File No.: EB-2010-0374

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 Natural Resource Gas Limited for an Order or Orders pursuant to Section 90(1) of the *Ontario Energy Board Act 1998*, granting leave to construct a natural gas pipeline and ancillary facilities in the Township of Malahide, Municipality of Thames Centre and the Town of Aylmer.

AND IN THE MATTER OF a hearing on the Board's own motion to review orders made by the Board on June 29, 2007.

SUBMISSIONS OF NATURAL RESOURCE GAS LIMITED

PART I - OVERVIEW

1. This proceeding relates to Orders of the Ontario Energy Board ("OEB") on a previous application (EB-2006-0243) brought by Integrated Grain Processors Co-operative Inc. ("IGPC") pursuant to which the OEB:

(a) ordered Natural Resource Gas Limited ("NRG") to execute the Assignment Agreement and the Bundled T-Service Agreement; and

(b) ordered NRG to pay an administrative penalty of $20,000, for each and every day until NRG executes the Assignment Agreement and the Bundled T-Service Agreement (as defined herein).

2. These decisions were appealed by NRG and the appeal was scheduled to be heard on January 28, 2011.

3. On December 7, 2010, the OEB issued a Notice of Motion to Review and Procedural Order No. 1 relating to the prior application.

4. On December 16, 2010, the OEB issued Procedural Order No. 2.

5. Pursuant to Section 19(4) of the *Ontario Energy Board Act*, 1998 (the "Act"),[1] the OEB has elected to review on its own motion its Order requiring NRG to execute the two contracts and the Order made immediately thereafter imposing a penalty for NRG's failure to execute the contracts immediately upon being ordered to do so.

6. In Procedural Orders No. 1 and No. 2, the OEB confirmed that it will not review its underlying jurisdiction to order NRG to execute the contracts, but will consider the extent to which procedural fairness requirements were met with respect to its order requiring NRG to execute the contracts, and whether the requirements of Part VII.1 of the Act were complied with in ordering the administrative penalty.

7. The questions to be considered by the OEB are as follows:

(a) Did the OEB follow the procedural requirements of Part VII.1 of the Act in ordering NRG to pay an administrative penalty? If the answer to this question is "no", what steps, if any should the OEB take to correct this error?

(b) Did the OEB meet the requirements of procedural fairness in ordering NRG to execute the contracts? If the answer to this question is "no", what steps, if any, should the OEB take to correct this error?

8. NRG respectfully submits that:

(a) the OEB did not comply with the procedural requirements of Part VII.1 of the Act in ordering NRG to pay the administrative penalty. The appropriate remedy is for the OEB to set aside or vacate that Order; and

(b) the OEB did not comply with the fundamental requirements of procedural fairness in ordering NRG to execute the contracts. The appropriate remedy is for the OEB to set aside or vacate that Order and to dismiss the application brought by IGPC.

9. NRG submits that, in ordering NRG to execute the contracts, the OEB failed to meet the fundamental requirements of procedural fairness by refusing to permit NRG any opportunity to:

(i) consider its position;

[1] *Ontario Energy Board Act*, 1998, NRG's Brief of Authorities, Tab 8

(ii) instruct counsel;

(iii) prepare responding evidence;

(iv) conduct cross-examinations; and

(v) present submissions concerning the abridgement of notice requirements and times for preparing a response to the motion.

10. NRG also submits that the OEB failed to follow the procedural requirements of Part VII.1 of the Act by:

(a) issuing a compliance order without following the mandatory procedure set out in the *Ontario Energy Board Act*, 1998 S.O. 1998, c. 15, Sch. B (the "Act") for compliance action and improperly exercising any discretion it may have had to proceed with compliance action; and

(b) issuing an order requiring NRG to pay an administrative penalty of $20,000 per day until NRG executes the Assignment Agreement and the Bundled T-Service Agreement;

(c) imposing an ongoing penalty when, at its highest, the alleged contravention is a single, one time event and not a continuing contravention.

11. To minimize NRG's costs incurred in preparing for this motion, NRG will rely upon the Appeal Record on the pending appeal before the Divisional Court. All parties have received a copy of this Record. NRG has also filed a Brief of Authorities containing the law referred to in these submissions.

PART II - FACTS

The Parties

12. NRG is a natural gas distribution company that provides natural gas distribution services in the Town of Almer and surrounding areas. The rates charged by NRG to its customers are regulated by the respondent, Ontario Energy Board ("OEB").

13. IGPC is an Ontario corporation incorporated April 4, 2002 under the laws of Ontario. The business purpose of IGPC is to develop and operate an ethanol plant in southwestern

Ontario.[2]

The IGPC Project

14. At the time of the prior proceeding, IGPC, together with its wholly-owned subsidiary, IGP Ethanol Inc., was in the process of arranging the financing required to design, develop, build and operate an ethanol production plant in Aylmer, Ontario,[3] within the franchise area of NRG.[4]

15. The IGPC financing was intended to be used for, *inter alia*, acquisition of land, facility design and construction, the establishment of a railway spur, and obtaining gas distribution service from NRG.[5]

The Gas Delivery Contract and Pipeline Cost Recovery Agreement

16. On or about January 31, 2007, IGPC and NRG entered into a Pipeline Cost Recovery Agreement dated as of January 31, 2007 (the "Pipeline Cost Recovery Agreement"). The Pipeline Cost Recovery Agreement sets out the terms and conditions on which IGPC was required to contribute to the cost of the construction of the Proposed Pipeline.[6]

17. On or about June 27, 2007, IGPC and NRG entered into the Gas Delivery Contract. The Gas Delivery Contract provides that NRG will provide natural gas distribution service to deliver natural gas to IGPC as required up to specified maximum daily and hourly maximum volumes.[7]

18. NRG applied to the OEB pursuant to Section 90(1) of the *Act* and sought leave to

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[2] *Affidavit of Martin Kovnats*, sworn June 28, 2007 ("Kovnats Affidavit"), para. 3, Appeal Record, Tab 10-2, p. 182
[3] *Kovnats Affidavit*, paras. 3-4, Appeal Record, Tab 10-2, p. 182
[4] *Kovnats Affidavit*, paras. 3-4, Appeal Record, Tab 10-2, p. 182
[5] *Kovnats Affidavit*, paras. 3-4, Appeal Record, Tab 10-2, p. 182;
Pipeline Cost Recovery Agreement, Appeal Record, Tab 13
[6] *Pipeline Cost Recovery Agreement*, Appeal Record, Tab 13
[7] *Gas Delivery Contract*, Appeal Record, Tab 12

construct the pipeline required to deliver natural gas to the IGPC ethanol plant. An oral hearing was held December 18, 2006. All parties and intervenors supported the application.[8]

19. On January 19, 2007, the OEB held an oral hearing to review the status of certain agreements between NRG and IGPC. On January 31, 2007, the OEB was provided with copies of the Gas Delivery Contract and the Pipeline Cost Recovery Agreement.[9]

20. By Decision and Order dated February 2, 2007, the OEB determined that (a) the terms and conditions of the Gas Delivery Contract and the Pipeline Cost Recovery Agreement adequately protected the interests of NRG and its ratepayers, and (b) the Proposed Pipeline was in the public interest. The OEB granted NRG leave to construct the Proposed Pipeline.[10]

The Assignment Agreement and the Bundled T-Service Agreement

21. The financing arrangements entered into by IGPC required that IGPC obtain from NRG and deliver to IGPC's lenders two agreements:

(a) the Consent and Acknowledgement Agreement (the "Assignment Agreement") between NRG, IGPC Ethanol Inc., IGPC and Société Générale (Canada Branch); and

(b) the Bundled T-Service Receipt Contract between NRG and IGPC Ethanol Inc. (the "Bundled T-Service Agreement").

