Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2013-0375

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 (EB-2011-0140);

AND IN THE MATTER OF a Notice of Motion by the Ojibways of Pic River First Nation for review of the Board's Decision and Order on Phase 2 Cost Awards in proceeding EB-2011-0140.

BEFORE: Christine Long
Presiding Member

Paula Conboy
Member

Cathy Spoel
Member

DECISION AND ORDER
February 20, 2014

OVERVIEW

This is a motion brought by the Ojibways of Pic River First Nation ("PRFN") for a review of the Ontario Energy Board's decision and order on cost awards relating to phase 2 of EB-2011-0140 (the "Designation Proceeding"), issued on October 1, 2013 (the "Costs Decision"). In that decision, the hearing panel awarded PRFN

costs in the amount of $40,000 (plus disbursements), a reduction from PRFN's claimed amount of $130,715.24.

The motion seeks to vary the Costs Decision to permit PRFN to recover its full cost claim, plus PRFN's cost for this motion. The motion is brought pursuant to Rules 8.02, 42 and 44 of the Board's *Rules of Practice and Procedure*.

The Board issued a notice of written hearing on November 15, 2013, setting out the procedural steps for the motion. While all parties to the Designation Proceeding were given notice, the Board received submissions on the motion from only PRFN and Board staff.

The Board has reviewed the submissions of PRFN and Board staff and is satisfied that the Board, in issuing the Costs Decision adequately considered the level and quality of participation of PRFN and the issues raised by PRFN in the Designation Proceeding. We have no difficulty in understanding how the Board arrived at its conclusions in the Costs Decision, and we are satisfied that those conclusions are within the range of acceptable outcomes.

BACKGROUND

In 2011, the Board initiated a proceeding to designate an electricity transmitter to undertake development work on a new electricity transmission line between Northeast and Northwest Ontario: the East-West Tie. The Board heard the Designation Proceeding in two separate phases. PRFN participated actively in the proceeding, and was one of eight intervenors granted eligibility to apply for cost awards in both phases thereof.

The Board issued the Costs Decision on October 1, 2013 and, with regard to PRFN, it provided as follows:

> *The PRFN claim is for $130,715.24 in fees plus disbursements. The Board finds that the claim for fees is excessive.*
>
> *The Board stated in its Decision on Intervention and Cost Award Eligibility that PRFN would, in the normal course, be ineligible for an award of costs because it has a direct interest in one of the registered transmitters.*

However, the Board found that there were special circumstances in this proceeding. The Board 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 First Nation 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.*
>
> *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 not 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.*
>
> *PRFN filed interrogatories, made an oral presentation and filed submissions, so a claim comparable to intervenors that were similarly active would be reasonable. The Board finds that there is no justification for allowing additional costs related to PRFN's decision to change legal representatives during the proceeding. Nor is there justification for additional costs related to PRFN's complex relationships with other parties or interests in related energy projects. Those matters are beyond the scope of the proceeding. In addition, PRFN's claim includes rates which are in excess of those set out in the practice direction. The Board concludes that PRFN's contributions were comparable to other intervenors which were similarly active, such as MNO, who were engaged on the same issues. On that basis, the Board will allow costs of $40,000 plus disbursements.*

PRFN filed a motion to review and vary the Costs Decision on October 21, 2013, asking the Board to permit PRFN to recover its full cost claim amount of $130,715.24 for its participation in phase 2 of the Designation Proceeding, plus PRFN's costs for this Motion.

PRFN submits that the Board made factual errors in the Costs Decision, which call into question its correctness. PRFN states that its interest in the Designation Proceeding was grounded in the Constitution and therefore differed significantly from the interests of the other parties to the proceeding, whose interests arose out of legal rights based in statute and common law. The grounds for the motion were summarized in the Board's notice of written hearing, as follows: [1]

> *The grounds for the Motion are that the Board made factual errors in its decision, which call into question the correctness of the Board's decision. These alleged errors include the following:*
>
> > *1. Failure to consider the fundamental principle of Aboriginal Consultation that a First Nation participating in the consultation process will be made whole with respect to its costs and expenses incurred;*
> >
> > *2. Overlooking the time spent by counsel for PRFN in adequately preparing to interpret case law and legal issues raised by another intervenor in the proceeding (the Métis Nation of Ontario);*
> >
> > *3. Failure to account for PRFN's reasonable expectations regarding the interrogatory process based on procedures followed in other Board proceedings; and*
> >
> > *4. Reducing PRFN's cost awards on the basis that PRFN changed its legal representatives during the proceeding.*
>
> *The Board has determined the "threshold question" without a hearing, as permitted by Section 45.01 of the Rules of Practice and Procedure, and will proceed directly to a review of the merits of the Motion.*

[1] *Notice of Written Hearing and Procedural Order No.1*, November 15, 2013, EB-2013-0375, pg. 2

In its submissions on the motion, PRFN also argues that the Board failed in recognizing that PFRN was unable to cooperate with other intervenors as it was the sole intervenor with proven aboriginal rights akin to land ownership rights in the corridor path of the East-West Tie line; and that, unlike some of the other intervenors in the Designation Proceeding, PRFN has no revenue stream from other taxpayers.

