On judicial review from Order No. 13/05 of The Public Utilities Board of Manitoba

Date: 20050627
Docket: CI 05-01-41476
(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

CONSUMERS' ASSOCIATION OF CANADA (MANITOBA) INC. and THE MANITOBA SOCIETY OF SENIORS,	)	For the Applicants:
	)	Kris M. Saxberg
	)	R. Ivan Holloway
	)	
	)	For the Respondent:
Applicants,	)	Robert F. Peters
	)	Anita L. Southall
- and -	)	
	)	For Centra Gas Manitoba Inc.:
THE PUBLIC UTILITIES BOARD OF MANITOBA,	)	Marla D. Murphy
	)	Brent A. Czarnecki
	)	
Respondent.	)	Judgment delivered:
	)	June 27, 2005

SCURFIELD J.

[1] The Consumers' Association of Canada (Manitoba) Inc. and The Manitoba Society of Seniors (the "applicants") have applied for judicial review of an order made by The Public Utilities Board of Manitoba (the "Board"). In particular, the applicants asked the court to set aside an

interim ex parte order of the Board that permitted Centra Gas Manitoba Inc. ("Centra") to increase its natural gas rates by approximately 10 percent effective February 1, 2005, without any notice to or input from Centra's customers.

[2] The applicants notionally represent residential gas consumers in Manitoba. They are long-standing intervenors in proceedings of this nature. Without exception, they have been given notice and have participated in such proceedings in the past. They argue that the Board did not have the jurisdiction to hear an application from Centra on an ex parte basis. They say that they ought to have been given notice of the application and an opportunity to participate in any hearing related to an application for an interim order. Consequently, they say that the court ought to set aside the order of the Board.

[3] The Board responds by saying that special circumstances existed which justified the making of the interim ex parte order.

ISSUES

[4] The issues are as follows:

(1) Is the application for judicial review moot? Do the applicants have an adequate alternative remedy?

(2) What is the appropriate standard of review with respect to an interim ex parte order of the Board?

(3) Does the order of the Board survive a review based on the appropriate standard?

STATUTORY REGIME

[5] **The Public Utilities Board Act**, C.C.S.M. c. P280 (the "**Act**") is the constating legislation for the Board.

[6] The rates for the supply of gas provided to consumers by Centra are reviewed by the Board, and the Board's approval is required to fix Centra's rates:

> 82(1) No owner of a public utility shall
>
> . . .
>
> (b) without the written authorization of the board and subject to subsection (2), make, impose, exact, or collect, any rate, toll, fare, or charge, or any schedule of rates, either individual or joint, for any product supplied or service rendered by it within the province;

[7] Gas commodity costs are only one consideration. Transportation, distribution and administrative costs are also a factor. The Board approves any change in rates for Centra's provision of gas supply to its customers based on statutory criteria:

> **Criteria for board orders**
> 126(1) … the Board may consider the following factors:
>
> (a) whether the rates, tolls or other charges are excessive, unjust, unreasonable or unjustly discriminatory;
>
> (b) security of gas supply;
>
> (c) the financial stability of a broker, deliverer, distributor, storer or transmitter of gas;

> (d) the impact of any order to sell, deliver, distribute, store, transmit gas on other purchasers of gas within the Province; and
>
> (e) any other criteria that the Lieutenant Governor in Council may, by order, direct the Board to consider or that the Board in its discretion may deem appropriate.

[8] The provisions of Parts I, II and III of the **Act** apply to Part IV of the **Act** respecting the regulation of gas, unless a provision of Part IV is in conflict with a provision contained in the former Parts. Normally, submissions by Centra for a change in rates are the subject of a public hearing that follows a general rate application ("GRA"). However, s. 125 of the **Act** permits the Board to hear applications for an interim order changing rates prior to a GRA:

> **Interim orders**
> 125 At the request of an applicant or intervenor or on its own motion, the Board may, without a hearing, make one or more orders under section 115, 116, 124 and 127, effective for a period of not more than one year, pending a final disposition of any application to or any matter before the Board.

[9] Section 15(3) says that all Board hearings shall be open to the public:

> **Public hearings**
> 15(3) All sittings of the board or of a member for hearing applications and taking evidence shall be open to the public.

[10] Nevertheless, s. 39 permits the Board to make an order without notice in certain circumstances:

> **Orders in emergencies, without notice**
> 39(1) Where the board may hear an application, complaint, or dispute, or make an order upon notice to the parties interested, it may, upon the ground of urgency or for other reasons appearing to the board to be sufficient, and notwithstanding any want of or insufficiency in any such notice, make the like order or decision in the matter as if due notice had been given to all parties; and that order or decision is as valid and effective in all respects as if made after such notice had been given.

