approximation of LPPs charged between 1994 to 2002) plus interest and costs. On the other hand, EGD's primary position was that the effective interest rates for its LPPs never exceeded the legal limit, meaning that there were no damages. The settlement does not represent any approximation of LPPs that EGD collected that may have been in excess of the legal limit on interest.

19. While EGD did not, and does not, concede that it has any liability in this matter, there was risk that a Court might determine otherwise. As such, the $22 million settlement is fair and appropriate from the perspective of the Company and its ratepayers. The fairness of the

settlement amount, from the perspective of the Company and ratepayers, can be seen in costs associated with the potential outcomes from a trial:

a) On the one hand, assuming that the Company had been successful (with no damages, or almost no damages awarded), the trial process would have been expensive. First, the Company estimates that it would have cost between $500,000 and $7 million to obtain and organize either an additional representative sample of, or all of the relevant billing data (which runs to tens of millions of transactions) for all of the LPPs charged in the 1994 to 2002 period and to then have the necessary actuarial and financial analysis completed. Second, there would have been substantial expert and legal fees incurred by the Company to proceed to trial. Third, given the history of the case, it is certainly reasonable to expect that the plaintiff would have appealed any outcome that was deemed unsatisfactory, adding to the costs of the proceeding. Finally, any award in favour of the plaintiff, no matter how small, would have exposed the Company to pay some amount of costs to the plaintiff's counsel.
b) On the other hand, if liability could be established, the plaintiff was seeking $74 million in damages, plus interest and costs. In terms of interest, the plaintiff was seeking compound interest at a high rate for the entire period in question (some of which goes back 12 years and all of which goes back more than 5 years). Any award of damages would, therefore, have been substantially increased with the addition of the appropriate amount of interest. In terms of costs, the plaintiff's counsel indicated that the value of its time to date amounted to millions of dollars (without interest). Of course, the plaintiff's legal costs would have increased if a trial had taken place. In these circumstances, even a modest award of damages against the Company would have become a large overall award, when interest and costs are included.

20. The settlement funds were allocated among fees, legal costs and a substantial 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	$311,825.30
Disbursements and GST not paid by Class Proceedings Fund	$31,050.55
Plaintiff's Counsel's Fees (including $95,000 compensation to Mr. Garland)	$10,130,469.20
GST	$609,154.95
Total	$22,000,000

21. Most of the settlement proceeds were directed to pay legal and related costs of Mr. Garland and his counsel. First, the settlement required the Company to make payments of approximately $10.1 million to class counsel (who were instructed by Mr. Garland) on account of the plaintiff's legal fees and expenses and Mr. Garland's own compensation.[17] The amount to be paid to Mr. Garland remained in dispute as between class counsel and Mr. Garland, until an appeal was brought to the Ontario Court of Appeal in December 2007. Ultimately, Mr. Garland was paid compensation totalling $95,000 for his role as representative plaintiff.[18] There were also payments on account of GST and repayment of advances from the Class Proceedings Fund. Finally, the settlement provides for an additional payment to the Class Proceedings Fund, operated by the Law Foundation of Ontario, of $1,917,500.[19]

22. The $9 million portion of the settlement proceeds that was not directed to Mr. Garland and his lawyers, and related litigation costs, was donated to the Winter Warmth Fund, which is administered by the United Way.[20] The Winter Warmth Fund provides eligible low-income customers of participating utilities with financial assistance for the payment of their natural gas and electricity bills. Initially launched by EGD, Toronto Hydro and the United Way in 2004, other Ontario natural gas and electric utilities have since joined the Winter Warmth Fund.[21]

23. There were two Court hearings to approve the settlement, held before Mr. Justice Cullity of the Ontario Superior Court on September 6 and November 21, 2006.[22] In his Endorsement after the first hearing, the Judge stated 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."[23] After a few outstanding issues were addressed to the Judge's satisfaction, the settlement was approved on November 21, 2006. Among other things, the effect of the Court-approved settlement in this case is that any future claims by customers related to the LPP are now barred, unless a party gave explicit notice that it wishes to be excluded from the settlement so that it can pursue its own specific claim.[24]

(vi) <u>The CASDA</u>

24. After Mr. Garland began his lawsuit in 1994, the Company requested approval from the OEB to establish a deferral account to to record the costs arising from the Company's defence of the class action. As described in Appendix 2, a deferral account is used to collect utility costs that cannot be forecast, so that a later determination can be made as to whether the costs are properly recoverable from ratepayers.

25. The Board first approved the establishment and operation of the Class Action Suit Deferral Account (the CASDA) in February 1995. In the years from 1995 to 2004, all parties involved in EGD's (mostly) annual rate proceedings agreed to the continuation of the CASDA and, on a number of occasions, agreed that it was appropriate for the costs that had been incurred and recorded to date in the CASDA be recovered from ratepayers, as part of distribution rates.[25] This was a recognition of the fact that the costs recorded in the CASDA were prudently incurred in the course of EGD conducting its business.

26. Following 2004, the CASDA was continued each year up to 2007, however, the issue of whether the amounts recorded in the account should be cleared to rates was deferred until the Board made its Decision in this Application. The costs recorded in the 2007 CASDA, which EGD sought to recover through the Application, include the $22 million settlement payment, as well as interest, and the Company's own legal, actuarial and data extraction costs.

(vii) EGD's Application for recovery of amounts in the CASDA

27. In September 2007, in accordance with directions from the OEB as to the manner in which it should make an application for recovery, the Company applied for permission to recover the balance in the 2007 CASDA from ratepayers.[26] In its Application materials (found as Attachment 1 to these submissions), the Company set out the facts that support the Company's application for full recovery of the amounts recorded in the 2007 CASDA.

