

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

AN ORDER OF THE BOARD

NO. P.U. 43(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** a prudence review
8 of certain projects and expenditures of
9 Newfoundland and Labrador Hydro; and
10

11 **IN THE MATTER OF** a request for an award of
12 costs by Danny Dumaresque.
13
14

15 **Application**

16
17 On December 23, 2015 Danny Dumaresque filed a submission requesting an award of costs for
18 his participation in the Board's prudence review of certain projects and expenditures as part of
19 the general rate application of Newfoundland and Labrador Hydro (the "Application"). The
20 submission requested that the Board exercise its discretion pursuant to section 90 of the *Public*
21 *Utilities Act*, RSNL 1990, c. P-47 to order costs to compensate Mr. Dumaresque following
22 completion of the review. The submission explained that Mr. Dumaresque's interest included
23 ensuring that additional power has been provided to the province in the most prudent and most
24 cost efficient manner possible. The submission stated:
25

26 ...Mr. Dumaresque is a concerned citizen with an avid interest in the reliability and
27 prudent operation of the provincial power system. As a previous member of the Board of
28 Directors of NL Hydro, an elected Member of the House of Assembly for the District of
29 Eagle River, Labrador, and himself a consumer of electricity in the province, Mr.
30 Dumaresque has been a staunch advocate on behalf of the interests of the people of
31 Newfoundland and Labrador in participating in the review regarding the prudence, value,
32 and cost effectiveness of the new generation assets at Holyrood.¹
33

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

¹ Mr. Dumaresque Submission, December 23, 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 prudent and cost effective power supply to customers.²
4

5 The submission stated that the prudence review was a time intensive and demanding process and
6 that Mr. Dumaresque reviewed all evidence, materials and reports submitted by all parties,
7 prepared requests for information, completed comprehensive research on the relevant issues, and
8 participated in the hearing by carrying out relevant and exhaustive cross examination. The
9 submission argued that the issues addressed by Mr. Dumaresque were unique and not examined
10 by any other party in the review and that Mr. Dumaresque's participation has been responsible,
11 valuable and necessary to the process and warrants an award of costs.
12

13 Mr. Dumaresque submitted a detailed claim for costs in the amount of \$85,475.60, with
14 supporting invoices.
15

- 16 1. An invoice for Mr. Dumaresque's individual costs of \$58,500.00, (195 hours at \$300 per
17 hour).
- 18 2. An invoice for legal fees of \$26,975.60, including HST and disbursements (71.44 hours
19 at a rate of \$180 per hour and 30.25 hours at \$350 per hour).
20

21 A copy of the submission was circulated to Newfoundland and Labrador Hydro ("Hydro"). Mr.
22 Dumaresque originally claimed solicitor-client privilege with respect to his submission but
23 waived that privilege upon notification that Hydro intended to challenge the claim.
24

25 On June 1, 2016 Hydro filed comments.
26

27 On July 28, 2016 Mr. Dumaresque filed a reply submission.
28

29 **Background**

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31 The prudence review was undertaken as part of the Board's consideration of Hydro's general rate
32 application. The review examined the prudence of Hydro's actions and decisions related to 11
33 projects and expenditures for which Hydro was seeking cost recovery from customers.
34

35 On February 27, 2015 the Board advised the intervenors in Hydro's 2014 Supplementary Capital
36 Budget Application relating to the new Holyrood combustion turbine generator that it would
37 conduct a prudence review of certain matters, including the purchase and installation of the new
38 Holyrood combustion turbine. The intervenors in the capital budget application (Danny
39 Dumaresque, Grand Riverkeeper Labrador Inc., and Sierra Club Canada) were invited to file for
40 limited intervenor status in the general rate application to participate in issues related to the
41 prudence review only. Mr. Dumaresque filed for and was granted limited intervenor status in the
42 general rate application for this purpose.
43

44 On April 26, 2016 the Board issued Order No. P.U. 13(2016) relating to the prudence review.
45 Hydro submitted a compliance filing relating to the prudence review on May 25, 2016. The

² Ibid, page 3.

