

COURT OF APPEAL FOR ONTARIO

CATZMAN, DOHERTY AND GOUDGE J.J.A.

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

**IN THE MATTER OF the Gas)
Distribution Access Rule made by the)
Ontario Energy Board under section 44)
of the *Ontario Energy Board Act, 1998*;)**

**AND IN THE MATTER OF an Appeal)
from provisions of the Gas Distribution)
Access Rule pursuant to subsection)
33(1) of the *Ontario Energy Board Act,*)
1998.)**

B E T W E E N :

**ENBRIDGE GAS DISTRIBUTION)
INC. and UNION GAS LIMITED)**

(Appellants)

- and -

ONTARIO ENERGY BOARD)

(Respondent)

) **J.L. McDougall, Q.C.**
) **Helen T. Newland**
) **Michael D. Schafler**
) **for the appellant**
) **Enbridge Gas Distribution Inc.**
)
) **Patricia D.S. Jackson**
) **Crawford G. Smith**
) **for the appellant Union Gas Limited**
)
) **David M. Brown**
) **for the intervenor Direct Energy**
)
) **Robert Frank**
) **Elisabeth DeMarco**
) **for the intervenor**
) **Ontario Energy Savings Corp. et al.**
)
) **Kenneth T. Rosenberg**
) **Richard P. Stephenson**
) **for the respondent Ontario**
) **Energy Board**
)
) **Heard: September 28, 2004**

On appeal from the order of the Divisional Court (Justice James D. Carnwath, Justice Warren K. Winkler and Justice Gloria J. Epstein) dated September 8, 2003.

GOUDGE J.A.:

[1] Natural gas is a major fuel source for energy users in Ontario. The gas consumer buys its gas from a gas vendor and then has a gas distributor transport the gas to it by pipeline. The consumer must pay both the gas vendor and the gas distributor for their services. Historically, gas distributors have always been able to bill their customers directly for the transportation service they provide. They consider this to be a very important and valuable means of regular communication with their customers.

[2] This came to an end on December 11, 2002, when the respondent Ontario Energy Board issued the Gas Distribution Access Rule (the “GDAR”) pursuant to the rule-making power given to it by the *Ontario Energy Board Act, 1998*, S.O. 1998 c. 15, Schedule B (the “Act”). It did so after a consultation process that took a number of months.

[3] Among other things, the GDAR permits the gas vendor to determine who will bill its customers for the gas they buy and for its transportation to them by the gas distributor. The gas vendor may choose to provide both charges to the customer, or require the gas distributor to do so, or choose to have each provide its own bill to the customer.

[4] The appellants, who are both large gas distributors in Ontario, exercised their right under the Act to appeal the making of the GDAR to the Divisional Court. Their position is that the Act does not give the Board the jurisdiction to make a rule with these billing

provisions. They argue that these aspects of the GDAR do not come within the Board's jurisdiction to make rules "governing the conduct of a gas distributor as such conduct relates to" a gas vendor. They also argue that, in any event, the Board did not follow the process that the Act requires it to follow before issuing a rule.

[5] The Divisional Court dismissed both arguments and upheld the GDAR. With leave, the appellants bring the matter to this court. For the reasons that follow, I would dismiss the appeal.

THE BACKGROUND

[6] The appellants are the two major gas distributors in Ontario. Each provides distribution service by delivering gas through its network of buried pipelines to consumers in its particular area of the province. Although the appellants' gas distribution activities are regulated by the Board, both engage in other business activities which are not regulated. However, they require the Board's approval to do so because of the risks posed where the same corporation combines unregulated activities with the regulated gas distribution service it alone provides to its particular franchise area.

[7] Gas vendors provide their customers with gas supply, but do not transport it to them. That supply reaches the customers through the distribution systems of the gas distributors. A customer buying from a gas vendor must pay the gas vendor for the gas supply it provides and the gas distributor for the gas distribution it provides. A gas distributor and a gas vendor are engaged in different but related business activities.