28. In October and November 2007, in accordance with the OEB's Letter of Direction, EGD published Notice of its Application in 41 English language newspapers in Ontario, including the Toronto Star. This Notice of Direction informed interested parties of the ways in which they could participate in the Application. In response, eight parties sought to participate in the Application as intervenors. Additionally, at least one individual submitted comments to the OEB. In December 2007, the OEB issued its Procedural Order, setting out the process through which it would consider the Application, including the opportunities for intervenors to ask EGD questions about the evidence, as well as the process for parties to submit written argument as to the appropriate decision to be made on the Application.

29. A variety of parties, representing the spectrum of EGD's customers, fully and actively participated in the Application. The most active intervenors were: the Council, who represent general residential customers (who constitute the bulk of EGD's 1.8 million customers); the Vulnerable Energy Citizens Coalition (VECC), who represent senior citizens and tenants; the Schools Energy Coalition (SEC), who represent the approximately 5000 public schools in the

Province; and the Industrial Gas Users Association (IGUA), who represent some of EGD's largest industrial customers; as well as Union Gas and the Electricity Distributors' Association. Notably, Mr. Garland himself did not participate.

30. While several of the intervenors filed argument opposing EGD's Application, the Council filed argument indicating that many factors militate in favour of granting EGD the relief it sought and indicating that it generally does not oppose the approval of EGD's Application. The nub of the Council's argument was that EGD should not bear the risk where it acts pursuant to a Board order or, put another way, EGD's shareholder should not bear the risk of Board orders turning out to be invalid. Coming as it does from the representative of the majority of EGD's ratepayers, the Council's apparent support for EGD's Application is highly significant. Attached to these submissions, as Attachment 2, is a copy of the Council's submissions to the OEB.

31. The OEB issued its Decision on February 4, 2008, permitting EGD to fully recover the balance in the CASDA in rates over five years, with a per customer impact of approximately $2.70 per year. The OEB took all relevant facts and circumstances, including the 2004 SCC decision, into account and determined that it is appropriate for EGD to recover the prudently incurred costs that arise from defending Board approved charges that are ultimately found to be invalid.

(viii) <u>EGD's LPP was changed at the appropriate time</u>

32. A final matter that underlies the logic of the OEB's Decision is the fact that EGD, acting under direction from the OEB, changed the LPP at the appropriate time, but not before. While Mr. Garland now seems to assert that the LPP should have been changed in 1994 when his lawsuit began, neither the Ontario Courts who initially considered the case, nor EGD's regulator, nor the intervenors involved in EGD's rate proceedings, asserted or agreed with this view. Mr. Garland did not himself make any such request or demand to the OEB. As such, it is reasonable that costs that now arise as a result of maintaining the old form of LPP, which benefited ratepayers, should be recoverable in rates.

33. Up until the time that the SCC issued its October 1998 decision, no participant in OEB proceedings expressed any disagreement with the Company's position, as set out in its Statement of Defence, that the LPP was not subject to the provisions of section 347 of the *Criminal Code*. A respected trial judge (who is now Ontario's Chief Justice) and three judges of the Ontario Court of Appeal agreed. Accordingly, there seemed to be no reason to seek to change the LPP.

34. Shortly after the SCC's October 1998 decision, on the first day of a Union Gas rate proceeding, the OEB made clear that it did not wish to address whether the LPPs being used by Ontario utilities should be changed until after the Ontario Court made a new determination on the Garland proceeding, stating that:

> Another matter requires comment from the Board. The Board has noted the Supreme Court of Canada's recent decision in Garland vs. Consumers Gas, a decision concerning the late payment penalty provisions of that utility. The Supreme Court has referred the matter back to the Ontario Court (General Division) for determination on the facts of the case. Given the similarity between the late payment provisions of Union Gas and the one under consideration by the Court, the Board wishes to inform the Company [Union] and intervenors that the Board does not intend, on its own motion, to address this matter in [this proceeding].
>
> Rather, the Board will await the Court's determination on this matter before addressing the current late payment penalty provisions of Union and Enbridge Consumers Gas.[27]

35. In January 2001, following the Ontario Superior Court of Justice's April 2000 decision (which dismissed Mr. Garland's claim and found that the OEB was the appropriate forum to address issues related to the LPP), the Board issued a Notice indicating that it was appropriate "at this time" for the Board to review its policy with respect to setting of LPPs for all utilities. In connection with this process, OEB Staff issued a discussion paper titled "Electricity & Gas Distributor Late Payment Charge Policy", setting out the history of LPPs, and noting that they were the result of the Guidelines issued by the Ontario Government, but also noting that it may be time to revisit LPPs in light of the SCC's 1998 decision.[28] Many parties submitted comments in response to the Board Staff discussion paper, often noting that changes to the LPP would result in increased rates for all customers. [29]

36. On October 1, 2001, after reviewing the recommendations of OEB Staff, and the submissions of stakeholders in response, the Board directed gas and electricity distributors to review their late payment policies and establish collection policies in accordance with common commercial practices for overdue payments, reflecting the time-value of money and consistent with the specific requirements of the *Criminal Code*, section 347.[30] Around the same time, in its December 2001 decision, the Court of Appeal made it clear that the OEB has exclusive jurisdiction over setting the LPP and should take steps to amend EGD's LPP.[31] On the other hand, however, the Ontario Court of Appeal specifically found that it was appropriate for the Board to have waited until that time, allowing the Courts to address the issues in the Garland proceeding, before requiring changes to the LPP:

> The Board, quite properly, has advised that it will await the court's resolution of these proceedings before addressing the LPP issue: see Board statement in E.B.R.O. 499 (30 November 1998). (para. 34)[32]

37. EGD then moved quickly, under the direction of the Board, to reduce the LPP charge. Effective February 1, 2002, EGD's LPP was reduced to a one time 2% charge. As before, this charge was only applicable to the customer's current month's gas charges and the LPP did not apply to other charges on the customer's bill. The LPP remained a non-recurring charge that is not compounded. At the time the LPP was reduced from 5% to 2% the Company also made several changes to the way its charges are presented on the EGD bill. Changes were also made to EGD's terms and conditions regarding billing and payment to clarify when charges are due and when the LPP charge becomes applicable. Thereafter, there was no concern that the LPP might result in payments that exceeded the interest rate limit.

