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August 19, 2011

BY COURIER, EMAIL AND RESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
27th Floor
Toronto, ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: Natural Gas Resource Limited
EB-2010-0018
Intervenor: Integrated Grain Processors Co-operative Inc. ("IGPC")

Please find attached two (2) hard copies of submissions filed on behalf of IGPC.

We confirm that an electronic copy of the above has been submitted through the Board's Regulatory Electronic Submission System ("RESS"). A copy of the RESS submission confirmation sheet is enclosed.

Yours truly,

AIRD & BERLIS LLP

Scott A. Stoll

SAS/hm
Encl.

cc: Applicant and Intervenors in EB-2010-0018 (via email)

10751434.1

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Natural Resource Gas Limited for an Order or Orders approving or fixing just and reasonable rates and other charges for the sale, distribution and storage of gas commencing October 1, 2010

AND IN THE MATTER OF an Application by Natural Resource Gas Limited for an Order or Orders approving a multi-year incentive rate mechanism plan

SUBMISSIONS OF INTEGRATED GRAIN PROCESSORS CO-OPERATIVE INC. AND IGPC ETHANOL INC. IN RESPECT OF MOTION

Our Mission

To promote a viable, sustainable and efficient energy sector that serves the public interest and assists consumers to obtain reliable energy services at reasonable cost.

Ontario Energy Board[1]

1. Setting rates, whether in the form of an aid-to-construct or monthly payment obligations, is the core function of the Board. The Board cannot permit a utility to avoid its legal obligations, to abuse its monopoly position or the Board will have failed to fulfill its statutory mandate and

[1] Ontario Energy Board Website, http://www.ontarioenergyboard.ca/OEB/Industry/About+the+OEB/What+We+Do .

will have failed the public interest. NRG is relying upon the inaction of the Board to continue its abusive conduct to act solely in the interest its shareholder to retain excessive charges.

2. IGPC is relying upon the Board – as it has been required to do in the past with NRG - to use its authority to stop the abuse it has been and continues to be subjected to by NRG. The IGPC Pipeline has been in service for over 3 years and IGPC has yet to receive any reimbursement which even by NRG's claims is owed to IGPC.

3. These submissions respond to the submissions of Board Staff dated August 9, 2011 regarding the Ontario Energy Board's (the "**Board's**") jurisdiction to resolve the dispute between IGPC and Natural Resource Gas Ltd. ("**NRG**") as to the reasonable capital cost of the IGPC Pipeline and the reasonable aid-to-construct that IGPC was obligated to provide to NRG.

4. For the following reasons, IGPC asserts the Board does have jurisdiction:

(a) Section 36 of the *Ontario Energy Board Act, 1998*, S.O.1998, c.15, Schedule B (the "**OEB Act**") provides a distributor may only charge for distribution in accordance with an order of the Board and the issue is a rate issue.

(b) Section 19(6) of the OEB Act provides the Board with the exclusive authority in relation to "all cases and in respect of all matters" where the Board has jurisdiction.

(c) The Board reviewed and approved the Pipeline Cost Recovery Agreement ("**PCRA**") and the Gas Delivery Contract ("**GDC**") as part of the leave to construct proceeding.

(d) The Board has in previous decisions involving a dispute between IGPC and NRG regarding the PCRA and GDC acknowledged and acted upon its jurisdiction.

(e) NRG has acknowledged the Board's jurisdiction relating to the PCRA was intended to protect ratepayers and that it was a conscious, thought-out decision to express that jurisdiction in the PCRA.

5. The regulation of the utility sector is intended to prevent the monopoly service provider from abusing its power yet provide the utility with a reasonable return. The over 840 community members of IGPC, the federal, provincial and municipal governments have all relied on this regulatory compact, the prior representations of NRG recognizing the Board's jurisdiction and the Board 's statements assuring parties and prior actions exercising jurisdiction.

6. To accept Board Staff's, and the current NRG, position would render sections 36 and 19(6) of the OEB Act meaningless as a utility could by contract extort additional compensation from a ratepayer and be immune from the Board's regulatory control. This cannot be the intent of the legislature.

EB-2005-0544

7. In 2006, NRG was in the midst of a rate proceeding, EB-2005-0544. The Board conducted a public meeting in Aylmer to hear from the residents. At the meeting, the Mayor, His Worship Paul Baldwin, indicated the importance of the Facility to the community and the need for the Board to do everything within its power to help ensure the success of the Facility and to provide the opportunity for the community of Aylmer to survive. The Vice Chair of the Board, Mr. Gordon Kaiser, understood the importance to the community and made this public pronouncement:

> "MR. KAISER: Well, let's leave it on this basis.
>
> The Board is aware that these things need to move promptly, as you say. We're aware that within this community there is a problem. The tobacco

> industry is declining. And it's important that new industry come into that void.
>
> The utility, NRG, has an obligation to serve, of course at reasonable rates. If, for some reason, the applicant, the customer in this case, the ethanol facility, feels that those negotiations aren't proceeding in a timely fashion **or the company isn't being responsive, then you can always make an application, contact the Ontario Energy Board, and the Board has remedies to deal with it.**
>
> But it sounds like at this time discussions are proceeding in the normal course and we can allow them to continue.
>
> Am I accurately stating it, Mr. King?
>
> MR. BRISTOLL: Mr. Bristoll here. That's correct."[2]

8. It was clear that NRG had an obligation to provide service. However, it was clear that service was not at any price set by the utility – but, at a reasonable rate as set by the Board. The Board then confirmed it had remedies to deal with an unresponsive utility. IGPC took comfort and relied upon the assurance of the Board that it possessed the ability to control and resolve issues. At that time, IGPC could never have predicted that it would need to rely upon the Board to ensure NRG would live up to its obligations as a public utility.

9. If the Board does not accept its jurisdiction in this Motion, IGPC will have relied upon the Board's previous statements and actions to its detriment.

10. As a result of NRG's unconscionable behaviour of refusing to execute agreements, demanding $32million in financial assurance, abdicating a responsibility to negotiate with Union, IGPC has been forced to spend several hundred thousand dollars in legal fees and additional interest charges. This has not been a utility acting in the public interest.

[2] EB-2005-0544, Transcript, Public Forum, July 18, 2006, page 8, lines 26-28 and page 9, lines 1-15.

11. During EB-2005-0544, NRG stated that it would require IGPC to enter into a series of agreements with NRG in order to provide distribution service. These agreements included the Gas Delivery Contract, the Pipeline Cost Recovery Agreement and the Bundled T Service Receipt Contract. NRG is obligated to enter a Bundled T with any direct purchase customer as part of its rate order.

12. The Board recognized that NRG was a utility that had several issues with the imminent loss of Imperial Tobacco. Ratepayers would be faced with potentially dramatic increases if new customers did not come onto the NRG distribution system.

13. The Board was acutely aware of the importance of IGPC to NRG and the other ratepayers and citizens of Alymer and the surrounding townships. Further, the Board also seemed concerned that NRG was either unable or unwilling to realize upon the opportunity being presented. In the Decision the Board took the unusual step of mandating monthly status updates and urged stated:

> With respect to the new ethanol plant, the Board recognises that this is a major opportunity for both NRG and the town of Aylmer. The Board urges NRG to co-operate with the town and IGPC to the maximum extent possible, in order to ensure that negotiations proceed in an efficient and timely manner. The Board orders NRG to provide monthly update to the Board on the status of its pending "Leave to Construct" application with respect to the proposed ethanol plant.
>
> The Board further directs NRG to consider the economic feasibility of adding a large pipeline than that required to accommodate volumes associated with the proposed ethanol plant. The mayor has indicated that this will help attract additional industries and mitigate the local impacts caused by the falling tobacco production and the closing of the Imperial Tobacco plant in Aylmer. NRG should look into the possibility of adding additional capacity as long as it does not cause undue burden on existing rate classes or significant cost overruns for NRG and IGPC. Such a study must be filed with the "Leave to Construct" application. [3]

[3] EB-2005-0544, Decision, September 20, 2006, page 6.

14. At this early juncture in the development of the IGPC Pipeline, the Board confirmed that IGPC should not be exposed to cost overruns to obtain service. IGPC, its individual members and government supporters and lenders relied upon the Board's statement that it would be vigilant to ensure NRG did not abuse its monopoly position.

EB-2006-0243 – the Leave to Construct

15. The right and privilege to construct a hydrocarbon line in Ontario is the subject of the Board's jurisdiction. The Board has specific express authority to grant approval to any person seeking to construct a hydrocarbon line. Where an expansion is of a nature within the requirements of section 90 (see below) of the OEB Act, the utility must come before the Board, seek and obtain leave to construct.

