

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

AN ORDER OF THE BOARD

NO. P.U. 42(2016)

1 **IN THE MATTER OF** the *Electrical Power*
2 *Control Act, 1994*, SNL 1994, Chapter E-5.1 (the
3 "*EPCA*") and the *Public Utilities Act*, RSNL 1990,
4 Chapter P-47 (the "*Act*"), as amended, and regulations
5 thereunder; and

6
7 **IN THE MATTER OF** an investigation and hearing
8 into supply issues and power outages on the Island
9 Interconnected system; and

10
11 **IN THE MATTER OF** a claim for an award of costs
12 by Danny Dumaresque.

13
14

15 **Application**

16

17 On April 28, 2015 Mr. Dumaresque filed a submission requesting an award of costs for his
18 participation in Phase One of the Board's investigation of the January 2014 supply issues and
19 power outages on the Island Interconnected system (the "Application"). The submission
20 requested that the Board exercise its discretion pursuant to section 90 of the *Public Utilities Act*,
21 RSNL 1990, c. P-47 to order costs to compensate Mr. Dumaresque following completion of
22 Phase One of the investigation. The submission explained that Mr. Dumaresque's interest
23 included ensuring that the reliability of the interconnected system is maintained going forward,
24 in the most timely and cost efficient manner possible. The submission stated:

25

26 ...Mr. Dumaresque is a concerned citizen with an avid interest in the reliability of the
27 provincial power system. As a previous member of the Board of Directors of NL Hydro,
28 an elected Member of the House of Assembly for the District of Eagle River, Labrador,
29 and himself a consumer of electricity in the province, Mr. Dumaresque has been a
30 staunch advocate on behalf of the interests of the people of Newfoundland and Labrador
31 in pursuing an investigation into the reliability and security of the interconnected system.¹

32

33 The submission argued that Mr. Dumaresque has participated in the investigation relying on his
34 own resources. The submission stated:

¹ Mr. Dumaresque's Submission, April 28, 2015, page 2.

1 Mr. Dumaresque does not have other available sources of revenue for purposes of
 2 participating in regulatory hearings but maintains a strong interest in doing so in order to
 3 pursue the provision of reliable and secure power supply to customers.²
 4

5 The submission sought an order for costs based on Mr. Dumaresque's participation thus far in
 6 the process to provide sufficient resources to continue to fully participate in the investigation and
 7 be a conduit of information to the public. The submission argued that Mr. Dumaresque's
 8 participation has been responsible, valuable and reasonably necessary to the process and
 9 warrants an award of costs.

10
 11 On April 30, 2015 Mr. Dumaresque submitted a detailed claim for costs in the amount of
 12 \$137,707.90, with supporting invoices:

- 13
- 14 1. An invoice for Mr. Dumaresque's individual costs, of \$93,000.00, (310 hours at \$300 per
 15 hour).
- 16 2. An invoice for legal fees of \$44,707.90, including HST (63.03 hours at a rate of \$150 per
 17 hour and 75.90 hours at \$350 per hour). This amount includes an outstanding balance of
 18 \$3,806.41 which is not detailed in the invoice.

19
 20 On May 4, 2015 a copy of the submission was circulated to: Newfoundland and Labrador Hydro
 21 ("Hydro"); Newfoundland Power Inc. ("Newfoundland Power"); the Consumer Advocate, Mr.
 22 Thomas Johnson ("Consumer Advocate"); Corner Brook Pulp and Paper Limited, NARL
 23 Refining Limited Partnership and Teck Resources Limited ("Industrial Customer Group"); and
 24 Grand River Keeper Labrador, Inc.

25
 26 On May 14, 2015 Hydro and Newfoundland Power filed submissions.

27
 28 On May 15, 2015 the Consumer Advocate filed a submission.

29
 30 On May 25, 2015 Mr. Dumaresque filed a reply submission.

31 32 **Background**

33
 34 On January 10, 2014 the Board initiated an inquiry and hearing into the circumstances leading up
 35 to and surrounding power outages and system disruptions which occurred on the Island
 36 Interconnected system during the period January 2-8, 2014.

37
 38 In advance of the pre-hearing conference on February 5, 2014 the Board received intervenor
 39 submissions from the Consumer Advocate, the Industrial Customer Group and Mr. Dumaresque.
 40 The Consumer Advocate is appointed annually by the Lieutenant-Governor-in-Council to
 41 represent the interests of domestic and general service consumers in the Province.³
 42

43 On February 19, 2014 the Board issued procedural Order No. P.U. 3(2014) which, among other
 44 things, granted intervenor status to the Consumer Advocate, the Industrial Customer Group and
 45 Mr. Dumaresque. This Order also set out that certain issues would be addressed in an interim

² Ibid., page 2.

³ OC2013-268, OC2014-233 and OC2015-126.

