

MANITOBA) **Order No. 133/14**
)
THE PUBLIC UTILITIES BOARD ACT) **November 28, 2014**

Before: Régis Gosselin, B ès Arts, M.B.A., C.G.A., Chair
Dr. Hugh Grant, Ph.D. (Economics)
Richard Bel, B.A., M.A. , M.Sc.
Marilyn Kapitany, B.Sc. Honours, MSc.

**ORDER WITH RESPECT TO AWARD OF COSTS
CONSUMERS' ASSOCIATION OF CANADA (MANITOBA) INC.**

THE PUBLIC UTILITIES BOARD'S "NEEDS FOR AND ALTERNATIVES TO" (NFAT)
REVIEW OF MANITOBA HYDRO'S PREFERRED DEVELOPMENT PLAN
TO CONSTRUCT THE KEEYASK AND CONAWAPA GENERATING STATIONS
AND ASSOCIATED TRANSMISSION FACILITIES

BACKGROUND AND BOARD FINDINGS

Consumers' Association of Canada (Manitoba) Inc. (CAC) sought an Order from the Public Utilities Board (Board) to recover costs incurred by CAC to intervene in The Public Utilities Board "NEEDS FOR AND ALTERNATIVE TO" Review of Manitoba Hydro's (MH) Preferred Development Plan which resulted in the Board issuing a report to the Minister responsible for The Public Utilities Board dated June 20, 2014.

CAC's cost request dated October 28, 2014 includes statements of account from the Public Interest Law Centre (PILC) and other experts and firms that provided advice to PILC and/or provided evidence and testified in the proceeding.

While MH's response of November 19, 2014 acknowledged that CAC deserved an award of costs, MH raised concerns regarding the quantum of a cost award. CAC subsequently responded November 26, 2014 to addressing the quantum concerns raised by MH.

Subsection 56(1) of *The Public Utilities Board Act* provides:

Cost in discretion of board

56(1) The costs of, and incidental to, any proceeding before the board are in the discretion of the board, and may be fixed in any case at a sum certain or may be taxed.

In exercising its discretion, the Board is guided by Rule 43 of the Board's *Rules of Practice and Procedure*:

Criteria

43. In any proceeding the Board may award costs to be paid to any intervener who has:
- (a) made a significant contribution that is relevant to the proceeding and contributed to a better understanding, by all parties, of the issues before the board;
 - (b) participated in the hearing in a responsible manner and cooperated with other Interveners who have common objectives in the outcome of the proceedings in order to avoid a duplication of intervention;
 - (c) insufficient financial resources to present the case adequately without an award of costs; and
 - (d) a substantial interest in the outcome of the proceeding and represents the interests of a substantial number of the ratepayers.

Having reviewed each of the criteria in Rule 43, the concerns raised by MH, and in exercising its discretion, the Board will approve CAC's Application for costs as amended by the Board.

In Board Order 67/13 and subsequent orders and correspondence, the Board determined the scope of intervention for each intervener, and approved on a preliminary basis, the budget for each intervener. As well, the Board authorized interim payments for costs applied for by interveners during the hearing process, subject to a 30% holdback pending disposition of the matter subsequent to the conclusion of the process.

CAC's Comments:

CAC submitted a total bill of costs of \$845,145.58 commenting that it compared favourably with the budget presented by the CAC with respect to individual amounts being sought by CAC's consultants and legal counsel.

CAC noted that it was presenting the bills for the entire Dunsky budget (shared with the Grean Action Center (GAC)) and the bulk of the ratepayers' budget (shared with the Manitoba Metis Federation (MMF)). CAC asked for the confirmation of its preliminary cost award of \$845,145.58 consisting of \$332,200.00 in legal fees and \$512,945.58 in witness disbursements.

CAC is also asking for an additional amount of \$77,183.55 consisting of \$4,471.11 in disbursements for witnesses and \$72,712.44 legal fees. CAC indicates that these amounts, an addition to its preliminary approved budget arose from material changes to MH's filing and while amendments to their budgets for its consultants were sought and obtained, time pressures of the proceedings prevented a revised legal budget from being presented. CAC submitted that it went beyond its proposed role to ensure the voices of Elders, traditional land users and vulnerable ratepayers were heard and that the costs incurred by CAC were prudent and reasonable. The total request amounts to \$922,329.13.

CAC in its letter of November 26, 2014 agrees with MH that costs related to media, The Court of Appeal and Dr. Gunn's travel amounting to \$2,509.00 should be removed from its request. CAC also agrees with MH that preapproved disbursements related to experts should be reduced by \$10,000.

However, CAC is asking the PUB at its discretion to consider the recovery of two additional amounts \$14,471.11 in disbursements associated with approved witnesses. This amount reflects the difference between the \$502,945.59 contemplated in prior orders and the \$517,416.09 in costs incurred by approved witnesses. The second amount is with respect to additional legal fees claimed for Ms. Menzies of \$70,203.44.

