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ONTARIO ENERGY BOARD
PROPOSED GAS DISTRIBUTION ACCESS RULE
BRIEF ON JURISDICTIONAL ISSUES

Introduction

1. The proposed *Gas Distribution Access Rule* ("Rule") is a rule made by the Board under the authority of subsection 44(1) of the *Ontario Energy Board Act, 1998* ("OEB Act").

2. Neither the Rule nor the Board's accompanying letter to Interested Parties (dated February 6, 2001) specifies the clause(s) of subsection 44(1) under which the Rule is made. The name of the Rule suggests that it is made under clause 44(1)(d); the February 6th letter, however, states that the Rule:
 - relates to gas distributors and access to distribution services;
 - establishes principles to standardize the conduct of business between distributors and marketers; and
 - establishes principles to standardize the conduct of business between distributors and customers.

The first two objectives appear to fall under clauses 44(1)(d) and 44(1)(b), respectively. The third objective does not appear to fall within the scope of any of the Board's specific rule-making powers set out in section 44.

3. We consider the Board's jurisdiction to issue the Rule, in its current form, in this brief. Specifically, we consider the following:
- whether the gas vendor consolidated billing provisions in section 8 of the proposed Rule are *intra vires* the Board's statutory jurisdiction conferred on it by its enabling legislation, the OEB Act;
 - whether the gas vendor consolidated billing provisions in section 8 of the proposed Rule are *intra vires* the Board's rule-making authority under subsection 44(1) of the OEB Act; and
 - whether the gas vendor consolidated billing provisions in section 8 of the proposed Rule are consistent with the principles of agency and contract law.

Conclusions

4. Our legal analysis of the issues, described above, have led us to the following conclusions:
- The gas vendor consolidated billing provisions of the proposed Rule are *ultra vires* the Board's powers under the OEB Act.
 - The gas vendor consolidated provisions of the proposed Rule are *ultra vires* the Board's powers to make rules under the OEB Act.
 - The gas vendor consolidated provisions of the proposed Rule may violate fundamental principles of agency and contract law.

Subordinate Legislation

5. The Board's rule-making authority under clauses 44(1)(b) and (d) of the OEB Act is a delegated legislative authority and, in consequence, the Rule is subordinate legislation. There are three clear limits on the delegation of legislative authority. The first is that subordinate legislation must be consistent with the purposes and

objects of the enabling statute and must, accordingly, be read in the context of that statute as a whole. In *Canada v. Compagnie Immobilière BCN*, [1979] 1 S.C.R. 865, the Supreme Court of Canada was asked to interpret the expression "disposed of" in section 1100 of the *Income Tax Regulations*. Writing for the court, Mr. Justice Pratte stated (at p. 876):

The expressions "disposed of" or "aliénés" found in Regulations 1100(2) should (...) not be interpreted in the isolated context of the Regulations itself as if it stood alone and independently from the statute under which it was passed. *Its true meaning should rather be gathered from a consideration of all relevant statutory or regulatory provisions* under which the scheme of capital cost allowances was established and regulated and of which the terminal loss provisions of Regulation 1100(2) are but a part. [emphasis added]

6. The second limit on the delegation of legislative authority stems from the principle that subordinate legislation cannot amend or conflict with the parent statute, or with any other legislation, absent explicit authority to do so. The Federal Court of Appeal addressed this issue when asked to interpret a provision of the *National Energy Board Cost Recovery Regulations* dealing with "program costs": *Ontario Hydro v. Canada*, [1997] 3 F.C. 565 (F.C.A.). Décarý J., writing for the court, stated at p. 573:

Counsel for the parties both approached this case on the assumption that the sole issue being the interpretation of the Regulations, it was not necessary to examine the provisions of the enabling statute. The Trial Judge also followed this approach, with the result that the Regulations were interpreted without having regard to the enabling statute.