> **90.** (1) No person shall construct a hydrocarbon line without first obtaining from the Board an order granting leave to construct the hydrocarbon line if,
> (a) the proposed hydrocarbon line is more than 20 kilometres in length;
> (b) the proposed hydrocarbon line is projected to cost more than the amount prescribed by the regulations;
> (c) any part of the proposed hydrocarbon line,
> (i) uses pipe that has a nominal pipe size of 12 inches or more, and
> (ii) has an operating pressure of 2,000 kilopascals or more; or
> (d) criteria prescribed by the regulations are met.

16. If a hydrocarbon line meets any of the requirements of section 90 of the OEB Act, a utility must apply to the Board for leave to construct. The IGPC Pipeline met several of the section 90 criteria as it is a 28.5km NPS 6 steel pipeline which cost in excess of $2,000,000 (the amount prescribed by regulation). As such, NRG was statutorily barred by section 90 of the OEB Act from constructing the IGPC Pipeline without an order of the Board granting leave to construct. NRG is also barred from charging a ratepayer except in accordance with a Board order.

17. The Board Panel had a long exchange regarding the filing of the contracts with NRG.

> "MR. KAISER: Here is our current thinking: Tell us whether that meets your concerns and your satisfaction.
>
> We would hope to have a written decision out in the first week of January, after people come back from their holidays. We've heard your submissions with respect to changing the conditions and filing this contract, but we really would like to see this contract executed.
>
> This is not your ordinary case. This is a $9 million expenditure that represents a 50 percent expansion of this company's rate base. This is not the garden-variety case.
>
> We would understand that there could be conditions that the contract was subject to third party approval by financing institutions, either in the case of NRG or in the case of the ethanol plant. But based on the evidence we have heard, we see no reason why an executed contract cannot be filed very quickly, and so we would urge you to consider that.
>
> And when we say that, we have in mind a concern. Union Gas has told us that they need eight months from the signing of their contract, and their contract is clearly not going to be signed until this contract is signed, because the flow-through in this contract is the indemnity to Union Gas.
>
> So we leave you with that thought. We are prepared to move very quickly on this. It's a big case. We want to have it nailed down, but we want to see this executed contract, if at all possible."[4]

18. The Board took extraordinary interest in the PCRA and the GDC and deferred making a decision to ensure it received executed agreements as demonstrated in the exchange with NRG's counsel:

> "MR. KAISER: Here's my point: It sounds like the contract is pretty close. That's a central part of this case. I think we'd like to see the contract before we make a decision.
>
> MR. MORAN: Sorry, Mr. Chair, I've known that in past cases where a contract is not in place - and it's not uncommon for that to be the case - that the Board simply, if it's inclined to approve the pipeline, will do it on condition that a contract is entered into. So I think you have some options to deal with that problem.

[4] EB-2006-0243, Transcript, December 18, 2006, page 70, ll. 18-28 and page 71, ll. 1-16.

> MR. KAISER: No, I understand that, but the best course would be to see the actual contract, and if I'm understanding what I've heard, that shouldn't be any big problem you guys filing that within the next week or so. Is there a problem or not a problem?"[5]

19. The assertion by Board Staff in its submissions that the Board did not consider its role in relation to a dispute between NRG and IGPC is clearly contradicted by a review of the record.

20. On December 20, 2006, approximately 6 weeks before issuing the Decision, draft copies of the PCRA and GDC were provided to the Board for review by IGPC. The draft PCRA and GDC included the dispute resolution and assignments provisions. The Board had ample opportunity review the PCRA and GDC in detail.

21. On January 15, 2007, IGPC and NRG appeared before the Board to provide an update in respect of the conclusion of negotiations of the PCRA and the GDC. Once again, NRG attempted to suggest the Board only need to be assured the PCRA and GDC had been concluded. The Board rejected this and required the agreements to be concluded filed with the Board prior to granting leave to construct. The Board was ensuring the public interest mandate would be fulfilled and was exercising appropriate oversight over NRG. The Board could not let NRG enter a contract that was unreasonable for either IGPC or the other NRG ratepayers.

22. On February 1, 2007, the parties submitted the concluded agreements and appeared before the Board. The Board Panel was alive to the issue of a potential dispute and the very situation we currently face. The Board Panel put the question directly to NRG's legal counsel.

> "MR. KAISER: One of the things, Mr. Moran, that may be a bit different -- I don't know. You would possibly be more familiar than I would. Both of these agreements have arbitration clauses that seem to appoint the OEB as an arbitrator.

[5] EB-2006-0243, Transcript, December 18, 2006, page 50, ll. 21-28 and page 51, ll. 1-7.

> In the case of the pipeline cost recovery agreement - this is at article 9 - it says:
>
> "In the event of any dispute arising between the parties regarding the subject matter of this agreement, the parties shall negotiate in good faith to resolve such matters.
>
> "9.2. In the event the parties are unable to resolve a dispute, then either party may refer the matter to the OEB for resolution."
>
> Now, that says "may", of course, so you could presumably take other actions by way of arbitration, if you chose to.
>
> MR. MORAN: Overall, Mr. Chair, we recognized that there was the possibility of three kinds of disputes. There can be disputes with respect to subject matter that falls within the jurisdiction of the OEB. There may be metering disputes, which clearly fall within the jurisdiction of Measurement Canada. And then outside of those two areas there might be disputes with respect to rights and obligations that don't necessarily fall within the jurisdiction of the OEB or Measurement Canada.
>
> So I think you will see that reflected in the gas delivery contract. In this one, because it is a cost recovery agreement and because it is all about protecting ratepayers, the dispute resolution clause really focuses on the OEB as the arbitrator –"[6]

23. NRG represented to the Board that the PCRA was intended to protect ratepayers - thereby assuring ratepayers that the OEB would be able to ensure rates would be just and reasonable.

24. Clearly, the Board had turned its mind to the potential for a dispute to arise and accepted its role in resolving such a dispute. If the Board did not agree with its intended role that should have been reflected in the Board's decision in granting leave to construct.

25. Section 96 of the OEB Act, see below, states the test for granting leave to construct.

> **96.** (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.

[6] EB-2006-0243, Transcript, February 1, 2007, pg. 8, ll. 24-28, pg. 9, ll. 1-27.

26. The Board is obligated to grant leave where it determines the proposed work is in the public interest. Part of the fulfillment of the public interest is ensuring the economic bargain between the utility and the customer results in just and reasonable rates. The public interest requires the utility to comply with its representations and commitments made to the Board whether in the form of an environmental report or a contractual commitment to a consumer.

27. The Board's website describes its role in as:

> "The Board is required to determine if the construction of a natural gas pipeline is in the public interest by considering need, safety, economic feasibility, community benefits, security of supply and environmental impacts."[7]

28. The consideration of a leave to construct application is not restricted to just the technical requirements of the project but also the rates that will be charged by the utility to the customer to ensure the profitability index ("PI") is at least 1.0. In the present circumstances, NRG's counsel made the following submission to the Board:

> "The first risk is with respect to the economic feasibility of the project and, as you already know from the evidence, the economic evaluation produces a PI of 1 provided that the IGPC pays an aid to construct towards the project, and as you will see in the agreements, the aid to construct is a requirement of getting service."[8]

29. NRG's counsel is acknowledging that the contribution in aid of construction is part of the overall rate charged by the utility necessary to achieve the financial level. Further, paying the aid to construct is a condition of receiving service and nothing is more intimately linked to the Board's mandate than providing distribution service.

[7] Board Website, http://www.ontarioenergyboard.ca/OEB/Industry/About+the+OEB/What+We+Do .
[8] EB-2006-0243, Transcript. February 1, 2007, pg. 2, ll. 15-21.

30. In EB-2006-0243 the Board relied upon the terms and conditions contained in the PCRA and the GDC to ensure the statutory requirement to serve the public interest was fulfilled. The Board Findings were as follows:

> The Board is satisfied that the terms and conditions of the two agreements, the GDC and the PCRA, adequately protect the interests of NRG and its ratepayers against anticipated risks. In making its finding to grant the requested leave to construct, the Board is placing significant reliance on the terms and conditions of both the PCRA and GDC that protect the interest of NRG's ratepayers.
>
> The Board finds that the Proposed Facilities are in the public interest and grants the requested leave to construct. The Board notes this is a significant expansion of NRG's facilities and will increase its rate base by approximately 50%.[9]

31. The contractual commitments in the PCRA and GDC incorporate the Board's approach to economic feasibility. But for the contractual commitments in the PCRA and the GDC which ensure a profitability index of 1.0 in respect of the IGPC Pipeline, the Board would not have found the proposed work was in the public interest.

32. As noted above, the Board made no comment in the Decision about any concern regarding its potential role in resolving disputes. As such, IGPC reasonably concluded the Board was satisfied that it could have recourse to the Board as represented by NRG and accepted by the Board.

33. NRG would not have been granted the authority to charge and collect the contribution in aid of construction or the authority to construct the IGPC Pipeline. As such, the amount of the contribution in aid of construction, or the Actual Aid-to-Construct as that term is used in the PCRA, is within the Board jurisdiction to ensure "rates" are just and reasonable.