ENDNOTES

[1] Prior to that time, in 1975, as part of EGD's annual rate proceeding, the OEB approved a different form of a 5% LPP to be charged by the Company to customers whose bills were outstanding beyond a 10 day grace period. This replaced the previous LPP of 10% that had applied to most customers. The OEB's decision 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". The OEB also noted that "if a bill is paid very soon after the due date, the penalty can, if calculated as an interest charge be shown to represent a very high rate of interest. However, all customers can avoid it by paying their bills on time". The OEB also observed that, although interest charged on overdue accounts (as opposed to flat penalty charges) has theoretical appeal, "it gives little incentive to pay by a named date, gives little weight to collection costs and seems complicated": E.B.R.O. 302-II Decision with Reasons, found in Attachment 1 as Exhibit C, Tab 1, Schedule 1.

[2] The Minister's statement (found in Attachment 1 as Exhibit C, Tab 1, Schedule 2) included the following:

> Late payment charges should not be imposed if payment is mailed within 16 days of the billing date. Late payment charges should not exceed 5 percent. Compliance with the guidelines is not legally required, but they are the benchmark of the practices accepted as reasonable by the majority of utility suppliers in Ontario.

[3] E.B.R.O. 369-II Decision with Reasons is included in Attachment 1 as Exhibit C, Tab 1, Schedule 3.

[4] As part of Ontario Hydro's "Standard Application of Rates", most electricity distributors also adopted LPPs where a flat penalty of 5% was imposed on bills that were more than 16 days overdue. The "Standard Application of Rates" was deemed to apply to each local distributor unless a separate tariff was specifically approved. A copy of the relevant sections of Ontario Hydro's Standard Application of Rates is included in Attachment 1, as Exhibit C, Tab 1, Schedule 4. The "Standard Application of Rates" discussed the LPP and provided, among other things, that:

> The late payment charge is implemented according to the voluntary Residential Guidelines for Credit, Collection and Cut-Off Practices of Public Utility Suppliers tabled in the Ontario Legislature in 1978. …. Legally, it is considered to be a pre-estimate of damages and therefore should be a reasonable and conscionable amount to cover the costs associated with collection and reconnection activities related to non payment of account.

[5] In the period of time from 1981 to 1989, the OEB rate orders for Enbridge Gas Distribution approved rate schedules that were attached to the rate orders. These rate schedules described the LPP, stating as follows (for residential customers):

> PENALTY FOR LATE PAYMENT
>
> When payment in full is not made within sixteen (16) days of the date of mailing, or hand delivery of the bill, a penalty of five per cent (5%) of the current amount billed shall be levied. Where payment is made by mail, payment will be deemed to be made on the date postmarked.

Commencing in 1989, the OEB rate orders applicable to EGD indicated that the provisions of the Company's Rate Handbook applied to the Company's rate schedules. Part III of the Rate Handbook that was approved for the Company starting in 1989 described the LPP and provided as follows:

> SECTION F - PAYMENT CONDITIONS
>
> Payment in full should be received by the Company, or by an institution authorized by the Company to accept payments on its behalf, on or before the due date specified in the monthly bill, which date is at least ten (10) days (sixteen (16) days in the case of Rates 1, 2, 6 and 9), after the date of rendering the bill. A penalty of five (5) percent of the unpaid portion of the current amount billed shall be added to the amount due if payment is not received as outlined above. When payment is mailed, the penalty will be added if the postmark on the envelope containing such payment is later than the due date.

This provision of the Company's Rate Handbook, which describes the Board-approved LPP applying to the Company's rates, was approved annually but remained unchanged until 2002

[6] For example, the Company's prefiled evidence in each of its rate cases from 1994 to 2002 indicated that "[The Company] will continue to apply the late payment penalty as a means of ensuring that all customers pay promptly so as to minimize the costs of carrying and collecting accounts that must be borne by all customers in rates charged for the sale of natural gas": See Attachment 1, at Exhibit B, Tab 2, Schedule 5, pp. 1-3 and Exhibit C, Tab 1, Schedule 29.

[7] A copy of the relevant pages from the E.B.R.O. 452 Decision with Reasons is included in Attachment 1 as Exhibit C, Tab 1, Schedule 5. The OEB also approved the same form of LPP for Union Gas each year. In response to a challenge to the Union Gas LPP in its 1988 rate case, the OEB stated that "The Board is reluctant to change the status quo, which is based on Government of Ontario guidelines, without more compelling evidence: copies of the relevant sections of the E.B.R.O. 412-III and E.B.R.O. 456 cases are included in Attachment 1 as Exhibit C, Tab 1, Schedule 6.

[8] Forecast LPP revenue is allocated and credited to ratepayers on the basis of customer numbers (meaning that all customers receive equal benefit).

[9] Copies of the pleadings in the Garland proceeding are included in Attachment 1 as Exhibit C, Tab 1, Schedule 7.

[10] Copies of each of the Court decisions referred to above are included in Attachment 1 as Exhibit C, Tab 1, Schedule 8.

[11] A copy of the decision of the Ontario Superior Court referred to above is included in Attachment 1 as Exhibit C, Tab 1, Schedule 9.