22. NRG:

(a) at no time agreed to sign these contracts;

(b) was never consulted about these contracts in advance; and

(c) received no consideration whatsoever for signing these contracts.

23. The proposed Assignment Agreement provided that NRG irrevocably consents to, and

[8] *Kovnats Affidavit*, para. 5, Appeal Record, Tab 10-2, p. 182
[9] *Kovnats Affidavit*, para. 6, Appeal Record, Tab 10-2, p. 182
[10] *Decision and Order of OEB* dated February 2, 2007, Appeal Record, Tab 5, p. 29

accepts notice of and acknowledges, the assignment and transfer of all of IGPC's right, title and interest in and to the Gas Delivery Contract and the Pipeline Cost Recovery Agreement.[11]

24. The proposed Bundled T-Service Agreement addressed the upstream transportation arrangement and balancing services for the natural gas required by IGPC's ethanol facility.[12]

25. After IGPC agreed to obtain these agreements from NRG and deliver them to IGPC's lenders, there were some discussions between the solicitors for NRG and IGPC respectively concerning the proposed form of each of the Assignment Agreement and the Bundled T-Service Agreement. However, NRG eventually determined that it was not in the best interests of NRG to sign the Assignment Agreement or the Bundled T-Service Agreement.[13]

26. On June 28, 2007, NRG advised IGPC that it would not execute the Assignment Agreement or the Bundled T-Service Agreement.[14]

The IGPC Motion

27. Late in the afternoon of June 28, 2007, IGPC filed a motion with the OEB. The motion record was served on Mark Bristoll, Chief Executive Officer of NRG, at approximately 7:15 in the evening of June 28, by way of service at his personal residence in London, Ontario.[15]

28. In the afternoon or early evening of June 28, 2007, the OEB issued an Emergency Notice of Hearing ordering that an oral hearing would be held the next day, June 29, 2007 at 8:30 a.m. The Emergency Notice of Hearing was purportedly served on NRG by way of delivery to Patrick

[11] *Assignment Agreement*, Appeal Record, Tab 15, p. 341
[12] *Bundled T-Service Agreement*, Appeal Record, Tab 14, p. 324
[13] *Kovnats Affidavit*, para. 24, Appeal Record, Tab 10-2, p. 186
[14] *Kovnats Affidavit*, para. 24, Appeal Record, Tab 10-2, p. 186
[15] *Affidavit of Service of David Mark Wood*, sworn June 29, 2007, Appeal Record, Tab 18, p. 490

Moran of Ogilvy Renault, solicitors for NRG.[16]

29. The Emergency Notice of Hearing was issued by the OEB:

(a) without any notice to NRG or without having any response from NRG;

(b) without allowing NRG any opportunity to respond to IGPC's request that the motion be heard on an urgent basis; and

(c) without compliance with the notice requirements set out in the OEB's *Rules of Practice and Procedure*.

30. At approximately 7:00 p.m. on June 28, NRG retained counsel to attend at the hearing the next day and seek a brief adjournment to allow NRG time to respond to the motion.

31. The following day, at 8:30 a.m., NRG's counsel attended at the motion, and requested a short adjournment to permit NRG time to respond to the motion.

32. Counsel for NRG submitted that NRG:

(a) had not had any time to retain and properly instruct counsel;

(b) had not had time to consider its position and instruct counsel as to its position;

(c) had not had adequate time to review the evidence or assemble and present responding evidence; and

(d) had no opportunity, prior to the issuance of the Emergency Notice of Hearing, to address the OEB as to whether the hearing should or should not proceed on an expedited basis.

> MR. THACKER: I was retained -- or contacted at 7 o'clock last night. My clients have asked me to attend today and to seek a short adjournment of this hearing on the basis that they have not had adequate time to -- the material was served yesterday, as I understand it, late in the day on my clients through their previous solicitors.
>
> They have not had time to consider their position. They have certainly not had any time to retain and properly instruct counsel. They have not had adequate time to prepare a responding evidentiary record, and they have not had time to consider what position they want to take and instruct me to take that position.
>
> In the circumstances, my submission is this hearing should be adjourned to allow my client time to consider the evidence against them, prepare a responding evidentiary record and properly instruct counsel after considering their position as to how to proceed in this hearing.

[16] *OEB Emergency Notice of Hearing*, Appeal Record, Tab 7, p. 43

> So I am seeking a short adjournment to enable them adequate time to do that.
>
> I am aware of the notice of hearing that was issued yesterday by this Board. I am also aware it was done without hearing from my client with respect to whether the hearing should or should not proceed on an expedited basis and my client's position and the merits of whether or not it is appropriate to abbreviate the notice requirements that are set out in the Act.
>
> Having said all of that, the fact you have issued the notice of hearing, we object in the most strenuous terms to the hearing proceeding on its merits today and would object to the basis on which the notice of hearing was issued and the basis on which the time limits that are normally available to my client were abbreviated without hearing from them.[17]

33. On the motion, IGPC relied on the IGPC motion record which was not served on NRG until 7:15 pm the previous evening. IGPC also relied on an additional affidavit, the affidavit of Heather Adams sworn June 28, 2007, which was never served on NRG.[18]

34. Counsel for IGPC referred to the Kovnats Affidavit. Mr. Kovnats attended at the motion as counsel to IGPC, and made submissions to the OEB on behalf of IGPC in which he explained the basis for the alleged urgency. He stated that the motion was urgent because if NRG did not sign the Assignment Agreement and Bundled T-Service Agreement by the end of the day on June 29, the terms of the escrow agreement pursuant to which funds were held in escrow by Canada Trust required that the equity funds raised for the financing be returned to the equity investors.

> MR. KAISER: Here is my point, you are raising a condition that says that the escrow provides that the money has to be returned to the shareholders, 840 shareholders.
>
> I want to know, practically, are they 840 shareholders going to enforce that covenant? And who is acting for them?
>
> MR. KOVNATS: Sir, the way the agreements are structured is, it was a condition to the raising of the money under the Cooperatives Act, that a public disclosure document similar to a prospectus is filed, submitted, reviewed and is used to help raise the funds. It was a condition imposed by the Cooperatives Branch that 94 percent of the amount of money raised is held in escrow and cannot be used by the cooperative until they are relatively certain that the facility will be used.
>
> Six percent could be used for working capital and development purposes.
>
> The escrowed money is deposited with Canada Trust, pursuant to an escrow agreement that was reviewed and approved by the Cooperatives Branch. That escrow agreement cannot be amended

[17] *Transcript of OEB Proceedings*, pp. 2-4, Appeal Record, Tab 8, p. 53-55
[18] *Transcript of OEB Proceedings*, pp. 7-8, Appeal Record, Tab 8, p. 58-59

without the consent of the Cooperatives Branch and all of the members and Canada Trust, the members being the beneficiaries of the escrow arrangements that have been set up. That agreement was amended once a year ago to get an extension from June 30, 2006 to June 30, 2007. The amendment process required the consent of each member, which required holding meetings, town hall meetings, going out to peoples' homes and getting consent documents signed.

MR. KAISER: So you're saying without an amendment in the manner you described, Canada Trust has to send this money back?

MR. KOVNATS: That's correct.

MR. KAISER: On June 30th?

MR. KOVNATS: That's correct.

MR. KAISER: Unless the agreements have been amended.

MR. KOVNATS: That's correct.

MR. KAISER: It takes a long time to get the agreement amended?

MR. KOVNATS: That is correct.

…

MR. KAISER: Anyone here for NRCan? All right.

If you were to able to get consent from the shareholders, would Canada Trust not agree to retain the funds the funds?