Each has a separate and direct business relationship with the customer. Although the Board regulates the price customers pay for gas distribution services, it does not regulate the price customers pay to gas vendors for the gas itself. That price is set by the marketplace.

[8] It is in this context that the Board set out to develop and promulgate a rule governing certain aspects of the relationship between gas distributors and gas vendors.

[9] For this case, the critical rule-making provision in the Act is s. 44(1)(b)(i). Of secondary importance is s. 44(1)(d). They read:

44(1) The Board may make rules,

...

(b) governing the conduct of a gas distributor as such conduct relates to any person,

(i) selling or offering to sell gas to a consumer,

...

(d) establishing conditions of access to transmission, distribution and storage services provided by a gas transmitter, gas distributor or storage company.

[10] The Act also creates the rule-making process. Subsections 45(1) to (8) say this:

Notice and comment

45(1) The Board shall ensure that notice of every rule that it proposes to make under section 44 is given in such manner and to such persons as the Board may determine.

Content of notice

(2) The notice must include,

- (a) the proposed rule or a summary of the proposed rule;
- (b) a concise statement of the purpose of the proposed rule;
- (c) an invitation to make written representations with respect to the proposed rule;
- (d) the time limit for making written representations;
- (e) if a summary is provided, information about how the entire text of the proposed rule may be obtained; and
- (f) a description of the anticipated costs and benefits of the proposed rule.

Opportunity for comment

(3) Upon giving notice under subsection (1), the Board shall give a reasonable opportunity to interested persons to make written representations with respect to the proposed rule within such reasonable period as the Board considers appropriate.

Exceptions to notice requirement

(4) Notice under subsection (1) is not required if what is proposed is an amendment that does not materially change an existing rule.

Notice of changes

(5) If, after considering the submissions, the Board proposes material changes to the proposed rule, the Board shall ensure notice of the proposed changes is given in such manner and to such persons as the Board may determine.

Content of notice

(6) The notice must include,

- (a) the proposed rule with the changes incorporated or a summary of the proposed changes;
- (b) a concise statement of the purpose of the changes;
- (c) an invitation to make written representations with respect to the proposed rule;
- (d) the time limit for making written representations;
- (e) if a summary is provided, information about how the entire text of the proposed rule may be obtained; and
- (f) a description of the anticipated costs and benefits of the proposed rule.

Representations re: changes

(7) Upon giving notice of changes, the Board shall give a reasonable opportunity to interested persons to make written representations with respect to the changes within such reasonable period as the Board considers appropriate.

Making the rule

(8) If notice under this section is required, the Board may make the rule only at the end of this process and after considering all representations made as a result of that process.

[11] Finally, the Act sets out the right of appeal used by the appellants.

Section 33(1)(b) and s. 33(2) read as follows:

33(1) An appeal lies to the Divisional Court from,

...

(b) the making of a rule under section 44;

...

(2) An appeal may be made only upon a question of law or jurisdiction and must be commenced not later than 30 days after the making of the order or rule or the issuance of the code.

[12] In December 1999, the Board notified all interested parties that it had instructed its staff to undertake a consultation process to develop a draft rule for the Board's consideration. On February 6, 2001, the Board issued a notice of proposal to make a rule, together with the draft GDAR. After receiving written and oral input from interested

parties including the appellants, a panel of the Board issued a report on June 19, 2002, giving its advice to the Board. Shortly thereafter, on June 28, 2002, the Board issued a notice of proposed changes to the proposed GDAR and attached a copy of the revised draft rule. A further consultation process followed, and again the appellants participated fully. On October 9, 2002, the same panel of the Board issued a supplementary report containing its advice to the Board. The Board responded by issuing a notice of additional proposed changes to the draft rule on October 11, 2002. It called for any further written representations by October 31, 2002. Finally, on December 11, 2002, the Board released the GDAR.