[11] However, s. 39(2) is directed at situations where there has not been sufficient time to notify an interested party. Section 39(2) reads:

> **Relief to persons affected thereby**
> 39(2) Where an order or decision made under subsection (1) affects a person entitled to notice who was not sufficiently notified, he may, within 10 days after becoming aware of the order or decision, or within such further time as the board may allow, apply to the board to vary, amend, or rescind the order or decision; and the board shall thereupon, on such notice to others interested as it may think desirable, hear the application, and either amend, alter, or rescind the order or decision or dismiss the application.

[12] Despite s. 15(3), s. 45 empowers the Board to make interim ex parte orders:

> **Interim orders ex parte**
> 45 The board may, if the special circumstances of any case so require, make an interim ex parte order authorizing, requiring, or forbidding, anything to be done that the board would be empowered on application, petition, notice, and hearing to authorize, require, or forbid; but no such order shall be made for any longer time than the board deems necessary to enable the matter to be heard and determined, on such application, petition, notice or hearing.

[13] Generally, all orders of the Board are deemed to be final. Section 54 states:

> **Finality of orders**
> 54 Subject only to the right of appeal for which provision is hereinafter made, and to subsection 44(3), every decision or order of the board is final.

[14] However, the Board has the internal jurisdiction to vary orders that would otherwise be final. Section 44(3) reads:

> **Varying order**
> 44(3) The board may review, rescind, change, alter, or vary any decision or order made by it.

[15] During the conduct of any application, whether it be interim or final, the Board has control of its own procedures:

> **Conduct of sitting**
> 15(2) The board shall sit at such times and places within the province as the chairman may designate, and shall conduct its proceedings in such manner as may seem to it most convenient for the speedy and effectual dispatch of business.
>
> . . .
>
> **Procedure governed by rules**
> 24(1) All hearings and investigations conducted by the board shall be governed by rules adopted by the board.
>
> **Rules of evidence not binding on board**
> 24(2) The board is not bound by the technical rules of legal evidence.
>
> **Rules of practice, their publication**
> 24(3) The board may make rules of practice, not inconsistent with this Act, regulating its procedure and the times of its sittings, but the rules do not come into force until they are published in *The Manitoba Gazette*.
>
> . . .
>
> **Evidence by affidavit or report**
> 24(6) The board may, in its discretion, accept and act upon evidence by affidavit or written affirmation or by the report

> of a member or of any officer or technical adviser appointed hereunder or obtained in such other manner as it may decide.
>
> . . .
>
> **Method of performance**
> 28(2) Any act, matter, or thing ordered and required to be done under subsection (1) shall be done
>
> > (a) forthwith, or within or at any time specified in the order; and
> >
> > (b) in any manner prescribed by the board, so far as it is not inconsistent with this Act or any other Act of the Legislature conferring jurisdiction upon the board.

[16] Finally, although leave to appeal is required, the statute confers a fairly broad right of appeal upon interested parties. The right of appeal from a decision of the Board is set out in s. 58(1):

> **Grounds of appeal**
> 58(1) An appeal lies from any final order or decision of the board to The Court of Appeal upon
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> > (a) any question involving the jurisdiction of the board; or
> >
> > (b) any point of law; or
> >
> > (c) any facts expressly found by the board relating to a matter before the board.

THE FACTS

[17] Rate regulation for sales of natural gas pursuant to provisions of the **Act** involves review and approval of three main cost categories: gas commodity, transportation, and distribution. Rate changes to the commodity price are dictated by the market. The Board normally sets

primary gas rates on a quarterly basis pursuant to an interim application filed by Centra in accordance with the procedures established by the Board. The other main cost categories, being transportation and distribution, are normally established following a GRA. Centra filed a GRA on January 10, 2005.

[18] Public notice of the GRA was served on all intervenors of record from the previous GRA, including the applicants. The GRA itself is not at issue.

[19] What is at issue is an interim ex parte application that Centra filed with the Board just prior to the GRA. This application was filed on December 10, 2004. It sought increased rates for supplemental gas, transportation, and distribution to be effective February 1, 2005. No notice was given to the applicants or any other interested parties of this application.

[20] On December 21, 2004, Board counsel made a request for information from Centra. On January 10, 2005, Centra responded to the Board's information request. The Board conducted the hearing on January 17, 2005. Oral evidence was presented at the hearing. Documentary evidence was received, and the evidence presented was subject to cross-examination by Board counsel. Notice that the process had occurred was given to the applicants at the end of

January. They were given no opportunity to appear. An order approving an interim ex parte rate increase was made effective February 1, 2005. Board Order No. 13/05 effectively functioned as written reasons for granting the application.