This approach is inconsistent with the cardinal rules that were the provision to be interpreted appears in a regulation, it must be read in the context of both the regulations and the enabling statute as a whole, and that *where, as here, the expressions used in the Regulations are those in the enabling statute, they have the same respective meaning as in the enactment conferring the power.* [emphasis added]

7. Subordinate legislation that conflicts with statute law is invalid.¹
8. Examples of conflict between subordinate legislation and the enabling statute that would invalidate the former include a broadening of limited discretionary power and a narrowing of the scope of statutory substantive entitlements:²
9. The third limit on the delegation of legislative authority is that the power to regulate an activity through subordinate legislation does not include the power to take measures that have the effect of prohibiting that activity. This principle was first articulated, in a Canadian context, in a 1896 decision of the Privy Council in *Municipal Corporation of the City of Toronto v. Virgo*, [1896] A.C. 88. This seminal case considered the validity of a municipal bylaw prohibiting street traders from carrying on trade in the most important areas of Toronto. The Privy Council stated that "*there is a marked distinction to be drawn between the prohibition or prevention of a trade and the regulation and governance of it, and indeed a power to regulate and govern seems imply the continued existence of that which is to be regulated and governed*" [emphasis added]. Without express words of prohibition, the Privy Council held that a power of regulation could not authorize the making unlawful of what is lawful trade carried on in a lawful manner.

The Rule is *Ultra Vires* the OEB Act

10. The effect of section 8 of the proposed Rule, as it pertains to "gas vendor consolidated billing", is to create a wholesale "distribution" service whereby the "gas vendor" (as defined in section 1.2 of the Rule) purchases "distribution" service from the distributor and resells that service to an end-use "consumer".

¹ *Texaco Canada Ltd v. Vanier (City)*, [1981] 1 S.C.R. 254; *Canada (Attorney General) v. Umpire Constituted Under s. 92 of the Unemployment Insurance Act*, [1983] 1 S.C.R. 335; *Booth v. R. (1915)*, 51 S.C.R. 20; *Reference re Regulations in Relation to Chemicals*, [1943] S.C.R. 1 at 7; *Hartley v. Matson (1902)*, 32 S.C.R. 575; *R. v. Dodge*, [1966] 1 O.R. 633; *Re Agraftiotis (1966)*, 56 W.W.R. 638 (B.C.C.A.); *Reimer v. Saskatchewan (Human Rights Commission) (1992)*, 8 Admin. L.R. (2d) (Sask. C.A.); *Sentes v. Saskatchewan (Program Manager of the Mortgage Protection Plan) (1991)*, 7 Admin. L.R. (2d) 140 (Sask. Q.B.); *St.-Jacques (Village) c. Nouveau-Brunswick (Ministre des municipalités, de la culture, et de l'habitation) (1997)*, 192 N.B.R. (2d) 141 (N.B. Q.B.).

² *Petrashuyk v. Law Society (Alberta) (1988)*, 33 Admin. L.R. 145 (S.C.C.); *Langlois v. Quebec (Minister of Justice) (1984)*, 7 Admin. L.R. 279 (S.C.C.).

- Under this scenario, the gas vendor is a customer of the distributor and the consumer is a customer of the gas vendor. The distributor looks exclusively to the gas vendor for payment for "distribution" services rendered, is entitled to be paid regardless of the vendor's ability to collect from the consumer, and is entitled to require security from the vendor. The gas vendor, in turn, looks to the consumer for payment for the delivery services.
11. Wholesale "distribution" service is not contemplated by the OEB Act. A "gas distributor" is defined as a "person who delivers gas to a consumer" and "distribution" has a corresponding meaning (§. 3). Accordingly, the sale of a delivery service to a gas vendor, as opposed to an end-use consumer, is not "distribution" within the meaning of the OEB Act.
 12. The proposed Rule attempts to navigate around the definitional limitations of the OEB Act by expanding the term "distributor" to mean "a person who delivers gas to a customer or a consumer" (§1.2). The term "customer" is defined as a "person who purchases distribution services" (§ 1.2); that is, not necessarily an end-use consumer.
 13. The proposed Rule is subordinate legislation. Subordinate legislation that conflicts with statute law is invalid. The proposed Rule is, accordingly, invalid to the extent of conflicts between the definitions set out in the OEB Act and the definitions set out in the Rule. In the result, the definition of "distributor" in section 1.2 of the Rule is invalid.
 14. Subordinate legislation must be consistent with the purposes and objects of the enabling statute. The creation of what amounts to a wholesale distribution service, through the artifice of expanding the statutory definition of distributor, vitiates the statutory scheme of regulating "gas distributors" (as defined in the OEB Act) who provide retail distribution service to end-use consumers.