[13] Although the GDAR speaks to a number of issues, only its provisions concerning billing the customer are under attack by the appellants. The rule sets out three billing options:

- (a) Gas distributor-consolidated billing: where the gas distributor issues a single bill to the consumer setting out the charges for gas distribution services and the charges for the gas commodity sold (which are remitted to the gas vendor when received);
- (b) Split billing: where the gas distributor issues a bill to the consumer for gas distribution services and the gas vendor issues a bill to the consumer for the gas commodity sold; and

(c) Gas vendor-consolidated billing: where the gas vendor issues a single bill to the consumer setting out the charges for the gas commodity sold and the charges for gas distribution services (which are remitted to the gas distributor when received).

[14] The GDAR requires a gas distributor to accommodate whichever option is chosen by a gas vendor for the gas supply services it provides or intends to provide to consumers in the gas distributor's part of the province.

[15] The appellants appealed the making of the GDAR to the Divisional Court pursuant to s. 33 of the Act. That court issued short reasons, finding that the standard of review is correctness, that s. 44(1)(b) of the Act gives the Board had jurisdiction to make the billing provisions of the rule, and that the Board complied with the process set out in s. 45 in arriving at the rule. With leave, the appellants come to this court.

ANALYSIS

[16] This appeal raises three issues:

(1) Was the Divisional Court right in finding that it should use the standard of review of correctness in deciding an appeal of the making of the GDAR?

(2) Does the Board have the jurisdiction to make a rule with the billing provisions contained in the GDAR?

(3) Did the Board follow the process required by the Act in making the GDAR?

THE FIRST ISSUE – THE STANDARD OF REVIEW

[17] The appellants argue that the Divisional Court was right and that the standard of review determined by the well-known pragmatic and functional approach is correctness. In this court, the Board's primary position is that the pragmatic and functional analysis is misplaced and that the issue on the appeal of the making of a rule is simply whether the rule is *ultra vires* the statutory provisions that give the Board jurisdiction to make it.

[18] In the end, both the appellants' approach and that of the Board end up at the same place, and, I think in this case, the correct place. On an appeal of the making of the GDAR, the court must determine whether s. 44(1) of the Act properly interpreted gives the Board the jurisdiction to make the rule. In this task, no deference is to be accorded to the Board's view of the extent of its rule-making jurisdiction.

[19] However, because the Board takes an alternative position that, on a pragmatic and functional analysis, the appropriate standard of review is reasonableness, something more should be said.

[20] Section 44(1) of the Act gives the Board jurisdiction to make rules that have the force of law. Historically, when subordinate legislation like this is attacked as not being authorized by the authorizing legislation, the court asks whether the subordinate legislation is *ultra vires* the rule-making jurisdiction granted by the statute. In this case, that is to ask whether s. 44(1) of the Act, properly interpreted, gives the Board the jurisdiction to make this rule. The court accords no deference to the Board's view of the scope of jurisdiction granted by s. 44(1) and in essence applies a correctness standard but without having first applied a pragmatic and functional analysis to determine that this is the appropriate standard of review.

[21] The Supreme Court of Canada described the pragmatic and functional analysis in detail in the seminal case of *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. Courts have commonly applied this analysis to determine the standard of review to be applied to the adjudicative decisions of administrative agencies. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada extended this to the task of determining the standard of review to be applied to the exercise of a statutory discretion by an administrative agency. Brown and Evans in their text [*Judicial Review of Administrative Action in Canada*], loose-leaf (Toronto: Canvasback, July 2004) at 14-3320 suggest that it is only a matter of time before the Supreme Court of Canada applies the pragmatic and functional analysis to determine the appropriate standard of review of an administrative agency's act of subordinate law-making. Indeed, the Federal

Court of Appeal has done just that in *Telecommunications Workers Union v. Canadian Radio-television and Telecommunications Commission* (2003), 233 D.L.R. (4th) 298.