[9] EB-2006-0243, Decision and Order, dated February 2, 2007, page. 4.

34. The Board, in EB-2006-0243 then went on to impose a series of conditions in granting leave which included the following:

> **IT IS THEREFORE ORDERED THAT**:
> …..
>
> 2. The granting of leave is subject to the Conditions of Approval set forth in Appendix "B".
>
> **Appendix B**
>
> 5.2 NRG shall not, without the prior approval of the Board, consent to any alteration or amendment to the Gas Delivery Contract or the Pipeline Cost Recovery Agreement as those agreements were executed on January 31, 2007, where such alteration or amendment has or may have any material impact on NRG's ratepayers.[10]

35. The Board's order in EB-2006-0243 established the legal obligations for the determination of payments between NRG and IGPC, and these obligations are contained in the terms and conditions of the PCRA and the GDC. These terms and conditions included the obligation to comply with EBO 188 and the Board's authority to establish just and reasonable rates pursuant to section 36 of the OEB Act.

36. The Board's EB-2006-0243 Decision and Order clearly asserts jurisdiction over the PCRA and GDC and the ability to amend these agreements. There was no suggestion that the Board lacked the jurisdiction to impose such a condition – and NRG had represented that such was within the Board's jurisdiction as a ratepayer protection.

37. Condition 5.2 of the Board's Order is intimately linked to the rates and conditions for the sale and distribution of natural gas and the assurance the public interest will be satisfied. It prohibits NRG from amending the PCRA or the GDC without the approval of the Board. IGPC,

[10] EB-2006-0243, Decision and Order dated February 2, 2007.

its members and supporters relied upon the Board's continued oversight of the PCRA and the GDC.

38. NRG could not, without the approval of the Board, modify the PCRA to remove the obligation to complete a reconciliation based upon the actual reasonable capital costs of the IGPC Pipeline as to do so would place NRG and its ratepayers at risk if such actual costs incurred exceeded the forecasted amount.

39. The fulfillment of the Board's mandate to ensure rates are just and reasonable and that the public interest is fulfilled necessitated that NRG and IGPC abide by the terms of the PCRA and GDC. NRG has failed to abide by such terms.

40. The Board's jurisdiction to enforce the payment obligations contained in the PCRA and GDC is based upon its authority of to ensure a gas distributor only charges in accordance with a Board order and those charges or rates are just and reasonable.

41. It took over 2 years from the IGPC Pipeline being put into service for NRG to provide support for it claimed costs. This is a clear breach of section 3.13 of the PCRA which required NRG to provide the Actual Capital Cost of the Pipeline within 45 Business Days of the pipeline being placed into service.

42. In the present situation IGPC submits that NRG has failed to comply with the Board's order in respect of the charges authorized by the Board pursuant to the Board's order.

EB-2006-0243 –Emergency Motion

43. Between February and June 2007, IGPC attempted to negotiate the Bundled T Service Receipt Agreement (the "**Bundled T**") and a consent to assignment agreement (the "**Consent to Assignment**") as was expressly contemplated by the PCRA and the GDC.

44. Finally, NRG's counsel settled on the terms and conditions of the Bundled T. NRG counsel sent the Bundled T to Mr. Bristoll on June 15, 2007 for execution. Despite numerous requests from IGPC to pick up an executed copy of the Bundled T – NRG remained silent.

45. The Consent to Assignment was first presented to NRG's legal counsel in March of 2007. It was not until late June that NRG counsel would actively engage in discussions. After lengthy discussions counsel to NRG settled on the terms and recommended that NRG execute the agreement.

46. On June 28, 2007 NRG informed IGPC that it would not execute the agreements. No explanation or rationale was provided to IGPC.

47. Only four years after the fact did NRG shed any light on their behaviour. On June 9, 2011, Mr. Anthony Graat, the non-resident non-voting shareholder of NRG, swore an affidavit in the $20,000,000 claim for malicious falsehood against IGPC and stated the following:

> "However, NRG eventually determined that it was not in the best interests of NRG to sign the Assignment Agreement of the Bundled T-Service Agreement."

48. The Bundled T is a requirement of its rate order. NRG was simply abusing its position as a monopoly.

49. While NRG has stated that it was not in its interest it has provided no indication that any terms or conditions in any of the 4 agreements, the PCRA, the GDC, the Bundled T or the Consent to Assignment are inappropriate or should be amended

50. After being informed that NRG would not execute the Bundled T or the Consent to Assignment, IGPC sought assistance from the Board.

51. On June 29, 2007 two hearings were conducted. The first a motion and the second a compliance proceeding.

52. During the IGPC motion, there was significant discussion regarding the Board's jurisdiction in this matter. The panel considered the jurisdictional issues for each of the PCRA and the GDC. With respect to the GDC the Board's jurisdiction over the agreement was irrefutable as acknowledge by the Board in the following:

> MR. KAISER: Let me -- it seems to me what you're suggesting is contrary to Ms. Sebalj's suggestion.
>
> We have a contract before us that is a gas delivery agreement --
>
> MR. O'LEARY: Yes, sir.
>
> MR. KAISER: -- which we have approved and nobody would dispute is within our jurisdiction, and it is signed by the utility.
>
> MR. O'LEARY: Yes.
>
> MR. KAISER: Now, we have a clause in that that requires them to assign the agreement, which assignment cannot be unreasonably withheld. So there is a term in which there is a dispute. You say they're being unreasonable. Mr. Thacker doesn't say whether they're being unreasonable or not being unreasonable. He doesn't know.
>
> So if that contract is within our jurisdiction and we make a finding that the utility is not complying with the contract, which would be what we would be saying if we found that the consent was being unreasonably withheld --

> MR. O'LEARY: That's right.
>
> MR. KAISER: -- what jurisdiction do we have to compel them to act pursuant to the contract?
>
> MR. O'LEARY: Well, our position, sir, is that under your general powers, your inherent jurisdiction, the necessary implication of you being provided with the authority under subsection 42(3) is that absent you having the ability to order a utility to take specific steps - in this case, to execute the necessary contracts - then the utility is able to defeat your authority.[11]

53. As noted the GDC is within the Board's jurisdiction. However, as represented above by NRG's counsel, the PCRA was a condition of receiving service.

54. Further, it is only the combination of the PCRA and GDC that provides the total rate NRG is permitted to charge. As such, the PCRA is no different from a jurisdictional perspective than the GDC.

55. NRG's position at the Emergency Motion was the Board had jurisdiction to order service but no ability to ensure service would be provided. The inconsistency of NRG's position and the inherent conflict with its obligation to provide service is evident in the following exchange:

> 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,

[11] EB-2006-0243, Transcript, Motion, June 29, 2007, starting page 57 at line 25 through page 58, line 26.

by simply not signing an agreement. Is that your position?

MR. THACKER: No.[12]

56. If the powers of the Board and the contractual commitments of the parties are to have any meaning, the Board must have the jurisdiction to interpret and enforce the terms of the PCRA and the GDC otherwise the utility has the unfettered ability to escape regulatory oversight.

57. At the conclusion of the Motion, the Board issued the following oral decision:

> "NRG has apparently refused to consent to an assignment contemplated in both of the agreements referred to, and, as a result, IGPC will not be able to satisfy the conditions precedent for the release of the escrow funds.
>
> I want to turn next to the actual agreements. First, the question of whether the Board has jurisdiction, was raised by counsel for NRG.
>
> Section 9.1 and 9.2 of the Pipeline Cost Recovery Agreement provides that:
>
> > "In the event of any disputes arising between the parties regarding the subject matter of this agreement, then the parties shall negotiate in good faith to resolve such matters. In the event the parties are unable to resolve a dispute, then either party may refer the matter to the OEB for resolution."
>
> The Pipeline Recovery Agreement, which was the basis by which the funding was made available for the pipeline. I referred you to the Board's decision with respect to the aid of construction that was necessary and mandated by this Board in order to allow the leave to construct to be granted. That agreement contains certain terms and conditions, one of which was in 11.2(d):
>
> > "Provide this agreement will not be assigned without the prior written consent of the other party, such consent not to be unreasonably withheld. For greater certainty, an assignment by way of security to the customers' lenders shall be considered reasonable."

[12] EB-2006-0243, Emergency Motion, June 29, 2007, page 47, ll. 5-25.

A similar section exists in the Gas Delivery Contract, also approved by the Board as part of the February 2nd decision. There section 7.4 says:

"This contract shall be binding on and enure to the benefit of the parties hereto and their respective successors and assigns, shall not be assigned or be assignable by the customer without the prior written consent of the utility. The utility agrees that such consent shall not be unreasonably withheld. For greater certainty, an assignment by way of security to the customers' lenders shall be considered reasonable."