ANALYSIS AND FINDINGS

The Test for a Motion to Review

Section 44.01 of the *Rules of Practice and Procedure* provides that:

> Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:
>
> a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
> (i) error in fact;
> (ii) change in circumstances;
> (iii) new facts that have arisen;
> (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

As stated by the Board in prior proceedings[2], and confirmed by the Divisional Court of the Ontario Superior Court of Justice[3], in order to demonstrate that there is an error, a moving party requesting review and variance of a Board decision must be able to show that the findings therein are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. In other words, it is not enough to argue that conflicting evidence should have been interpreted differently.

[2] See for example, *Motions to Review the Natural Gas Electricity Interface Review Decision*, May 22, 2007, EB 2006-0322/0338/0340.
[3] *Grey Highlands (Municipality) v. Plateau Wind Inc*. [2012] O.J. No. 847 (Div. Court).

Under section 45.01 of the Rules, the Board may determine (with or without a hearing), in respect of a motion brought under a threshold question of whether the matter should be reviewed before conducting any review on the merits. The Board determined the "threshold question" without a hearing and has proceeded directly to a review of the merits of the Motion.[4]

PRFN has grounded its motion on the basis that the Board made several factual and legal errors which in turn affected the correctness of the Board's Order.

The Board's jurisdiction to order costs

The Board's power to make cost awards arises from section 30 of the *Ontario Energy Board Act, 1998*:

> *The Board may order a person to pay all or part of a person's costs for participating in a proceeding before the Board, a notice and comment process under section 45 or 70.2 or any other consultation process initiated by the Board.*

The *Practice Direction on Cost Awards* uses similar permissive, but not mandatory, language. Section 2.01 states: "The Board may order any one or all of the following: (a) by whom and to whom costs are to be paid; […]". And, section 3.01 states: "The Board may determine whether a party is eligible or ineligible for a cost award."

In the Board's view, cost awards, as evidenced by the word "may" in both the Act and the Practice Direction, and irrespective the Board's long standing practice of awarding intervenors their reasonably incurred costs, are entirely discretionary.

Generally, in order to ensure that cost awards are appropriate and fair, the Board must assess the value of the contribution of the party to the process. It is not always easy to assess and assign the specific dollar value that a party provides to a process. A Board panel is not privy to all of the activities that a party may undertake and it would also not be efficient or practical to do a line by line review of

[4] *Notice of Written Hearing and Procedural Order No.1*, November 15, 2013, EB-2013-0375 pg. 3.

all docket entries to assess the merit of each individual entry. For these reasons, it is not uncommon for (and it is entirely within the discretion of) the Board to compare the cost claims of parties that engaged in similar levels of participation in a process. Where one party's claimed costs are significantly in excess of other parties', it is reasonable for the Board to make disallowances without any other specific finding. Moreover, it is not wrong for the Board to make disallowances if the value of a party's participation is disproportionate to the level of costs requested.[5]

The hearing panel did not, nor was it required, to simply add up the hours submitted by various parties and ensure that the appropriate rates were applied. Ultimately, the Board must make a determination on the value of an intervenor's contribution measured against its claimed costs. In exercising its discretion to make cost awards, the Board must ensure that the party's cost claim is commensurate with the value to the process.

We make the following additional findings with respect to the specific issues raised on the motion.

Did the Board fail to consider the fundamental principle of Aboriginal Consultation in making PRFN whole?

PRFN argues that the Board erred by not considering the "fundamental principle of Aboriginal Consultation that a First Nation that is participating in the consultation process will be made whole with respect to the costs and expenses incurred". To this end, PRFN also states that the "costs and expenses incurred are not visited on the First Nation, but rather on the party who will benefit from the consultation"[6].