[22] In my view, whether one uses the *ultra vires* analysis or the pragmatic and functional analysis the result is the same. An application of the latter to the making of the GDAR by the Board yields the conclusion that the proper standard of review is correctness. As a consequence, the court must ask whether s. 44(1), correctly interpreted, gives the Board the jurisdiction to make the rule. This is the same question the court would pose in assessing whether the rule made by the Board is *ultra vires* its empowering legislation.

[23] All the contextual factors to be considered in the pragmatic and functional approach suggest the strict scrutiny of the correctness standard of review. The Board's rule making is not protected by a privative clause but is subject to a statutory right of appeal to the Divisional Court. The question here – the proper interpretation of s. 44(1) – is clearly one of law. It involves pure statutory interpretation, something to which the Board can claim no greater expertise than the courts, particularly where the interpretation is of statutory provisions that do not engage the core of the Board's expertise. The desirability of the rule, and the various considerations that the Board must balance in making it, are not factors in the court's task. The Act does not require the Board to give reasons to explain why s. 44(1) provides the jurisdiction to make the rule, making it difficult to subject the Board's reasoning to the somewhat probing analysis that would be part of a more deferential standard of review. Finally, there is nothing in the language of

s. 44(1) to suggest that the court should give deference to the Board's view of the extent of the jurisdiction granted to it. For example, s. 44(1) does not entitle the Board to make rules governing the conduct of a gas distributor that "in the Board's opinion" relates to a gas vendor.

[24] In short, all these considerations indicate that the legislature intends the court to ask if the Board was correct in finding that s. 44(1) of the Act gives it jurisdiction to issue the GDAR. Whether a pragmatic and functional analysis or an *ultra vires* analysis is used, the question is the same.

THE SECOND ISSUE: THE RULE-MAKING JURISDICTION OF THE BOARD

[25] The central issue in this appeal is whether s. 44(1) gives the Board jurisdiction to make the GDAR and, in particular, its provisions concerning billing the consumer for gas distribution services and gas commodity sales.

[26] The Divisional Court found that s. 44(1)(b) gives the Board sufficient jurisdiction, and in this court this subsection was the main battleground. It provides that the Board may make rules "governing the conduct of a gas distributor as such conduct relates to [a gas vendor]".

[27] The appellants' primary argument is that s. 44(1)(b), properly interpreted, does not give the Board jurisdiction to do what it did. They say that the intention of this subsection is to limit the Board's jurisdiction to a rule governing only the part of a gas

distributor's conduct that relates to its business relationship with a gas vendor, such as when the gas vendor acts as agent on behalf of its gas supply customer to arrange with the gas distributor for delivery of that gas supply to that customer. This would exclude the billing provisions of the GDAR, which govern a gas distributor's conduct that is part of its business relationship, not with a gas vendor, but with its gas distribution customer.

[28] In my view, there is nothing in either the language of s. 44(1)(b) or its statutory context to suggest such a narrow interpretation. The subsection does not say that the conduct of the gas distributor governed by a rule must relate to the gas vendor by being a part of a direct business relationship between the two and that in no other sense can the conduct be related to the business of the gas vendor. Moreover, such a narrow reading would be inconsistent with the broad purpose of the Act, which is to regulate all aspects of the gas distribution business, not simply those aspects that involve a direct business relationship with gas vendors.

[29] The contested provisions of the GDAR apply to the billing arrangements used by gas distributors to charge their customers for transporting their gas supply to them. How gas distributors get paid by their customers for the gas distribution service provided is obviously an important part of the gas distribution business. Similarly, how gas vendors get paid by their customers for the gas commodity supplied is an important part of the gas vendors' business.