We have heard evidence that the assignment in the form contemplated by the applicant has been in the hands of NRG's lawyers for over a month. To date, NRG has apparently refused to execute that consent to assignment.

This Board believes it has jurisdiction to enforce the two contracts before us. Section 42(3) of the Ontario Energy Board Act provides that:

> "Upon application, the Board may order a gas transmitter, gas distributor or storage company to provide any gas sale, transmission, distribution or storage service or cease to provide any gas sales service."

What we have are two linked agreements. One is a Gas Distribution Agreement in favour of the applicant. The other is a Pipeline Cost Recovery Agreement by which the applicant has agreed and NRG has accepted certain funding which will make the pipeline viable.

While we may or may not have jurisdiction over an ethanol plant, the Board certainly has jurisdiction over this pipeline and has rendered a decision with respect to it; namely, a leave to construct, and has approved the very funding that is at issue.

It is now apparent this funding will not flow through and the transaction cannot be completed unless the requested consent is executed in the form requested by the applicant.[13]

.....

“In conclusion, we should add that various parties to this proceeding include the Town of Aylmer as well as IGPC, have invested substantial sums in the expectation that this contract would proceed and this plant would be built. We are aware, from the main case that the economic base of the Town of Aylmer is disintegrating, as a result of the problems in the tobacco industry. It was the expectation of all parties as well as the Board’s that the parties would proceed expeditiously to develop this facility within the expected timelines. As stated, we see no reason for the

[13] EB-2006-0243, Emergency Motion, June 29, 2007, page 83, line 18 to page 85, line 29.

> refusal by NRG to execute the requested agreement. It was clearly provided for in the contracts which are binding on NRG and subject to the jurisdiction of this Board."[14]
>
> .....
>
> "That completes the Board's rulings with respect to the consent.
>
> We have a collateral matter. There is a second agreement before us that is unexecuted, and to which a dispute arises. That is called the bundled T service receipt contract, which is Exhibit J1.5.
>
> The evidence before us suggests that this is a standard form agreement, and not unique to this particular proceeding. We also note, and this is of some moment, that the contract to which the parties have agreed and executed namely J1.3, the Gas Delivery Agreement, specifically contemplates the bundled direct purchase delivery. That is set out in Schedule A, section 4.
>
> This, again, is a service agreement, an agreement to provide service which the Board has clear jurisdiction over. The Board orders NRG to provide the service contemplated in that agreement.
>
> That completes the Board's rulings with respect to the second agreement at issue."[15]

58. The Board clearly exercised jurisdiction over the PCRA and GDC and provided an order in the nature of mandamus to compel NRG to comply with the terms and conditions of the PCRA and the GDC.

59. Later that day, NRG informed the Board it had no intention of abiding by its contractual obligations or the order of the Board. NRG refused to carry out its legal obligations.

60. At that time IGPC had paid more than $500,000 to NRG pursuant to the terms of the PCRA, yet NRG had no qualms about refusing to abide by its legal commitments.

[14] EB-2006-0243, Emergency Motion, June 29, 2007, page 86, ll. 15-28.
[15] EB-2006-0243, Emergency Motion, June 29, 2007, page 87, ll. 1-19.

61. The Board, on its own motion, schedule a compliance hearing after NRG informed the Board that it had no intention of complying with its contractual obligations or the Board order that it was going to refuse to provide distribution service.

62. At the end of the compliance hearing the Board made the following Decision:

> MR. KAISER: There may be hope, or slim hope, or no hope at all; but it is fair to say that the Board understands the urgency of the situation on the basis of the submissions today.
>
> One thing we do know for sure is that the Board has today issued two orders, and those orders are being disregarded. The utility, NRG, does not intend to comply with them and has not complied with them.
>
> These orders are enforceable provisions under section 112.1. The Board does have the authority to make interim orders under this section, with or without a hearing, and an order can take effect without granting the time for notice required in the subsection.
>
> The statute does provide in section 112.5(3) that an administrative penalty for contravention of these provisions can be awarded by the Board, in an amount not to exceed $20,000 a day for each day that the contravention continues.
>
> NRG has been franchised to provide natural gas service in this municipality, in the Town of Aylmer. This is an exclusive franchise. Natural gas is not available from anyone else. But that exclusivity carries with it certain responsibilities to act in the public interest. It is not apparent that NRG understands those responsibilities at all.
>
> The failure to comply with this Board's order signals a complete disregard for the Board and its processes. It also signals a complete disregard for the people of Aylmer, many of whom are out of work as a result of the decline in the tobacco industry. It looked like this ethanol facility would offer considerable relief in that regard.
>
> It is also a complete disregard for the federal government, the province of Ontario, and the investors, the farmers that have invested in this facility, and of course, IPGC, all of whom have invested considerable time over a considerable period to bring about the agreements which would result in the construction of this facility.
>
> This Panel is unable to understand what appears to be the capricious behaviour of this utility.

> Accordingly, we order that an administrative penalty will go into effect immediately in the amount of $20,000 a day for each day in which the contravention continues.
>
> The penalty will be lifted when the orders are complied with."[16]

63. This Decision by the Board confirmed it was willing to take the necessary steps to ensure NRG would be held accountable for its actions and the Board would demand NRG met its contractual and legal obligations to comply with Board orders. The strength of the Decision was the reason IGPC was able to secure the funding to proceed with the Facility. IGPC, its members, the governments and the lenders all relied upon the Board's ability to force NRG to comply with its contractual obligations and statutory obligations.

EB-2006-0243 The Board's Own Motion

64. In January of 2008, almost 1 year following the Decision to grant leave to construct, NRG had yet to complete the tender package for the IGPC Pipeline or the customer station. Further, NRG had not concluded any contractual arrangement with Union despite the knowledge that Union could require as long as 8 months to complete its work and IGPC was intending to be in service as early as June 2008.

65. Without warning or justification and contrary to the provisions of the PCRA, NRG demanded IGPC provide financial assurance in the amount of $32,000,000. This was more than 5 times what was permitted by the PCRA. This was not the act of a utility acting in the public interest but an abuse of its monopoly position.

66. NRG continued to refuse to abide the obligations of the PCRA.

[16] EB-2006-0243,Transcript, Compliance Oral Decision, dated June 29, 2007, page 22, ll. 1-28 and page 23, ll. 1-20.

67. IGPC was well along with construction of the Facility. The supply of natural gas was essential to the testing, commissioning and operation of the Facility.

68. Following many fruitless discussions and attempts to reason with NRG, IGPC was forced to request the intervention of the Board.

69. Again, the Board took action to enforce the agreements and commitments made by NRG. The Board schedule a motion upon its own initiative to be held in Aylmer on February 28, 2008.

70. A review of the transcript reveals that the jurisdiction of the Board to interpret and rule on the requirements of the PCRA was not mentioned a single time. In fact, NRG agreed to having the Board examine 7 issues in light of the contractual arrangements in the following exchange:

> "MR. KAISER: All right. Gentlemen, can we at least agree those are the seven issues? NRG is saying these are liabilities which either they forgot about or didn't get recognized for one reason or another when we fixed the original 5.3 amount, and they are asking us to make a determination as to whether they're valid and whether the 5.3 should be increased.
>
> Your client, Mr. O'Leary, of course, will be opposing this. I am trying to go to the procedural aspect now.
>
> Would you be content if this Panel heard written submissions on those?
>
> MR. THACKER: Yes.
>
> MR. KAISER: And made a binding ruling? Would you be prepared to accept it or not?
>
> MR. O'LEARY: I will seek instructions, but my recommendation, sir, is that we should proceed with the evidence, because there is none to support these remote costs, and to simply proceed in writing, sir, I think would be a disservice to IGPC.
>
> There is a contract that was executed that should be observed by this sophisticated entity to come forward now and admit that they forgot something. That's not an expense that puts the ratepayers at risk. That's something that the shareholder should be assuming, and I am just

> surprised that they would have the audacity to come forward and say they forgot something and now they're looking to reopen a contract.
>
> MR. THACKER: We would be prepared to proceed on the basis you suggested."[17]

71. NRG did not suggest the Board had no jurisdiction. In fact, it is entirely the opposite, NRG suggested the Board had the jurisdiction and could amend the terms of the PCRA. NRG accepted the Board's jurisdiction.