PRFN submits that the constitutional nature of its interest should be viewed as greater than other intervenors; that is, while the interests of other parties to the Designation Proceeding arise out of legal rights based in statute and common law, PRFN's interests are grounded in the Constitution and, therefore, the depth of the

[5] See, for example, *Decision and Order on Cost Awards*, September 9, 2011, EB-2011-0011, pp. 2-3; *Phase 1 Decision and Order on Cost Awards,* September 17, 2012, EB-2011-0140, pg. 5.
[6] *Ojibways of Pic River Notice of Motion, Affidavit of Byron Leclair*, October 21, 2013, EB-2013-0375*,* pg. 8.

affected interest differs significantly. PRFN states that the power and authority granted to the Board by statute is subject to the *Constitution Act, 1867* and that this includes section 35 of that Act, from which flows a duty to consult and accommodate the aboriginal rights and treaty rights of aboriginal peoples of Canada.

PRFN argues that the costs relating to aboriginal consultation are an inherent component of aboriginal consultation and therefore properly within the responsibility of the Board. On this point, PRFN concludes that the Board brought PRFN into the Designation Proceeding to fulfill its responsibility to consult, and that it would now be improper for the Board to exercise its discretion in a manner that forces PRFN to bear the costs of consultation.

In its submission on this issue, Board staff notes that PRFN did not raise this issue during the course of the designation proceeding and that, to the contrary, in its Notice of Intervention filed with the Board on March 2, 2012, PRFN requested intervenor status and cost eligibility in the designation proceeding based on the Board's Practice Direction at the prevailing Cost Award Tariff. PRFN submitted to the Board (at the outset of the Designation Proceeding), as follows:

> *The PRFN … will proceed on the basis that the PRFN can recover the related fees and disbursements incurred based on the Board's Practice Direction on Cost Awards at the prevailing Cost Award Tariff.*

Section 19(1) of the *Ontario Energy Board Act, 1998* states: "The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and fact." The Board therefore has the power (and the obligation) to consider duty to consult issues that arise within matters over which it has jurisdiction. The power to decide questions of law on its own, however, does not provide the Board with the ability to conduct Aboriginal consultation itself:

> *The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a*

> *right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation.*[7]

The Board, as is the case with other tribunals, is confined to the powers conferred on it by its constituent legislation. In the matter of the Designation Proceeding, the legislature has not delegated the Board the power to engage in aboriginal consultation or to assess the adequacy of consultation. Moreover, the Board's authority to award costs in a regulatory proceeding does not attract considerations of the duty to consult.

The Board finds that there was never any expectation during the course of the Designation Proceeding, whether of the Board, of the licensed transmitters ultimately paying the costs of the proceeding, or of the intervenors in the proceeding, including PRFN, that any party would receive costs in any amount greater than that deemed reasonable by the Board in accordance with the Board's *Practice Direction on Cost Awards* at the prevailing Cost Award Tariff.

Did the Board overlook the time spent by counsel for PRFN in adequately preparing to interpret case law and legal issues raised by another intervenor in the proceeding (the Métis Nation of Ontario)?

PRFN submits that the Board incorrectly assessed the time spent by counsel for PRFN in adequately preparing to interpret case law and legal issues raised by the Métis Nation of Ontario, another active intervenor in the Designation Proceeding.

The Costs Decision was made by a three-member panel of the Board that presided over the entirety of phase 2 of the Designation Proceeding. In our view, the hearing panel was clearly aware of the scope of the record in the Designation Proceeding, and the very large volume of evidence filed. The phase 2 Decision and Order and the Costs Decision describe, in good detail, the Board's review of the substantive submissions made by PRFN as well as the account submitted on its behalf by its counsel.

[7] Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, [2010] S.C.J. 43, para. 60.

We are not persuaded that the Board failed to adequately consider the time spent by PRFN in its intervention in the Designation Proceeding; including its efforts to interpret case law and legal issues raised by the Métis Nation of Ontario.

Did the Board fail to account for PRFN's reasonable expectations regarding the interrogatory process based on procedures followed in other Board proceedings?

PRFN submits that the Board did not consider PRFN's reasonable expectation for an interrogatory process similar to other proceedings. PRFN states in its Motion that "[a]t no time, prior to the submissions of the interrogatories, did the Board communicate that the interrogatory process would be restricted or different from other proceedings which include an interrogatory process".[8]

Board staff submits that the hearing panel made it clear at various times that the interrogatory process in the Designation Proceeding would be different from other proceedings. Among other earlier communications on this point, on November 21, 2012, the Board issued a letter providing "guidance and information" to all participants in the designation proceeding. With respect to the matter of the "Content of Interrogatories", the Board's letter provided as follows:

> *As the Board stated in its Phase 1 decision, this designation proceeding is unique in that it involves multiple competing applicants and has elements which are similar to a procurement process but are absent from most Board proceedings. In a typical Board proceeding, interrogatories serve to complete the record and possibly augment the evidence filed by the applicant. In the designation proceeding, however, it would not be appropriate for applicants to use the interrogatory process to fill any gaps in their applications after those applications have been filed. The Board will control the interrogatory process to ensure that no particular applicant gains an unfair competitive advantage through that process.*

[8] *Ojibways of Pic River Notice of Motion,* October 21, 2013, EB-2013-0375, pg. 4.