MR. KOVNATS: Mr. Chairman, if we had the consent of the 840 members who are the beneficiaries, I am sure we could get Canada Trust to consent.

MR. KAISER: It's just a practicality of getting that done in a short frame.

MR. KOVNATS: Tomorrow, yes.

MR. KAISER: You're assuring us that if that is not done, this money is going back.

MR. KOVNATS: Yes.

MR. KAISER: Because Canada Trust is obligated legally to send it back and they will send it back?

MR. KOVNATS: Yes, sir.

…

MR. KAISER: All right. So I think where we stand, leaving aside the July 5th date, we have the June 30th date. The practicality suggests that that can't be amended over the long weekend, and if I am understanding counsel, if it is not amended the money goes back?

MR. KOVNATS: That is correct, sir.

MR. KAISER: Does that mean the end of the deal? Or can the 840 shareholders send the money back the next day?

> In other words, I'm trying to get to the practicalities here. If you're telling me that this deal legally is going to fall apart, that's one thing. If it's just an annoyance, and no doubt you are entitled to be annoyed, that's another thing.
>
> MR. O'LEARY: Sir, we don't believe it is an annoyance. We believe the deal is in real peril and jeopardy. [emphasis added][19]

35. Subsequent events have proven that the evidence of Mr. Kovnats was not correct.[20]

36. Although no affidavit was submitted by Mr. George Alkalay, the OEB nonetheless accepted unsworn evidence from Mr. Alkalay that if the financing transaction did not close by July 5, 2007, IGPC would lose $11.9 million in funding under the Federal Government's ethanol expansion program.

> MR. ALKALAY: Mr. Chairman, can I also add to that point that under the conditions of our federal government funding the ethanol expansion program, we have $11.9 million. The final date for receiving those funds, we have to have financial close by July 5th, 2007. That date has already been extended a couple of times. July 5th is the absolute deadline for that. Even if we were to attempt to amend the provisions of our escrow agreement, we would not be able to amend the provisions of the ethanol expansion program funds.
>
> MR. KAISER: All right. July 5th date, let me understand that better. That is imposed by, who?
>
> MR. ALKALAY: That is by NRCan, Natural Resources Canada.
>
> MR. KAISER: Federal government.
>
> MR. ALKALAY: Federal government, under the ethanol expansion program.
>
> MR. KAISER: And that can't be extended?
>
> MR. ALKALAY: That cannot be extended. It has already been extended and they have told us that it is the absolute - [21]

37. Subsequent events have proven that the evidence of Mr. Alkalay was not true.[22]

38. The OEB also inquired into the impact on NRG of the order sought by IGPC. IGPC referred to a reference in the Kovnats Affidavit that refers to an agreement that was not in the IGPC motion record. Upon discovering that the key agreements relating to issue to be

[19] *Transcript of OEB Proceedings*, pp. 9-12 and 14, Appeal Record, Tab 8, p. 60-63 and 65
[20] See paragraphs 55 and 56 below
[21] *Transcript of OEB Proceedings*, pp. 10-11, Appeal Record, Tab 8, p. 61-62
[22] See paragraphs 55 and 56 below

determined were not included in the IGPC motion record, the OEB heard lengthy unsworn evidence from Mr. Kovnats, who was appearing apparently both as witness and counsel. Mr. Kovnats referred to four agreements, none of which were included in the motion record. When counsel for NRG objected that these agreements were not in the motion record, the OEB marked the agreements as exhibits on the motion.

> MR. KOVNATS: Yes, sir. Mr. Chairman there are, in essence, four material agreements between NRG and IGPC, and for these purposes IGPC includes its wholly-owned subsidiary.
>
> One is an agreement for the design, build and operation of a pipeline, which was signed before the previous hearing, which does require IGPC to pay cash and to put up a letter of credit, all of which it is prepared to do.
>
> There was a second agreement dealing with the supply of gas, which was signed before the hearing that was held with respect to this matter and was signed last January.
>
> We're not here discussing those two agreements.
>
> There are two remaining agreements that we wish to have considered and which have been reviewed extensively by McCarthy on behalf of the lenders, ourselves, on behalf of IGPC, and Ogilvy Renault on behalf of NRG, all of which agreements were -- both agreements were satisfactory to all counsel involved and resolved this week, in which Ogilvy Renault has recommended NRG sign, so they have advised us.
>
> The purpose of these two agreements - we'll call one the bundled T agreement and the other we will call the consent and assignment agreement. The consent and assignment agreement is an agreement that is designed for the benefit of the secured lender so in the event there is a default by IGPC with the secured lending group, who will be advancing approximately $100 million, the lending group can then step into the shoes of IGPC and take over the agreements relating to the pipeline, the supply of gas, and the bundled T agreement.
>
> There is an acknowledgement in the agreement, and the major purpose of that agreement is to get an acknowledgement from NRG to the lending syndicate that in the event of that financial calamity for IGPC, that the bank can then step in and have a plant that will work and they will have good security.
>
> MR. KAISER: So just stopping you there, sir. That doesn't affect NRG in any sense.
>
> MR. KOVNATS: That is correct.
>
> MR. KAISER: Somebody else just walks into their shoes and continues operating the plant.
>
> MR. KOVNATS: That is correct. The second agreement is the bundled T agreement.
>
> On the completion of this facility, IGPC will be, I think, the largest single customer NRG has in its area, buying a significant amount of natural gas to run its facility. It is a material concern to everybody that NRG has the source and pricing and the flexibility on pricing and source, to be able to allow IGPC to manage its costs of input -- its input production costs.
>
> There have been many conversations with other gas suppliers for us to be able to buy gas from others, and use it through the pipeline, creating a handling charge to NRG for this. That requires

> sourcing, pricing, delivery, flow measurement and flow allocation. And I am not an energy lawyer, so forgive me, I am going way beyond where I need to go.
>
> MR. KAISER: You're doing very well.
>
> MR. KOVNATS: But that bundled T agreement manages that flexibility for the supply of natural gas through the facility.
>
> MR. KAISER: So do I understand that that agreement, the bundled T agreement allows you or the lenders, I guess --
>
> MR. KOVNATS: No. IGPC. It's one of the --
>
> MR. KAISER: IGPC to go and source their gas elsewhere?
>
> MR. KOVNATS: Yes.
>
> MR. KAISER: And have NRG merely distribute it as opposed to purchasing your gas from NRG?
>
> MR. KOVNATS: That is correct.
>
> …
>
> **MR. THACKER: I would like to say one thing, and I don't want to interrupt, but I think I have to at some point. These agreements, which clearly are at the focus of all of this and the rationale for my client's choosing not to sign them at the same time, aren't in the record and I haven't read them, and that's a fundamental flaw.**
>
> **MR. KAISER: I agree. We're going to get them in the record. We haven't read them either. We'll come to that. [emphasis added][23]**

39. Counsel for NRG also objected that although there were lengthy submissions about the terms of the financing and the terms of the escrow, none of the documents relating to the escrow arrangements were in the IGPC motion record. The OEB agreed, but then directed that those documents would also be marked as exhibits on the motion.

> MR. THACKER: One other thing I might ask for this, although there is discussion about the terms of financing and the terms of the escrow, none of those documents are there, either.
>
> MR. KAISER: I understand. We're going to cure that right now.
>
> MR. THACKER: So apart from the other two agreements...
>
> MR. KAISER: We have the two agreements which are outstanding that you want signed.
>
> MR. O'LEARY: Yes, sir. And I have just -- my understanding is that -- we do have copies to share with you -- is that there may be a need or a request for confidential treatment of the documents.

