Superior Court of Justice
Divisional Court
130 Queen Street West, Rm. 174
M5H 2N5
Tel: (416) 327-5100
Fax: (416) 327-5549

Facsimile Transmittal

To:	Lawrence E. Thacker and Yashoda Ranganathan	416-865-9010
	Michael Millar	416-440-7656
	M. Philip Tunley	416-593-9345
	Scott Stoll	416-863-1515
From:	Romana Jurankova	**Date:** June 19, 2012
RE:	Natural Resource Gas Limited v. Ontario Energy Board	
Court File No.: 309/12		**Pages (including coversheet): 06**
Cc:		

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NOTE: Please find attached a copy of Oral Reasons for Judgment from Justices Aston, Sachs and Herman JJ. with regard to the above-noted matter.

If you have any questions please feel free to contact the Divisional Court office at 416-327-5100.

CITATION: Natural Resource Gas Limited v. Ontario Energy Board, 2012 ONSC 3520
DIVISIONAL COURT FILE NO.: 309/09
DATE: 20120614

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

ASTON, SACHS AND HERMAN JJ.

BETWEEN:	
NATURAL RESOURCE GAS LIMITED Appellant	*Lawrence E. Thacker* and *Yashoda Ranganathan*, for the Appellant
– and –	
ONTARIO ENERGY BOARD, THE CORPORATION OF THE TOWN OF AYLMER and INTEGRATED GRAIN PROCESSORS' CO-OPERATIVE INC. Respondent	*Michael Millar*, for the Respondent, Ontario Energy Board *M. Philip Tunley*, for the Intervenor, The Corporation of the Town of Aylmer *Scott Stoll*, for the Intervenor, Integrated Grain Processors Cooperative Inc.
	HEARD at Toronto: June 14, 2012

ASTON J. (ORALLY)

[1] Natural Resources Gas Limited ("NRG") appeals a decision of the Ontario Energy Board dated May 5, 2009 in which the Board approved the renewal of NRG's franchise agreement with the Town of Aylmer for a three year term with certain conditions instead of the twenty year term requested by the appellant.

[2] NRG is seeking an order on this appeal setting aside the franchise renewal order and renewing the franchise agreement between NRG and Aylmer for a period of twenty years or, in the alternative, an order from the Court directing the Ontario Energy Board to reconsider the franchise renewal order in light of the Board's February 11, 2011 Decision and Order vacating and setting aside two orders of the Board (which have been referred to as the Assignment Order and the Administrative Penalty Order).

[3] One of the grounds of appeal raised by the appellant is that the Ontario Energy Board relied upon those two prior orders as primary reasons for limiting the renewal term to three years. The appellant submits that the subsequent setting aside of those orders undermines the foundation of the order under appeal.

[4] The appellant's other grounds for appeal are that the Board erred in law and exceeded its jurisdiction by: failing to consider adequately or at all whether it was in the public interest or "meets public convenience and necessity" to impose a three year renewal term; failing to consider adequately or at all the legal advice given by OEB staff; failing to consider the "adverse impact" on NRG and its ability to finance its capital assets and business operations; and relying on allegations of customer related concern for which there was inadequate evidence.

[5] The Divisional Court has jurisdiction to hear this appeal under s.33 of the *Ontario Energy Board Act*. An appeal may only be made though on a question of law or jurisdiction.

[6] The appellant acknowledged that the Board articulated the correct legal test, but erred in its application of that test to the facts of the case. In our view, the appellant has failed to demonstrate any error of law or jurisdiction.

[7] The decision of the Ontario Energy Board in issue is essentially one involving discretion. The factors involved in the exercise of that discretion are primarily matters of policy and specialized facts and relationships that are within the expertise of the Board and which are at the core of its exclusive jurisdiction.

[8] The decision in this case is fact-intensive and the appellant has failed to extract from the facts any discrete question of law or jurisdiction to support its appeal. As put by the Alberta Court of Appeal in *Wood Buffalo (Regional Municipality) v. Alberta (Energy and Utilities Board),* 2007 ABCA 192 at para. 8:

> There is no extricable issue of law. An arguably unreasonable exercise of a discretion is not an error of law or jurisdiction.

[9] It is trite that an appeal generally is a review of the record before the Board or Tribunal when it made its decision. In this case the appellant asks the Court to direct the Board to reconsider its decision based upon subsequent events, specifically, the Board's decision to set aside on procedural grounds two orders that were taken into account in the decision under appeal. This is, in essence, a request in the nature of a *mandamus* application. Though the respondents do not raise any objection to the process by which the appellants have put that proposed relief before us, they point out that the appellant has a pending application before the Ontario Energy Board in which the Board can, and surely will, consider all facts and circumstances subsequent to its original decision.

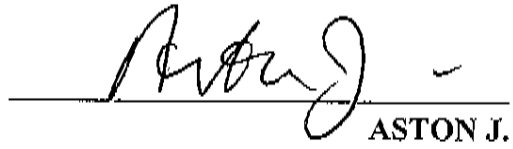
[10] We agree with the respondent that we should not exercise our discretion to make an order in the nature of *mandamus*, a discretion sparingly exercised, in the circumstances of this case.

[11] The appeal is therefore dismissed on the merits. Therefore, there is no need to address the motion to quash the appeal is moot.

COSTS

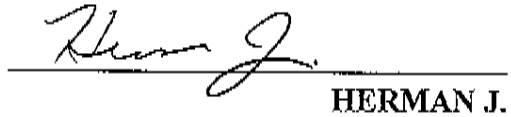
[12] I have endorsed the Motion Record on behalf of the panel, "The motion was heard and reserved. For oral reasons given and recorded on the appeal itself, it is unnecessary to consider this motion any further. No costs."

[13] I have endorsed the Appeal Book on behalf of the panel, "For oral reasons given and recorded, the appeal is dismissed. The appellant is to pay costs, $10,000 to the respondent Aylmer and $5,000 to the respondent IGPC."



ASTON J.

SACHS J.



HERMAN J.

Date of Reasons for Judgment: June 14, 2012
Date of Release: JUN 19 2012

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ASTON, SACHS AND HERMAN JJ.

BETWEEN:

NATURAL RESOURCE GAS LIMITED

Appellant

– and –

ONTARIO ENERGY BOARD, THE CORPORATION OF THE TOWN OF AYLMER and INTEGRATED GRAIN PROCESSORS' CO-OPERATIVE INC.

Respondent

ORAL REASONS FOR JUDGMENT

ASTON J.

Date of Reasons for Judgment: June 14, 2012

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