Then, in its Procedural Order No. 5 dated January 8, 2013 the Board confirmed:

> *As indicated in its Phase 1 Decision and Order, the Board will require all parties to send their interrogatories to the Board, and the Board will issue a combined set of interrogatories to the applicants for responses. The Board will combine and edit the interrogatories proposed by the parties.*
>
> *This proceeding involves multiple competitive applicants and has elements similar to a procurement process that are absent from most Board proceedings. In a typical Board proceeding, interrogatories serve to complete the record and possibly augment the evidence filed by the applicant. In this designation proceeding, however, it would not be appropriate for applicants to use the interrogatory process to fill any gaps in their applications after those applications have been filed.*

It was very clear, throughout the entirety of the Designation Proceeding that the interrogatory process in that proceeding would differ from the interrogatory process used in most other Board proceedings. Counsel for PRFN ought to have been aware of this. We therefore find that the Board neither erred in reducing the scope of the interrogatory process in the Designation Proceeding, nor erred in awarding costs on that defined scope.

Did the Board incorrectly reduce PRFN's cost awards on the basis that PRFN changed its legal representatives during the proceeding?

PRFN submits that the Board reduced PRFN's cost awards on the basis that PRFN changed its legal representatives during the proceeding.

Upon our review of the Costs Decision, we find that PRFN was not penalized for a change in representation but rather the hearing panel found that "there is no justification for allowing **additional** costs related to PRFN's decision to change legal representatives during the proceeding. [emphasis added]" We are of the view that this was a reasonable finding within the discretion of the hearing panel.

Did the Board err in comparing PRFN's costs claim to other claimants in the Designation Proceeding; or err in failing to recognize PRFN's alleged difficulty in cooperating with other intervenors?

PRFN submits that "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'."[9] In making this submission, PRFN specifically refers to subsection 5.01 (c) of the *Practice Direction on Cost Awards.* Section 5.01 sets out the principles used in determining cost awards, and subsection (c) identifies, as a factor that may be taken into consideration by the Board in awarding (or denying) costs, "[w]hether the intervenor made reasonable efforts to cooperate with other parties". PRFN seems to argue that the Board based its Costs Decision, in part, on PRFN's lack of cooperation with other parties. PRFN also claims that, in light of its unique intervenor status, the Board's comparison of it to other intervenors was improper; for example, PRFN submits that, in comparison to another intervenor who received a reduced cost award, "the OEB failed to consider that PRFN does not have access to a revenue stream from constituent taxpayers".[10]

In our view, once a party is granted intervenor status, the Board does not conduct a needs assessment in awarding costs. Moreover, because the Board's ability to award costs is discretionary, it is within the Board's purview, when making an order for costs in a proceeding before it, to make comparisons between the costs claimed by various parties in the light of their level of participation and in the light of their contributions to the proceeding. We do not find that the Board failed to adequately consider the contribution made by PRFN or that it erred when comparing PRFN's contributions and costs claimed to those of the other parties who claimed costs in phase 2 of the Designation Proceeding. The hearing panel granted intervenor status and cost eligibility to four First Nations and Métis groups, including PRFN. And, while the hearing panel recognized the unique status of PRFN (as having both land-based rights and a direct interest in one of the applicants), we do not find that the hearing panel penalized PRFN in any way for its alleged difficulty in participating with the other intervenors in the Designation Proceeding.

[9] *Ojibways of Pic River Factum*, November 22, 2013, EB-2013-0375*,* pg. 14.
[10] Ibid, pg. 16.

CONCLUSIONS

After considering the written submissions of PRFN and Board staff, we are not persuaded by PFRN's arguments. The hearing panel did not commit an error in awarding PRFN an award of costs in an amount lesser than that which it claimed. For the reasons set out above, PRFN's motion to vary the Costs Decision is denied. PRFN may disagree with the findings of the Costs Decision, but this alone is not sufficient grounds for a successful motion for review and variance of that decision.

On the matter of the costs of this motion, PRFN requested an award of $6,500 for its costs. As PRFN was unsuccessful on the motion, the Board will not award PRFN its costs of this motion.

THE BOARD ORDERS THAT:

1. PRFN's Motion to review and vary the Board's Phase 2 Decision and Order on Cost Awards (EB-2011-0140) with respect to the award granted to PRFN is dismissed.

DATED at Toronto, February 20, 2014
ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary