Case Name:

Enbridge Gas Distribution Inc. v. Ontario (Energy Board)

Enbridge Gas Distribution Inc.
v.
Ontario Energy Board

[2006] S.C.C.A. No. 208

File No.: 31477

Supreme Court of Canada

Record created: June 6, 2006.
Record updated: November 9, 2006.

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Status:

Application for leave to appeal dismissed with costs (without reasons) November 9, 2006.

Catchwords:

Administrative Law -- Boards and Tribunals [Ontario Energy Board] -- Appeals -- Standard of Review -- Whether the current standards of review of correctness, reasonableness simpliciter and patently unreasonable should give way to a less complex approach -- Whether it is appropriate for an administrative tribunal to act as a litigant in respect of an appeal from an appellate court's decision setting aside the tribunal's own decision.

Case Summary:

Enbridge distributes and sells gas. The Ontario Energy Board regulates the rates which Enbridge charges to its customers. The Board practice is to allow Enbridge to recover costs that were prudently incurred. Before 1996, Enbridge shipped its gas through the Trans Canada Pipeline System but, from 1996 to 1999, it entered into agreements to use alternate pipeline routes. The

alternate routes proved more costly than the TransCanada route. Enbridge applied to recover the additional costs. The Board allowed it to recover some costs but not the costs associated with two of the alternate agreements. Enbridge appealed to the Ontario Superior Court which held the Board had erred by using hindsight in two instances in its decision. The Superior Court set aside the Board's decision and ordered a new hearing. The Board appealed to the Court of Appeal for Ontario. The Court of Appeal allowed the appeal and restored the Board's decision.

Counsel:

J.L. McDougall, Q.C. (Fraser, Milner, Casgrain), for the motion.

David M. Brown (Stikeman, Elliott), contra.

Chronology:

1. Application for leave to appeal:

FILED: June 6, 2006. S.C.C. Bulletin, 2006, p. 849.
SUBMITTED TO THE COURT: September 25, 2006. S.C.C. Bulletin, 2006, p. 1197.
DISMISSED WITH COSTS: November 9, 2006 (without reasons). S.C.C. Bulletin, 2006, p. 1400.
Before: Bastarache, LeBel and Fish JJ.

Procedural History:

Judgment at first instance: Decision in part denying approval to increase rates to recover costs.
Ontario Energy Board, Halladay, Spoel and Betts, December 13, 2002.

Judgment at first instance: Appeal allowed, new hearing ordered.
Ontario Superior Court of Justice, Lane, Molloy and Power JJ.A., March 2, 2005.

Judgment on appeal: Appeal allowed; Board's order restored. Court of Appeal for Ontario, Doherty, Moldaver and Gillese JJ.A., April 7, 2006.

Case Name:

Enbridge Gas Distribution Inc. v. Ontario (Energy Board)

Between
Enbridge Gas Distribution Inc., appellant (respondent in appeal), and
Ontario Energy Board, respondent (appellant in appeal)

[2006] O.J. No. 1355

210 O.A.C. 4

41 Admin. L.R. (4th) 69

147 A.C.W.S. (3d) 131

2006 CarswellOnt 2106

Docket: C44102

Ontario Court of Appeal
Toronto, Ontario

D.H. Doherty, M.J. Moldaver and E.E. Gillese JJ.A.

Heard: March 23, 2006.
Judgment: April 7, 2006.

(29 paras.)

Administrative law -- Judicial review and statutory appeal -- Standard of review -- Correctness -- Appeal by the Ontario Energy Board from an order of the Divisional Court setting aside the Board's order made on an application by Enbridge Gas Distribution for a rate increase and directing a new hearing before a different panel of the Board -- Appeal allowed -- Court erred in determining that Board improperly used hindsight when deciding whether added transportation costs incurred by Enbridge justified rate increase -- When impugned passage was read in context of entire judgment, it was to be read in manner consistent with the rest of the Board's reasons.

Administrative law -- Boards and tribunals -- Reasons -- Appeal by the Ontario Energy Board from

an order of the Divisional Court setting aside the Board's order made on an application by Enbridge Gas Distribution for a rate increase and directing a new hearing before a different panel of the Board -- Appeal allowed -- Court erred in determining that Board improperly used hindsight when deciding whether added transportation costs incurred by Enbridge justified rate increase -- When impugned passage was read in context of entire judgment, it was to be read in manner consistent with the rest of the Board's reasons.