[30] The GDAR requires the gas distributor to use the billing arrangement chosen by the gas vendor for the gas distribution service it provides to the customer they share. In doing so, the rule governs conduct of the gas distributor that is a part of its gas distribution business. That conduct relates to the billing arrangement used by the gas vendor for the gas commodity sold to the customer it shares with the gas distributor. The connection is that the two charges, whether contained in a single bill sent by the gas distributor, or in one sent by the gas vendor, or in separate bills, reflect two complementary services both of which are necessary if either is to be of any value to the customer. The commodity is of no use without the distribution, and vice versa. The billing method for gas distribution is related to the billing method for gas sale because together they comprise the way the customer receives the total charge for his use of gas.

[31] Thus, in my view the words of s. 44(1)(b) read in their grammatical and ordinary sense, confer ample jurisdiction on the Board to make the billing provisions of the GDAR. Moreover, such a reading is harmonious with the scheme and object of the Act and the intention of the legislature. The exercise of jurisdiction by the Board in making these provisions regulates an important part of the gas distribution business. This constitutes a manifestation of one of the fundamental purposes of the Act, namely the regulation by the Board of gas distribution in Ontario.

[32] However, the appellants raise a number of additional arguments beyond simple statutory interpretation to buttress their position that s. 44(1)(b) does not provide the Board with the necessary jurisdiction.

[33] First, they say that the billing provisions of the GDAR have the effect of requiring a gas distributor to act not as a gas distributor but as either a billing service provider for gas vendors or a billing service purchaser from gas vendors, and that s. 44(1)(b) cannot have contemplated a rule that does so. However, this argument overlooks the reality that under the GDAR, gas distributors remain distributors of gas. They continue to deliver gas to consumers. The rule does not change the nature of their business. They remain gas distributors. The rule simply governs the billing arrangement they have with their customers for the gas distribution service they provide, which is an important part of that business.

[34] Second, the appellants argue that the billing provisions of the GDAR go beyond s. 44(1)(b) because they do not regulate an existing field of conduct but rather create a new field by requiring gas distributors and gas vendors to cooperate in billing their common customers. The error in this argument is that the rule governs the conduct of gas distributors in the way they transmit to their customers the charges for the gas distribution service they provide. That is not a field of conduct created by the rule but something that has always been an integral part of the gas distribution business.

[35] Third, the appellants say that the GDAR turns gas distributors into wholesale distributors by requiring them to send their bills to gas vendors when the latter select the gas vendor-consolidated billing option. They argue that because the Act limits the definition of “gas distributor” to one who delivers gas to a consumer, s. 44(1)(b) cannot sustain a rule that creates wholesale gas distributors. However, the billing provisions of

the GDAR do not take gas distributors outside of their statutory definition. Distributors continue to deliver gas to the end consumer. Under the gas vendor-consolidated billing option, all that the gas distributor sends to the gas vendor is the charge to the consumer for the gas distribution service. This does not make the gas distributor into a wholesale distributor of gas.

[36] Fourth, the appellants rely on a 1999 Board decision finding that a gas distributor is not engaged in a business activity that is subject to regulation under the Act when it offers a billing service that permits a gas vendor to provide its charge for gas sales to the gas distributor to forward to the customer they share. The appellants argue that having found this, the Board cannot now find that it can make a rule regulating the conduct it has previously determined to be beyond regulation. However, this miscasts what the billing provisions of the GDAR do. They govern the billing method to be used by gas distributors in providing their customers with the charges for gas distribution services. This constitutes the regulation of an important part of the gas distribution business, consistent with the central purpose of the Act. By requiring the gas distributor to enclose the charge for gas sales with its own charge for gas distribution services to the customer, where the gas distributor-consolidated billing option is chosen by the gas vendor, the rule is doing no more than governing the billing practice of the gas distributor as it relates to the billing practice of the gas vendor.

[37] Fifth, the appellants argue that the vendor billing provisions of the GDAR effectively expropriate their goodwill by depriving them of direct contact with their

customers. They say that the legislature could not have intended s. 44(1)(b) to permit expropriation without compensation. I do not accept this submission. While the gas vendor-consolidated billing option precludes one way for the gas distributor to communicate with its customers, there are many others. Moreover, many instances of statutory regulation of business may have an adverse impact on that business. The issue is not this, but whether the regulation is properly authorized by the governing legislation.

