

**NEWFOUNDLAND AND LABRADOR
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES**

AN ORDER OF THE BOARD

NO. P. U. 27(2010)

IN THE MATTER OF the *Electrical Power Control Act, 1994*, SNL 1994, Chapter E-5.1 (the “*EPCA*”) and regulations thereunder;

AND IN THE MATTER OF an application by Nalcor Energy for an order to establish the terms of a water management agreement between Nalcor Energy and Churchill Falls (Labrador) Corporation Limited with respect to the Churchill River, Labrador;

AND IN THE MATTER OF the quantum of costs to be awarded in the application.

BEFORE:

**Andy Wells
Chair & Chief Executive Officer**

**Darlene Whalen, P.Eng.
Vice-Chair**

**Dwanda Newman, LL.B.
Commissioner**

**James Oxford
Commissioner**

1 **Background**

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3 On November 10, 2009 Nalcor Energy (“Nalcor”) filed an application with the Board of
4 Commissioners of Public Utilities (the “Board”), pursuant to s. 5.5 of the *EPCA*, for an
5 order of the Board establishing the terms of a water management agreement between
6 Nalcor and Churchill Falls (Labrador) Corporation Limited with respect to the Churchill
7 River. The Conseil des Innus de Ekuanitshit (the “Innus of Ekuanitshit”) and the Innu
8 of Uashat mak Mani-Utenam, the Innu Takuaikan Uashat mak Mani-Utenam Band
9 Council and certain traditional families of the Ushat mak Mani-Utenam Innu (the
10 “Uashaunnuat”) were granted intervenor status in the proceeding. In Order No. P.U.
11 8(2010) the terms of a water management agreement between Nalcor and Churchill Falls
12 (Labrador) Corporation Limited (“CF(L)Co”) were established and the Board stated that
13 the parties may apply for an order in relation to costs.

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15 On April 16th, 2010 the Innus of Ekuanitshit and the Uashaunnuat filed separate
16 applications for an award of costs. The Innus of Ekuanitshit filed a Bill of Costs on
17 Friday, April 16, 2010, with an English translation filed on April 22, 2010, claiming total
18 fees and disbursements of \$42,692.39, as follows:

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Legal fees	\$ 36,648.00 (295 hours)
Experts fees	\$ 3,750.00
Travel and miscellaneous expenses	\$ 2,294.39
Total	\$ 42,692.39

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21 The Uashaunnuat filed a Bill of costs on April 20, 2010, claiming total fees and
22 disbursements of \$44,714.29, as follows:

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Legal fees	\$ 37,660.00 (187 hours)
Advisors fees	\$ 857.00
Disbursements	\$ 6,197.29
Total	\$ 44,714.29

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25 The Board received submissions on the issue of whether there should be an award of
26 costs in the circumstances and left the quantum to be established thereafter, if necessary.
27 In Order No. P.U. 24(2010) the Board found that there should be an award of costs to the
28 Innus of Ekaunitshit and the Uashaunnuat. This decision addresses quantum.

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30 **Submissions**

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32 On August 18, 2010 the Innus of Ekuanitshit filed submissions regarding the quantum of
33 costs arguing that the claimed costs accurately reflect the value of the contribution to the
34 proceedings. The Innus of Ekuanitshit submit that an award of costs in the amount
35 claimed would be fair and reasonable because solicitor-client costs are appropriately
36 awarded to parties that raise issues of public importance in the public interest, the costs
37 have already been subject to a substantial deduction, the legal fee rates are very

1 reasonable and a large portion of the work completed in the file was in response to
2 actions or requests made by other parties to the proceedings.

3
4 On August 24, 2010 the Uashaunnuat filed submissions stating that it is fair and
5 reasonable that the Intervenors be awarded costs for professional fees as well as
6 disbursements considering the Intervenors' responsible participation in the proceedings as
7 well as their valuable and meaningful contribution to the proceedings and the public
8 interest. It is argued that the average billing rate charged by O'Reilly and Associés of
9 \$200 per hour is a reasonable rate for the combined work of the primary lawyer with 4.5
10 years experience and another senior lawyer with over 45 years experience. It is suggested
11 that the Intervenors' participation in the proceedings necessitated the use of advisors,
12 particularly a respected anthropologist, and that significant disbursements were incurred
13 due to, amongst others, the considerable photocopying and printing required.