[23] *Transcript of OEB Proceedings*, pp. 21-23 and 27-28, Appeal Record, Tab 8, p. 72-74 and 78-79

MR. KAISER: We will deal with that. Anything else you need, Mr. Thacker?[24]

40. The OEB then adjourned for a 30-minute break.[25]

41. Upon resuming, counsel for NRG again objected that, although he had been given some of the documents that had been added to the record, he did not have all of the documents. Some of the documents he had been provided with were incomplete. Eventually, after numerous requests and objections, counsel for NRG was provided with a complete set of the documents that the OEB had already decided to mark as exhibits on the motion.[26]

42. Counsel for NRG again requested a short adjournment to allow him time to read the new documents that had been marked as exhibits and added to the record, and to discuss those documents with NRG and to obtain instructions.

> **MR. THACKER: They just became part of the evidentiary record about five or ten minutes ago so I have to object. My client -- I have not had a chance to speak to them about the question you are raising, and I'm not in a position to answer it; certainly haven't had the chance to take instructions or review it with my client and discuss it with him.**
>
> **So a procedural matter I have to object.**
>
> You asked the question of my friends, who were adverse to me, whether or not these detailed agreements do anything different than the one-line provision in the agreements that this Board approved. And it would be an error, in my submission, to take their word that they're identical, when I have not had a chance to read them or discuss that issue with my client.
>
> So I'm not really able to answer your question because of the time constraints, but I appreciate your asking me.
>
> They are different. There are many pages and words are different than the one liner. So it might well be that you have or that -- it might well be that the agreements you have approved contain the relief that they're seeking, but the many pages of the other agreements are different. They have more words in them than the minimum.
>
> To take their word there is nothing different about the many, many words seems implausible and procedurally unfair.[27]

43. The OEB:

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[24] *Transcript of OEB Proceedings*, pp. 30-31, Appeal Record, Tab 8, p. 81-82
[25] *Transcript of OEB Proceedings*, p. 31, Appeal Record, Tab 8, p. 82
[26] *Transcript of OEB Proceedings*, pp. 33-42, Appeal Record, Tab 8, p. 84-93

(a) refused NRG's request for an adjournment;

(b) refused to give counsel any opportunity to consult with NRG; and

(c) instead proceeded to hear the motion.[28]

44. Counsel for NRG again objected to the motion proceeding, on the basis that:

(a) there was no evidence in the record to demonstrate urgency; and

(b) proceeding on an urgent basis had the effect of denying NRG any opportunity to review the evidence against it, consider its position and instruct counsel, assemble and present responding evidence; conduct cross-examinations, and present its case fully to the OEB.

> **MR. THACKER: Well, as I said, the bulk of the documents that form the evidentiary foundation for this hearing were admitted into the record in the middle of the hearing. They were not served. They're not sworn. We have not had an opportunity to read them. We have not had an opportunity to review them with our clients. We have not had an opportunity to determine whether we wish to cross-examine and to conduct cross-examinations, and we have not had any opportunity to prepare a responding evidentiary record.**
>
> **The decision is to proceed with this hearing the absence of my client, without hearing from my client.**
>
> **And so we are here in a situation where the evidentiary foundation for the ruling that you are being asked to make was introduced in the middle of the hearing, and I have not had any opportunity, other than the lunch break, to try to explain things with my client.**
>
> **So we are seeking an adjournment on the basis that we have not had adequate time. There is no basis to abbreviate the time requirements that are otherwise set out in the Act.**
>
> I am happy to try to -- to answer the first question, which was is there any difference between the two provisions in the agreements that had been approved, and the detailed agreements that this court is -- or that my friends are asking you to order an individual on behalf of the corporation to execute, there is obviously a difference. One is two lines. One is about -- well, many, many pages.
>
> For you to rely simply on their assurance that they're exactly the same thing, they're clearly not, because if they were exactly the same thing, they would be relying on the agreements that have already been signed and already approved. So they're different things.
>
> With respect to the bundled T agreement, our submission is that this is not a service request. There is not a question here of whether or not my client will supply or provide service. The question is whether or not this Board should make an order compelling an individual to sign a piece of paper binding a corporation that is governed by a board of directors.
>
> My submission is that you do not have the jurisdiction to order a corporation to sign an agreement. You may have other remedies that you can impose against a distributor or a regulated entity, but to make an order purporting to compel an individual to sign a contract, where the board of directors of the corporation has chosen not to sign, would be an error of law, in my submission, and in excess of your jurisdiction.

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[27] *Transcript of OEB Proceedings*, pp. 42-43, Appeal Record, Tab 8, p. 93-94
[28] *Transcript of OEB Proceedings*, pp. 42-44, Appeal Record, Tab 8, p. 93-95

> **So I object to the hearing proceeding on the basis that there's been a denial of procedural fairness and a denial of natural justice with respect to the time requirements. The evidentiary record was inadequate. Clearly that was recognized and it was coopered up in the middle of the hearing. My client hasn't had a chance to read them and to consider them and to respond.**
>
> With respect to the bundled T agreement, the remedy you are being asked to make -- and I am not sure if you're now proposing to deal with the draft order or if you have some other remedy that you are considering, but to order an individual to sign a document on behalf of a corporation that binds the corporation would be an error and would be a significant error in my submission. There is no jurisdiction under the Ontario Energy Act that would enable this Board to make that order.
>
> MR. KAISER: Well, Mr. Thacker, you would agree the Board has jurisdiction to order your client to provide service?
>
> MR. THACKER: That is clear, yes. To characterize the signing of a document that has contractual obligations as the provision of service is strange, in my submission, not correct and an error.
>
> MR. KAISER: Well, it is generally the case that any time the utility provides service to industrial customers, they enter into a contract with them and we generally approve those contracts. And that's what is before us as J1.5.
>
> MR. THACKER: I can understand the concept of approving a contract that has been entered into by the parties. It is a very different thing to order a party to enter into a contract it doesn't wish to enter into.
>
> MR. KAISER: On your basis, the utility could choose when to provide service or when not to provide service, regardless of the Board's decision, by simply not signing an agreement. Is that your position?
>
> MR. THACKER: No. The position is you could order the entity to provide service. You can't order them to execute a contract.[29]

45. NRG also objected to the motion proceeding on the basis that the OEB does not have jurisdiction to compel a corporation to sign an agreement, where the Board of the Directors of the corporation has decided not to sign the agreement.[30]

46. The OEB then asked its counsel to advise it as to the remedies available to the OEB. Counsel for the OEB, Kristi Sebalj, then provided her legal advice to the OEB.

> **MR. KAISER: Ms. Sebalj, I wonder if you could help us on a point. Let's suppose we find that the consent being requested of NRG, in the two agreements, is being unreasonably withheld.**
>
> **MS. SEBALJ: Yes.**
>
> **MR. KAISER: What is our remedy?**

[29] *Transcript of OEB Proceedings*, pp. 44-47, Appeal Record, Tab 8, p. 95-98
[30] *Transcript of OEB Proceedings*, pp. 44-47, Appeal Record, Tab 8, p. 95-98

MS. SEBALJ: Well, you are taking me to the crux of some submissions that I am prepared to make to you. But I am not sure that the -- and this Panel knows better than I do what was intended when you referred to these two agreements in your decision of February 2nd, 2007, and that decision was with respect to a Section 90 leave to construct application.

This is a private agreement between the two parties and to the extent that the consent was required by that agreement – and I'm not necessarily, in my, in Board Staff's opinion in agreement with the parties that that was necessarily required of that agreement - but leaving that aside for a moment, if you were to make that finding, I am not sure that the Panel has the ability to enforce the signing by another party of a private commercial agreement.

MR. KAISER: Well, we have approved an agreement. The agreement, and certainly the decision that we did make on February 2nd was conditioned on those agreements.

MS. SEBALJ: Yes.