1 Board's financial consultants reviewed the compliance filing and submitted a report on
2 September 9, 2016. The parties were provided the opportunity to submit comments on Grant
3 Thornton's report. The Board did not receive any comment from Mr. Dumaresque.
4

5 **Submissions**

6

7 Hydro noted in its submission that, pursuant to the *Act*, the Board has a broad discretion whether
8 to award costs and, if so, to determine the amount of costs but that there is no absolute right for
9 any party to recover its costs. Hydro further noted that, in exercising its discretion to award costs,
10 the Board has stated that it will consider all the circumstances in a proceeding, in particular:
11 whether other intervenors could properly represent the applicant's interests before the Board, and
12 the degree to which the intervenor contributed to an understanding of the matters before the
13 Board in the proceeding.
14

15 Hydro submitted that Mr. Dumaresque's interests were within the legislative mandate of the
16 Consumer Advocate and were appropriately represented by the Consumer Advocate. Hydro
17 argued that ratepayers in the province should not be required to pay the costs of a Consumer
18 Advocate as well as the costs of a "concerned citizen" attempting to act in the same role as the
19 Consumer Advocate. Hydro provided a recent decision from the Nova Scotia Utility and Review
20 Board ("NSUARB"). The NSUARB denied costs to volunteer associations stating³:
21

22 [449] With respect to future proceedings, the mandate LPRO has taken upon itself is one
23 which the Board views as largely served by the CA (Consumer Advocate) and SBA
24 (Small Business Advocate) and, therefore, LPRO should not assume that costs would be
25 available in, for example, upcoming NSPI rate cases or other proceedings.
26

27 Hydro noted that Mr. Dumaresque's participation in the prudence review was focused on the
28 new Holyrood combustion turbine project. Hydro submitted that Mr. Dumaresque did not
29 contribute to the understanding of the issues before the Board and that his intervention added no
30 value to the proceedings. Hydro further submitted that Mr. Dumaresque's intervention
31 unnecessarily increased the costs of all parties involved.
32

33 Hydro stated that the hourly rate charged by Mr. Dumaresque is unreasonable and exceeds the
34 maximum intervenor rate permitted in other Canadian jurisdictions. Hydro advised that the
35 Alberta Utilities Commission ("AUC") has a maximum rate of \$270 per hour for consultants,
36 analysts and experts with more than 12 years experience. Hydro noted that the AUC may also
37 award a Preparation Honorarium in the range of \$300 to \$2500 to a local intervener who
38 prepares a submission without expert help. Hydro argued that, if there is an award of costs in this
39 case, the number of hours and the hourly rate should be substantially reduced. In particular,
40 Hydro noted that the claim included 10 hours related to preparation and speaking to the media as
41 well as 19 hours that are duplicated from Mr. Dumaresque's submission for costs in a separate
42 proceeding.
43

44 In relation to the claim for legal fees, Hydro stated that it is unclear why Mr. Dumaresque
45 required his own legal counsel and that Mr. Dumaresque did not establish that he had a legal

³ 2013 NSUARB 154.

1 interest to protect or advance, distinct from the interests of other customers, which required legal
2 advice and assistance throughout the proceeding. Hydro stated:

3
4 Should the Board consider any of the cost claim of Mr. Dumaresque to be appropriate,
5 Hydro submits that the amount reimbursed for legal costs should be substantially reduced
6 by virtue of the lack of active contribution to the proceeding by Mr. Dumaresque's legal
7 counsel.⁴

8
9 Hydro further stated:

10
11 Hydro is concerned with the significant amount of Mr. Dumaresque's request for costs
12 and the signal that such an award could send to other potential intervenors. It is important
13 to note that any amount that may be paid to Mr. Dumaresque by way of costs, to someone
14 who is essentially a volunteer, will ultimately be the responsibility of the Newfoundland
15 and Labrador ratepayers. In this proceeding, and pursuant to his statutory mandate, the
16 interests of the province's electricity consumers have been well represented by the
17 Consumer Advocate.⁵