72. Further the Board understood the reliance that many parties had relied upon the terms of the Board approved PCRA and GDC. The Panel Chair, noted the following:

> "MR. KAISER: No, but the problem is that the ethanol plant is not going to give you the 5.3 if they think there is a risk it is going to go to 6.3 or something. They probably have a little bit of leeway. They understand that they may have to get topped up if the actual costs are greater than the estimated costs. They have bought into that risk, and so have their advisors and investors and bankers." [18]

73. In its oral Decision, the Board stated the following:

> "DECISION:
>
> The Board has heard submissions today from Natural Resource Gas Limited ("NRG") and the Integrated Grain Producers' Cooperative ("IGPC"). This proceeding relates to a Decision of the Board that was rendered on February 2nd, 2007. That Decision granted NRG a leave to construct a 29-kilometre natural gas pipeline for the purpose of providing the gas distribution requirements of an ethanol plant proposed by Integrated Grain Producers' Cooperative, to be located in Aylmer. That Decision contained certain conditions and included a provision that any modification of the conditions required approval of this Board."[19]
>
> .....
>
> "That is the guiding rule throughout. So we have NRG's estimates of those costs. The parties have agreed that it will be resolved by this Panel that they will accept the result as binding, and that no further evidence is required with respect

[17] EB-2006-0243, Transcript February 28, 2008, page 124-5 ll.19-28 and 1-19.
[18] EB-2006-0243, Transcript February 28, 2008, page 128-9, ll. 24-28 and 1-3.
[19] EB-2006-0243, Transcript February 28, 2008, page 138, ll. 3-14.

> to those four matters. The parties agree that this can be dealt with by written argument, only. We will proceed in that fashion."[20]

74. Again, IGPC and NRG have recognized the jurisdiction of the Board and the Board has accepted and acted upon that jurisdiction.

75. The Board went even further to indicate that should a subsequent non-compliance develop, the Board would step and terminate the leave to construct as a result of the breach of a clause in the agreements.

> "MR. KAISER: Well, if there is a problem on your funding agreements of that nature that a hiatus between the old leave to construct and the new leave to construct would create a problem, I am sure there will be a mechanism that we can deal with that. This is not going to happen automatically. We have now added the clause which counsel will draft that provides that it will be on application of either party for termination. They will have a right to come to the Board, to have the Board declare the leave to construct terminated by reason of a breach of the clause, and we will have a finding of fact of whether there was a breach of the clause and we can introduce an interim mechanism to take care of that technicality.
>
> Obviously, if this happens, it will be serious. The parties will know this is a real prospect this leave to construct is going to be terminated, and they better find somebody else to step in the shoes of NRG if that happens. So time will be of the essence, but time is of the essence anyway. So maybe this will keep everyone facing the schedule that you have agreed upon."[21]

76. Once again the Board reviewed the terms of the PCRA and interpreted the obligations and exercised its jurisdiction.

[20] EB-2006-0243,Transcript, Decision, February 28, 2008, page 140, ll. 5-11.
[21] EB-2006-0243, Transcript February 28, 2008, pages 148-9, ll. 11-28 and ll. 1-2.

Board's Jurisdiction - Generally

77. The legislative framework provided by the OEB Act creates a comprehensive authority to establish regulatory oversight of the distribution of natural gas in Ontario with the Board. Pursuant to section 19(6) of the OEB Act, the Board has exclusive authority over matters within its jurisdiction.

78. The Board is a tribunal with specialized expertise in setting rates. The Courts have recognized this expertise. The Board has the authority and is in the best position to review and determine the prudence of the claimed capital expenditures.

79. The authority provided by section 36 of the OEB Act obligates the Board to establish rates, as that term is defined in the OEB Act, which are just and reasonable which the utility is permitted to charge to ratepayers. Further, the OEB Act requires the fulfillment of this mandate to be completed in the public interest and consistent with the statutory objectives provided in section 2 of the OEB Act.

80. Section 3 of the OEB Act includes the following definition: "*"rate" means a rate, charge or other consideration and includes a penalty for late payment;".* This is an expansive definition that goes beyond periodic monthly payments and includes a contribution in aid of construction.

81. Section 36 of the OEB Act provides the Board with the authority to establish the rates a utility may charge for the distribution of natural gas.

> 36. (1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.

> (2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.
>
> (3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.

82. Pursuant to section 36(1) of the OEB Act, NRG is statutorily prohibited from charging a customer except in accordance with an order of the Board. This includes any charge, whether by way of a contribution in aid of construction or the ongoing monthly payments calculated in accordance with a rate order.

83. Pursuant to the authority granted by the OEB Act, the Board has developed a process for utilities to charge customers where a capital expenditure is required by the utility for the distribution of natural gas. This process contemplates the potential for a one-time payment, a contribution in aid of construction, combined with a series of periodic payments determined in the current and future rate orders. The calculation of the contribution in aid of construction is performed in accordance with EBO 188.

84. Section 2 of the OEB Act, see below, provides the Board's statutory objectives in carrying out this mandate.

> **2.** The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:
> 1. To facilitate competition in the sale of gas to users.
> 2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
> 3. To facilitate rational expansion of transmission and distribution systems.
> 4. To facilitate rational development and safe operation of gas storage.

85. This mandate expressly includes the protection of the interests of consumers. IGPC is NRG's largest consumer.

86. It is commonly understood that utilities have the ability to exercise monopoly power and that the regulatory framework is intended ensure that such power is not abused. A utility cannot escape regulatory oversight and charge rates that are not just and reasonable by forcing a customer to pay a contribution in aid of construction relating to unreasonable and imprudently incurred costs. If the Board condones such actions then it has failed to fulfill its statutory obligations.

87. For several years, the Board has obligated utilities that required an expansion of the distribution system to perform an economic analysis in accordance with a prescribed approach. This approach was developed in EBO 188.

88. The prescribed formula in EBO 188 is essentially a comparison of the net present value of the revenue from a project against the net present value of the capital expenditures and incremental operation and maintenance ("**O&M**") costs associated with a project.

89. The utility projects a future revenue stream based upon the applicable currently approved monthly charges. Where the overall profitability index of the project is greater than 1.0, the projected revenues from the monthly charges over the forecast horizon are greater than the forecasted costs, capital and incremental O&M, of the utility. EBO 188 permits the utility to proceed with the project without any requirement to charge a rate in the form of a contribution in aid of construction.

90. However, where the forecasted revenue stream does not exceed the forecasted capital and incremental O&M expenditures, the profitability index is less than 1.0. In such situations EBO 188 obligates the utility to charge a rate in the form a contribution in aid of construction in addition to the periodic monthly charges.

91. The authorized contribution in aid of construction is not an arbitrary figure but rather a payment, or series of payments, to the utility to ensure the profitability index is equal to 1.0. It does not authorize the utility to charge a contribution in aid of construction that results in the profitability index exceeding 1.0. This ensures the financial framework results in just and reasonable rates for the utility and the customer.

92. In the present situation, the Board reviewed the profitability index during EB-2006-0243, and noted that absent a contribution in aid of construction, the profitability index for the project was 0.55.[22]

93. The terms and conditions of the PCRA provided the detailed commitments between the parties, IGPC and NRG, regarding the manner in which rates were to be charged and payments would be made. This would ensure NRG would achieve a profitability index of 1.0. IGPC made a series of payments totalling $3,538,792.47 as a contribution in aid of construction based upon the forecasted costs of NRG to bring the profitability index to 1.0.

94. To ensure NRG did not over-recover, and thereby charge rates that are not just and reasonable and outside the statutory obligation, the Board required NRG to perform a reconciliation based upon the actual reasonable (prudent) capital expenditures required for the construction of the IGPC Pipeline. Conversely, if the costs had exceeded the forecast, the Board would have expected and required NRG collect such additional monies to drive the profitability index to 1.0. The requirement for reconciliation is expressly provided in the PCRA which was reviewed by the Board and found to be in the public interest.

[22] EB-2006-0243, Decision and Order, dated February 2, 2007, page 2.

95. In reviewing the actual expenditures of NRG, IGPC submits that certain of the expenditures claimed by NRG were imprudent and unreasonable. Therefore, the rate charged by NRG should not be permitted to include such expenditures.

96. IGPC submits that the rate paid in the form of a contribution in aid of construction is excessive as certain costs were unreasonable and imprudently incurred. As such, IGPC is owed a refund by NRG including interest on all monies owed.

Incorporating Capital Expenditures into Rates: EB-2010-0018

97. In the Board's Decision and Order (the "**Decision**") dated December 6, 2010 the Board established the basis for NRG's monthly charges or rates for all of its customers, including IGPC. In that Decision, the Board approved the inclusion of a level of capital expenditures related to the IGPC Pipeline in the Rate Base of Natural Resource Gas Ltd. ("**NRG**").

98. In setting rates in EB-2010-0018, the Board did not determine the total prudent or reasonable capital cost of the IGPC pipeline.

99. The Board took the approach that the amount that could be incorporated into the monthly rates was the discounted revenue created by the project. During oral submissions, the Board panel indicated that the approach used by the Board in the statement of Panel Member Quesnelle.

> MR. QUESNELLE: From a rates perspective, you know, there is a formula in place. Establishment from a rates perspective, recognizing there might be some slight differences depending on what -- the depreciation, and what have you, but from an order of the process, the determination of what would be going into rate base would be what can be paid for with the revenue stream.[23]

[23] EB-2010-0018, Transcript, Sept. 7, 2010, page 97, ll. 15-20.