Appeal by the Ontario Energy Board from an order of the Divisional Court setting aside the Board's order made on an application by Enbridge Gas Distribution for a rate increase and directing a new hearing before a different panel of the Board. The Board was charged with the responsibility of fixing the rate that Enbridge, a gas distributor and seller to consumers in Ontario, could charge customers for its gas. The Board refused in part Enbridge's application for a rate increase. On appeal to the Divisional Court, the Court held unanimously that the Board erred in law in its application of the legal test to be applied when deciding whether Enbridge was entitled to a rate increase to reflect higher transportation costs incurred by Enbridge as a result of certain agreements it had entered into. In reaching its conclusion, the Divisional court read a passage from the reasons of the Board as demonstrating, contrary to statements made earlier in the reasons of the Board, that the Board had improperly used hindsight when deciding whether the added transportation costs incurred by Enbridge justified a rate increase. On Enbridge's application for a rate increase, the Board was obliged to decide whether the rate increase sought was "just and reasonable". In making that decision, the Board was required to balance the competing interests of Enbridge and its consumers. The balancing process was achieved by the application of what was known as the "prudence" test. Enbridge was entitled to recover its costs by way of a rate increase only if those costs were "prudently" incurred. Knowledge of facts relevant to the prudence of the business decision gained after the decision was made could not be used at the second stage of the "prudence" inquiry to determine the ultimate question of whether the decision was prudent. Those facts could, however, be taken into account at the first stage in determining whether the presumption of prudence had been rebutted. As a result, the Board could use the fact that increased transportation costs had been incurred by Enbridge to decide whether the presumption of prudence was rebutted, but could not use that fact in making the ultimate determination of whether Enbridge's decision to enter into the contracts was prudent. The Divisional court held that reference to a notional deferral account as a "key element of the prudence review" indicated a misuse of hindsight in respect of all contracts under review.

HELD: Appeal allowed. The Board's order was restored. It was an error to read the words "prudence review" as referable only to the second part of the "prudence" inquiry. When the impugned passage was read in the context of the entire judgment, it could and should be read in a manner consistent with the rest of the reasons of the Board. In sum, the phrase "prudence review" was to be read as referring to the entire inquiry, which avoided creating a flat out contradiction between the impugned passage and the rest of the judgment insofar as it described the "prudence" inquiry.

Statutes, Regulations and Rules Cited:

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, s. 36

Ontario Energy Act, 1998

Appeal From:

On appeal from the order of the Divisional Court (Lane, Molloy and Power JJ.) dated March 2, 2005.

Counsel:

David M. Brown and Manizeh Fancy for the appellant in appeal

J.L. McDougall, Q.C., Jerry H. Farrell and Michael D. Schafler for the respondent in appeal

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The judgment of the Court was delivered by

D.H. DOHERTY J.A.:--

I

OVERVIEW

1 This is an appeal with leave by the Ontario Energy Board ("OEB") from the order of the Divisional Court that set aside the order of the OEB made on an application by Enbridge Gas Distribution Inc. ("Enbridge") for a rate increase and directing a new hearing before a different panel of the OEB.

2 Enbridge is a gas distributor and seller of gas to consumers in Ontario. The OEB is charged with the responsibility of fixing the rate that Enbridge can charge consumers for its gas. Enbridge applied for a rate increase. The OEB refused that request in part and Enbridge appealed to the Divisional Court. The Divisional Court unanimously held that the OEB erred in law in its application of the legal test to be used when deciding whether Enbridge was entitled to a rate increase to reflect higher transportation costs incurred by Enbridge as a result of certain agreements it had entered into. In reaching its conclusion, the Divisional Court read a passage from the reasons of the OEB as demonstrating, contrary to statements made earlier in the reasons of the OEB, that the

OEB had improperly used hindsight when deciding whether the added transportation costs incurred by Enbridge justified a rate increase.

3 I would allow the appeal and restore the order of the OEB. When the impugned passage is read in the context of the entire judgment, it can and should be read in a manner that is consistent with the rest of the reasons of the OEB. When read in that way, the passage demonstrates no error in law.

