

ONTARIO ENERGY BOARD

**Industrial Gas Users Association Motion to Review the Ontario Energy Board's  
Decision and Order on Cost Awards dated August 9, 2016 (EB-2016-0122)**

**Written Submissions of  
Industrial Gas Users Association (IGUA)**

1. On August 10, 2016 we submitted a letter on behalf of the Industrial Gas Users Association (IGUA), asking that the Board reconsider an aspect of the Board's August 9, 2016 decision on costs in EB-2016-0122 (Costs Decision). Our letter asked that the Board reconsider denial of a portion of IGUA's cost claim in that proceeding.
2. On October 3, 2016 the Board issued a Notice of Hearing and Procedural Order No. 1 herein, indicating that IGUA's request that the Board reconsider an aspect of the Costs Decision would be treated as a motion to review the Costs Decision. The Board deemed Union Gas Limited and OEB staff to be parties to the motion.
3. IGUA was the only intervenor in the EB-2016-0122 proceeding in which the Costs Decision was made. In the result, no other cost award dependant intervenors have been provided with notice of, or the ability to participate in, this motion proceeding.

**Objection to Requirement to Satisfy a Threshold Question**

4. Procedural Order No. 1 states:

*The OEB's only means of reviewing and amending a decision at the request of a party is through a motion to review under Rule 40....*

5. While correct in and of itself, the foregoing statement does not consider the Board's authority under Rule 41.01 to, at any time, "review all or part of any order or

*decision and .... confirm, vary, suspend or cancel the order or decision*". Such review, conducted on the Board's own motion, does not require any party to satisfy the "threshold question" of whether the matter should be reviewed. In such an instance, the Board will have itself determined that circumstances indicate that the subject decision merits review.

6. In our August 10<sup>th</sup> letter, we submitted that;
- (a) as the nature of the Board's concern with the impugned portion of IGUA's cost claim was not mechanical (like a calculation error) or procedural (like the lack of appropriate expenditure receipts or documentation), but rather was substantive;
  - (b) that as no other party had raised any concerns with IGUA's cost claim; and
  - (c) thus that the nature of the Board's concern was brought to IGUA's attention for the first time through the Costs Decision itself,

that procedural fairness required that IGUA be provided with an opportunity to respond to the Board's concerns regarding those aspects of its cost claim disallowed prior to the Board making the disallowance determination. In that letter we provided IGUA's response to those concerns, and asked that the Board consider that response and reconsider the disallowance directed in its Costs Decision.

7. ***It is respectfully submitted that in the circumstances set out in our August 10<sup>th</sup> letter, and set out again above, the Board should act on its own initiative, accord IGUA with procedural fairness in respect of disallowance of a portion of its cost claim, and review the Costs Decision on the merits, without requiring that IGUA satisfy a "threshold question" as a precondition to such review.***

## Satisfaction of the Threshold Question

8. Notwithstanding our objection to requiring that IGUA satisfy a “threshold question” as a precondition to review by the Board of the Costs Decision, and without prejudice to that objection, we now address Rule 43.01.
9. Rule 43.01 provides that the Board “*may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits*”.
10. Among the grounds for a motion to review set out in Rule 42.01(a) are:
  - (i) error in fact; and
  - (ii) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.
11. In respect of the facts relevant to IGUA’s claim for recovery of costs related to 0.15 hours of counsel’s time to review OEB Staff submissions on Union’s EB-2016-0122 application, they were not placed on the record prior to the issuance of the Costs Decision as IGUA could not have reasonably anticipated the basis for denial of its claim for recovery of the impugned costs. That was precisely the reason for our initial request that the Board consider the facts provided in our August 10<sup>th</sup> letter and reconsider its cost disallowance.
12. It is therefore submitted that, on this basis alone, the “threshold question” of whether the Board should proceed to review the Cost Decision should be answered in the affirmative.
13. In any event, the Board has held that the grounds for review set out in Rule 42.01(a) are inclusive, rather than exhaustive. Despite the small amount of money in issue (\$49.50 in legal fees plus HST thereon), we submit that the principle raised by IGUA’s objection to the Costs Decision is an important one, and of broad applicability, to cost eligible intervenors, and thus merits a more careful and thorough review. We further submit this is particularly so given the inability of IGUA

to anticipate, and thus respond to, the Board's concerns prior to issuance of the Costs Decision, as noted above.

### **Merits of the Cost Decision**

14. In the Costs Decision, the Board directed two disallowances. One of the two disallowances was directed as follows:

*The OEB will disallow 50% of the 0.30 hour that Mr. Ian Mondrow claimed for work on June 14, 2016 to "Review and finalize submissions; review OEB Staff submissions". The OEB finds it not appropriate for an intervenor to charge for time to review the OEB Staff submission given it was circulated and filed after IGUA had filed its own submissions.*

15. The conclusion begged by the rationale provided by the Board for disallowance of 0.15 hours of time claimed (which translates into legal fees of \$49.50) is that it is not reasonable for intervenors to review the final submissions of Board Staff once the intervenor's own final submissions have been filed. This is, to our knowledge, a novel suggestion.
16. Effective and reasoned participation in a proceeding, which is the type of participation that an intervenor is obligated to engage in, requires that the intervenor; i) properly monitor the participation of other interested and active parties, and in particular OEB Staff; and ii) remain informed of the positions being taken by other interested parties, and in particular OEB Staff, on issues of reasonable and legitimate concern to the intervenor.
17. For example, what if Staff had mischaracterized or misinterpreted IGUA's interest in, or position on, the application? What if Staff had raised a new issue in respect of the application which new issue IGUA was legitimately concerned about and appropriately placed to respond to? The cost determination in issue would, if extrapolated to its logical conclusion, dictate that IGUA would have no notice of such a development and would thus be wholly unable to protect its interests in the

proceeding and/or respond in order to provide the Board with an appropriate alternative perspective.