MR. KAISER: Albeit we were relying upon those agreements to assure that the other ratepayers would not be impacted adversely was the principal concern in the Board's mind.

MS. SEBALJ: Yes.

MR. KAISER: But nonetheless there was an assignment clause, and the assignment clause, it turns out, may have been necessary to secure the financing, which would have which would have been important.

If the assignment is not given, if the utility simply refuses to execute the assignment, notwithstanding the fact that it would appear that it's reasonable that it be given -- at least on the record we have -- are you saying that we have no remedy and this plant simply goes away?

MS. SEBALJ: The issue that I have is what this Board's jurisdiction is with respect to the plant itself. This Board's jurisdiction was grounded in a Section 90 leave to construct application for a pipeline.

The plant itself is, legally speaking, outside the realm of the Ontario Energy Board's jurisdiction. And to the extent that there was a peripheral requirement in an agreement that we would otherwise want to see to satisfy ourselves that the economic feasibility of the pipeline was satisfactory, I am not sure that this Board now gets involved in a financing transaction for an ethanol plant, because our jurisdiction lies with the pipeline itself.

MR. KAISER: Our concern is to make sure the utility serves this customer. You would agree we have jurisdiction to ensure that service is provided?

MS. SEBALJ: Yes.

MR. KAISER: Gas service is provided.

MS. SEBALJ: Yes.

MR. KAISER: And the utility brought a leave to construct and the Board approved it. The Board's relied upon that.

MS. SEBALJ: Yes.

MR. KAISER: And these parties have relied upon that.

MS. SEBALJ: Yes.

> MR. KAISER: And now, for no apparent reason, it is all going up in smoke and you say there is nothing we can do?
>
> MS. SEBALJ: I understand the predicament that the Board is in, because the balance is we don't have a satisfactory understanding of why this deal is going up in smoke.
>
> I don't pretend to understand why NRG has not come to the table to sign a consent, a consent to assignment. But I would mention that you're absolutely correct that Section 42(2) is fairly clear that there is an obligation to serve, but the obligation to serve is with respect to the provision of gas distribution service. And gas distribution service, I don't think, is in question at this hearing.
>
> The financing of an ethanol plant is in question at this hearing. And I am sympathetic to Integrated Grain Processors Co-Operative and the predicament that they're in, and I don't begin to understand why Natural Resources Gas hasn't come to the table.
>
> But having said that, I am legal counsel for the Board and I am working within the parameters of the Board's jurisdiction, and the Board's jurisdiction is fairly limited in these circumstances.[31]

47. When OEB asked IGPC to provide it with the basis of its purported jurisdiction for the orders sought, IGPC submitted that jurisdiction arose from section 42(3) of the *Act*.[32]

48. Counsel by NRG again objected to the relief requested by IGPC on the basis of a lack of jurisdiction.

> MR. THACKER: No, we're not hearing entirely different. In this record, there is not one stitch of evidence that my client, NRG, is refusing to provide services, not one piece of evidence. And the reason it is not in the record is there is no evidence. They have not at all refused to provide services.
>
> **What NRG is under no obligation to do is sign a contract that Société Générale would like to have because it makes them feel better, and my submission is you have no more jurisdiction to order NRG to sign a document to make NRG -- to make Société Générale feel better than you have jurisdiction over Société -- to order Société Générale to advance the money in the absence of the agreement.**
>
> **It is a private contract that you are being asked to require a party to sign, and your own counsel is dead right as to what your jurisdiction is and my friend is misdirecting you, and you would be making a serious error. I would urge you to consider what your counsel has told you with respect to your jurisdiction. So that is my first point.**
>
> **My second point, my friends have failed to give you any legal obligation upon my clients to sign the documents they're asking you to order my client to sign. There is no contractual obligation to sign that particular piece of paper.**
>
> **It may be that they have an enforceable right to compel my client to comply with the obligations in the two agreements that contain those provisions, but the right place to go is a court, not here, because you don't have the jurisdiction, in my submission, to compel a corporation to enter into a contract. They're in the wrong place, and they're trying to shoehorn the remedy they ought to be seeking from a court from you and they're leading you down the wrong path.**

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[31] *Transcript of OEB Proceedings*, pp. 54-57, Appeal Record, Tab 8, p. 105-108
[32] *Transcript of OEB Proceedings*, pp. 58-60, Appeal Record, Tab 8, p. 109-111

There is no obligation under the Ontario Energy Act for my client to sign contracts. They have an obligation to provide service in certain circumstances. They have never denied it and there is no evidence that they're denying to provide service today.

There is not any order here that requires them to provide service. You are being asked to order them to sign a contract that makes the lenders to the builders of the plant feel better. They're not required to do that under the Ontario Energy Act. My submission is this Board doesn't have jurisdiction to compel them to.

The Board's Counsel's conclusions as to your jurisdiction are correct. My friend, when you asked the question, told you that your jurisdiction came from your inherent jurisdiction. That is not correct. That is just legally wrong. My submission is you don't have any inherent jurisdiction.

You are a creature of statute. You have a mandate and your jurisdiction is prescribed in the statute that creates you. There is no inherent jurisdiction in this Board and he is telling you the wrong thing.

Your counsel is correct as to your jurisdiction.

You have jurisdiction if a distributor is refusing to provide service, but there is no evidence of that here. That is not what is in issue here, and the reason you are being asked to shoehorn this remedy into this provision is that there is no other basis for you to compel a corporation to sign it and this isn't about providing service.

Even if the form of the agreements has been negotiated -- and clearly it was. There is a long record. There is a thin record, but there is evidence of e-mails that drafts were passed back and forth over a period of time. I don't suggest there wasn't.

But that is not the same thing as agreeing to sign. Two parties can negotiate the form of a contract over and over again for many, many months and choose, for economic reasons, not to conclude the deal. That's the essence of an agreement. Until there is a meeting of the minds, until they're ad idem, there isn't a contract. And there is no enforceable obligation to sign a contract.

A contract -- an agreement to agree is not enforceable. There may be an agreement to assign, and that comes from a different place, from contracts that are already signed and already executed, and those should be the subject of litigation, if that is what my friends are seeking.

But they have chosen not to do it. They have got a different kind of proceeding here and they have done it the wrong way, and they're leading you down the wrong path.

They can negotiate proposed financing documents back and forth until they're blue in the face, but my clients, until they choose to accept those terms, are under no obligation to enter into them.

With respect to the compliance order you're being asked to make, there is a number of serious deficiencies in it and you would be making serious error, in my submission, if you made the order. You have no jurisdiction over a trustee, or over anything, under the Ontario Energy Act, and it would be a serious error if you were to do that.

There is no trustee here who has indicated they're willing to act as trustee, and so you can't appoint anybody, anyway. So the order is deficient and has to be changed.

You only have jurisdiction under the provisions you're being urged to employ if there is, in fact, a breach of an enforceable provision, and there isn't one. The only provision you are pointed to, other than some assertion of inherent jurisdiction, which is just dead wrong, is this jurisdiction to compel the provision of service.

There is no indication here that there is a failure or refusal to provide service. So my submission is you don't have any basis on which to compel an individual to sign a piece of paper on behalf of a corporation that isn't properly governed by a board of directors.