II

FACTUAL BACKGROUND

4 Prior to 1996, Enbridge shipped gas from western Canada along the TransCanada pipeline system to Ontario. Beginning in 1996, Enbridge entered into four agreements to acquire transportation services on other pipelines. The first two agreements, Alliance 1 and Alliance 2, provided for transportation along the Alliance pipeline running from Alberta to Chicago. The third agreement, Vector 1, related to transportation along the Vector pipeline running from to Chicago to southwestern Ontario. The fourth agreement, Vector 2, also related to a pipeline running from Chicago to southwestern Ontario but contemplated the transportation of gas sourced in Chicago.

5 The new routes became operational in 2000. They proved more costly than the TransCanada pipeline route. In 2000, Enbridge applied to the OEB for an increase in its rates effective in 2001. That increase was said to reflect, in part, the added costs attributable to the Alliance and Vector contracts.

6 Enbridge's application for a rate increase did not proceed to a hearing in 2000. Enbridge entered into a provisional settlement, conditional upon various contentious issues being deferred to a hearing at a later date. As a term of the 2000 settlement, Enbridge agreed to set up what was described as a "notional deferral account." This account was to record the difference between Enbridge's actual transportation costs using the Alliance/Vector pipelines and its notional costs had it used the TransCanada pipeline system.

7 Enbridge's rate increase application proceeded to hearing in June 2002. It was common ground that Enbridge had added costs as a result of the Alliance/Vector contracts. The issue was whether Enbridge was entitled to recover these costs by increasing its rates.

III

THE DECISION OF THE OEB

8 On Enbridge's application for a rate increase, the OEB was obliged by s. 36 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, to decide whether the rate increase sought was "just and reasonable." In making that decision, the OEB was required to balance the competing interests of Enbridge and its consumers. That balancing process is achieved by the application of what is known

in the utility rate regulation field as the "prudence" test. Enbridge was entitled to recover its costs by way of a rate increase only if those costs were "prudently" incurred.

9 The OEB concluded that the added costs associated with the Alliance 1 and Alliance 2 contracts were not prudently incurred and therefore could not be recovered by way of a rate increase. The OEB did, however, hold that the added costs associated with Vector 1 were prudently incurred and therefore could be recovered. Finally, the OEB held that it had insufficient information to decide whether any added costs associated with the Vector 2 contract were prudently incurred by Enbridge. On its appeal to the Divisional Court, Enbridge challenged the OEB's findings with respect to the Alliance 1 and Alliance 2 contracts.

10 The approach of the OEB to the "prudence" inquiry is captured in the following extract from its reasons:

> While the parties described it in somewhat varying terms, in the Board's view they were in substantial agreement on the general approach the Board should take to reviewing the prudence of a utility's decision.
>
> The Board agrees that a review of prudence involves the following:
>
> * 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.

11 Neither the Divisional Court nor either party to this appeal takes issue with the correctness of the above quoted passage from the OEB's reasons. The "prudence" inquiry described by the Board has two stages. At the first stage, the decision of Enbridge is presumed to have been made prudently unless those challenging the decision demonstrate reasonable grounds to question the prudence of that decision. At the second stage of the inquiry, reached only if the presumption of prudence is overcome, Enbridge must show that its business decision was reasonable under the circumstances that were known to, or ought to have been known to, Enbridge at the time it made the decision.

12 In the above quoted extract from its reasons, the OEB expressly alluded to the limited role played by hindsight. Hindsight, that is knowledge of facts relevant to the prudence of the business decision gained after the decision was made, could not be used at the second stage of the "prudence" inquiry to determine the ultimate question of whether the decision was prudent. Those facts could, however, be taken into consideration at the first stage in determining whether the presumption of prudence had been rebutted.

13 The records from the notional deferral account kept by Enbridge demonstrated that, during the ten-month period for which the account operated, Enbridge's transportation costs were significantly higher under the Alliance contracts than those costs would have been had Enbridge used the TransCanada pipeline system. The amount of the added transportation costs could not have been known to Enbridge when it entered into the relevant contracts, but became known to Enbridge only after the ten-month period with the benefit of hindsight. Consequently, the OEB could use the fact of the increased transportation costs incurred by Enbridge to decide whether the presumption of prudence was rebutted, but could not use that fact in making the ultimate determination of whether Enbridge's decision to enter into the contracts was prudent.