[21] A pre-hearing conference respecting the GRA was held on February 3, 2005. The applicants were notified of that hearing. At the hearing, the applicants made submissions to the Board in which they questioned the Board's jurisdiction to grant the interim ex parte application to Centra. No formal request for reconsideration was made by the applicants on that date. However, the Board considered the applicants' objection as if it were a request for reconsideration. The Board responded to the challenge by confirming its decision in Order No. 22/05. The Board justified its decision on the basis of economic urgency.

[22] The applicants then filed an application for judicial review. The GRA hearing commenced prior to the court hearing. The Board held its oral public hearing with respect to the GRA on May 30, 2005. At that hearing, Order No. 13/05 and Order No. 22/05 were both open to review. The Board has the jurisdiction to rescind, alter, or confirm the interim ex parte order following the GRA hearing.

Issue No. 1: Is the application for judicial review moot? Do the applicants have an adequate alternative remedy?

[23] The Board submits that the application for judicial review should be dismissed peremptorily because the point is moot. The interim ex parte order is subject to review in the context of the GRA. That process commenced at the beginning of February, shortly after the interim order was made. The evidence and argument will be completed by June 27, 2005. Although argument might be delayed, and a decision reserved, the Board has the jurisdiction to confirm, vary, or set aside the effect of the interim ex parte order. Therefore, Board counsel submits that the application is moot.

[24] Alternatively, the Board argues that its internal process constitutes an adequate alternative remedy: ***Turnbull et al. v. Canadian Institute of Actuaries et al.*** (1995), 107 Man.R. (2d) 63 (C.A.).

[25] I am satisfied that there continues to be a live controversy between the parties. The Board cannot escape judicial review of an important interim process that continues to affect gas consumers in Manitoba simply by pointing out that the interim order will be reconsidered by the Board at the GRA hearing where all parties are represented. The rate increase remains in place. A decision has not

been delivered. A rollback will not compensate consumers who stop using gas or leave the province. Thus, the point at issue was alive on the date of the hearing and on the date when these reasons were delivered: ***Borowski v. Canada (Attorney-General)*** (1989), 57 D.L.R. (4th) 231 (S.C.C.); ***New Holland Canada, Ltd. Versatile Farm Equipment Operations v. National Automobile, Aerospace, Transportation and General Workers of Canada (C.A.W. Canada) and its Local 2224*** (February 19, 2001), Winnipeg CI 00-01-17074 (Man. Q.B.).

[26] Clearly, the court should not conduct a judicial review when there is an adequate alternative remedy available to an applicant: ***Turnbull, supra***. The Board's alternative submission is based on the premise that the applicants have no right to challenge interim ex parte orders of the Board because they are always reviewable by the Board at a GRA hearing. Such an argument is, with respect, circular and self-serving. If accepted, and if the Board has exceeded its jurisdiction, then it could continue to do so in perpetuity. Large amounts of money are at issue as a consequence of temporary rate changes. The statute grants limited authority to hold ex parte hearings. Elusive legal issues that have the potential for ongoing impact on the rights of citizens should be adjudicated by the court: ***New Holland Canada, Ltd., supra***. Administrative bodies cannot

always avoid jurisdictional limits by pointing to the potential power to correct their transgression. Therefore, the internal review is not an adequate alternative remedy.

[27] In any event, this decision will assist the parties in their ongoing relationship. Thus, even if the issue was moot, I would exercise my discretion to conduct a judicial review of the Board's interim ex parte order.

Issue No. 2: What is the appropriate standard of review with respect to an interim ex parte order of the Board?

[28] The Supreme Court of Canada has mandated what it describes as a pragmatic and functional approach to the judicial review of all administrative decisions. See ***Law Society of New Brunswick v. Ryan***, [2003] 1 S.C.R. 247, 2003 SCC 20; ***Dr. Q v. College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226, 2003 SCC 19; and ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982.

[29] There are basically three standards to be applied to a judicial review. The court must commence by deciding what is the appropriate standard to apply to a particular decision.

[30] The standards of review occupy a spectrum that varies from correctness, for example, whenever matters of constitutional law are being considered, to patent unreasonableness, whenever a purely factual decision is being made by an administrative body that has a particular expertise in the area. Reasonableness *simpliciter* falls in the middle.