18
19 Mr. Dumaresque submitted in his reply that there is no requirement in the legislation that an
20 intervenor have an official or statutory mandate, and commented:

21
22 Indeed, by the Board granting Mr. Dumaresque Intervenor status, Mr. Dumaresque was
23 therefore granted the mandate of fulfilling the role of Intervenor in all respects.⁶

24
25 Mr. Dumaresque further argued that there was little, if any, overlap in the issues explored by the
26 Consumer Advocate and Mr. Dumaresque. Mr. Dumaresque stated his focus related to the new
27 Holyrood combustion turbine project and that the Consumer Advocate did not ask any questions
28 on this project. Mr. Dumaresque stated:

29
30 Mr. Dumaresque acknowledges that the Consumer Advocate's interests in the Outage
31 Inquiry and Prudence Review relate to domestic and general service customers of the
32 province. However, Mr. Dumaresque respectfully submits that, while the Consumer
33 Advocate was certainly able to represent those interests pursued by Mr. Dumaresque, the
34 Consumer Advocate did not represent these interests in practice.⁷

35
36 Mr. Dumaresque explained that he spoke to a number of experts with respect to providing
37 evidence in relation to the new Holyrood combustion turbine but that he was unable to incur the
38 associated expenditures. He stated:

39
40 Mr. Dumaresque submits that he participated in the Prudence Review as fully and
41 effectually as he possibly could have within the confines of the financial limitations he
42 faced.

⁴ Hydro Submission, June 1, 2016, page 6.

⁵ Ibid.

⁶ Mr. Dumaresque Reply Submission, July 28, 2016, page 3.

⁷ Ibid.

1 Therefore, Mr. Dumaresque submits that any such lack of contribution to the Board's
2 understanding of the prudence of Hydro in the planning, procurement and construction of
3 the CT project are a result of the limitations of the Intervenor process and not the actions
4 of Mr. Dumaresque.⁸
5

6 Mr. Dumaresque also disagreed with Hydro's suggestion that his contribution was not valuable
7 because the Board did not find the new Holyrood combustion turbine project to be imprudent.
8

9 Mr. Dumaresque submitted that the hourly rate is commensurate with his experience and
10 qualified background in these areas. Further, Mr. Dumaresque stated that his legal counsel was
11 consulted on each aspect throughout the proceedings which allowed him to participate in the
12 investigation as effectively as possible.
13

14 Mr. Dumaresque stated:

15
16 While Mr. Dumaresque acknowledges that the awarding of costs in any matter before the
17 Board is discretionary, he notes that he applied for Intervenor status in this Outage
18 Inquiry, and more particularly the Prudence Review, and was accepted as such, on the
19 basis that he would be applying for costs.⁹
20

21 Mr. Dumaresque submitted that he dedicated considerable time and expense in an effort to bring
22 forward public issues that would not otherwise have been addressed and that his participation
23 was valuable and that his cost application is both reasonable and appropriate.
24

25 **Board Findings**

26
27 The Board commented on its jurisdiction and approach in relation to requests for of an award of
28 costs in Order No. P.U. 42(2016). The Board stated:
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30 Section 90 of the *Public Utilities Act* sets out the Board's authority to award costs in a
31 proceeding but does not prescribe how the Board's discretion is to be exercised in relation
32 to a claim for costs. The Board has stated in the past that an award of costs will be made
33 with due consideration of all of the circumstances including the length and complexity of
34 the matter, financial circumstances of the claimant, the contribution made and whether
35 there are other parties that could have properly represented the interests of the claimant.
36 The Board has also stated that in reviewing a claim for costs it takes a pragmatic
37 approach in the context of the Board's general knowledge and expertise and the particular
38 circumstances to determine the award which is fair and reasonable to the claimant, the
39 utility and consumers, given that the utility may seek recovery of the cost in rates.
40

41 In considering a claim for costs the Board must balance the claimant's interest in having a
42 reasonable opportunity to provide fair comment with the interest of consumers generally
43 in an efficient regulatory process with a view to ensuring least possible cost consistent
44 with reliable service. The issues raised in the investigation were significant for all
45 customers on the Island Interconnected system and notice was published on several
46 occasions inviting participation in the investigation. While the Board encourages

⁸ Ibid., page 4.