18. Stated another way, there is a reason that final submissions are publically filed. We find it a novel proposition that intervenors – who have both the privilege and the obligation for full and informed participation in a proceeding – need not and should not inform themselves of the substance of the filings of other parties to the proceeding, to the extent reasonably warranted by the intervenor’s own legitimate interest in the proceeding.
19. Further, proper discharge of counsel’s obligation to inform our client of the Board’s ultimate decision on the application and the issues raised by participants (in this instance Board Staff) and addressed (or not) in the Board’s decision, requires at least a rudimentary awareness and consideration of the issues addressed by other parties. This is a standard feature of legitimate, responsible, and consistently sanctioned (through hundreds of cost decisions) intervention conduct, within reasonable time allowance bounds.
20. Accepting that review of the filings of Board Staff for issues/positions of concern to our client is an appropriate activity in furtherance of the privileges and obligations of intervention, disallowance of reasonable costs associated with this activity is, with respect, arbitrary and unwarranted, as well as a departure from long-standing Board sanctioned practice.
21. In respect of the rationale provided for the Board’s departure from long-standing practice, the fact that IGUA could not, absent an atypical (though not unprecedented) procedural indulgence, provide further submissions does not vitiate the appropriateness of counsel considering the positions of Board Staff and their (eventual) influence on the outcome of the proceeding. That is, it is entirely reasonable that IGUA’s counsel spent \$49.50 worth of time to review OEB Staff’s 9 page submission on the merits of Union’s application, as part and parcel of responsibly participating in the proceeding, and our ultimate review of the Board’s decision and concluding advice to our client.

22. It is respectfully submitted that none of the interests of Union's ratepayers, Union's own interests, or the broader public interest, have in any way been compromised by the extremely modest, and completely responsible, expenditure of time by counsel to quickly review the nature of Board Staff's final submissions herein.
23. In contrast, the narrow approach to cost award considerations reflected in the cost determination in question has the potential to significantly, and inappropriately, constrain future responsible intervenor conduct, to the prejudice of both cost eligible intervenors and the Board's own processes.
24. We do not believe that such a result is intended by the decision maker in this instance, which is another reason that we respectfully suggest that reconsideration of the determination in question is appropriate.
25. We noted at the outset of this submission that other intervenors who rely on cost eligibility for full and effective participation in Board proceedings have not, in the circumstances, been given notice of the Board's consideration of the principles raised by IGUA in respect of the impugned portion of its cost claim. We have submitted that time spent by intervenors reviewing the submissions of other parties is time reasonably spent by intervenors in responsible participation in Board proceedings, and should continue (as has been past practice) to be eligible for cost recovery. This principle affects every cost eligible intervenor which submits a cost claim. It should not be abandoned by the Board through a decision made in the absence of the ability of those other directly affected, and potentially prejudiced (should the principle be rejected), parties to make submissions.
26. We have also considered the principle enunciated in past Board decisions on costs to the effect that disallowance has been directed on the basis that the time spent by the cost claimant has provided limited value to the Board in its deliberations. Clearly time spent by counsel reviewing Staff's submissions after IGUA's own final submissions, where further submissions were not offered on behalf of IGUA, will not have provided value to the Board's deliberations.

27. However, while we agree that the value provided to the Board's deliberations should be a primary consideration in assessing costs eligible for recovery, it should not be the only consideration, nor a necessary one in all circumstances.
28. While informed deliberations are certainly a primary function of the Board's public proceedings, accessibility to Board proceedings by interested and directly affected stakeholders is also an important function.
29. The reasonable ability of cost supported intervenors to inform themselves of both the positions of other parties (in particular Board Staff) on issues of concern to them, and of the ultimate decisions of the Board, is a critical aspect of an accessible regulatory process, and independently merits cost award support for otherwise cost eligible intervenors.
30. Costs awarded for a reasonable amount of post submission review of other submissions by cost eligible parties support accessibility to OEB processes even if no further submissions to the Board are proffered following such review.
31. In contrast, denying reasonable and relatively modest costs for such review activities would compromise the accessibility, and public acceptability, of the Board's processes.
32. It should also be considered that the Board's cost award tariff for external legal fees has been consciously set by the Board below "market". IGUA does not recover all of its intervention costs, even if the Board awards IGUA recovery of 100% of its costs eligible for recovery. In the result, like many other cost eligible intervenors, IGUA makes a significant investment of its members' own money in responsible pursuit of its Ontario Energy Board interventions.
33. It is therefore not necessary for the Board to arbitrarily or unduly limit the type of activities for which IGUA is eligible to recover costs in order to ensure that IGUA's self-funded contribution towards its participation in OEB proceedings continues.

IGUA's self-funded contribution towards its participation in OEB proceedings continues.

### **Conclusion and Relief Requested**

34. For the foregoing reasons, we respectfully request that the Board amend its Cost Decision and allow recovery by IGUA of a further 0.15 hours of counsel's time for review of the submissions of Staff in Union's EB-2016-0122 application, plus GST applicable thereon.
35. As evidenced by the extent of IGUA's efforts in responding to the Board's disallowance of a very small portion of its EB-2016-0122 cost claim, the principle in issue on this motion is an important one to IGUA. IGUA also believes that the principle in issue is important for other cost reliant intervenors and to the integrity of the OEB's processes in general. However, given the broad nature of the issue on this motion compared to the relatively modest impact on ratepayers of Union's Sudbury expansion, IGUA is not seeking recovery of its reasonably incurred costs of this motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED by:**



**GOWLING WLG (CANADA) LLP, per:**  
Ian A. Mondrow  
Counsel to IGUA

TOR\_LAW\ 9036278\2