14 After the OEB accurately described the "prudence" inquiry, it proceeded to apply that inquiry individually to the Alliance 1, Alliance 2, and Vector 1 contracts. The OEB then turned to the Vector 2 contract. That contract was somewhat different than the other three in that it provided for the transportation of gas sourced in Chicago and not Alberta. Accordingly, it was not part of the alternative transportation path created by the other three contracts.

15 In considering the Vector 2 contract, the OEB said:

> The Board notes that the Vector 2 decision was independent from its previous decisions to enter into the Alliance 1 and 2 and Vector 1 contracts and was not required in order to complete the single continuous transportation path from the western Canada supply basin to southern Ontario. In addition, the Board notes that the cost 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].

IV

THE REASONS OF THE DIVISIONAL COURT

16 The Divisional Court fastened upon reference by the OEB to the notional deferral account as "a key element of the Board's prudence review" in concluding that, despite the earlier proper description of the "prudence" inquiry by the OEB, it had improperly used hindsight gained by reference to the notional deferral account in deciding that the Alliance 1 and Alliance 2 contracts were not prudent.[1]

17 The Divisional Court applied a correctness standard of review in determining whether the OEB conducted a proper "prudence" inquiry. In this court, counsel for the OEB advanced a forceful argument that the standard of review should, at the highest, be one of reasonableness. It is unnecessary to decide the correct standard of review. Assuming without deciding that correctness is the proper standard of review, the reasons of the OEB clear that standard.

18 The Divisional Court acknowledged that the OEB's reasons must be read as a whole. The court also accepted that the OEB had correctly described the "prudence" inquiry and that the Board was well aware of a distinction which had to be drawn between the use of hindsight in the first and second stage of the inquiry. Despite the OEB's clear statement of the proper test, the Divisional Court ultimately held that the reference to the notional deferral account as a "key element of the prudence review" indicated a misuse of hindsight in respect of all of the contracts, including the Alliance contracts. This single sentence demonstrated to the Divisional Court that, despite the earlier passages from the reasons, the OEB had "slipped in its application of the test and did allow hindsight to creep into its consideration of prudence."

19 In reaching this conclusion, the Divisional Court must have read the words "prudence review" in the impugned passage as referring only to the second stage of the "prudence" inquiry. On that reading, the OEB had improperly used information provided in the notional deferral account to determine the ultimate question of the prudence of the contracts.

20 The Divisional Court erred in reading the words "prudence review" as referable only to the second part of the "prudence" inquiry. Taken as a whole, the reasons indicate that the phrase "prudence review" and similar phrases (*e.g.* "review of prudence") were used throughout the reasons, not as terms of art with a fixed single meaning but in different ways in different parts of the reasons. Sometimes the phrase "prudence review" or an equivalent phrase was used to refer to the entire "prudence" inquiry. Sometimes the OEB used the phrase "prudence review" to refer only to the second stage of that inquiry at which the ultimate question of the prudence of the contracts had to be decided. For example, when describing the submissions of Enbridge at para. 3.1.1, the OEB used the phrase "prudence review" to describe the entire process, including the first stage at which the presumption of prudence operated and during which the information provided in the notional deferral account was clearly relevant. Similarly, under the heading "Board Comments and Findings" (para. 3.12) the OEB used the subheading "Review of Prudence" to describe the entire "prudence" inquiry, including the first stage. Other references to the same phrase in the reasons (*e.g.* para. 3.12.5) used the phrase in the narrower sense to refer only to the second stage of the "prudence" inquiry.

21 Considered in isolation, the phrase "prudence review" in the impugned passage from the reasons of the OEB may be open to the interpretation provided by the Divisional Court. However, the words viewed in isolation can also be taken as referring to the entire "prudence" inquiry. This latter reading is consistent with earlier usage of similar terminology in the reasons and, more significantly, is consistent with earlier statements describing the "prudence" inquiry and the limited

role played by hindsight in that inquiry. I read the phrase "prudence review" as referring to the entire inquiry, which avoids creating a flat out contradiction between that passage and the rest of the judgment insofar as it described the "prudence" inquiry.