⁹ Ibid., page 5.

1 participation in its proceedings, sound regulation would not encourage duplicative efforts
2 which protracts a proceeding and increases costs without any measurable contribution to
3 the issues to be addressed.¹⁰
4

5 In this matter, Mr. Dumaresque claims that he has interests different than those of the Consumer
6 Advocate and, while the Consumer Advocate could have represented his interests, he did not.
7 The Board recognizes that Mr. Dumaresque limited his participation to the new Holyrood
8 combustion turbine project. However, any issues which Mr. Dumaresque had in relation to this
9 project could have been investigated and represented through consultation with the Consumer
10 Advocate. The Board finds that Mr. Dumaresque's participation failed to raise any distinct issues
11 which were not within the scope of the Consumer Advocate's intervention. The Board believes
12 there were alternate, more efficient, processes available to convey Mr. Dumaresque's views to
13 the Board.
14

15 The Board commented on the intervention and participation of Mr. Dumaresque in the prudence
16 review in Order No. P.U. 13(2016). The Board stated:
17

18 The only intervenor to challenge Liberty's prudence finding for this project was Danny
19 Dumaresque. Mr. Dumaresque focused in his questioning of Hydro and in his final
20 submission primarily on the procurement process and costs. The Board has reviewed the
21 information Mr. Dumaresque provided on alternatives and costs and finds that it is of
22 limited value. It appears to be mostly third-party information taken from websites with no
23 verification or authentication of the validity of the contents or source. No evidentiary
24 support was provided to explain the relevance of this information to the circumstances of
25 this project. Therefore, the Board gives this information no weight.
26

27 The Board has reviewed the record for the issues identified by Mr. Dumaresque and finds
28 that Hydro has provided complete responses in evidence and testimony to all of his
29 claims.¹¹
30

31 The Board notes that Mr. Dumaresque's intervention was limited to a project that had been
32 found by the Board's consultants to be prudent and that all the issues raised by Mr. Dumaresque
33 were fully answered by Hydro. Further, the Board found that the information provided by Mr.
34 Dumaresque was of limited value and was not supported. As a result, the Board gave the
35 information no weight.
36

37 The Board finds that Mr. Dumaresque did not contribute to its understanding of the issues
38 addressed in Order No. P.U. 13(2016). Given the Board's assessment of Mr. Dumaresque's
39 contribution, the Board will not exercise its discretion to make an award of costs to Mr.
40 Dumaresque for his participation in the prudence review.

¹⁰ Order No. P.U. 42(2016), pages 5-6.

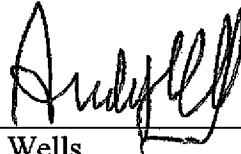
¹¹ Order No. P.U. 13(2016), page 59.

1 **IT IS THEREFORE ORDERED THAT:**

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3 1. The request for award of costs is denied.

DATED at St. John's, Newfoundland and Labrador, this 12th day of October, 2016.



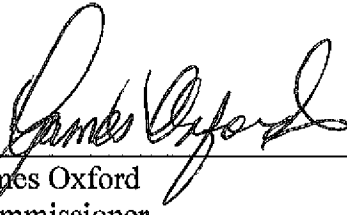
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Vice-Chair



Dwanda Newman, LL.B.
Commissioner



James Oxford
Commissioner



Sara Kean
Assistant Board Secretary