

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

AN ORDER OF THE BOARD

NO. P. U. 5(2010)

IN THE MATTER OF the *Electrical Power Control Act*, 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 for the Churchill River, Labrador;

AND IN THE MATTER OF a request by the Conseil des Innus de Ekuanitshit in relation to costs.

BEFORE:

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

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

**James Oxford
Commissioner**

Nalcor Energy (“Nalcor”) filed an application with the Board of Commissioners of Public Utilities (the “Board”) on November 10, 2009 for an order of the Board establishing the terms of a water management agreement between Nalcor and Churchill Falls (Labrador) Corporation Limited (“CF(L)Co”) with respect to the Churchill River (the “Application”). On December 11, 2009, pursuant to s. 6 of the *Water Management Regulations* under the *EPCA*, Nalcor filed a written submission setting out a proposed water management agreement. On December 10, 2009 CF(L)Co filed a written submission proposing the same water management agreement.

On December 15, 2009 the Board received an intervenor submission from the Conseil des Innus de Ekuanitshit claiming the use of the air, lands, water, plant and animal life of the territory affected by the proposed water management agreement and seeking:

“An Order:

that on an interim basis and in any event of the cause, Nalcor pay all expenses incurred by the Conseil des Innus de Ekuanitshit in connection with Nalcor’s application to the board, including cost of counsel, engineers, valuers, stenographers, accountants and other experts or assistants retained by or for the Conseil de Innus de Ekuanitshit in and about the inquiry; and

that Nalcor and the Conseil des Innus de Ekuanitshit are to attempt to agree on a procedure whereby, upon incurring costs and disbursements from time to time up to the end of the inquiry, trial, the intervenor will so advise the applicant and the applicant shall pay them within a given time-frame, unless Nalcor objects, in which case it shall refer the matter to the Board.”

The Board received two other intervenor submissions, one from Twin Falls Power Corporation Limited (“Twinco”) and one from the Innu of Uashat mak Mani-Utenam, the Innu Takuaikan Uashat mak Mani-Utenam Band Council and certain traditional families of the Uashat mak Mani-Utenam Innu (the “Innu of Uashat mak Mani-Utenam, et. al.”), neither of which sought an order as to advance costs.

On January 22, 2010 the Board issued Order No. P. U. 2(2010) granting intervenor status to the Conseil des Innus de Ekuanitshit, Innu of Uashat mak Mani-Utenam and Twinco. The request of the Conseil des Innus de Ekuanitshit in relation to costs was not addressed in this order.

On January 26, 2010 Nalcor filed a submission regarding the claim by the Conseil des Innus de

Ekuanitshit in relation to costs. Nalcor's submission states that section 90 of the *Public Utilities Act*, RSNL 1990, Chapter P-47 sets out the Board's jurisdiction with respect to an award of costs and that this section does not specifically permit an award of costs to an intervenor in advance. Nalcor cites Order No. P. U. 8(2001-2002). Nalcor notes that it has not been the practice of the Board to award costs to an intervenor in advance and cites the Board's practice of making an award of costs after determining whether an intervention provided assistance to the Board in its decision making. Nalcor cites *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 which it says relates to an award of costs by a court, not a statutorily based regulatory board, and further that an award of costs in advance by a court is an exceptional power not to be lightly exercised. Nalcor argues that the Conseil des Innus de Ekuanitshit have not provided any evidence to demonstrate adverse effect on land or resources flowing from the proposed water management agreement. Nalcor notes that the Conseil des Innus de Ekuanitshit received \$55,850.25 to participate in the environmental assessment process which Nalcor says is the appropriate forum to deal with consultation issues relating to the development of the Lower Churchill Project and aboriginal land or resources usage.

On January 27, 2010 the Conseil des Innus de Ekuanitshit filed a reply submitting that the Board has the jurisdiction to make an order of advance costs. The Conseil des Innus de Ekuanitshit argue that the legislation gives the Board broad discretion. The Conseil des Innus de Ekuanitshit cite *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 arguing that it specifically allows for advance costs orders in constitutional cases. The Conseil des Innus de Ekuanitshit notes that the Supreme Court has held that the "*issuance of a costs award is a quintessential example of 'the development of imaginative and innovative remedies when just and appropriate'*", citing *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, para. 81.

In Order No. P. U. 8(2001-2002) the Board found that ss. 90(1) of the *Public Utilities Act* does not specifically permit the Board to deal with the issue of costs prior to the hearing. Subsection 28(1) of the *EPCA* states:

"28(1) The costs of and incidental to a reference or inquiry under this Act to the public utilities board shall be in the discretion of that board, and may be fixed at a sum certain, or may be taxed and the board may order by whom the costs are to be taxed and to whom the costs are to be allowed and the

1 *public utilities board may prescribe a scale under which costs are to be taxed.”*
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3 This legislation is in contrast to the provisions found in public utility legislation in some other
 4 Canadian jurisdictions where the statutory authority in relation to costs is more broad. In these
 5 provinces there are often comprehensive guidelines setting out detailed requirements in relation to
 6 the exercise of this authority. The Board finds that the narrow language of the *EPCA* and the *Public*
 7 *Utilities Act*, RSNL 1990, Chapter P-47 constrains it in relation to an award of advance costs.
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9 While the express legislative authority of the Board is narrow, the Board notes the development of
 10 the common law in relation to the inherent jurisdiction of a court to award advance costs in
 11 exceptional circumstances. In particular, the Supreme Court of Canada stated in *British Columbia*
 12 *(Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, at para. 35:
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14 *“The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in*
 15 *the exercise of which the court may determine at its discretion when and by whom costs are to be*
 16 *paid.”*
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18 The Supreme Court of Canada set out several conditions which are relevant to the exercise of this
 19 power, all of which must be present. Specifically the Court stated, at para. 40:
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21 *“With these considerations in mind, I would identify the criteria that must be present to justify an*
 22 *award of interim costs in this kind of case as follows:*
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- 24 1. *The party seeking interim costs genuinely cannot afford to pay for the litigation, and no*
 25 *other realistic option exists for bringing the issues to trial – in short, the litigation would be*
 26 *unable to proceed if the order were not made.*
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- 28 2. *The claim to be adjudicated is prima facie meritorious; that is, the claim is at least of*
 29 *sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the*
 30 *case to be forfeited just because the litigant lacks financial means.*
 31
- 32 3. *The issues raised transcend the individual interests of the particular litigant, are of public*
 33 *importance, and have not been resolved in previous cases.”*
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35 The Board has reviewed the circumstances in this matter as they relate to the framework set out by
 36 the Supreme Court of Canada to determine if special circumstances have been shown to justify an
 37 award of costs outside of the usual principle of the indemnification of the successful party. In

1 relation to the first condition, the Board finds that the Conseil des Innus de Ekuanitshit have not
 2 shown impecuniosity as set out by the Supreme Court of Canada. The Conseil des Innus de
 3 Ekuanitshit have not shown that they genuinely cannot afford to appear before the Board and that no
 4 other realistic option exists. The evidence does not address impecuniosity and further the Board
 5 notes that the Conseil des Innus de Ekuanitshit have not shown that the issues at hand cannot or will
 6 not be addressed in other processes. Neither have the Conseil des Innus de Ekuanitshit shown that
 7 the claim to be adjudicated is prima facie meritorious as outlined by the Supreme Court of Canada in
 8 *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371. While the
 9 Board was satisfied that there is a sufficient interest to justify intervenor status, the Conseil des
 10 Innus de Ekuanitshit have not shown that it would be contrary to the interests of justice for the
 11 opportunity to pursue the claim to be forfeited due to lack of financial means. Lastly the Conseil des
 12 Innus de Ekuanitshit have not shown that the issues raised transcend the individual interests of the
 13 Conseil des Innus de Ekuanitshit. The claim that is being advanced relates to the impact of the
 14 proposed water management agreement on the Conseil des Innus de Ekuanitshit. The Board has
 15 concluded that the Conseil des Innus de Ekuanitshit have failed to show special circumstances that
 16 justify the exercise of any inherent jurisdiction in relation to an award of advance costs. The Board
 17 notes the following comments of the Supreme Court of Canada in *British Columbia (Minister of*
 18 *Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, at para. 38:

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 20 *“It is for the trial court to determine in each instance whether a particular case, which might be*
 21 *classified as ‘special’ by its very nature as a public interest case, is special enough to rise to the level*
 22 *where the unusual measure of ordering costs would be appropriate.”*
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24 It is not necessary for the Board to determine at this time if the inherent jurisdiction of the courts in
 25 relation to an award of advance costs applies equally to the Board since it has found that evidence
 26 does not justify such an award in any case.

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 28 The order sought by the Conseil des Innus de Ekuanitshit in relation to costs is not granted as the
 29 Board has not been persuaded that exceptional circumstances exist so as to justify the exercise of
 30 any inherent jurisdiction that may rest in the Board in relation to an award of advance costs.

1 **IT IS THEREFORE ORDERED THAT:**

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- 3 1. No order in relation to costs will be made at this time.

DATED at St. John's, Newfoundland and Labrador this 29th day of January 2010.

Darlene Whalen, P.Eng.
Vice-Chair

Dwanda Newman, LL.B.
Commissioner

James Oxford
Commissioner

Barbara Thistle
Assistant Board Secretary