100. IGPC did not suggest the prudently incurred reasonable costs of NRG were less than the revenue stream. As such, the Board could take the approach that the capital expended in a prudent manner by NRG exceeded the revenue stream. The Board then used the revenue stream to determine the amounts to be included in the monthly rates that NRG would be authorized to charge. Had the allegations of imprudence been such that the revenue stream exceeded the prudently incurred costs the Board would have been obligated to determine the total actual prudently incurred costs as part of the monthly rates. Clearly the Board had jurisdiction over the capital expended by NRG relating to the IGPC Pipeline.

101. IGPC would note the Board's accounting procedures permit a utility to either enter the net amount of the asset or make two entries – the gross amount of the plan and the contribution in aid of construction. As such the Board has the jurisdiction to review the numbers. The Board does not lose that jurisdiction because the utility uses a net number to hide an excessive contribution in aid of construction.

102. However, the Board's approach in the December 6, 2010 left the rate charged by way of a contribution in aid of construction to be determined later. This is the issue before the Board and is squarely within the Board's jurisdiction.

103. It is a long held principle that utilities are not permitted to recover imprudent expenditures. In *Enbridge Gas Distribution Inc. v. Ontario Energy Board*, 2005 CanLII 4941 (ON SCDC), the Court made these statements about the prudence standard to which utilities are held:

> [8] Essentially, a utility is entitled to recover its prudently incurred costs. The test of prudence was first developed in United States jurisprudence, but has since been widely accepted in Canada: *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 CanLII 44 (S.C.C.), [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.
>
> [9] Before us, and likewise before the Board, there was no dispute between the parties as to the applicability of the prudence standard and the nature of the test. 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.

104. IGPC raised legitimate questions regarding the prudence of certain expenditures including the administrative penalty, legal costs, costs associated with Mr. Bristoll and interest charges.

105. For example, the interest claimed by NRG was originally approximately $190,000 but contained several errors which were acknowledged by NRG during cross-examination. Also, the Administrative Penalty was waived subsequently to the Board's Decision in EB-2010-0018. As such there would be no basis for including the $140,000 cost in the rate to be charged by NRG.

106. Further, NRG was claiming more than $130,000 for contingencies yet had no intention of actually ever incurring any such costs. IGPC is not aware of any situation where a utility is permitted to claim and recover through rates costs that were never and will never be incurred. Furthermore, the concept of "*prudently incurred costs*" entails that the cost to be recovered have actually been "incurred". NRG seeks to recover in its contribution in aid of construction amounts that NRG admits were not actually incurred.

107. IGPC is not suggesting that a contribution in the aid of construction was not required. IGPC is stating that the contribution in aid of construction that was charged and collected was excessive, contravened the PCRA, the Board's order and section 36 of the OEB Act.

108. The total capital costs claimed by NRG were not prudently incurred and the Board should not authorize NRG to retain such amounts.

109. The rate charged by NRG is a combination of the contribution in aid of construction and the monthly payments made pursuant to the applicable rate orders.

110. To claim the Board only retained jurisdiction to review certain of the expenditures up to the revenue stream is illogical and inconsistent with the Board's statutory obligation to set just and reasonable rates.

111. The fact that the rate charge was in the form of a capital contribution does not cause the Board to lose its jurisdiction to review the prudence of such capital expenditures. IGPC is effectively requesting the capital expenditures of NRG in respect of the IGPC Pipeline be reviewed by the Board.

112. It is inconsistent with the Board's authority under section 36 and the fulfillment of the Board's statutory objectives under section 2 of the OEB Act for the Board lose jurisdiction to review expenditures and enforce the determination of the proper contribution in aid of construction.

Section 36

113. The Board's jurisdiction to review the PCRA and the GDC is not restricted by section 36(1) of the OEB Act as others have suggested. Such an interpretation is just wrong. Section 36(1) is:

> **36.** (1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.

114. Section 36(1) gives effect to the over-riding public policy consideration of compliance with the order of the Board. If the Board was bound by the terms of the contract, then the utility would be in a position to remove the decision making power from the Board merely through entering a contract – a contract that may not in the Board's determination be in the public interest.

Concluding Submissions

115. The fundamental issue is whether the Board has the jurisdiction to determine the rate a utility can charge for the expansion of its distribution system to provide distribution services to a ratepayer. NRG charged IGPC rates that were a combination of a contribution in aid of construction and periodic monthly payments. The manner of calculating such rates and the obligations of NRG and IGPC were provided in the PCRA and the GDC which were reviewed and approved by the Board as part of the granting of leave for the construction of the IGPC Pipeline. Absent the authorization of the Board, NRG had no ability to charge IGPC any rate or to construct the IGPC Pipeline.

116. The Board is an expert tribunal in the subject matter and has the jurisdiction, authority and ability to consider the motion in an efficient and competent manner. The Board has greater expertise than a court in the subject matter and can deal with the issue in a more expeditious fashion.

117. The Board has the jurisdiction. The Board has represented and acted upon this jurisdiction in respect of the PCRA and the GDC.

118. IGPC, it members and supporters, have all relied upon the Board to continue to act within its jurisdiction to resolve prior disputes under the terms of the Board approved PCRA and GDC.

119. If the Board fails to exercise its authority has it has done so in the past when NRG has failed to conduct itself in accordance with the PCRA or the obligations of the Board, then IGPC will have relied upon this past conduct to its detriment.

120. The jurisdiction for the Board is found in the rates charged by NRG to IGPC pursuant to the provisions of the OEB Act and the obligation to serve as embodied in the PCRA and the GDC.

121. The issues are properly before the Board and IGPC requests the Board proceed to review the Motion on its merits.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

August 19, 2011

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FILE NO.: 40/03
DATE: 20050302

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

LANE, MOLLOY and POWER JJ.

B E T W E E N:	
ENBRIDGE GAS DISTRIBUTION INC.	*J. L. McDougall Q.C., Jerry H. Farrell*, and *Michael Schafler*, for the Appellant
Appellant	
- and -	
ONTARIO ENERGY BOARD	*Kenneth T. Rosenberg* and *Richard P. Stephenson*, for the Respondent
Respondent	
	HEARD: February 15, 2005

MOLLOY J.:

REASONS FOR DECISION

A. INTRODUCTION

[1] Enbridge Gas Distribution ("Enbridge") appeals from a decision of the Ontario Energy Board ("the OEB" or "the Board") dated December 18, 2002.

[2] Enbridge is a gas distributor and a seller of gas to consumers, and as such is subject to regulation by the OEB under the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 ("the Act"). The rates Enbridge is permitted to charge to its customers are fixed by the OEB, based on what the OEB deems to be just and reasonable. The OEB must balance fairness to the consumer (in terms of a reasonable price for gas) and fairness to Enbridge and its shareholders (in terms of a

reasonable rate of compensation and profit). Generally speaking, Enbridge would be permitted by the OEB to pass on its costs to the consumer, but only to the extent those costs were prudently incurred.

[3] Prior to 1996, Enbridge shipped its gas through the TransCanada Pipeline System ("the Trans Canada"). Between 1996 and 1999, Enbridge entered into a series of four agreements with various entities to deliver some of its gas through alternate pipeline routes. These new routes became operational in 2000 and proved to be more costly than the TransCanada route. In mid-2000, Enbridge applied to the OEB for an increase in the rates it could charge to its customers in 2001 in order to reflect this increase in its supply costs. (The OEB referred to the four agreements as Alliance 1, Alliance 2, Vector 1 and Vector 2, and for ease of reference I will do the same.)

[4] The parties entered into a provisional settlement in 2000, which was conditional upon various contentious issues being deferred to be argued at a subsequent Enbridge rates hearing. As a term of the settlement, Enbridge agreed to set up a "Notional Deferral Account" to record, over a ten-month period, the differential between its actual costs for the Alliance/Vector lines and its hypothetical costs if it had used the TransCanada line.

[5] The next year, Enbridge applied for approval of its rates proposed for 2002. One of the contentious issues still remaining to be resolved was whether the costs incurred by Enbridge with respect to the Alliance and Vector lines were "prudently incurred". That issue proceeded to a full hearing before the Board in June 2002.

[6] The Board issued its decision on December 18, 2002. The Board found that Enbridge did not act prudently in incurring the Alliance 1 and Alliance 2 costs and was therefore not permitted to build those costs into the rates it charged. The Board found, however, that the Vector 1 costs were prudently incurred and could be passed on. The Board deferred its consideration of the Vector 2 costs. In the result, Enbridge was not permitted to recover $11 million in costs incurred in respect of Alliance 1 and 2.