> **You may have other supervisory powers, but what you can do is require someone to provide services, a distributor to provide services. That is not what this proceeding is about. So you can't issue a compliance order, because there is no breach under the enforceable provision and the compliance order isn't seeking to compel an enforceable -- compliance with an enforceable provision. It is seeking to compel an officer of a corporation to sign a piece of paper the corporation doesn't want to enter into.**
>
> It is unfortunate, but why is the blame laid at the feet of NRG rather than Société Générale? Why are we not blaming Société Générale for placing this project in jeopardy? Why is it my client's problem because they choose not to accept the terms of a contract that is offered to them? Why not make an order against the lenders?
>
> Nobody would suggest you could do that. And my submission is although you have jurisdiction over NRG in certain areas by virtue of it being a distributor, you don't have jurisdiction to compel it to enter into commercial contracts when it chooses not to.
>
> Unless you have questions, those are my submissions.[33]

49. At 2:25 p.m. on June 29, the OEB ordered NRG to execute the Assignment Agreement and the Bundled T-Service Agreement by 4:00 p.m. that day.[34]

50. Despite repeated requests by NRG, the OEB refused to issue any formal Order. In response to NRG's requests for a formal order, the OEB advised that the transcript of the hearing constitutes the Order of the OEB.

51. NRG did not execute the Assignment Agreement and the Bundled T-Service Agreement by 4:00 p.m.[35]

52. At the request of IGPC, the OEB reconvened at 4:29 p.m. and proceeded with a hearing purportedly under section 112.2 of the Act.

53. The OEB determined on its own motion that the failure of NRG to execute the Assignment Agreement and the Bundled T-Service Agreement by 4:00 p.m. that day was in contravention of an enforceable provision under the Act because NRG had failed to execute those agreements as purportedly required by the OEB's Order made earlier that day. The OEB

[33] *Transcript of OEB Proceedings*, pp. 71-75, Appeal Record, Tab 8, p. 122-126
[34] *Transcript of OEB Proceedings*, pp. 81-87, Appeal Record, Tab 8, p. 132-138

stated that "due to the urgency of the financing requirements", the OEB had determined to act under the authority given to it under section 112.2(6) to issue an interim order under section 112.3.[36]

54. The OEB ordered that:

> NRG shall pay an administrative penalty of $20,000.00 Canadian Dollars per day to be lifted when the Board's Orders regarding the execution of the required consents and Bundle T-Agreements have been complied with by NRG.[37]

55. By letter to the OEB sent July 5, 2007 (attached as Schedule C hereto), counsel for NRG advised that, contrary to statements in the Kovnats Affidavit, the oral evidence of Martin Kovnats and George Alkalay and representations of counsel made on behalf of IGPC to the OEB, the failure of NRG to sign the Assignment Agreement and the Bundled T-Service Agreement did not cause the IGPC financing arrangements to collapse, and did not require funds held in escrow to be distributed back to equity investors. To the contrary, IGPC and its lenders proceeded to close the financing transaction and all documents relating to the financing were executed and delivered into escrow to be released subject to certain conditions.

56. This letter confirms that the alleged urgency that IGPC relied upon in bringing the emergency motion to the OEB, and the basis on which the OEB proceeded to hear the motion on an urgent basis and without proper notice to NRG, did not exist.

> We are writing to provide a status report of the efforts undertaken by and on behalf of the Integrated Grain Processors Co-operative Inc ("IGPC") to pursue salvaging the financial commitment of lenders to the proposed ethanol plant to be constructed in Aylmer, Ontario and the natural gas pipeline required to serve it.
>
> …
>
> As a result of discussions after the proceedings last Friday, IGPC and its lenders agreed that all of the documents relating to the financing for the project should be executed and delivered into escrow to be released subject to certain conditions, including, receipt before noon on Wednesday,

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[35] *Transcript of OEB Proceedings*, pp. 1, Appeal Record, Tab 9, p. 149
[36] *Compliance Order of OEB*, dated June 29, 2007, Appeal Record, Tab 3, p. 18-19
[37] *Compliance Order of OEB*, dated June 29, 2007, Appeal Record, Tab 3, p. 18-19

> July 4, of the agreement of IGPC and its proposed lenders to the insertion into the credit agreement of an event of default occurring if the construction of the necessary 28.5 km natural gas pipeline and the continuous uninterrupted supply of natural gas at a reasonable price is not resolved in a satisfactory manner within a specified timeframe.

PART III – LAW AND SUBMISSIONS

The Board had no Basis or Reason to Hear the Motion on Short Notice

57. Rule 7.01 of the OEB's *Rules of Practice and Procedure* entitles the OEB to "extend or abridge a time limit…on such conditions the Board considers appropriate". The OEB is nonetheless subject to the rules of the *Statutory Powers Procedure Act* ("SPPA") in exercising its power. Section 6(1) of the SPPA requires that "the parties to a proceeding shall be given reasonable notice of the hearing by the tribunal". The OEB's *Rules of Practice and Procedure* do not, therefore, permit the OEB to abridge the requirements in a way that will result in unreasonable notice.[38]

58. The courts have held that reasonable notice of an administrative proceeding is notice that enables a party affected to learn of, and respond to, the issues affecting his interests. As the Divisional Court has explained, a tribunal's "notice must be sufficient to give those whose rights may be affected knowledge of the allegations made against them, the grounds upon which it is relying in its decision, the nature of the evidence in support of the decision, and adequate time to fairness [sic] respond." Accordingly, the notice "must be sufficient to give any person, whose rights are in jeopardy, an opportunity to respond to what is, in effect, the charge against him. Anything short of that is not 'reasonable notice'."[39]

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[38] Ontario Energy Board *Rules of Practice and Procedure,* NRG's Brief of Authorities, Tab 10;
Statutory Powers Procedure Act, R.S.O. 1990, NRG's Brief of Authorities, Tab 11

[39] *Gratton-Masuy Environmental Technologies Inc. v. Building Materials Evaluation Commission* (2002), 60 O.R. (3d) 245 (Div. Ct.), NRG's Brief of Authorities, Tab 1 at para. 39;
Seven-Eleven Taxi Co. Ltd. v. City of Brampton et al. (1976), 10 O.R., (2d) 677 (Div. Ct.), NRG's Brief of Authorities, Tab 2 at 5 [QL]

59. IGPC filed its notice of motion on June 28, 2007, and the emergency Notice of Hearing was issued that same day. The Appellant received notice of this hearing at approximately 5:45 pm on June 28, 2007 and the hearing was set to commence at 8:30 a.m. on June 29, 2007, the very next morning.

60. The OEB's Emergency Notice of Hearing did not enable NRG to fully understand or respond to the case against it. NRG learned at the end of the day that its rights would be adjudicated at the start of the next morning. This notice was unreasonable. As a result, the OEB denied NRG a fundamental requirement of procedural fairness and erred in law in proceeding with the hearing as it did.

The Board Denied NRG its Fundamental Procedural Rights in Conducting the Hearing

61. When conducting a hearing, every administrative tribunal has a duty to act fairly. It is fundamental to this common law requirement that both sides to a dispute be entitled to present their arguments fully and fairly to the decision-making body. The Supreme Court of Canada has made it clear that this is an absolute principle of administrative law: "At the heart of [the] analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly."[40]

62. Urgency cannot override the administrative body's duty to hear both sides of an issue. The Federal Court of Appeal explained that even where there is an obligation to proceed quickly, each party must have an opportunity to present its case: "Although the Board is commanded by subsection 82.1(9) [of the Canada Labour Code] to proceed 'without delay and in a summary

[40] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, NRG's Brief of Authorities, Tab 3 at para. 30

way', it remained obliged to hear both sides to the dispute before rendering its decision."[41]

63. This obligation to hear both sides includes the requirement that all parties be given the materials and information to be relied upon in the case. "The opportunity to be heard is meaningless unless information is provided upon which a meaningful response can be based. Only then are the applicants afforded a truly meaningful opportunity to respond to 'the case to be met'." [42]

64. In the instant case, crucial evidence was not provided to NRG. As the hearing transcript demonstrates:

(a) no evidence was disclosed to show that the federal government would not provide more extensions;

(b) no documents were disclosed that described the terms of the financing or terms of the escrow, which were alleged to form the foundation of the alleged urgency;