1 report of the Board to be issued on May 15, 2014 and longer term issues would be addressed
2 subsequently in a final report of the Board to be issued after the completion of the investigation.

3
4 On March 7, 2014, Grand Riverkeeper Labrador, Inc. filed a request to become an intervenor.
5 The Board granted intervenor status in Order No. P.U. 15(2014) and also addressed the scope of
6 issues and cautioned that the parameters and scope of the established issues must be respected
7 and that evidence and submissions should be restricted to matters which may be of assistance to
8 the Board in determining these issues.⁴

9
10 On October 8, 2014 the Board advised the parties that, as a result of delays in receiving
11 requested information from Hydro and the impact on the schedule, the investigation would
12 proceed in two phases. Phase One would focus on the immediate reliability issues for the Island
13 Interconnected system prior to the interconnection with Muskrat Falls and Phase Two would
14 proceed thereafter to address issues related to reliability after interconnection with Muskrat Falls.

15
16 The Board issued its Phase One report on September 29, 2016. Phase Two of the Board's
17 investigation is ongoing with a hearing anticipated in the winter of 2017.

18 19 **Submissions**

20
21 Hydro argued that an award of costs is neither justified nor appropriate. Hydro noted that Mr.
22 Dumareque's interests were appropriately represented by the Consumer Advocate, he did not
23 submit expert evidence, and the majority of his requests for information were outside the scope
24 of the proceeding. Hydro submitted that Mr. Dumaresque did not contribute to the understanding
25 of the issues before the Board but rather contributed to the length of time and increased costs for
26 all parties. Hydro stated that the scope of Mr. Dumaresque's intervention falls within the
27 legislative mandate of the Consumer Advocate and is included in the Consumer Advocate's
28 intervenor submission and that his interests as a concerned citizen and consumer of electricity
29 were well represented by the Consumer Advocate. Hydro stated:

30
31 Hydro recognizes the importance of an open regulatory process in Newfoundland and
32 Labrador and the right of individual ratepayers to make submissions to the Board.
33 However, Hydro also recognizes the important role played by the Consumer Advocate in
34 representing all ratepayers and the contribution this role makes to an efficient regulatory
35 process in this province. The costs of the Consumer Advocate are ultimately borne by the
36 ratepayers. Hydro submits these same ratepayers should not be required to bear the
37 additional costs of Mr. Dumaresque, or of any other concerned citizen, who volunteers to
38 intervene on their behalf, particularly if such intervention results in delays to the
39 proceeding in question or is duplicative of the work of the Consumer Advocate.⁵

40
41 Hydro argued that, if there is an award of costs, the number of hours and the rate are not
42 reasonable or appropriate and should be substantially reduced. In particular Hydro noted that the
43 claim includes time related to: i) the preparation of requests for information, almost half of which
44 were found to be outside of the scope of the proceeding; ii) other proceedings before the Board;
45 iii) preparation and speaking to the media; and, iv) Nalcor's annual general meeting. Hydro also

⁴ Order No. P.U. 15(2014).

⁵ Hydro Submission, May 14, 2015, page 8.

1 took issue with the rate of \$300 for Mr. Dumaresque's time, noting the claim includes several
2 hours of copying and distributing.

3
4 In relation to the claim for legal fees, Hydro stated that it is unclear why Mr. Dumaresque
5 required his own legal counsel and that Mr. Dumaresque did not establish that he had a legal
6 interest to protect or advance, distinct from the interests of other customers, which required legal
7 advice and assistance throughout the proceeding. Hydro stated:

8
9 Should the Board consider any of the cost claim of Mr. Dumaresque to be appropriate,
10 Hydro submits that the amount reimbursed for legal costs should be substantially reduced
11 by virtue of the lack of active contribution to the proceeding by Mr. Dumaresque's legal
12 counsel.⁶

13
14 Hydro further stated:

15
16 Hydro is concerned with the significant amount of Mr. Dumaresque's request for costs
17 and the signal that such an award could send to other potential intervenors. It is important
18 to note that any amount that may be paid to Mr. Dumaresque by way of costs, to someone
19 who is essentially a volunteer, will ultimately be the responsibility of the Newfoundland
20 and Labrador ratepayers. In this proceeding, and pursuant to his statutory mandate, the
21 interests of the province's electricity consumers have been well represented by the
22 Consumer Advocate.⁷

23
24 Hydro argued that allowing Mr. Dumaresque's claim for costs would be inconsistent with
25 regulatory practice in other jurisdictions.