[7] The Act provides for an appeal to this court from the decision of the Board, but "only upon a question of law or jurisdiction": s. 33 (1) and (2). Enbridge argues on this appeal that the Board erred in law by failing to apply the correct legal test in determining whether Enbridge acted prudently at the time it entered into the two Alliance agreements. Specifically, Enbridge submits that although the Board articulated the correct legal test, it fell into error when it was influenced by the benefit of hindsight rather than confining itself to a consideration of prudence based solely on circumstances that existed at the time the decisions in question were made.

B. THE PRUDENCE STANDARD

[8] Essentially, a utility is entitled to recover its prudently incurred costs. The test of prudence was first developed in United States jurisprudence, but has since been widely accepted in Canada: *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.

[9] Before us, and likewise before the Board, there was no dispute between the parties as to the applicability of the prudence standard and the nature of the test. 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. As was stated by the United States Court of Appeals (First Circuit) in *Violet v. FERC*, 800 F. 2d 280 at 282 (1st Cir. 1986):

> In an industry that combines long lead times for plant construction with wide fluctuations in supply and demand, constant changes in the regulatory environment, and unpredictability in the availability and price of alternative sources of fuel, some projects that seem prudent at the time when costs are incurred may appear, some years later, in hindsight, to have been unnecessary or inadvisable. The prudence of the investment must be judged by what a utility's management knew, or could have known, at the time the costs were incurred. (citations omitted)

[10] The parties also agree that the Board in this case correctly defined the prudence standard at paragraph 3.12.2 of its decision as follows:

- Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.
- To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
- Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
- Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time.

C. THE DECISION OF THE BOARD

[11] The Reasons of the Board are extensive, covering 216 pages. For purposes of this appeal, it is unnecessary to review those Reasons in detail, as there is no real issue with respect to the facts. The portion of the Reasons dealing with the Alliance/Vector issues runs from pages 27-72. However, the actual findings of the Board commence at page 62. First, the prudence test is defined (see preceding paragraph). Next, the Board examined the presumption of prudence and whether it was rebutted. The Board noted the argument made by Enbridge that it was unnecessary to consider this aspect of the test as Enbridge conceded a prudence review was appropriate. However, the Board determined that it would nevertheless be useful to actually rule on the point.

[12] There was evidence before the Board that Enbridge's corporate parent, Enbridge Inc., held an equity interest in both the Alliance and Vector pipelines at the time Enbridge entered into the agreements in question. The Board found that the fact Enbridge Inc. may have profited as a result of Enbridge entering into these contracts was not sufficient evidence to establish that the arrangements were not therefore prudent. However, the Board noted that the interests of Enbridge Inc. and Enbridge might not completely coincide and found the evidence of this ownership interest was "sufficient to overcome the presumption of prudence and invite further inquiry by the Board": paragraph 3.12.11 of the Reasons.

[13] The Board noted that it is permissible to use hindsight in determining the threshold issue as to whether the presumption of prudence is rebutted. In this regard, the Board considered the balance in the Notional Deferral Account, which favoured the traditional TransCanada pipeline, and held this evidence would suggest that the prudence of Enbridge's decisions to use the Alliance and Vector routes should be examined.

[14] The Board then concluded (at paragraph 3.12.13) that "the presumption of prudence has been overcome and that there are reasonable grounds to inquire into the prudence of [Enbridge's] decisions to enter into long term transportation arrangements with the Alliance and Vector pipelines."

[15] The Board then proceeded (from pages 65 to 69) to consider whether Enbridge made prudent decisions to enter into each of the four contracts, examining the circumstances of each decision under a separate subject heading. At this point, the onus would be on Enbridge to establish its prudence in entering into each of the four contracts.

[16] Under the heading "Alliance 1" (paragraphs 3.12.14 to 3.12.21), the Board considered the justifications advanced by Enbridge for its decision in 1996 to enter into this contract. The Board focused on what was referred to as the "Otsason Memo", based on Enbridge's testimony that the memo summarized all of the factors Enbridge took into account in making this decision. The Board described the Otsason Memo as a "rudimentary financial analysis". The Board then took issue with a number of conclusions in the Otsason Memo (the content of which is not

relevant for purposes of this appeal) as well as noting Enbridge's failure to consider the full range of reasonable alternatives. The Board then concluded (at paragraph 3.12.23) that it was "not satisfied that [Enbridge's] decision to enter into the Alliance 1 contract in 1996 was prudent".

[17] For purposes of this appeal, Enbridge does not take issue with this portion of the Board's Reasons in respect of Alliance 1, except for the Board's reference in paragraph 3.12.20 to the fact that a risk identified in the Ostason Memo had in fact materialized. Mr. McDougall, for Enbridge, submits that this reference illustrates error by the Board in using hindsight to evaluate prudence. The relevant paragraph of the Reasons states:

> 3.12.20 One of the disadvantages identified in the Ostason Memo was the risk of in-service delays for the Alliance pipeline. This risk in fact materialized; the in-service date was delayed by over one year from November 1999 to December 2000. (emphasis added)

[18] Under the heading "Alliance 2", the Board held that all of its concerns with respect to Alliance 1 were equally applicable to the 1997 decision to enter into the Alliance 2 contract, and also noted two additional concerns. The Board then concluded (at paragraph 3.12.27) that it was not satisfied that Enbridge's 1997 decision to enter into the Alliance 2 contract was prudent.

[19] The Board next considered Vector 1 (paragraphs 3.12.28 to 3.12.31) and concluded that Enbridge's decision to enter into that contract in 1999 was in fact prudent.

[20] The last portion of the Board's consideration of prudence falls under the heading "Vector 2" (paragraphs 3.12.32 to 3.12.33). The Board started by noting that Enbridge had "advised" the Board that it entered into the Vector 2 contract in order to replace its expiring capacity on the TransCanada pipeline. The Board then found (at paragraph 3.12.32) that Enbridge "did not provide the Board with sufficient evidence and analysis, including alternatives, to justify this decision." The Board noted that the Vector 2 decision was independent from and unrelated to the Alliance 1 and 2 and Vector 1 contracts. The Board then stated, at paragraphs 3.12.33 to 3.12.34:

> 3.12.33 .... In addition, the Board notes that the costs consequences of the Vector 2 contract were not included in the calculation of the Notional Deferral Account, which is a key element of the Board's prudence review of the Alliance and Vector arrangements. (emphasis added)
>
> 3.12.34 As a result, the Board is not prepared at this time to make a determination of the prudence of [Enbridge's] decision to enter into the Vector 2 contract.

[21] Mr. McDougall relies on this passage as a further illustration of the Board's improper use of hindsight in evaluating prudence.

[22] The balance of the Board's decision on Alliance and Vector is devoted to "Relief and Remedies" at pages 70-71 of the Reasons and is not relevant for purposes of this appeal.

D. STANDARD OF REVIEW

[23] It is well recognized that the applicable standard of appellate review is to be determined on a "functional and pragmatic approach" based on consideration of four factors: (1) the existence or absence of a privative clause in the enabling statute of the administrative tribunal; (2) the expertise of the tribunal relative to the court; (3) the purpose of the legislation; and (4) the nature of the problem: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* (1998), 160 D.L.R. (4th) 193 (S.C.C.) at 208-215; *Ryan v. Law Society of New Brunswick* (2003), 223 D.L.R. (4th) 577 (S.C.C.) at 587-592, paras. 27-42; *Dr. Q. v. College of Physicians & Surgeons (British Columbia)* (2003), 223 D.L.R. (4th) 599 (S.C.C.) at 609-13.

[24] In this case, the expertise of the tribunal in regulatory matters is unquestioned. This is a highly specialized and technical area of expertise. It is also recognized that the legislation involves economic regulation of energy resources, including setting prices for energy which are fair to the distributors and suppliers, while at the same time are a reasonable cost for the consumer to pay. This will frequently engage the balancing of competing interests, as well as consideration of broad public policy. That is why courts have accorded considerable deference to the Board and applied standards of reasonableness *simpliciter*, or even patent unreasonableness when reviewing decisions which engage the Board's expertise: *Consumer's Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (Div.Ct.); *Graywood Investments Limited v. Ontario (Energy Board)*, [2005] O.J. No. 345; *ATCO Electric Ltd. v. Alberta (Energy and Utilities Board)*, [2004] A.J. No. 823 ("ATCO No. 1") (C.A.); *ATCO Electric Ltd. v. Alberta (Energy and Utilities Board)*, [2004] A.J. No. 906 ("ATCO No.2") (C.A.).

[25] However, the case before us involves a pure question of law. There is an appeal as of right to this court on a question of law, and there is no applicable privative clause. Further, the nature of the legal issue involved does not engage the expertise of the tribunal, *vis a vis* the court. The test is well understood and was correctly defined by the Board. The only issue is whether, in applying that test, the Board took into account an impermissible factor. That is not a situation of mixed fact and law, but rather an alleged error in applying the correct legal test. In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at paragraph 27, the Supreme Court of Canada (referring to its own earlier decision in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748) held as follows:

> 27 Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In Southam, supra, at para. 39, this Court illustrated how an error on

a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

> . . . if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.
>
> Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

[26] The Supreme Court's illustration applies equally well in the reverse. If the correct test requires the consideration of A, B and C and prohibits the consideration of D, and the decision-maker considers D, that is an error of pure law.