22 Reasons are sometimes internally inconsistent and that inconsistency can demonstrate an error in law. However, the requirement that the reviewing court read reasons as a whole dictates that, where different parts of the same reasons can reasonably be read so as to maintain consistency within the reasons, that reading must be preferred over one which sends the reasons careening off in different directions and creates an error in law.

23 The reasons of the OEB, read as a whole, do not reveal any legal error in the "prudence" inquiry conducted by the OEB in respect of the Alliance 1 and Alliance 2 contracts.

V

THE OEB'S STANDING TO APPEAL

24 I will make brief reference to one additional argument made by Enbridge. It submitted that the OEB had no standing to appeal the decision of the Divisional Court to this court. Enbridge contends that the *Ontario Energy Act, 1998* gives the OEB authority to participate in an appeal taken to the Divisional Court under the right of appeal provided in that statute. Enbridge argues however, that the *Ontario Energy Act, 1998* does not give the OEB any authority to seek leave to appeal a decision of the Divisional Court in this court.

25 I agree with counsel for the OEB that, as a party to Enbridge's appeal in the Divisional Court, the OEB had standing to seek leave to appeal to this court. That standing flows not from the *Ontario Energy Act, 1998* but from s. 6(1)(a) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

26 Enbridge blended its argument that the OEB did not have standing to appeal the order of the Divisional Court with submissions that the OEB should not be allowed to advance arguments on appeal in support of the correctness of its own decision. In *Children's Lawyer for Ontario v. Goodis* (2005), 75 O.R. (3d) 309 (C.A.), this court held that the extent to which a tribunal will be allowed to make submissions in a proceeding involving a decision of that tribunal is a matter for the discretion of the court in which the proceedings are being conducted. The court also considered the factors relevant to the exercise of that discretion in the context of a judicial review application. As this is an appeal and not a judicial review application, it may be that the *Goodis* analysis is not applicable. However, assuming in Enbridge's favour that the analysis does apply, I am satisfied that the factors identified in that analysis do not support Enbridge's contention that the OEB should not have been allowed to participate in this appeal.

27 The OEB advanced essentially two arguments on this appeal. It submitted that the Divisional Court should have used a reasonableness standard of review, and it argued that the reasons of the Board, read as a whole, did not reveal the legal error found by the Divisional Court. The OEB was

the only appellant in this court. Its submissions were essential to a proper hearing of both issues.

28 I do not share Enbridge's concern that the participation of the OEB in this appeal could harm the appearance of the OEB's impartiality in any future proceedings involving Enbridge. This appeal came down to a very narrow point. Everyone agreed that the OEB had outlined the proper approach to be taken on Enbridge's application for a rate increase. The narrow question was whether the OEB had "slipped" in one part of its analysis. There is no reason to think that the Board arguing that the reasons reveal no such "slip" should cause any legitimate concern about the impartiality, real or apprehended, of the OEB in its future dealings with Enbridge. Enbridge is after all a sophisticated entity that has a long standing relationship with the OEB. Like all regulated bodies, I am sure Enbridge wins some and loses some before the OEB. I am confident that Enbridge fully understands the role of the regulator and appreciates that each application is decided on its own merits by the OEB.

VI

29 I would allow the appeal and restore the order of the OEB. The OEB has not asked for costs and I would make no order as to costs.

D.H. DOHERTY J.A.
M.J. MOLDAVER J.A. -- I agree.
E.E. GILLESE J.A. -- I agree.

1 The Divisional Court referred to another passage from the OEB's reasons (para. 3.12.20) and suggested that the OEB had also misused hindsight in that passage. I do not propose to refer to it in detail, as the Divisional Court ultimately determined that this reference alone did not raise "serious concerns" that the OEB had misapplied the "prudence" test. It is sufficient to say that I think it raises no concerns about the misuse of hindsight. The passage indicates that subsequent events validated the risk of higher costs associated with potential in service delays. Enbridge was advised of that risk before it entered into the contracts. The nature and extent of the risk flowing from potential delays was, therefore, properly factored into the second stage of the "prudence" inquiry. The fact that the risk came to pass is some indication of the validity of the risk.