

ONTARIO ENERGY BOARD

IN THE MATTER OF sections 70 and 78 of the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15, (Schedule B);

AND IN THE MATTER OF a Board-initiated proceeding to designate an electricity transmitter to undertake development work for a new electricity transmission line between Northeast and Northwest Ontario: the East-West Tie Line.

FACTUM

(Motion for Review of Board Decision and Order on Costs Awards issued October 1, 2013)

November 22, 2013

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I. OVERVIEW

1. On October 1, 2013, the Ontario Energy Board (“**OEB**”) released its Decision and Order Cost Awards related to the costs incurred by intervenors to a proceeding to designate an electricity transmission transmitter to undertake development work for a new electricity transmission line between Northeast and Northwest Ontario: the East-West Tie line (the “**Proceeding**”).

2. The OEB reduced Ojibways of Pic River First Nation’s (“**PRFN**”) from the actual \$130,715.24 plus disbursements that were incurred to an award of \$40,000.00 on the basis that those incurred costs were “excessive”. This evaluation was based almost entirely on a comparison of the costs of PRFN to the costs incurred, or claimed, by other intervenors to the Proceeding.

3. PRFN respectfully requests a review of that Decision and Cost Award on the ground that the OEB erred in fact and law by comparing the intervention of PRFN to that of other intervenors.

II. LAW AND ARGUMENT

4. In granting PRFN cost award eligibility status the OEB correctly recognized the unique and extraordinary circumstance of PRFN. It stated:

By virtue of their geographic location, the Ojibways of Pic River First Nation will be directly affected by this proceeding regardless of which proponent becomes designated. Given this position which in some ways is comparable to that of a

landowner, the Board will grant cost eligibility to the Ojibways of Pic River in this proceeding. However, the Ojibways of Pic River will only be eligible to recover costs related to their interests in land, and rights arising from those interests, in any proposed East-West corridor and not for costs related to their position as a part owner of one of the registered transmitters.¹

5. The OEB did not take issue with any of the costs submitted by PRFN as being unrelated to PRFN's interest in land or PRFN's rights arising from those interests. Rather, all of the costs incurred by PRFN were directly related to its interest in land and its Aboriginal rights arising therefrom.

6. Section 5.01 of the OEB Practice Direction on Cost Awards sets out the following principles to be used in determining costs awards:

- (a) Responsible participation in the process;
- (b) Whether the intervenor was unduly repetitious;
- (c) Whether the intervenor made reasonable efforts to cooperate with other parties;
- (d) Whether the intervenor contributed to a better understanding of the OEB with respect to one or more issues in the process.

7. PRFN actively participated in the Proceeding. In doing so, it was unable to cooperate with other intervenors as it was the only intervenor with certain proven Aboriginal rights akin to a land ownership right in the corridor.

¹EB-2011-0140 Decision and Cost Award, dated October 1, 2013 p. 6.

8. PRFN fully cooperated with the process set out by the OEB. For example, since cross-examinations on evidence were prohibited, PRFN developed written interrogatories to test evidence put before the OEB. That the other intervenors did not avail themselves of the interrogatory process in a similar manner should not be used *ex post facto* to categorize such efforts as excessive particularly when there were no limitations or restrictions provided to intervenors at the outset of the interrogatory process. When Metis Nation of Ontario (“MNO”) brought extensive case law for the OEB’s consideration, PRFN properly reviewed the decisions in order to assist the OEB with the issues raised. In doing so, PRFN acted in a cooperative and reasonable manner with a view to assisting the OEB.

9. The OEB erred in its analysis that PRFN’s intervention was comparable to that of other intervenors by failing to consider the depth of the affected interests. The Board stated:

“The Board notes that PRFN’s participation was focused almost exclusively on Aboriginal Consultation and Participation, whereas other intervenors focused on other issues, many of which were just as complex. PRFN’s intervention was generally no broader overall in comparison to many of the other intervenors, and therefore the Board concludes that the claim should be comparable to that of other intervenors.”²

10. The interests affected by other intervenors arise out of legal rights based in statute and common law. Comparatively, PRFN’s affected rights are grounded in the constitution. While at first glance, the intervention appears “no broader overall” the depth of affected interest differs significantly. One set of interests can be changed with the stroke of a judge’s pen or an

² EB-2011-0140 Decision and Cost Award, dated October 1, 2013 p. 6.

Act of Parliament while the other requires an extensive majority of both levels of government.

11. Contrary to its decision to reduce the cost awards given to the City of Thunder Bay Coalition on the basis that municipalities and their associations “have access to a revenue stream from their own constituent taxpayers”³, the OEB failed to consider that PRFN does not have access to a revenue stream from constituent taxpayers.

12. Finally, the costs submitted by PRFN cannot be considered excessive in light of the costs incurred by the applicants who were granted the right to seek to be awarded the status of designated transmitter. For example, Upper Canada Transmission Inc. incurred costs of \$1.4 million; RES Canada Transmission LP, Transcanada Power Transmission (Canada) L.P. Altalink Ontario L.P. and EWT LP each incurred costs of \$1.5 million. These parties all benefited from the fulsome participation and submissions of PRFN with respect to the obligations related to Aboriginal Consultation and Participation as will the designated transmitter when it proceeds to carry out its consultation process. The total costs of these parties are in excess of \$7.4 million, making PRFN’s costs a mere 1.8% of the aggregate total which cannot be considered excessive.

13. PRFN repeats and relies upon the statements of facts and analysis of facts provided in the Affidavit of Byron Leclair, sworn October 21, 2013.

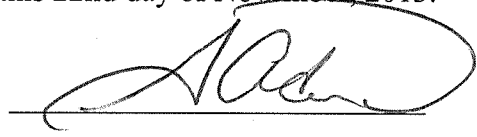
III. CONCLUSION

14. PRFN respectfully requests an order setting aside the Decision and Cost Award of October 1, 2013 as it relates to PRFN and awarding in its place, costs in the amount of

³ EB 2011-0040 Decision on Intervention and Cost Award Eligibility, quoted at EB-2011-0140 Decision and Cost Award, dated October 1, 2013 p. 4.

\$130,715.24 plus disbursements together with costs of \$6,500.00 for this motion.

ALL OF WHICH IS respectfully submitted this 22nd day of November, 2013.

A handwritten signature in black ink, appearing to read 'Cherie Brant', is written over a horizontal line.

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ONTARIO ENERGY BOARD

IN THE MATTER OF sections 70 and 78 of the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15, (Schedule B);

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