[27] Given the right of appeal and the nature of the issue, in my opinion, the appropriate standard of review in this case is one of correctness. The Board was required to be correct on this point. If, in considering prudence, the Board took into account factors involving the application of hindsight, then it has committed legal error and its decision cannot stand.

E. ANALYSIS

[28] It is important to distinguish between things that can be considered at the stage of deciding if the presumption of prudence is rebutted, and things that can be considered as part of the prudence analysis itself. In considering the application of the presumption, it is acceptable to use the benefit of hindsight. Thus, a decision which turned out to have a bad economic outcome will not be presumed to be prudent, but rather will be subject to an analysis of the surrounding circumstances to determine if it was in fact prudent. In this case, the Board had before it evidence from the Notional Deferral Account as to the extra cost incurred by Enbridge as a result of the Alliance and Vector contracts, over and above what would have been the cost if the TransCanada pipeline had been used. The Board was entitled to use that information in determining the threshold issue as to whether the presumption of prudence was rebutted. It was not entitled to use the information as part of its analysis as to whether the decisions at issue were, or were not, prudent at the time they were made.

[29] The Board in this case was well aware of that distinction. The Board held, at paragraph 3.12.36 of its decision:

> 3.12.36 The Notional Deferral Account was intended as a measure to ascertain whether the cost differential between the old and the new paths was substantial, such that it would raise the issue of whether the presumption of prudence had been overcome. It was not intended as a method of determining the cost

consequences and any potential disallowance of costs if the Board were to find that entering into the Alliance and Vector agreements were not prudent.

[30] Notwithstanding the Board's articulation of the proper use of this information, there are two clear references to matters of hindsight in the portion of its reasons dealing with the prudence of Enbridge's decisions.

[31] The first such reference is at paragraph 3.12.20 of the Board's reasons in which the Board refers to delay which occurred from November 1999 to December 2000 in determining whether a decision in 1996 was prudent. The impact of this reference could, however, be minimized since it was made in the context of a risk which Enbridge had identified and took into account in 1996. The impact on the decision would obviously be worse if the Board had been pointing out a delay that had occurred after the fact and had not been predicted or considered back in 1996. Therefore, if the only hint of a hindsight type analysis was this one reference, I would not have serious concerns.

[32] However, the Board's reference to later events in its analysis of the Vector 2 contract (in paragraph 3.12.33) is more troublesome. The Board had already determined that Enbridge "failed to provide sufficient evidence and analysis, including alternatives, to justify this decision." Since the onus was on Enbridge to establish prudence, that would have been sufficient to support a finding by the Board that Enbridge had not discharged that onus and that the extra costs of that decision could therefore not be passed on to consumers. Obviously, the Board was not required to make such a finding, and it was perfectly open to the Board to defer the matter to give Enbridge an opportunity to file additional evidence. However, the reason cited by the Board for deferring the matter was that the cost consequences of the Vector 2 contract had not been included in the calculation of the Notional Deferral Account. The inescapable inference from this is that the Board felt unable, or was unwilling, to make a decision on prudence without this information. However, information as to what the actual costs of the decision turned out to be after the fact, is clearly an application of hindsight and is not permitted as part of the analysis of prudence.

[33] Counsel for the OEB submits that the reference to the Notional Deferral Account relates only to the rebuttal of the presumption of prudence and that the Board was not discussing the use of the financial information as part of its prudence analysis. Rather, he argues, the Board was simply stating it was unable to deal with whether the presumption of prudence applied without the missing information as to actual costs after the fact. I cannot accept that argument. The Board's decision is very logically laid out, as I have discussed above in paragraphs 11 to 22. The Board dealt first with the general test for relevance and then with whether the presumption of prudence was rebutted. It was only after finding the presumption was rebutted that the Board turned to a consideration of each of the four contracts and a determination of prudence in respect of each of them. When the decision is looked at as a whole, it is clear that in paragraphs 3.12.32 to 3.12.34 the Board was dealing with whether the prudence standard had been met for the Vector 2 contract. That is the context in which the Notional Deferral Account is mentioned, and it can only logically be interpreted as referring to the prudence standard.

[34] In any event, it was not necessary for the Board to have information from the Notional Deferral Account in order to deal with the presumption of prudence issue. For the Alliance 1, Alliance 2 and Vector 1 contracts, the Board had three bases upon which the presumption was rebutted:

(i) the concession by Enbridge that the presumption was rebutted and that a prudence review was warranted;

(ii) the potential for conflict of interest because of the ownership interest of Enbridges's parent in the Alliance and Vector pipelines; and

(iii) the substantial extra costs actually incurred as demonstrated by the Notional Deferral Account.

[35] With respect to the Vector 2 contract, the Board did not have the information from the Notional Deferral Account, but it had already determined that the conflict of interest issue alone was sufficient to rebut the presumption and it had the concession from Enbridge that a review of prudence was appropriate in the circumstances. The Board did not need the Notional Deferral Account information to make its decision on the presumption, and indeed had already made that decision in respect of all four contracts at paragraph 3.12.13 of its Reasons.

[36] Counsel for the OEB further argues that since the Board made no decision with respect to Vector 2, its reasoning on Vector 2 is not the subject of this appeal and not relevant to our consideration of whether the Board erred in its analysis of the Alliance contracts. That might well be a valid point if the Board had confined its reasoning in paragraph 3.12.33 to the Vector 2 contract itself. However, the Board referred to the absence of the Deferral Account information for Vector 2 and then commented that this information was "a key element of the Board's prudence review of the Alliance and Vector arrangements". Given the context in which these words appear as well as the actual language used, it seems clear that the Board did in fact consider the actual costs incurred for Alliance as compared to the TransCanada pipeline to be a "key element" in its determination that the Enbridge decision to enter into the Alliance contracts was not prudent.

[37] The Board clearly articulated the correct test for the prudence review and appeared to understand that the prudence review must be based on circumstance that were known, or should reasonably have been known, by management making the decision at the time the decision was made. Because the test is so clearly stated by the Board, I have considered very carefully whether the Board's references to matters of hindsight in paragraphs 3.12.20 and 3.12.33 ought to be considered as innocuous, or related to some other analysis. I cannot reach that conclusion. In my view, the Board must be taken to have meant what it said. There are two clear references to a consideration of events which occurred after the decisions were made in the context of the Board's consideration of the prudence of the decisions. Reading the Board's comments any other way would, in my view, unduly strain the language used, particularly in the context in which those words appear.

[38] The retrospective application of the prudence test, ignoring the benefit of hindsight, is not an easy task for a decision-maker who is fully aware of the actual financial consequences of a decision. The decision-maker must shut out of his or her mind all knowledge of matters that are not permitted to be taken into account. This is something which is easier to describe than it is to carry out in practice. In this case, the Board described the test correctly, instructed itself not to use hindsight in evaluating prudence, but then slipped in its application of the test and did allow hindsight to creep into its consideration of prudence. That is a fundamental error of law.

F. CONCLUSIONS

[39] There was certainly evidence before the Board upon which it could have reasonably concluded that the Alliance contracts were not prudent. However, it is not possible to determine the extent to which an impermissible line of thinking clouded the Board's determination in this case. This is particularly problematic in that the hindsight considerations involved only the first 10 months of contracts that were to run for a period of 15 years. The appellant is entitled to a decision based on the correct application of the legal test to the relevant facts. In the result, the Board's decision cannot stand and is therefore quashed in so far as it relates to the Alliance 1 and Alliance 2 contracts.

[40] The determination of prudence and the remedies flowing from a determination that a particular decision was or was not prudent are matters within the specialized expertise of the Board. Such determinations are intended under the Act to be the sole province of the OEB and ought not to be made by courts. Accordingly, this matter is remitted back to the OEB for consideration by a differently constituted tribunal.

[41] If the parties are unable to agree on the costs of this appeal, they may be addressed in writing. Counsel for Enbridge is requested to coordinate the timing of the costs submissions and to forward three copies of all of the submissions, preferably bound and indexed, to the Divisional Court office.

MOLLOY J.

I agree:

LANE J.

I agree:_____
POWER J.

Released:

COURT FILE NO.: 40/03
DATE: 20050302

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

LANE, MOLLOY and POWER JJ.

B E T W E E N:

ENBRIDGE GAS DISTRIBUTION INC.

Appellant

- and -

ONTARIO ENERGY BOARD

Respondent

REASONS FOR JUDGMENT

MOLLOY J.

Released: March 2, 2005