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15 On September 20, 2010 Nalcor filed submissions relating to the quantum of costs.
16 Nalcor notes that the quantum of costs is in the discretion of the Board and argues that the
17 nature and extent of the contribution of the party claiming costs as well as the Board's
18 past practice should be considered in assessing the quantum of costs. Nalcor
19 acknowledges that the Board found that the Intervenors made a contribution in advancing
20 the Board's understanding of the duty to consult but argues that the Board will need to
21 consider whether all of the steps in the proceeding were really necessary to enable the
22 Board to conclude that the Agreement would not adversely impact on aboriginal rights or
23 title. Nalcor argues that it is difficult to see that the Intervenors' participation provided a
24 significant level of material assistance to the Board in reaching its decision in accordance
25 with its statutory and regulatory mandate. Nalcor argues that the quantum of costs should
26 only be a portion of the full costs incurred by the Intervenors given the limited
27 contribution to assisting the Board with understanding and deciding the issues raised in
28 Nalcor's application. Nalcor states that the Board typically only awards partial indemnity
29 rather than the full amount claimed and argues that a partial indemnity approach is fair
30 and reasonable in this case when the relative success of the parties is assessed and is more
31 consistent with the prima facie position that costs should not be awarded to an
32 unsuccessful party. Nalcor argues that, given the limited success and contribution of the
33 Intervenors, the costs awarded should be on the lower end of the scale. Nalcor makes
34 several comments in relation to particular aspects of the costs claimed. In particular:

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36 i) some costs appear to relate to learning Newfoundland and Labrador laws
37 and practice and procedure before the Board;
38 ii) significant time appears to relate to researching the Intervenors' positions
39 which Nalcor states would be already researched and known;
40 iii) the cost award should not become an indirect means of additional funding
41 to the Intervenors for participation in the environmental assessment
42 process; and
43 iv) the claim of the Innus of Ekuanitshit contains professional fees for
44 Biofilia-Environmental Consultants, but no expert reports were filed from
45 Biofilia and no expert witness was called.

1 **Board Findings**

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3 The Board agrees with Nalcor's submission that partial indemnity is appropriate in the
4 circumstances of this proceeding. The Intervenors were not successful in their objection
5 to the approval of a water management agreement. While the issues raised by the
6 Intervenors were of importance to the communities involved, the Board in making its cost
7 assessment has taken into consideration that the Intervenors are also participating in a
8 parallel environmental assessment process which provides another venue to raise issues
9 in relation to the impact of the water management agreement. The Board does not agree
10 with the Intervenors that the amounts claimed are reflective of their contribution in the
11 proceeding and therefore the Board finds that it is appropriate to award costs at the lower
12 end of the scale.

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14 The Intervenors each claimed approximately \$35,000.00 in legal fees. The Board finds
15 that an award of \$5,000.00 for legal fees is appropriate and reflective of the Intervenors
16 contribution to the proceeding. The Board finds that the claims for advisor fees or expert
17 fees should not be reimbursed on the basis that nothing turned on this type of advice in
18 the proceeding. In terms of miscellaneous expenses, including travel, the Board accepts
19 that these should be reimbursed to a reasonable level which the Board determines to be
20 \$2,000.00.

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23 **IT IS THEREFORE ORDERED THAT:**

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25 1. Nalcor shall pay the Innus of Ekaunitshit costs in the amount of \$7,000.00.
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27 2. Nalcor shall pay the Uashaunnaut costs in the amount of \$7,000.00.
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29 3. Nalcor shall pay the expenses of the Board arising from these Applications.

DATED at St. John's, Newfoundland and Labrador this 12th day of October 2010.

Andy Wells
Chair & Chief Executive Officer

Darlene Whalen, P.Eng.
Vice-Chair

Dwanda Newman, LL.B.
Commissioner

James Oxford
Commissioner

Cheryl Blundon
Board Secretary