(c) the Gas Delivery Agreement and Pipeline Cost Recovery Agreement at the heart of the IGPC motion were not in the motion record served; and

(d) the draft order setting out the emergency relief that the OEB was asked to grant was not contained in the motion record or otherwise provided to NRG.[43]

65. The rules of procedural fairness and natural justice also require that a party be provided with time to consult counsel and prepare its case. As the Federal Court of Appeal commented with respect to an Immigration Appeal Board hearing, "to permit counsel but forty five minutes to peruse and digest what was in the transcript, obtain instructions from the applicant thereon and determine how to present what case there was, was, in our opinion unfair and amounted to a failure to observe a principle of natural justice."[44]

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[41] *Alberto Timpauer v. Air Canada and Canada Labour Relations Board*, [1986] 1 F.C. 453 (F.C.A.), NRG's Brief of Authorities, Tab 4 at para. 14
[42] *Gratton-Masuy, supra,* at para. 39
[43] Transcript of OEB Proceedings, June 29, 2007, pp. 15, 30, 33 and 19, Appeal Record, Tab 8, pp. 66, 81, 84 and 70
[44] *de Oliveira v. Canada (Minister of Employment and Immigration)* (1958), 32 Admin. L.R. 138 (F.C.A.), NRG's Brief of Authorities, Tab 5 at 2 [QL]

66. These fundamental principles therefore oblige an administrative body to adjourn a hearing if failure to do so will result in an unfair procedure. Thus:

> "In each case, whether or not the adjournment should be granted must be considered in the light of the circumstances having regard to the right of the applicant to a fair hearing weighed against the obvious desirability of a speedy and expeditious hearing, into charges of professional misconduct. When balancing these two factors the right of the applicant to a fair hearing must be the paramount consideration." [45]

67. Counsel for NRG repeatedly advised the OEB that he had not had an opportunity to consult with NRG or prepare NRG's response. In particular, IGPC first disclosed a number of documents at the hearing itself, thus prejudicing NRG's opportunity to know the case against it, review the evidence and instruct counsel on an appropriate response.

68. In allowing the motion to proceed and be determined in this manner, and by failing to grant an appropriate adjournment, the OEB failed to protect NRG's procedural rights and denied NRG the essential requirements of procedural fairness. It was patently unreasonable for the OEB to proceed as it did.

The Board did not Follow the Proper Procedure for Enforcing its Order

69. After making its flawed order, the OEB reconvened and conducted a compliance hearing. In convening this hearing without the requisite notice and without permitting NRG to prepare its case, the OEB again contravened the NRG's procedural rights as outlined above.

70. Moreover, the OEB was not empowered by its constating statute to proceed as it did. The OEB stated that it was acting pursuant to s. 112.2(6), which allows the OEB to issue an interim order without a hearing. However, if the order was interim, NRG is entitled to be heard on the matter, including a full evidentiary hearing, before the interim order becomes final. Moreover, in

the specific circumstances of this motion, there is no urgency that could possibly require the issuance of an interim order, and therefore the issuance of a purported "interim order" has the same effect as issuing a final order. The procedural rights required to be granted before a final order is made, were improperly denied to NRG.[46]

71. If, on the other hand, the compliance order is final, the Board erred in proceeding without giving the statutorily required notice. Under s. 112.2(2), the Board "shall give written notice to a person that it intends to make an order under section 112.3, 112.4 or 112.5". Section 112.2(6) makes it clear that such a notice is still required even if the Board issues an interim order. Such notice was not provided in this case. In the absence of the required notice and the resulting denial of NRG's right to require a hearing under section 112.2(4), the interim order is a nullity.[47]

72. The Board's authority to impose a penalty is set out in section 112.5. The Board's authority to issue an interim order pursuant to section 112.2(6) is limited to orders under section 112.3 which deals with compliance orders and not penalties. Therefore, Board had no authority to issue an interim penalty Order.

73. By making the interim penalty Order, the OEB failed to follow the procedural requirements of Part VII.1 of the Act, which are both an essential requirement of procedural fairness and a pre-condition to the Board's jurisdiction to issue any interim penalty Order.

74. The penalty imposed was also patently unreasonable. Under s. 112.5(3), the maximum penalty that the OEB can impose is an administrative penalty not exceeding $20,000 "for each day or part of a day on which a contravention occurs or continues". The OEB gave no

[45] *Morgan v. Association of Ontario Land Surveyors (1980)*, 28 O.R. (2d) 19 (Div. Ct.), NRG's Brief of Authorities, Tab 6 at 4 [QL]

consideration to the seriousness of the contravention at hand. The OEB's Regulation entitled *Administrative Penalties* explicitly requires the OEB to determine an appropriate range of penalty based on whether the contravention was a major, moderate or minor deviation and its potential to adversely affect customers. Indeed, the OEB's counsel specifically advised the OEB that it was necessary to determine whether a violation is major, moderate or minor and to act accordingly. Nonetheless, the OEB imposed the maximum penalty without considering the nature of the contravention.[48]

75. The OEB's action was inconsistent with its own statute and with Supreme Court jurisprudence. The Supreme Court has held that if an administrative tribunal "imposes a remedy which is not rationally connected to the breach and its consequences or is inconsistent with the policy objectives of the statute then it will be exceeding its jurisdiction. Its decision will in those circumstances be patently unreasonable."[49]

76. The OEB therefore failed to comply with the procedural requirements of Part VII.1 of the Act and erred in law by imposing an administrative penalty of $20,000 a day until NRG signed the Assignment Agreement and the Bundled T-Service Agreement.

77. The daily penalty is also inconsistent with the OEB's initial order. The OEB specifically required NRG to sign the Assignment Agreement and the Bundled T-Service Agreement by 4:00 p.m. on June 29, 2007. The violation therefore crystallized at that time, and cannot be construed as an ongoing contravention. As counsel for NRG argued at the hearing, the OEB had issued its

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[46] *Ontario Energy Board Act, 1998*, *supra*
[47] *Ontario Energy Board Act, 1998*, *supra*
[48] *Ontario Energy Board Act*, *Administrative Penalties,* O. Reg. 331/03, NRG's Brief of Authorities, Tab 12; Transcript of OEB Proceeding, p. 16, Appeal Record, Tab 9, p. 164
[49] *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369, NRG's Brief of Authorities, Tab 7 at para. 56

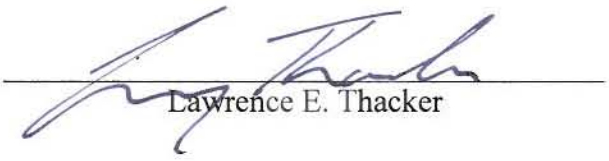
order compelling NRG to sign the Assignment Agreement and the Bundled T-Service Agreement because of IGPC's submission that all money would have to be returned to investors by the close of business on June 29, 2007. There was therefore no basis for imposing a penalty that accrued every day after that time.

78. Neither the issuance, quantum nor timing of the OEB's administrative penalty Order complied with the procedural requirements of Part VII.1 of the Act or the essential requirements of procedural fairness.

PART IV - ORDER SOUGHT

79. NRG respectfully requests that the Decision and Order of the OEB made June 29, 2007, and the subsequent Compliance Order of the OEB made June 29, 2007, each be set aside and vacated and the prior IGPC application be dismissed with costs to NRG.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of December 2010.



Lawrence E. Thacker

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto, Ontario
M5H 3P5

Lawrence E. Thacker
Tel: (416) 865-9500
Fax: (416) 865-9010

Solicitors for Natural Resource Gas Limited

SCHEDULE A
LIST OF AUTHORITIES

TAB

1. *Gratton-Masuy Environmental Technologies Inc. v. Building Materials Evaluation Commission* (2002), 60 O.R. (3d) 245 (Div. Ct.)