[31] The standard of correctness is obvious. Whenever the court determines that an interpretation of the law is wrong, it is entitled, if correctness is the appropriate standard, to reverse the decision. The standard of reasonableness *simpliciter* is best explained by Iacobucci J. in ***Law Society of New Brunswick, supra***, where he said, at p. 267: "The standard of reasonableness basically involves asking 'After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?' " The patently unreasonable standard speaks for itself. The decision must be so clearly wrong that even a person without the expertise of the administrative body can clearly articulate the error. The courts have also described a patently unreasonable decision as that which is "clearly irrational"; that is, one where there is no line of logical reasoning that could support the decision.

[32] Determination of the appropriate standard of review involves the application and balancing of the pragmatic and functional approach in relation to four contextual factors:

(1) the presence or absence of a privative clause or statutory right of appeal;

(2) the expertise of the tribunal relative to that of the reviewing court on the issue in question;

(3) the purposes of the legislation as a whole and the provision in particular; and

(4) the nature of the question — law, fact, or mixed law and fact.

[33] What then is the appropriate standard of review in this case? Factual decisions of a public utilities board must be afforded a high degree of deference. While matters of pure statutory interpretation normally attract a standard of correctness, the Supreme Court of Canada has recognized in ***Pezim v. British Columbia (Superintendent of Brokers)***, [1994] 2 S.C.R. 557, and subsequently in ***Cartaway Resources Corp. (Re)***, [2004] 1 S.C.R. 672, 2004 SCC 26, that a commission may develop special expertise that assists it in interpreting and applying the provisions of its own

Act. However, not all attempts to interpret its own statute are entitled to deference. Rather, deference is due where the interpretation engages the broad policy context within which the commission operates: ***Cartaway Resources Corp. (Re), supra***, at pp. 692-93, paras. 45, 46 and 47.

[34] Some functions of a public utilities board do not engage its core expertise. Statutory interpretation that does not require the application of its specialized experience will normally be subjected to a standard of correctness. The deference to be afforded to its interpretation of its own statute will vary with the extent to which its interpretation necessarily relies upon the application of a policy perspective that is unique to it.

[35] In the present situation, the real challenge is narrow. The applicants say that the Board did not have the jurisdiction to permit Centra to proceed with its interim ex parte application. This judicial review focuses on the interpretation and application of s. 45 of the **Act**. The Board has not argued that there were policy considerations in this case which supported the decision to hear Centra's application on an ex parte basis. In any event, the decision as to whether or not to hear that application on an ex parte basis would not ordinarily engage broad policy considerations specific to the Board's mandate.

Rather, it would engage the sort of considerations with which a court is familiar.

[36] Finally, before determining the level of deference to be afforded to the Board's decision to permit this application to proceed on an ex parte basis, it is useful to review the privative clause set out in s. 58(1) of the **Act**. For ease of reference, I will repeat it:

> **Grounds of appeal**
> 58(1) An appeal lies from any final order or decision of the board to The Court of Appeal upon
>
> (a) any question involving the jurisdiction of the board; or
>
> (b) any point of law; or
>
> (c) any facts expressly found by the board relating to a matter before the board.

[37] Although an applicant must first obtain leave before it can proceed with its appeal, I note that this privative clause provides a greater right of appeal than does, for example, s. 128(2) of **The Labour Relations Act**, C.C.S.M. c. L10, which reads:

> **Judicial review of final decision**
> 128(2) Subject to subsection (3), a final decision of an arbitrator or arbitration board may be reviewed by a court of competent jurisdiction solely by reason that
>
> (a) the arbitrator or arbitration board failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise the jurisdiction of the arbitrator or arbitration board; or
>
> (b) the decision was obtained by fraud or was based on perjured evidence.

[38] This is an application for judicial review and not an appeal from an order. However, the Court of Appeal's relatively broad jurisdiction to hear appeals from orders of the Board is another factor to be considered in determining the appropriate standard of review.

[39] I have concluded that to the extent that statutory interpretation of s. 45 as a whole is required in order to define the Board's jurisdiction, the standard of review ought to be correctness. In a recent decision in ***Enbridge Gas Distribution Inc. v. Ontario (Energy Board)***, [2005] O.J. No. 33, the Ontario Court of Appeal said, at para. 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.

[40] Having said that, after interpreting s. 45 as a whole, there may be a need to further define the phrase “special circumstances”. Those words have some meaning in law, but they are infused with policy considerations at the Board level. The phrase “special circumstances” is not defined in the **Act**. Moreover, it is a phrase that is not capable of precise definition. Use of that phrase by the Legislature in this context, and in particular in the context of the **Act** as a whole, implies the transfer of some discretion to the Board. Thus, the definition by the Board of what facts constitute “special circumstances” is entitled to some deference. Consequently, the Board need only demonstrate that it has defined “special circumstances” in a reasonable manner.

