

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

AN ORDER OF THE BOARD

NO. P. U. 24(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 applications for an award of costs.

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 (“CF(L)Co”) with respect to
7 the Churchill River (the “Application”).

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9 In the hearing of the Application the Board received requests for and granted intervenor
10 status to the Conseil des Innus de Ekuanitshit (the “Innus of Ekuanitshit”) and the Innu
11 of Uashat mak Mani-Utenam, the Innu Takuaikan Uashat mak Mani-Utenam Band
12 Council and certain traditional families of the Uashat mak Mani-Utenam Innu (the
13 “Uashaunnuat”).

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15 The details of the Application, interventions and proceeding are set out in the Board’s
16 Reasons for Decision issued on March 17th, 2010 in relation to Order No. P.U. 8(2010),
17 which established the terms of a water management agreement between Nalcor and
18 Churchill Falls (Labrador) Corporation Limited (“CF(L)Co”). In Order No. P.U. 8(2010)
19 the Board stated that the parties may apply for an order in relation to costs within 30 days
20 of the issuance of the Board’s Reasons for Decision.

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22 Submissions

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24 On April 16th, 2010 the Innus of Ekuanitshit and the Uashaunnuat filed separate
25 applications for an award of costs. The cost applications request that the Board order that
26 Nalcor pay the intervenors’ costs on the basis of responsible participation in the
27 Application and contribution to the Board’s understanding of the issues. In particular,
28 both the Innus of Ekaunitshit and the Uashaunnuat submit that their participation in the
29 Application helped the Board discharge its jurisdiction in relation to the constitutional
30 issue of consultation with Aboriginal peoples. As well both the Innus of Ekaunitshit and
31 the Uashaunnuat submit that their interventions were in the public interest as the
32 Application concerned Aboriginal rights and environmental protection.

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34 In response to the applications for an award of costs Nalcor states that an award of costs
35 to either intervenor is not justified or appropriate in this case. Nalcor submits that neither
36 intervenor addressed the regulatory issues under the *EPCA* and the regulations which
37 were required to be considered by the Board in order to reach a decision on the
38 Application. Nalcor’s position is that both parties raised issues for their own purposes
39 that the Board would not otherwise have had to consider, specifically the duty to consult
40 and the applicability of s. 68 of the *Environmental Protection Act*. Since both these issues
41 were decided against the intervenors Nalcor submits that, *prima facie*, the intervenors
42 should not be entitled to costs.

1 Board Findings

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3 Section 28(1) of the *EPCA* sets out the Board's jurisdiction and discretion to award costs
4 in relation to a proceeding. In exercising its discretion the Board considers all the
5 circumstances in the proceeding and, in particular, the contribution to the proceeding
6 made by the party requesting costs.

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8 The Board's jurisdiction and responsibilities in relation to an application for approval of a
9 water management agreement between producers of power on a body of water are set out
10 in the *EPCA*. The Board is required to ensure that the water management agreement
11 satisfies the policy objectives set out in the *EPCA* and the *Regulations*. These policy
12 objectives include efficiency considerations, sound public utility practices and protection
13 of prior power contracts. Neither of the intervenors addressed these policy objectives and,
14 in this respect, did not contribute to the Board's understanding of the specific issues
15 delineated in the legislation. Rather both intervenors raised the constitutional duty of the
16 Crown to consult in relation to the water management agreement and, in particular,
17 whether the implementation of the proposed water management agreement would
18 adversely affect Aboriginal right or title. In its Reasons for Decisions in relation to Order
19 No. P.U. 8(2010) the Board acknowledged that the question of the Crown's constitutional
20 duty to consult with Aboriginal peoples may be somewhat beyond its accustomed area of
21 decision-making but concluded that it would be appropriate to make a determination in
22 relation to the issue in the context of the Application before it. The Board noted the
23 uncertainty of the law in relation to the role of the Board with respect to this issue and
24 also noted that there were two matters before the Supreme Court of Canada in relation to
25 the duty of the crown to consult.

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27 After considering the evidence and arguments presented in the Application in Order No.
28 P.U. 8(2010) the Board found that Nalcor did not have a duty to consult with the
29 intervenors with respect to the proposed water management agreement. This finding was
30 based on the Board's conclusion that the water management agreement would not
31 adversely impact Aboriginal right or title, as was claimed by both intervenors.

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33 While the intervenors were not successful in the Application this does not preclude an
34 award of costs. In assessing costs the Board considers the contribution that the party
35 claiming costs made in advancing the Board's understanding of the matter before it. In
36 this regard the intervenors brought a unique perspective that was not duplicative of the
37 position of any other party. While the duty of the crown to consult is not expressly set out
38 as a consideration for the Board in the legislation it is a fundamental issue arising from
39 the constitutional obligations of the Crown. The nature and extent of the Crown's duty to
40 consult is an evolving area of the law and it is expected that the Supreme Court of Canada
41 will soon provide more guidance in this respect, especially in relation to the obligations
42 of quasi-judicial tribunals. The Board finds that the position of the intervenors was
43 arguable in the context of the current state of the law, was not raised by any other party,
44 and was of significant interest and concern to the communities represented by the
45 intervenors.

1 Based on the above the Board is satisfied that there should be some award of costs in
2 favour of both the Innus of Ekaunitshit and the Uashaunnuat. The extent of the award of
3 costs will be addressed in a subsequent decision of the Board after the parties have had an
4 opportunity to comment on the quantum.

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6 **IT IS THEREFORE ORDERED THAT:**

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8 The Innus of Ekaunitshit and the Uashaunnuat will be awarded costs in an amount to be
9 determined by the Board.

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DATED at St. John's, Newfoundland and Labrador this 21st day of July 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