2. *Seven-Eleven Taxi Co. Ltd. v. City of Brampton et al* (1976), 10 O.R. (2d) 677 (Div. Ct.)

3. *Baker v. Canada (Minister of Citizenship and Immigration),* [1992] 2 S.C.R. 817

4. *Alberto Timpauer v. Air Canada and Canada Labour Relations Board*, [1986] 1 F.C. 453 (F.C.A.)

5. *de Oliveira v. Canada (Minister of Employment and Immigration)* (1958), 32 Admin. L.R. 138 (F.C.A.)

6. *Morgan v. Association of Ontario Land Surveyors* (1980), 28 O.R. (2d) 19 (Div. Ct.)

7. *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369

8. Ontario Energy Board, decision in E.B.R.O. 410-II/411-II/412-II (March 23, 1987)

9. *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15

10. Ontario Energy Board *Rules of Practice and Procedure*

11. *Statutory Powers Procedure Act,* R.S.O. 1990

12. *Administrative Penalties,* Ontario Regulation 331/03

13. David M. Brown, *Energy Regulation in Ontario,* looseleaf (Aurora: Canada Law Book, 2006) at 2-20

SCHEDULE B
TEXT OF STATUTES, REGULATIONS & BY-LAWS

Ontario Energy Board Act, 1998
Loi de 1998 sur la Commission de l'énergie de l'Ontario

ONTARIO REGULATION 331/03

No Amendments

ADMINISTRATIVE PENALTIES

This Regulation is made in English only.

Amount of administrative penalty

1. For the purposes of section 112.5 of the Act, the Board shall determine the amount of an administrative penalty for a contravention of an enforceable provision in accordance with the following rules:

1. The Board shall determine whether, in its opinion, the contravention was a major, moderate or minor deviation from the requirements of the enforceable provision.

2. The Board shall determine whether, in its opinion, the contravention had a major, moderate or minor potential to adversely affect consumers, persons licensed under the Act or other persons.

3. Using the Schedule, the Board shall determine the appropriate range for the administrative penalty, based on the determinations made under paragraphs 1 and 2.

4. The amount of the administrative penalty for the contravention is, for each day or part of a day on which the contravention occurred or continued, an amount selected by the Board from within the range determined under paragraph 3 after considering the following criteria:

i. The extent to which adverse effects of the contravention have been mitigated by the person who committed the contravention.

ii. Whether the person who committed the contravention has previously contravened any enforceable provision.

iii. Whether the person who committed the contravention derived any economic benefit from the contravention.

iv. Any other criteria that the Board considers relevant. O. Reg. 331/03, s. 1.

2. Omitted (revokes other Regulations). O. Reg. 331/03, s. 2.

3. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 331/03, s. 3.

SCHEDULE
RANGES OF ADMINISTRATIVE PENALTIES (SEE PARAGRAPH 3 OF SECTION 1)

		Deviation from the requirements of the enforceable provision that was contravened (see paragraph 1 of section 1)		
		Major	Moderate	Minor
Potential to adversely affect consumers, persons licensed under	Major	$15,000 - $20,000	$10,000 - $15,000	$5,000 - $10,000

the Act or other persons (see paragraph 2 of section 1)				
	Moderate	$10,000 - $15,000	$5,000 - $10,000	$2,000 - $5,000
	Minor	$5,000 - $10,000	$2,000 - $5,000	$1,000 - $2,000

O. Reg. 331/03, Sched.

AIRD & BERLIS LLP

Barristers and Solicitors

Dennis M. O'Leary
Direct: 416 865-4711
E-mail: doleary@airdberlis.com

July 5, 2007

Sent Via E-mail and Courier

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, ON M4P 1E4

Attention: Ms. Kirsten Walli
Board Secretary

Dear Ms. Walli:

Re: Integrated Grain Processors Co-Operative Inc.
Orders Against Natural Resource Gas Limited
EB-2006-0243; EB-2005-0544

We are writing to provide a status report of the efforts undertaken by and on behalf of the Integrated Grain Processors Co-operative Inc ("IGPC") to pursue salvaging the financial commitment of lenders to the proposed ethanol plant to be constructed in Aylmer, Ontario and the natural gas pipeline required to serve it.

These efforts commenced immediately upon the conclusion of the hearings held by the Ontario Energy Board (the "Board") on Friday, June 29, 2007 and continued well past midnight that day. People's commitment to realizing the IGPC project continued throughout the long weekend and throughout Tuesday July 3.

Subsequent to the emergency motion which was heard on Friday, June 29th, we have received no oral or written indication from Natural Resources Gas Limited ("NRG") that it intends to comply with the Board's Order and execute the contracts in question. As is evident from the following, as a result of the ongoing intransigence of NRG, IGPC is still in the position of not having any confidence that the future of the pipeline and its proposed ethanol plant is assured.

As a result of discussions after the proceedings last Friday, IGPC and its lenders agreed that all of the documents relating to the financing for the project should be executed and delivered into escrow to be released subject to certain conditions, including, receipt before noon on Wednesday, July 4, of the agreement of IGPC and its proposed lenders to the insertion into the credit agreement of an event of default occurring if the construction of the necessary 28.5 km natural gas pipeline and the

continuous uninterrupted supply of natural gas at a reasonable price is not resolved in a satisfactory manner within a specified timeframe.

Also, we wish to point out that the law relating to escrows provides, in essence, that matters placed into escrow are deemed to be removed from escrow as of the time such matters are deposited into escrow. Accordingly, having all the documents placed into escrow on June 29 means that when the escrow is lifted the documents are deemed to have been released as at June 29, being before the 'drop-dead' date of June 30, of which we had advised the Board.

Under the new event of default provision, insisted upon by the lenders, the lenders may pursue all available remedies provided in the credit facility agreements unless within thirty days of the 27th of June, 2007, either:

(a) NRG executes the contracts which were the subject of the Board's Order on June 29th (being both the Bundled T Agreement and the Consent and Acknowledgement Agreement), in the forms which NRG's counsel had previously approved; or

(b) the Board approves an assignment or transfer of its leave to construct approval for the pipeline to an acceptable entity and such entity agrees.

The remedies available to the lenders include the ability to terminate the financing transaction, which will end the project.

Accordingly, IGPC has no option but to consider and pursue all other reasonable alternative means of natural gas supply for which it will ultimately require the Board's assistance approving an assignment or transfer of the earlier leave to construct approval.

We wish to advise that the escrow arrangement was used to allow the lenders sufficient time to consider their willingness to finance a project where one of the suppliers of a vital service was not complying with the applicable regulatory regime. IGPC is of the view that its ability to convince the lenders to proceed with the closing in escrow was a direct result of the Board's order compelling NRG to execute the subject contracts, the reasons given in support of this order and the imposition of an administrative penalty. Absent such action, IGPC believes that the closing would not have occurred.

Based upon the foregoing, IGPC anticipates that further proceedings will be required in the very near future, possibly seeking leave of the Board to assign or transfer the

facilities approval. Given the short time frame noted above, we trust that the Board will similarly deal with such a proceeding on an urgent basis.

Yours very truly,

AIRD & BERLIS LLP

Dennis M. O'Leary
DMO/gt

cc: Larry Thacker, counsel to NRG
Tom Cox, Chairman, IGPC
Brent McBlain, Vice-Chair and Director, IGPC
Joseph Kloepfer, Secretary and Director, IGPC
His Worship Mayor Hapkirk, Town of Aylmer
Heather Adams, Administrator, Town of Aylmer
Phil Tunley, Counsel to Town of Aylmer
David Woodward, Lerners LLP

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