[12] A copy of the Court of Appeal's decision is included in Attachment 1 as Exhibit C, Tab 1, Schedule 10.

[13] A copy of the SCC's April 2004 decision is included in Attachment A as Exhibit C, Tab 1, Schedule 11.

[14] Copies of the pleadings in the proceedings against Union Gas and Toronto Hydro are included in Attachment 1 as Exhibit C, Tab 1, Schedule 12.

[15] Counsel for the plaintiff filed extensive materials with the Court in connection with a subsequent motion for approval of the settlement. These materials set out the background to the mediation, and the reasons why the proposed settlement is fair and appropriate. The Notice of Motion, and supporting affidavit (without attachments), are included in Attachment 1 as Exhibit C, Tab 1, Schedule 21.

[16] The specific terms of the settlement are described in the Minutes of Settlement that are included in Attachment 1 as Exhibit C, Tab 1, Schedule 22.

[17] The total $11,082,500 paid on account of the plaintiff's legal fees and expenses and the class representative's compensation is divided such that $2,825,000 relates to the plaintiff's costs, agreed to on a "partial indemnity basis", with the balance of $8,227,500 relating to the fees of class counsel, including Mr. Garland who will receive $95,000. From the total $11,082,500 in class counsel fees, the payments set out in the chart above related to GST ($609,154.95), the repayment of disbursements to the Class Proceedings Fund ($311,825.30) and disbursement and GST not paid by Class Proceedings Fund ($31,050.55) must be made. As seen in the chart, this leaves a net payment of approximately $10,130,500 in counsel fees.

[18] *Garland v. Enbridge Gas Distribution Inc.*, 2008 ONCA 13 (CANLII).

[19] The Class Proceedings Fund provides grants to support the costs of class actions which it deems worthy of support. In the Garland proceeding, the Class Proceedings Fund provided financial support to class counsel for disbursements and other costs. Ontario Regulation 771/92 under the *Law Society Act*, which is the legislation governing the Class Proceedings Fund, provides that a party who has received support from the fund must pay 10% of any judgment or settlement amount to the Class Proceedings Fund. The amount being paid to the Fund is equivalent to 10% of the settlement, exclusive of the $2,825,000 agreed upon for the plaintiff's costs on a partial indemnity basis.

[20] Following the SCC's April 2004 decision, it is the LPPs collected between April 1994 (when the class action commenced) and January 2002 (when EGD's LPP was changed) that remained in issue at that time. All parties recognized that it would be unduly expensive and ineffective (given the small amount at issue on a per-customer basis) and perhaps impossible to identify all the ratepayers who had paid LPPs, and whether

any of them had paid interest in excess of the legal limit. It was further recognized that even if this could be done, many of those ratepayers will have moved and/or may no longer be customers of the Company. Finally, it would be disproportionately expensive to administer the modest refunds that could be at issue. As a result, parties agreed that it is appropriate that amounts paid in settlement of this action would be directed to a charitable end that would benefit the same or a similar class of persons who would otherwise receive the benefits of any settlement. This is referred to as a "*cy-pres* distribution".

[21] The manner in which this contribution will be used is set out in the Implementation Order of the Court which provides that "an amount equal to the estimated annual income from the funds shall be used to assist Enbridge customers, who qualify under the Winter Warmth Fund program operated by the United Way and its affiliates, to pay their gas bills". A copy of the 2006 Annual Report for the Toronto Winter Warmth Fund, as well as a letter from the United Way of Toronto dated October 20, 2006 addressing how the endowment resulting from the settlement of the Garland proceeding will be used, are included in Attachment 1 as Exhibit C, Tab 1, Schedule 28. The Company has annually contributed approximately $300,000 to the Winter Warmth Fund every year since its inception. As part of the settlement, the Company has also agreed that it will continue, for at least five years (or until it has given two years notice), to donate at least $300,000 per year to the Winter Warmth Fund.

[22] Copies of the Endorsement and Reasons for Decision of Mr. Justice Cullity from the September 6 and November 21, 2006 hearings are found in Attachment 1 as Exhibit C, Tab 1, Schedule 23 and Exhibit C, Tab 1, Schedule 26.

[23] Endorsement and Reasons for Decision of Mr. Justice Cullity from the September 6, 2006 hearing, at para. 25.

[24] Only four account-holders gave notice that they are opting out of the settlement and none of these customers have pursued any claim against the Company.

[25] Copies of the prefiled evidence, settlement proposals and Board decisions from 1995 to 2004 related to CASDA are included in Attachment 1 as Exhibit C, Tab 1, Schedule 29.

[26] A copy of the Company's letter to the Board on July 20, 2006 informing the OEB of the settlement of the Garland class action and the Board's August 17, 2006 letter in response, setting out its expectations of the OEB proceeding to consider recovery of the settlement costs, are included in Attachment 1 as Exhibit C, Tab 1, Schedule 31.

[27] A copy of the relevant pages from the transcript of the E.B.R.O. 499 proceeding is included in Attachment 1 as Exhibit C, Tab 1, Schedule 14. Just before this time, the Board had sent a letter indicating that it wished to have discussions with EGD and Union Gas to discuss issues around the then-current LPPs and a meeting was held amongst Board Staff, Union Gas and EGD in November 1998 to address these issues : a copy of a letter from the OEB to the Ontario gas utilities, dated November 6, 1998, is included in Attachment 1 as Exhibit C, Tab 1, Schedule 13.

[28] Copies of the Board's January 30, 2001 Notice and the Board Staff discussion paper are included in Attachment 1 as Exhibit C, Tab 1, Schedule 15.