In conclusion, CAC seeks recovery of:

Legal fees	\$332,200.00
Witness Disbursements	<u>\$502,945.58</u>
Total	\$835,145.58

And further asks PUB to exercise its discretion and allow:

Legal fees	\$ 70,203.44
Disbursements	<u>\$ 14,471.11</u>
Total	\$ 84,674.55

Manitoba Hydro's Comments:

MH did not take issue that CAC is deserving of an award of costs. MH comments focused on whether the costs sought to be approved are consistent with the approved budget in quantum and scope. MH noted that excluding legal counsel the approved budget amounted to \$494,216. MH submitted that all fees should be in keeping with the existing Board tariff.

With respect to Mr. Dunsky, MH noted an approved budget of \$142,400 and a cost submission of \$153,383.12, a difference of \$10,983.12. MH submitted that Mr. Dunsky's rate be reduced from \$225/hr to \$220/hr in line with the Board's tariff reducing the claim by \$2,071.25. MH submits, the Board grant a cost award of \$142,400, the budget approved on a preliminary basis by the Board.

With respect to Mr. Harper, MH, noted an approved budget of \$140,800 and an additional approval of \$6,000 and submits that invoices payable to Elenchus totalling \$11,839.58 not be approved and that fees of \$143,600 plus disbursements of \$1,536.11 be approved by the Board for a total of \$145,136.11, consisting of fees and disbursements. MH noted that CAC had overstated the budget item by \$10,000.

With respect to Dr. Wayne Simpson/Mr. Harvey Stevens, MH noted the absence of any invoices with respect to statistics, for which the Board had granted \$10,000. MH submitted that the overage on the account of Dr. Simpson was not related to updated evidence, as submitted by CAC, and submitted that any increase above the approved budget of \$23,250 be limited to 10 hours. With respect to Mr. Stevens, MH noted that no rationale was provided for the \$3,400 over budget and asked that the award be limited to \$6,800.

With respect to Mr. Gotham, MH noted the approved budget of \$36,792. MH indicated that the contract with Mr. Gotham entered into September 2013 was in the amount of \$34,994 US\$. The final bill is \$38,837.22 due to the exchange rate, a matter that MH suggests must be managed by the intervener.

MH also commented on additional consultants engaged by CAC. MH indicated that it had no objection to the payment of \$2,950.07 for the services of Ms. Vespa. With respect to the services of Mr. Weiss, Mr. Roland, Dr. Winfield and Dr. Fitzpatrick, MH notes that no submission was made to the PUB for review or approval of these consultants and submits that \$5,512.50 of costs associated with the services of these individuals be denied.

MH had no comments with respect to the costs submitted by consultants, Higgins, Gaudreau, Gibson, Buckland, O’Gorman, Orenstein as well as the Traditional Land Users and Elders’ Panel and the Ratepayers’ Panel.

MH agreed with CAC on the matter of not seeking a cost award for Dr. Jill Gunn and Dave Lamont.

On the matter of the cost submission for Legal Counsel, MH noted PUB approval of a budget of \$332,200 for legal fees and disbursements proposed on June 28, 2013. The fees consisted of 1,286 hours for Senior Counsel at \$200/hr (\$257,200) and 600 hours for Junior Counsel at \$125/hr (75,000) for a total cost of \$332,200.

MH noted the total hours claimed for Senior Counsel amounted to 1,120.9 hrs, amounting to \$243,235.30. MH took no issue with the claim for 2 hrs for Mr. Craft.

With respect to Junior Counsel MH notes the increase in hours (600 hours to 1,192 hours) an increase of almost 100%. MH submitted that roughly \$14,000 from Mr. William's budget could be applied to Ms. Menzies' time and that it is not appropriate to simply double the amount allocated for Junior Counsel. In addition, there are a number of hours recorded by Ms. Menzies for which MH submits that no reimbursement should be approved, these include media related matters, Notice of Motion in the Court of Appeal and costs associated with the Elders' panel. MH submitted that if additional hours claimed for Ms. Menzies are granted the approval should be limited to \$14,000 for a total of \$89,000 award for Ms. Menzies.

With respect to disbursements, CAC's total request is \$22,278.94. MH submits that it be reduced by \$1,396.50 for a new total of \$20,882.44, disallowing any disbursements associated with media activities, the Notice of Motion to Appeal and the cost of accommodations for Dr. Jill Gunn.

BOARD FINDINGS

The Board has reviewed the cost application of CAC, the comments provided by MH. The Board finds that CAC meets all of the requirements for a cost award. In particular, the Board is of the view that CAC made a significant contribution that was relevant to the proceeding, and which enhanced the understanding of all parties of the issues before the Board. Further, it is the view of the Board that CAC participated in the hearing in a responsible manner and co-operated with other interveners to avoid duplication in intervention. The Board also noted the efforts of CAC to engage Elders, traditional land users and vulnerable rate payers

With respect to Mr. Dunsky's billing rates, the Board in Order 124/13 accepted "the rationale provided by the CAC and approved the blended rates provided by the Dunsky Team".

The Board will adopt a similar position in this case accepting the hourly rates provided in the application. The Board notes the significant change in the NFAT application in the area of expertise of the Dunsky Team, namely Demand Side Management, and will grant the cost in full as applied for by Mr. Dunsky, that amount being \$153,383.12.