[38] Finally, the appellants argue that s. 44(1)(b) could not have been intended to permit a rule which interferes with their common law right to have a direct billing relationship with their customers. The simple answer to this is that the appellants have no common law right to engage in the gas distribution business at all. This is an activity that is entirely governed by the Act under the supervision of the Board. This regulation, including the making of rules, cannot be said to deprive the appellants of any common law rights.

[39] I therefore conclude that, interpreted properly, s. 44(1)(b) of the Act gives the Board jurisdiction to make the billing provisions of the GDAR and that none of the appellants' arguments to the contrary can succeed. Having reached this conclusion, it is unnecessary to determine whether s. 44(1)(d) of the Act also provides the necessary jurisdiction to do so.

THE THIRD ISSUE: THE PROCESS THE BOARD MUST FOLLOW TO MAKE A RULE

[40] Section 45(2) requires that the Board must give notice of the anticipated costs and benefits of the rule it proposes to make. If, after receiving written representations from interested parties, the Board then proposes material changes to the proposed rule, s. 45(6) requires that it give a second notice describing the anticipated costs and benefits of the proposed rule as amended. The appellants complain that in this case the Board did not do so, either for the proposed GDAR as a whole, or for the provisions setting out the different billing arrangements. They say that this allowed the Board to escape the discipline required of it by the Act and prevented the appellant from fully making representations to the Board, something to which the Act entitles them. They say that for this reason the GDAR, or at least the billing provisions of it, cannot stand.

[41] I do not agree with this submission.

[42] Section 45 requires the Board to provide only a description of the anticipated costs and benefits of the proposed rule as whole. It does not require a prospective cost-benefit analysis of each provision in the proposed rule. That would take the notice requirement to an unworkable level of detail.

[43] Nor do I think that the Act requires a description of anticipated costs and benefits as a means of imposing an intellectual discipline on the Board. If the legislature was concerned that the Board would engage in thoughtless rule making, it would surely have

imposed a requirement to give reasons for rule making, if indeed it left the Board with any rule-making power at all.

[44] Rather, s. 45 read in its entirety, makes clear that the notice requirement, both for the proposed rule and for proposed material changes in it, is in order to give interested parties a reasonable opportunity to make written submissions with respect to the proposed rule or the changes. That is the standard to be used in evaluating what the Board did here.

[45] In this case the Board issued the notice that it proposed to make the GDAR on February 6, 2001. Following representations by interested parties including the appellants, the panel of the Board issued an advisory report to the Board. This was followed on June 28, 2002, by a notice of proposed material changes, which again elicited representations from the appellants and others and another advisory report from the panel. A further notice of additional proposed changes followed on October 11, 2002, again offering the opportunity for written representations before the GDAR was issued on December 11, 2002.

[46] In each case, the notice set out the anticipated costs and benefits in a general way, although the Board made it clear that precision was impossible given that this involved prediction of things yet to come.

[47] The Divisional Court aptly summed up its conclusion that these notices fulfilled the legislative objective of permitting reasonable opportunity for written submissions prior to the making of the GDAR. At para. 9 it said:

What is clear from the chronology attached to this endorsement is that interested parties had ample opportunity to make representation in respect of the "described costs and benefits". The Appeal Book is in eight volumes comprising 5,058 pages. Even a cursory examination of the record reveals the considerable extent to which the appellants and others participated in the process of developing the GDAR.

[48] I agree entirely with this assessment. This ground of appeal must fail.

[49] In summary, the appeal must be dismissed. As no party seeks costs, none are ordered.

RELEASED: JAN 11 2005

MAC

W. Rowley JA

I agree: MacCormac JA.

Jayne [Signature]