[29] Copies of submissions from some interested parties, including EGD, in response to the Board Staff discussion paper are included in Attachment 1 as Exhibit C, Tab 1, Schedule 16.

[30] Copies of the Board's directive to electricity distributors and the Board's letters of October 1, 2001 to gas distributors are included in Attachment 1 as Exhibit C, Tab 1, Schedule 17.

[31] A copy of the Court of Appeal's decision is included in Attachment 1 as Exhibit C, Tab 1, Schedule 10. In that decision, the Court stated:

> Allowing the plaintiff to bring this action in the courts does not encroach on the Board's exclusive jurisdiction over setting the LPP. Regardless of the success of the plaintiff's claim for restitutionary relief, the Board will need to design a new penalty for late payments that does not have the capacity to result in a contravention of s. 347(1)(b).

[32] The Board referred to this finding of the Ontario Court of Appeal in its May 4, 2004 "Factsheet" titled "Utility Late Payment Penalties", where it stated:

> While these issues [related to the legality of LPPs] were being addressed by the Courts, the Board carried out stakeholder consultations to review utilities' policies on late payment penalties and interest rates. The 5% penalty remained in place during this period of court proceedings and stakeholder consultations, which the Ontario Court of Appeal stated was "quite properly" done.

Tab B

Appendix 2: The OEB's Ratemaking Role

The OEB's Ratemaking Role

1. In order to understand the context for the OEB's Decision, it is instructive to first consider the OEB's role and expertise in setting rates for Ontario's natural gas distribution utilities. The OEB is an economic regulator. Among other things, it regulates the Province's natural gas industry to protect the public interest. One of the OEB's primary roles is to set "just and reasonable" rates that gas distribution companies can charge for the delivery of natural gas to consumers (the cost for the natural gas commodity itself is not regulated, but gas utilities cannot make a profit from the commodity). [1]

2. In setting "just and reasonable rates", a regulator is directed to fix delivery rates which, in all relevant circumstances, are fair to the consumer on one hand, and which, on the other hand, provide the utility with the opportunity to obtain a fair return on the capital invested.[2]

3. This approach is meant to ensure that consumers are protected with respect to prices and quality of service and the utility is incented and able to finance its operations and any required investments, so that its operations are safe and sustainable.[3] This balancing of interests is referred to as the "regulatory compact".[4]

4. The OEB has traditionally set the "just and reasonable rates" that may be charged by gas distribution utilities through rate hearings conducted on a "cost of service" basis.[5] Cost of service rate proceedings before the OEB are often contested and lengthy. On the one hand, the utility presents its case, including the rationale for why the rates it seeks are just and reasonable. On the other hand, intervenors representing customer groups and OEB Staff, representing the public interest, set out the reasons why elements of the utility's position are unsupported, generally arguing that rates should be less than the utility's proposal. The OEB assigns a panel of members (between one and three) to hear a case. This panel considers all of the evidence and argument of the parties, and issues a written decision. The role of intervenors in this process is critical, as they provide the OEB with insight as to the concerns and positions of all ratepayers. In recognition of the critical role played by intervenors, the OEB's rules provide that the lawyers, consultants and experts representing approved intervenors in rate proceedings are entitled to have the utility pay their costs of participating. Partly as a result of this funded participation, established intervenors in Ontario rate proceedings, who represent the range of residential, commercial and industrial customers,

have developed substantial expertise and their views are often very influential in the OEB's decisions.

5. In Phase I of a cost of service proceeding, the Board determines the total revenue requirement that the utility is allowed to recover from ratepayers by looking at the utility's full costs of providing service, which includes the expenses of operations and maintenance, depreciation and taxes, as well as a return on capital investment, to determine revenues required to provide safe and reliable service. In Phase II, the resulting revenue requirement is then divided amongst the utility's rate paying consumers on a rate class basis (i.e., residential, commercial, industrial, etc.), based upon a cost allocation exercise where the costs attributable to serving each rate class are allocated to that rate class, so that the rates charged to each rate class are consistent with the cost of serving those customers. The approved rate of return (currently less than 9%) that EGD is allowed to recover on its investment is predicated on the OEB approving rates that allow the Company the opportunity to fully recover the revenue requirement approved by the Board from all of its ratepayers.

6. As part of the Phase II exercise, the Board looks at other revenues that may be obtained from members of a particular rate class, to offset the revenue requirement that may be recovered from that rate class in distribution rates. One example of this relates to LPPs. In each year, the forecast total of LPP revenue is credited to each of the Company's rate classes, on a pro rata basis, meaning that the amount that may be recovered from each rate class in distribution rates is reduced by the amount of that credit.[6]

7. Typically, a utility's rates are set in advance, based on a forecast of what the utility's costs will be in a future period. There are some costs, however, that cannot be forecast with sufficient precision to be fully included in this process. There are other costs that arise from time to time, outside the utility's control, that are properly payable by ratepayers even though they are not included in the forecast of costs. To deal with these situations, utilities use "deferral" and "variance" accounts to record the costs, and then, once the costs are finalized, seek permission from the OEB to recover the balance in such accounts on the basis that the costs have been prudently incurred.[7]

8. As the economic regulator of Ontario's natural gas distribution utilities for almost 50 years, and now the economic regulator of electricity distribution companies, the OEB has developed considerable experience and expertise in setting "just and reasonable" rates. Moreover, the

economic regulation of gas distribution companies occurs throughout North America and, over the decades, has generated long established principles of utility regulation which are consistently applied by regulators like the OEB and that are recognized and accepted by the Courts. In recognition of the OEB's independence, experience and expertise, the Courts of Ontario have shown themselves hesitant to interfere with the Board's exercise of its jurisdiction, stating, for example, "[w]here a regulatory tribunal, acting within its jurisdiction, makes an order in the public interest with the experience and understanding of what that interest consists of in a specialized field accumulated over many years, the Court will be especially loath to interfere."[8]