[41] Finally, once defined, the factual decision as to whether special circumstances exist attracts the highest level of deference — that of patently unreasonable.

Issue No. 3: Does the order of the Board survive a review based on the appropriate standard?

[42] Section 15(3) makes it clear that all Board hearings “shall be open to the public.” However, s. 45 says that the Board may, “if the special circumstances of any case so require”, make an interim ex parte order. Section 45 is not specifically exempted from s. 15(3). Despite the apparent conflict, I am satisfied by the specific language of

s. 45 that the Legislature intended to give the Board jurisdiction to make an ex parte order.

[43] Similarly, I am satisfied that there was at least some evidence to support the Board's decision that Centra's special economic circumstances "required" an interim order.

[44] However, that does not resolve the issue. Section 45 says that the Board may, if the special circumstances so require, make an interim ex parte order. A plain reading of these words leads me to conclude that the Board's jurisdiction to hold an interim ex parte hearing depends upon a finding that the facts presented to it "require" an ex parte hearing. This interpretation of s. 45 does not engage the policy function or expertise of the Board. Therefore, the standard of review is correctness. However, I am satisfied that there is no other reasonable interpretation of this section of the **Act**.

[45] Ex parte hearings should be rare. Taken as a whole, the **Act** contemplates the Board operating in an open manner. While an ex parte hearing may technically be open to the public, it is practically closed since no interested party has notice that it is taking place. As Steel J.A. noted in ***Jane Doe 1 v. Manitoba***, [2005] M.J. No. 151, 2005 MBCA 57, at paras. 9 and 10:

> There is nothing on the record to indicate why the motion proceeded against Manitoba on a without notice basis. It is trite

> law that notice should be dispensed with only in the most exceptional and extraordinary of circumstances. Lack of notice to the other party is a significant departure from our rules of natural justice.
>
> As the Supreme Court of Canada has noted in *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, *per* Arbour J. (at para. 25):
>
> > The circumstances in which a court will accept submissions *ex parte* are exceptional and limited to those situations in which the delay associated with notice would result in harm or where there is a fear that the other party will act improperly or irrevocably if notice were given.

[46] Section 125 of the **Act** permits the Board to hear interim applications generally. The Board controls its own process. Therefore, it can expedite the manner of an interim hearing if it is necessary to do so. What distinguishes s. 125 from s. 45 is the exceptional right to hold such hearings ex parte. That jurisdiction is derived from a finding that there are special circumstances that require not just an interim hearing but also an ex parte hearing.

[47] A finding that special economic circumstances exist may justify an interim order. However, standing alone, that finding does not support the need for an ex parte hearing. There may be cases where the evidence that supports the interim order will also support the conduct of the hearing on an ex parte basis. However, this is not one of those cases.

[48] Special circumstances that require an ex parte hearing may include those where notice of the application, and the evidence filed in support, would cause harm to the applicants or the public. It is not reasonable to dispense with notice simply to expedite the process.

[49] The need to move quickly underlies most interim applications. Perhaps the Board felt that giving notice to the applicants would delay the process. Yet, the **Act** gives the Board control over its own processes. A requirement to give notice does not entail an obligation to provide a full hearing in response to an application for an urgent interim order. The obligation to give notice to interested parties or intervenors does not mean that the Board is obliged to permit them to frustrate an expedited hearing.

[50] The Legislature made it clear by s. 15(3) that the public has a right to attend Board hearings unless an ex parte hearing is required. Consequently, in most circumstances, short notice is preferable to no notice. Notice to some of the parties is preferable to notice to none of the parties. Here, neither Centra nor the Board made any attempt to give notice to anyone in circumstances where there was ample time to do so.

[51] The record shows me that the Board did not turn its mind to the distinction between an interim hearing and an interim ex parte

hearing. Indeed, there was no evidence presented to the Board that supported the exceptional requirements of an ex parte hearing. The Board never decided that an ex parte hearing was required. It justified its decision by reference to the economic circumstances of Centra even after it was challenged by the applicants on February 3, 2005. There was sufficient time for the Board or Centra to notify interested parties of the proposed hearing. Consequently, regardless of the standard of review, the Board did not discharge its statutory duty.

CONCLUSION

[52] The Board should not have heard Centra's interim application on an ex parte basis. Therefore, the applicants are entitled to an order quashing the interim rate increase ordered by the Board following the ex parte hearing.

_____J.