15. The power to regulate an activity does not include the power to take measures that prohibit or prevent that activity. The effect of the gas vendor consolidated billing option is to eliminate the very thing that the OEB Act seeks to regulate: a retail distribution service provided by a gas distributor (as defined in the OEB Act).
16. The gas vendor consolidated billing provisions in section 8 of the Rule violate the three limits on the delegation of legislative authority and are, in consequence, *ultra vires* the Board's statutory jurisdiction.

The Rule is *Ultra Vires* the Rule-making Powers

17. Quite apart from the statutory overreach of the provisions of the Rule having to do with gas vendor consolidated billing, the provisions are *ultra vires* the specific subsection of the OEB Act under which they are purported to be promulgated. In other words, even if the Board had the statutory authority to create a wholesale distribution service — and we are of the view that it does not — to do so is beyond the scope of the specific rule-making powers enumerated in subsection 44(1) of the OEB Act. None of the Board's specific rule-making powers authorize the Board to mandate, in effect, the provision by a gas distributor (as defined in the OEB Act) of a completely new type of distribution service.
18. Leaving aside the issue of the statutory definition of "gas distributor" and the corresponding definition of "distribution", the Board could perhaps proceed by way of subsection 36(4) of the OEB Act which empowers the Board to attach conditions to orders fixing the rates charged for distribution service. In other words, it is at least arguable that the Board could issue a rate order that restricts, to a gas vendor, the provision of the distribution service affected by the order. Such an order may only be made, though, following a hearing: subsection 21(2) of the OEB Act. Alternatively, but only upon application, the Board could proceed under subsection 42(3) of the OEB Act to order a gas distributor to provide wholesale distribution service. Such an order could only issue following a hearing.

The Rule is Contrary to Agency and Contract Law

19. The gas vendor consolidated billing provisions of the Rule may violate fundamental principles of either agency or contract law.
20. It was perhaps not intended that section 8 of the proposed Rule change the role of a gas vendor from that of an agent of a consumer to that of a retail distributor. If this is the case (and the Rule is ambiguous in this regard), then the Rule violates principles of agency law wherein the principal, on whose behalf the agent contracts, is the one entitled to take the benefits of a contract negotiated by the agent, as well as being the one liable in the event of default.³ This is so because the effect of the Rule is to hold the gas vendor/agent, as opposed to the gas consumer/principal, solely responsible for paying the distributor. The distributor may require security from a gas vendor as opposed to a consumer (§ 9.3.6). If the gas vendor does not pay for the service, the distributor may cease to provide service to the gas vendor and may transfer the gas vendor's customers to system gas (§ 6.7.1); that is, may terminate the gas vendor's consolidated billing. These shifts in rights and obligations, from a consumer/principal to a gas vendor/agent, are inconsistent with the incidents of an agency relationship.
21. The gas marketer consolidated billing provisions also may be contrary to contract law because, on their face, they appear to displace the existing contractual relationship between a gas distributor and gas consumers by mandating two new contractual relationships: the first is between a distributor and a gas vendor and the second, between a gas vendor and consumers (previously the distributor's end-use customers). Put another way, the gas vendor consolidated billing provisions appear to have the effect of abrogating existing contractual rights and obligations and, in their stead, creating new ones. This result is beyond the statutory power of the Board, generally, and it is certainly beyond its rule-making authority. Only

³ G.H.L. Fridman, *The Law of Contract in Canada*, 4th ed. (Toronto: Carswell, 1999) at 207.

clear and express statutory language, evincing intention, can displace the presumption that legislation is not meant to interfere with common law rights.⁴ The OEB Act contains no such language.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on behalf of Enbridge Consumers Gas, by its counsel, this 15th day of June, 2001.

(signed) J.H. Farrell

(signed) H.T. Newland

⁴ As explained in *Halsbury*, in a formulation adopted by Canadian courts:

Except in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law. (36 Hals., 3rd ed., p. 412, para. 625).

See also S.G.G. Edgar, *Craies on Statute Law*, 7th ed. (London: Sweet & Maxwell, 1971) at 118-121.