ENDNOTES

[1] The Ontario Divisional Court recently described the OEB's role in this regard in *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, 2008 CanLII 23487, at paras. 39-40, where it stated that:

> The Board's regulatory power is designed to act as a proxy in the public interest for competition in view of a natural gas utility's geographical natural monopoly. Absent the intervention of the Board as a regulator in rate-setting, gas utilities (for the benefit of their shareholders) would be in a position to extract monopolistic rents from consumers, in particular, given a relatively inelastic demand curve for their commodity. Clearly, a prime purpose of the [*Ontario Energy Board*] *Act* and the Board is to balance the interests of consumers of natural gas with those of the natural gas suppliers. The Board's mandate through economic regulation is directed primarily at avoiding the potential problem of excessive prices resulting because of a monopoly distributor of an essential service.
>
> In performing this regulatory function, it is consistent for the Board to seek to protect the interests of *all* consumers vis-a-vis the reality of a monopoly. The Board must balance the respective interests of the utility and the collective interest of all consumers in rate setting.

[2] The Supreme Court of Canada (SCC) has noted that "fair return" in this context means that the utility is allowed as large a return on the capital invested in its enterprise as it would receive if investing the same amount in securities with an attractiveness, stability and certainty equal to that of the utility's business: *Re Union Gas Ltd. and Ontario Energy Board* (1983), 43 O.R. (2d) 489 (Div. Ct.), at p. 496, citing *Northwestern Utilities, Ltd. v. City of Edmonton et al*., [1929] S.C.R. 186, at 192-193.

[3] See *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, at paras. 62-63.

[4] The "regulatory compact" is discussed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, *ibid*., at para. 63.

[5] A brief description of this process is set out in the *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board* case, at paras. 42-43; the process is also described in *Re Union Gas Ltd. and Ontario Energy Board* (1983), 43 O.R. (2d) 489 (Div. Ct.).

[6] The actual amount of these credits is set out in EGD's response to an Interrogatory in the Application, included in Attachment 1 as Exhibit I, Tab 1, Schedule 1.

[7] A variance account tracks differences between the forecast cost of an activity (which is the amount being recovered in rates) and the actual cost – the balance is then credited or debited to ratepayers, as deemed appropriate by the OEB. A deferral account tracks costs that have not been forecast.

[8] *Re Union Gas Ltd. and Ontario Energy Board* (1983), 43 O.R. (2d) 489 (Div. Ct.), at p. 501, citing *Re Western Ontario Credit Corp. Ltd. and Ontario Securities Com'n* (1975), 9 O.R. (2d) 93. See also, for example, the comments of the Court of Appeal in *Natural Resource Gas Ltd. v. Ontario Energy Board,* 2006 CanLII 24440:

> It is clear that the Act constitutes the OEB as a specialized expert tribunal with the broad authority to regulate the energy sector in Ontario. In carrying out its mandate, the OEB is required to balance a number of sometimes competing goals. On the one hand, it is required to protect consumers with respect to prices and the reliability and quality of gas service, but on the other hand, it is to facilitate a financially viable gas industry. The legislative intent is evident: the OEB is to have the primary responsibility for setting gas rates in the province.

See also the comments of the Divisional Court in *The Consumers' Gas Company Ltd. v. Ontario Energy Board*, Court File 707/99, endorsement issued December 19, 2001:

> The standard of review is reasonableness. In applying a pragmatic and functional approach, we have considered the high level of expertise the Board brings to its mandate – the balancing of a reasonable price to the consumer with the necessity of ensuring a viable monopolistic utility that earns a reasonable return on its capital investment.

Tab C

Attachments

Attachment 1: **EGD's Application in EB-2007-0731**

The Application materials are being filed separately,
in two binders titled “2007 CASDA Application”

Attachment 2: Written argument of Consumers Council of Canada in EB-2007-0731

ONTARIO ENERGY BOARD

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

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 as of January 1, 2008.

SUBMISSIONS OF THE CONSUMERS COUNCIL OF CANADA

I INTRODUCTION

1. These are the submissions of the Consumers Council of Canada (the "Council") in the application of Enbridge Gas Distribution Inc. ("EGD") to the Ontario Energy Board ("Board") for an order or orders approving the balance and clearance of the Class Action Deferral Account ("CASDA").

2. For the reasons, and subject to the qualifications, set out below, the Council does not oppose the granting of the relief EGD seeks.

II BACKGROUND

3. As set out in EGD's pre-filed evidence, the CASDA contains costs arising from a class action lawsuit, commenced in 1994, challenging EGD's late payment penalty ("LPP") as being a violation of section 347 of the *Criminal Code*. That class action will be referred hereinafter as the "Garland Action".

4. The history of the Garland Action is described in EGD's pre-filed evidence, and in the court decisions which are attached as exhibits thereto. The Council will not repeat that history herein. However, the conclusions to be drawn from EGD's actions at various stages of that history are relevant in considering whether to grant the relief EGD seeks. Those conclusions are discussed below.

5. The total amount recorded in the 2007 CASDA, as of August 1, 2007, is a debit of $23, 537,600, plus interest of $682,400. (Ex. A, Tab 2, S. 1, p. 2)

6. EGD is requesting that the balance of the CASDA be cleared to ratepayers over the course of eight years, from 2008 to 2015. According to EGD, the impact of its request for recovery is $3.5 million per year, over eight years, which equates to approximately $1.90 per customer per year. (Ex. A, Tab 2, S. 1, pp. 2 and 3)

III EGD's Position

7. EGD argues that the balance in the 2007 CASDA should be recovered from ratepayers, for the following principal reasons:

1. EGD has acted in the public interest by imposing a LPP which discouraged late payment by delinquent ratepayers, thereby reducing the burden on the balance of ratepayers who would otherwise be required to shoulder the costs of the delinquent payers;

2. EGD adopted the recommendations of the Legislative Assembly, which was subsequently reviewed by the Board, considered by the intervenors, and found to be just and reasonable;

3. The application of the LPP reduced the cost of providing service and the revenue requirement;

4. For each of the relevant years, the Board has approved the inclusion of the LPP in EGD's rates;

5. The intervenors have supported, and the Board has approved the clearance of the CASDA over a number of years.

(Ex. B, Tab 1, S. 1, p. 6)

8. Union Gas Limited ("Union") has filed a Written Argument, in which it supports EGD's support for relief. Union argues that "it appears likely that the principles established in this case may have application to the future treatment of similar costs in other cases". Given that, the Council believes that it is appropriate to address, herein, Union's arguments, as well as those of EGD.

9. Union's arguments, in support of EGD's request, are the following:

1. LPP litigation costs were incurred as a direct consequence of good faith compliance with what were believed to be valid orders of the Board;

2. The LPPs which gave rise to the LPP litigation costs were levied for the benefit of utility customers generally and did, in fact, confer customer benefit.

3. The LPP litigation costs were not incurred dishonestly, negligently or wastefully. They were prudently-incurred costs;

4. The orders of the Board requiring the LPPs to be charged constituted an assurance, intended to have legal effect, that the LPPs were just and reasonable and, therefore, in the public interest. The utilities changed their position in reliance on those assurances to their detriment by not seeking other means to recover the costs caused by late payers. Refusal to allow recovery of the LPP litigation costs now would be "patently unreasonable" and contrary to the principles of regulatory estoppel. (Written Argument of Union Gas Limited, p. 2)

IV Issues

10. EGD asserts that the intervenors have supported the clearance of the CASDA over numerous years. The implication of that argument is that the intervenors have thereby

acknowledged that the amounts in the CASDA should be paid by ratepayers. The Council disagrees with that position. The settlement agreements between the intervenors and EGD with respect to the treatment of the CASDA have been expressly conditioned on the provision that they are without prejudice to the resolution of the issue of whether the ratepayers or EGD's shareholder is responsible for payment of the amounts in the CASDA.

11. The Council submits that EGD's arguments, with the exception noted in the preceding paragraph, and those of Union, are essentially correct. There are, however, alternative arguments which need to be considered.

12. The Council believes that the following issues need to be resolved in considering EGD's request for relief:

(i) Is EGD at risk for incorrect forecasts?

13. In the ordinary course, EGD would be at risk for incorrect forecasts. The extent to which its forecasts were incorrect, and any resulting shortfall in the revenue requirement, would have to be made up by EGD's shareholder.

14. However, the Council does not believe that the circumstances of this case can properly be characterized as a forecasting error. It was not the accuracy of the forecasts that was in issue, but rather whether the formula on which they were based was legal. The annual forecasts of the LPP were predicated on the interpretation of the relevant provisions of the *Criminal Code* in the context of the LLP. That interpretation was accepted by two levels of courts in Ontario. At no point was the forecast challenged by the intervenors, or for that matter by the Board, on the basis that the LPP might constitute a violation of the *Criminal Code*. Given those factors, the Council does not believe that this is properly characterized as a case of forecasting error.

(ii) EGD's shareholder should bear some or all of the risk.

15. The Council agrees that, in the ordinary course, EGD's shareholder bears the risk of imprudent decisions. An example would be a transportation contract entered into imprudently, as was the case with the Alliance/Vector contract.

16. However, the Council does not believe that EGD's shareholder should bear the risk where it acts pursuant to a Board order. To put the matter another way, the Council does not believe that EGD's shareholder should bear the risk of Board orders turning out to be invalid. If EGD's shareholder were to have to bear that risk, then the approved level of ROE would have to be changed.

(iii) EGD cannot rely on Board approval of the LPP from and after the commencement of the Garland Action in 1994.

17. The Supreme Court of Canada in its 2004 Decision on the Garland Action, held that after the action was commenced and the respondent was put on notice that there was a serious possibility that its LPPs violated the *Criminal Code*, it was no longer reasonable for EGD to rely on the OEB rate orders to authorize the LPPs. That finding might be used as an argument that EGD bears the entire risk of the overpayment of the LPPs, from and after the commencement of the Garland Action.

18. The difficulty with that line of argument is that EGD would have had to assumed, at the moment that the Garland Action was commenced, that the essential argument of the Garland Action was correct. To put the matter another way, EGD would have had to have adjusted its LPP immediately upon receipt of the notice of action.

19. The Council believes that it was reasonable for EGD to have defended the Garland Action. Indeed, two levels of Ontario courts supported its interpretation of the LPP and the relevant provisions of the *Criminal Code*.

20. If the Board were now to decide that EGD acted imprudently in not adjusting its LPP immediately following the commencement of the Garland Action, that would effectively preclude EGD, or any regulated utility, from undertaking, in good faith, the defence of actions commenced against it, even where those actions are spurious.

(iv) EGD should be responsible for the excess LPP payments after the 1998 Decision of the Supreme Court of Canada

21. It was the 1998 Decision of the Supreme Court of Canada that found that the LPP violated section 347 of the *Criminal Code*. An argument might be advanced that, from and after that point, EGD should be responsible for the excess LPP.