With respect to Mr. Harper, the Board accepts the position of CAC on the need to have access to modelling expertise given the lack of access to MH's models and will allow the claim from Mr. Harper adjusted to reflect an over statement adjustment of \$10,000 for a total allowed of \$146,975.69

With respect to the claim for Dr. Wayne Simpson and Mr. Harvey Stevens, the Board notes MH's position on an invoice for statistics and Mr. Stevens being over budget by \$3,400. The Board notes that jointly, the two consultants together came within \$1,350 of the approved budget. With respect to the absence of the invoice on statistics, the Board accepts the position of CAC that cost pressures related to the change in Hydro's evidence created additional work and will allow for the flexibility of reallocating the Team's resources. Therefore the Board will grant an award of costs in full as applied for Simpson and Stevens, that amount being \$41,400.

With respect to Mr. Gotham, the Board notes that CAC did enter into a contract in September of 2013 where payment was to be in US\$. The Board notes that this was for a lesser amount than the preliminary approved budget and recent fluctuations in exchange rates. The Board will grant an award of costs in full as applied for, that amount being \$38,837.22.

With respect to Dr. Gaudreau and Dr. Gibson, the Board will approve an award of \$14,732.91 and \$6,085.82 for them respectively as applied for. The Board will also approve the amount of \$2,950.07 and claimed for Ms. Vespa.

With respect to the services of Mr. Weiss, Dr. Rowland, Dr. Winfield and Dr. Fitzpatrick, the Board notes MH's position that these consultants were engaged without the approval of the Board and that the costs associated with their services should be denied. The Board notes that these individuals, worked through the offices of Dr. Gaudreau and Dr. Gibson. The Board appreciates that they were not specifically authorized by the Board however they did undertake assignments through Board approved consultants. Given the nature of the matter before the Board, the Board is prepared to allow the intervener some

flexibility in the management of the case and will allow the claim in full amounting to \$5,512.50.

With respect to the cost associated with Messers. Higgins, Buckland, O’Gorman and associated individuals, Orenstein and the Traditional Land Users and Elders panel and as well the Ratepayers Panel, the Board will approve these costs in full as filed amounting to \$97,539.36.

Approved costs for the consultants are as follows:

<u>Consultant</u>	<u>Amount</u>
Mr. Dunsky	\$153,383.12
Mr. Harper	\$146,975.69
Dr. Simpson and Mr. Stevens	\$ 41,400.00
Mr. Gotham	\$ 38,837.22
Dr. Gaudreau	\$ 14,732.91
Dr. Gibson	\$ 6,085.82
Ms. Vespa	\$ 2,950.07
Mr. Weiss et al	\$ 5,512.50
Mr. Higgins, Mr. Buckland, Mr. O’Gorman (staff), Mr. Orenstein, Traditional Land Users and Elders Panel	\$ 97,539.36
TOTAL	\$507,416.75

Legal Counsel for CAC

CAC filed a claim for Senior Counsel for 1,120.9 hours and asked for the rates to be set at \$217/hour. MH has no comment on the number of hours being sought by Mr. Williams. The Board notes that its revised tariff allows for an hourly rate of \$221/hour for Mr. Williams and will grant an award of \$247,718.90 based on this hourly rate. This amounts to an additional \$13,535.90 to the claim of CAC for legal fees for Mr. Williams. As well the Board will grant an award for the 2 hours of time allocated to Ms. Craft for an amount of \$250.00.

With respect to the claim for Ms. Menzies, Junior Counsel, the Board notes the significant increase in hours, deviating from the original budget estimate. The Board notes MH's position as to its reasonableness and its submission that the budgeted amount of \$89,000 be increased by an amount of only \$14,000. The Board has considered CAC's position that it had the most extensive role of any of the interveners given the amount and type of expert evidence it presented and that it undertook the most extensive cross examination of all the interveners.

CAC also noted the extensive nature of its expert evidence and submits revisions in the earlier estimates of Mr. Williams and Ms. Menzies are justified by the material changes in the case presented by MH which generated additional work and therefore more costs. The Board notes that CAC did not ask for additions to its legal budget during the course of the proceedings as it did for the budget for its consultants. Given the significant revisions to the application and the all encompassing role played by this intervener in the process, the Board will grant an additional amount for legal fees and allows the claim for 1,183.1 hours to reflect an adjustment for media and Court of Appeal matters. The award for Ms. Menzies amount to \$147,887.50.

With respect to disbursements, the Board will disallow an amount of \$1,396.50 for a final allowance of \$20,882.44.

The total award of costs approved for CAC will be the amount of:

Mr. Williams	\$247,718.90	1120.9 hrs x \$221.00
Ms. Menzies	\$147,887.50	1183.1 hrs x \$125.00
Ms. Craft	\$ 250.00	2 hrs x \$125.00
Disbursements	\$ 20,882.44	
TOTAL	\$416,738.84	

Board decisions may be appealed in accordance with the provisions of Section 58 of *The Public Utilities Board Act*, or reviewed in accordance with Section 36 of the Board's *Rules of Practice and Procedure*. The Board's Rules may be viewed on Board's website at www.pub.gov.mb.ca.