26
27 Newfoundland Power submitted that it ought not to bear responsibility for payment of any
28 portion of Mr. Dumaresque's costs in light of Liberty's findings with respect to the causes of the
29 outages and the fact that Mr. Dumaresque's intervention focused on Hydro and not
30 Newfoundland Power. In addition Newfoundland Power suggested that the Board first consider
31 whether Mr. Dumaresque has contributed to the Board's understanding of the issues and whether
32 his interest was duplicative of the interests represented by the Consumer Advocate.
33 Newfoundland Power noted that Mr. Dumaresque seeks reimbursement at the equivalent of a
34 professional hourly rate for personal time and states that it is not aware of any other instance
35 where a participant has been reimbursed for costs of that nature. Newfoundland Power submits
36 that it is not appropriate to reimburse Mr. Dumaresque at the equivalent of a professional rate for
37 personal time.

38
39 It was the Consumer Advocate's position that should the Board award any costs to Mr.
40 Dumaresque these costs should not be recoverable from electrical customers in the province. The
41 Consumer Advocate submitted that the principles to be applied by the Board in the exercise of its
42 discretion as to costs were set out in the utilities' submissions.

43
44 Mr. Dumaresque submitted in his reply that there is no requirement in the legislation requiring an
45 intervenor to have an official or statutory mandate, and commented:

⁶ Ibid., page 6.

⁷ Ibid.

1 This fact aside, Mr. Dumaresque would like to note that he has an extensive record of
2 representing the people of the Province as an elected Member of the House of Assembly,
3 as the president of the Liberal Party and as a provincial Liberal leadership candidate.
4 While he acknowledges that he does not hold these offices at the present time, he does
5 maintain a provincial constituency for which he represents in his capacity as an intervenor
6 in the Investigation.⁸

7
8 Mr. Dumaresque further argued that the issues explored by the Consumer Advocate were
9 different and there was very little overlap in the requests for information. Mr. Dumaresque noted
10 that nearly 70 requests for information remained which posed relevant and valuable questions.
11 Mr. Dumaresque explained that his time logs are not exhaustive and do not reflect all of his time.
12 Further he argued that his continual consultation with legal counsel allowed him to participate in
13 the investigation as effectively as possible. Mr. Dumaresque argued that he applied for
14 intervenor status on the basis of applying for costs, and commented:

15
16 Mr. Dumaresque would also note that one of the key purposes of the Board is to enlist
17 members of the public to participate in these important public matters but that very few
18 are able to do so due to the financial constraints of dedicating large amounts of time, as
19 well as having to pay for out-of-pocket expense in advance of any potential funding. Mr.
20 Dumaresque notes that following the approach suggest(sic) by Hydro in its submission,
21 whereby so-called “volunteers” can never expect to recover costs, or will recover only
22 very minimal costs regardless of the complexity of the matter, will set an even more
23 troubling precedent in that there will be a substantial chilling effect for public
24 participation in Board matters.⁹

25
26 Mr. Dumaresque submitted that he dedicated considerable time and expense in an effort to bring
27 forward public issues that would not otherwise have been addressed and that he believes that his
28 participation was valuable and that his cost application is both reasonable and appropriate.

29 30 **Board Findings**

31
32 Section 90 of the *Public Utilities Act* sets out the Board’s authority to award costs in a
33 proceeding but does not prescribe how the Board’s discretion is to be exercised in relation to a
34 claim for costs. The Board has stated in the past that an award of costs will be made with due
35 consideration of all of the circumstances including the length and complexity of the matter,
36 financial circumstances of the claimant, the contribution made and whether there are other
37 parties that could have properly represented the interests of the claimant.¹⁰ The Board has also
38 stated that in reviewing a claim for costs it takes a pragmatic approach in the context of the
39 Board’s general knowledge and expertise and the particular circumstances to determine the
40 award which is fair and reasonable to the claimant, the utility and consumers, given that the
41 utility may seek recovery of the cost in rates.¹¹

42
43 In considering a claim for costs the Board must balance the claimant’s interest in having a
44 reasonable opportunity to provide fair comment with the interest of consumers generally in an

⁸ Mr. Dumaresque’s Reply Submission, May 25, 2015, pages 2-3.

⁹ Ibid., page 4.

¹⁰ Order No. P.U. 1(2015), page 3.

¹¹ Order No. P.U. 41(2004) and Order No. P.U. 42(2004).

1 efficient regulatory process with a view to ensuring least possible cost consistent with reliable
2 service. The issues raised in the investigation were significant for all customers on the Island
3 Interconnected system, and notice was published on several occasions inviting participation in
4 the investigation. While the Board encourages participation in its proceedings, sound regulation
5 would not encourage duplicative efforts which protract a proceeding and increase costs without
6 any measurable contribution to the issues to be addressed.

7
8 The circumstances of this claim for costs are somewhat unusual in that Mr. Dumaresque did not
9 claim that he had a unique interest. While Mr. Dumaresque argued that he had an avid interest in
10 the reliability of the provincial power system as well as related experience he did not
11 demonstrate that he had an interest distinct from the interests represented by the Consumer
12 Advocate. The Board finds that his participation failed to raise any distinct issues which were not
13 within the parameters of the representation of the Consumer Advocate. In addition the Board at
14 times found that Mr. Dumaresque raised matters which were clearly outside of the scope of the
15 proceeding.¹² Mr. Dumaresque argued that he applied for intervenor status on the basis of
16 applying for costs. The Board notes that Mr. Dumaresque was advised that an award of costs is
17 discretionary with no guarantee that costs will be awarded, and where there is an award it is
18 often substantially less than the amount claimed.¹³

19
20 The Board notes that the claim for Mr. Dumaresque's time of \$93,000 reflects time related to
21 issues beyond the scope of this proceeding and other unrelated matters before the Board. In
22 addition the amount reflects time in preparation for and attendance at media briefings and the
23 Nalcor annual general meeting. This work was not of value in this proceeding. In addition the
24 Board finds that the proposed hourly rate of \$300 for Mr. Dumaresque is not reasonable, given
25 his training, experience and contribution to the proceeding. The Board does, however,
26 acknowledge the significant time and effort which Mr. Dumaresque devoted to this matter. It is
27 clear that Mr. Dumaresque had a genuine interest and concern in the issues and, given the
28 extraordinary nature of this proceeding, the Board accepts that it is appropriate to award some
29 costs to reflect his contribution.

30
31 In relation to the claim for legal costs, the Board notes that the cost submission states that the
32 total amount claimed for solicitor client costs is \$40,700.91 but the claim for costs appears to
33 include the full amount of the invoice for legal costs of \$44,707.90 which includes an
34 outstanding balance of \$3,806.41. Since no explanation is provided in relation to the outstanding
35 balance the total amount claimed should not include this amount. In relation to the legal work
36 that was completed the Board believes that the need for legal advice would have been
37 significantly reduced or avoided entirely had Mr. Dumaresque consulted with the Consumer
38 Advocate. As already stated the Board has found that Mr. Dumaresque's interest was within the
39 scope of the representation of the Consumer Advocate. In the circumstances the Board finds that
40 Mr. Dumaresque has not demonstrated that the claim for legal fees was necessary and of value in
41 this proceeding. Nevertheless the Board acknowledges that this was an unprecedented
42 proceeding involving matters of great importance to the province. While the Board will not

¹² In Order No. P.U. 41(2014) the Board accepted Hydro's motion that the following requests for information filed by Mr. Dumaresque were outside of the scope of the proceeding DD-NLH-1 to 9, 12 to 15, 17 to 23, 28, 42, 44, 45, 48 to 50, 54, 57, 59, 61 to 64, 69, 71, 72, 74 to 84 and 86 to 90 and denied the motion with respect to DD-NLH-10, 11, 16, 52, 56, 58, 70 and 73.

¹³ Letter to Mr. Dumaresque, June 27, 2014.

1 accept the amount claimed with respect to legal fees it believes that it is appropriate in these
2 unique circumstances to award some costs to reflect reasonably necessary legal advice in relation
3 to this extraordinary proceeding.
4

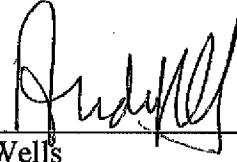
5 The Board will make an award of costs but believes that Mr. Dumaresque's claim is out of scale
6 with his contribution to this proceeding. Given the Board's assessment of Mr. Dumaresque's
7 contribution, the Board finds that an amount of \$5,000 is a fair and reasonable amount to
8 compensate him for his time and legal fees.
9

10 The Board believes that Newfoundland Power should not be responsible for these costs and
11 acknowledges the Consumer Advocate's position that consumers should not be responsible for
12 these costs. The Board will require Hydro to pay costs in the amount of \$5,000 to Mr.
13 Dumaresque with the issue of whether Hydro will have recovery of any part of these costs to be
14 addressed at the conclusion of the investigation.
15
16

17 **IT IS THEREFORE ORDERED THAT:**
18

- 19 1. Mr. Dumaresque is entitled to an award of costs in the amount of \$5,000, exclusive of
20 HST.
21
- 22 2. Hydro shall within 30 days of this Order pay costs in the amount of \$5,000, exclusive of
23 HST, to Mr. Dumaresque with recovery of these costs to be addressed in a subsequent
24 Order of the Board.

DATED at St. John's, Newfoundland and Labrador, this 4th day of October, 2016.



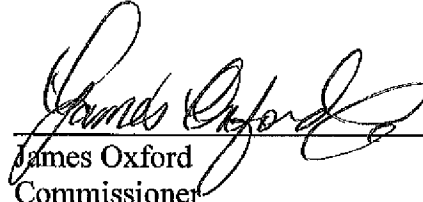
Andy Wells
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