22. The 1998 Decision of the Supreme Court of Canada did not resolve all of the issues in the Garland Action. It resolved one issue only, and remitted the Action back for trial. EGD was entitled, acting both reasonably and prudently, to advance whatever other defences it felt were appropriate. Again, two levels of courts found that some, although not all, of those defences were reasonable. EGD should be entitled, acting prudently and reasonably, to advance defences to actions commenced against it. If the Board were to rule otherwise, EGD, and any other utility, would effectively be precluded from defending actions commenced against it, even if those actions are spurious.

23. It is also relevant that, from and after 1998, the Board did not direct EGD to change its LPP policy. On the contrary, the Board said that any change in the LPP should await the outcome of the second tranche of litigation.

(v) Allowing EGD to recover the CASDA amount from ratepayers amounts to retroactive ratemaking

24. The Council acknowledges that allowing EGD to recover the CASDA amounts to retroactive ratemaking, something which, in the ordinary course, the Board should not allow. Having said that, however, the circumstances of this case are very unusual. To impose an absolute prohibition on retroactive ratemaking would have the effect of precluding EGD from ever defending any litigation which had some prospect of subsequent recovery of amounts from ratepayers, even if the claim were spurious, defending it was in the interest of ratepayers. The Council submits that it would be contrary to the best interests of ratepayers to hamstring EGD, or any other utility, in that way.

25. The Council does acknowledge, however, that there is an issue of whether the Board has the authority to approve the retroactive recovery of rates even if, as the Council believes is the case here, it should do so.

Other considerations

26. There are other additional factors which militate in favour of granting, subject to the limitation noted below, the relief EGD seeks. One consideration is that ratepayers have benefited, over the years, from the LPP. The second consideration is that, to the knowledge of the Council, no intervenor has ever objected to the LPP. In particular, to the knowledge of the Council, no intervenor has, at any time since 1994, taken the position that a different LPP should be applied because of the risk represented by the Garland Action.

27. While, as a general proposition, the Council does not oppose the granting of the relief which EGD seeks in this case, there is one important qualification. In most, if not all, of the years since 1994, EGD has earned a return in excess of its allowed ROE. It is possible that, for some or all of those years, the LPP forecast has resulted in revenues which have contributed to that over-earning. The Council submits that it would be unfair to burden ratepayers with the full amount of the CASDA if the LPP forecasts had contributed to the shareholder's profit. Accordingly, the Council submits that EGD should, as a condition of a final order granting the relief requested, set out the amounts by which its over-earnings were the result of the difference between the LPP forecast and the actual amount of the LPP.

28. EGD proposes to recover the CASDA amount over a period of eight years. The Council believes that such an extended period will result in inter-generational unfairness. It is inevitable that a substantial number of ratepayers will, over the course of such an extended period, be paying amounts out of the CASDA in circumstances where they did not get any benefits from the former LPP. While the Council believes it is not possible to reduce inter-generational unfairness entirely, it submits that some of that unfairness would be eliminated if the recovery period were reduced to correspond with the period of any incentive regulation regime approved for EGD.

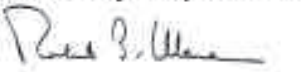
29. The Council has no basis on which to challenge the reasonableness of the ultimate settlement of the Garland Action. The Council notes that the settlement, for practical reasons, requires that damages be paid to the Winter Warmth Program. The Council submits that this practical provision in this settlement agreement has no bearing on the question of whether the

Board has the jurisdiction to require EGD, or any other utility, to implement a low income rate program.

VI Costs

30. The Council asks that it be paid 100% of its reasonably-incurred costs for its participation in this proceeding.

All of which is respectfully submitted.



Robert B. Warren
Counsel to the Consumers Council of Canada

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Attachment 3: OEB's costs decision in EB-2007-0731

Ontario Energy Board

Commission de l'énergie de l'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

COST AWARD DECISION AND ORDER

Enbridge Gas Distribution Inc. ("Enbridge" or "the Company") filed an Application dated September 28, 2007 (the "Application") 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, for an order of the Board approving the final balance in the 2007 Class Action Suit Deferral Account ("CASDA") and the disposition of that balance.

The Board assigned file number EB-2007-0731 to the Application and issued a Notice of Application and Hearing dated October 26, 2007.

The Board's Decision and Order in this proceeding was issued on February 4, 2008 and made provision for the filing of cost claims by eligible intervenors.

Parties eligible for an award of costs submitted their cost claims by the deadline established for that purpose in the Board's February 4, 2008 Decision and Order. Cost claims were filed by the Consumers Council of Canada ("CCC"), the Industrial Gas User Association ("IGUA"), the School Energy Coalition ("SEC") and the Vulnerable Energy Consumers Coalition ("VECC").

On March 5, 2008, Enbridge filed a letter with the Board indicating that it found the claims to be consistent with the allowances of prescribed rates within the cost assessment guidelines and that it had no objection to the claims.

The Board awards CCC, IGUA, SEC and VECC 100% of their reasonably incurred costs. The amounts awarded reflect those claimed except as follows. In the case of the claims by SEC and VECC, the hourly rates submitted for legal counsel are reduced to accord with the years of practice, as set out in the Board's Practice Direction on Cost Awards.

THEREFORE, THE BOARD ORDERS THAT:

1. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Enbridge Gas Distribution Inc. shall immediately upon receipt of this Cost Award Decision and Order pay the listed parties below the noted amounts.

Consumers Council of Canada	**$ 6,875.48**
Industrial Gas Users Association	**$ 3,479.86**
School Energy Coalition	**$ 3,115.50**
Vulnerable Energy Consumers Association	**$ 6,309.50**

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School Energy Coalition	$ 3,115.50
Vulnerable Energy Consumers Association	$ 6,309.50

2. Enbridge Gas Distribution Inc. shall pay the Board's costs of, and incidental to, this proceeding immediately upon receipt of the Board's invoice.

DATED at Toronto, April 3, 2008.

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary