

Order No. 97/18

**AWARD OF COSTS TO THE
ASSEMBLY OF MANITOBA CHIEFS
FOR THEIR INTERVENTION IN THE
MANITOBA HYDRO 2017/18 AND 2018/19 GENERAL RATE APPLICATION**

July 24, 2018

BEFORE: Robert Gabor, Q.C., Chair
Marilyn Kapitany, B.Sc., (Hon), M.Sc., Vice Chair
Hugh Grant, Ph.D., Member
Shawn McCutcheon, Member
Sharon McKay, BGS, Member
Larry Ring, Q.C., Member

Table of Contents

1.0 Introduction 3

2.0 Application..... 3

3.0 Manitoba Hydro’s Comments..... 5

4.0 AMC’s Response Comments..... 6

5.0 Board Findings 8

6.0 IT IS THEREFORE ORDERED THAT: 10

1.0 Introduction

By this Order, the Public Utilities Board (Board) approves an award of costs of \$148,027.88 to the Assembly of Manitoba Chiefs for their intervention in Manitoba Hydro's 2017/18 and 2018/19 General Rate Application.

2.0 Application

On June 1, 2018, the Association of Manitoba Chiefs (AMC) filed with the Board an Application for an Award of Costs for its intervention at the Manitoba Hydro 2017/18 and 2018/19 General Rate Application.

Pursuant to Section 56 of *The Public Utilities Board Act*, the Board has jurisdiction to award costs of, and incidental to, any proceeding. The Board's Rules of Practice and Procedure (Rules) stipulate the Board may award costs to be paid to an Intervener which has:

1. made a significant contribution that is relevant to the proceeding and contributed to a better understanding, by all parties, of the issues before the Board;
2. participated in the hearing in a responsible manner and cooperated with other Interveners with common objectives in the outcome of the proceedings in order to avoid a duplication of intervention;
3. insufficient financial resources to present the case adequately without an award of costs; and
4. a substantial interest in the outcome of the proceeding, and represents the interests of a substantial number of the ratepayers.

In Order 70/17 the Board found that the sufficiency of financial resources (point #3, above) would not be a factor in determining the cost awards in the General Rate Application, as the full Board was in the process of reviewing its rules and policies respecting interveners, including the factors to be considered for awarding costs.

The Board approved Intervener status to AMC in Order 70/17, the Procedural Order for Manitoba Hydro's 2017/18 and 2018/19 General Rate Application. In the same Order, the Board requested that all approved interveners file a budget proposal with the Board by July 14, 2017.

On July 14, 2017, AMC filed a budget proposal with the Board. On August 25, 2017, the Board provided its decision regarding intervener budgets. In the case of AMC, the Board reduced the legal disbursement budget by \$1,500 to reflect the availability of hearing live streaming and the reduced need for counsel in-person hearing attendance.

On October 26, 2017, AMC provided the Board a revised budget to correct for the inclusion of taxes, which were omitted from AMC's original budget. On November 30, 2017, the Board acknowledged AMC's revised budget submission.

In Order 70/17, the Board approved interim invoicing from interveners for the duration of the General Rate Application hearing. All interim invoices were subject to a 25% holdback. Based on a statement of accounts, the total interim costs paid to date to AMC's counsel is \$115,667.06 (including taxes).

On June 1, 2018, AMC filed its Cost Application for its participation in Manitoba Hydro's 2017/18 and 2018/19 General Rate Application. The Cost Application was supported by statements of accounts as summarized below:

	Budget Total	Cost Application Total*
Legal Costs		
Counsel (Fees)	\$70,875.00	\$81,417.00
Counsel (Disbursements)	\$12,475.00	\$13,971.25
GST	NIL	NIL
PST	\$5,670.00	\$7,631.06
<i>Sub Total Legal</i>	<i>\$89,020.00</i>	<i>\$103,019.31</i>
Consultants		
Raphals (Fees)	\$61,875.00	\$44,000.00
Raphals (Disbursements)	\$2,100.00	\$1,008.57
<i>Sub Total Consultants</i>	<i>\$63,975.00</i>	<i>\$45,008.57</i>
TOTAL COSTS *	\$152,995.00	\$148,027.88

* The legal fees portion of the Cost Application accounts shown are based on hourly rates of \$190/hour for senior counsel and \$140/hour for junior counsel, which were used by AMC in its approved budget proposal of July 14, 2017.

As part of its submission, AMC stated that while the legal fees portion of its Cost Application amounts were calculated using the hourly rates used in its approved budget proposal (i.e. \$190/hour for senior counsel and \$140/hour for junior counsel), AMC actually billed its counsel's standard rates of \$250/hour for senior counsel and \$205/hour for junior counsel. Using AMC counsel's standard rates, AMC's total legal fees are significantly higher than AMC's approved budget. In light of the financial hardship experienced by AMC, AMC is requesting a cost award to the full budget amount in order to offset the additional costs that AMC will otherwise have to bear.

3.0 Manitoba Hydro's Comments

On June 15, 2018, Manitoba Hydro provided its comments regarding AMC's Cost Application. Manitoba Hydro raised the following areas of concern.

First, Manitoba Hydro noted that AMC's Cost Application accounts, at the Board's approved rates, totaled \$148,027.88. However, AMC requests that the Board approve

costs to the full budget amount on the basis that its lawyers' standard rates are higher than those authorized by the Board's tariff. Manitoba Hydro also noted that all other legal counsel participating in the GRA have charged rates consistent with the Board's tariff, regardless of the rate charged in other circumstances. Manitoba Hydro therefore submitted that charging an additional sum simply because there is room left in the budget is not reasonable and could establish a very poor precedent for future hearings.

Second, Manitoba Hydro reiterated its prior concerns with respect to the hourly rates charged by AMC's Consultant, which are above the rates set forth in the Board's policy for advisory services.

Third, Manitoba Hydro noted that AMC provided redacted invoices and receipts related to legal services provided. The redactions included in AMC's Cost Application materials limit Manitoba Hydro's ability to assess the reasonableness of the expenses submitted. As such, Manitoba Hydro submitted that AMC should provide copies of un-redacted invoices or, in the alternative, file a request pursuant to Rule 13 of the Board's Rules of Practice and Procedure seeking confidential treatment of the information and providing its rationale for the same.

4.0 AMC's Response Comments

On June 22, 2018, AMC filed a response to Manitoba Hydro's comments of June 15, 2018. In its submission, AMC explained that the room remaining in the budget is simply reflective of the rebalancing of the division of labour between legal counsel and the expert consultant as the hearing evolved, relative to its initial budget estimates. AMC also stated that it has limited financial capacity and therefore requests compensation at the full budgeted amount as this enhances predictability for the finances of AMC and other interveners, as well as for Manitoba Hydro.

Regarding the billing rate of its consultant, AMC stated that Manitoba Hydro is attempting to relitigate an issue that had already been decided by the Board, and that this attempt should be rejected.

In response to Manitoba Hydro's request for the removal of redactions in AMC's legal invoices, AMC disagreed that these redactions should be subject to the provisions of Rule 13 since Rule 13 applies to evidence relied on in a proceeding of the Board. Legal invoices in a Cost Application are not evidence and are prima facie subject to solicitor-client privilege. However, AMC consented to the disclosure of its invoices (with almost all of the original redactions removed) to Manitoba Hydro only for the purpose of the review of its Cost Application. AMC also noted that its redacted entries add up to only \$5,555 in legal costs and that Manitoba Hydro did not raise any objections to any other legal expenses.

5.0 Board Findings

The Board has reviewed the Cost Application by AMC, the comments provided by Manitoba Hydro, as well as the response from AMC, which included legal invoices with the removal of almost all of AMC's initial redactions. The Board finds that AMC meets all of the requirements for a cost award.

The Board accepts AMC's consultant cost totals as filed as they have been calculated using rates equal to AMC's approved budget proposal and are reasonable.

In regards to the legal fees portion of AMC's Cost Application, the Board notes that AMC's Intervener Application and Budget proposal both included legal fees of \$190/hour (senior counsel) and \$140/hour (junior counsel), which were consistent with the Board's policy and billing rates for advisory services. The Board also notes that AMC's Intervener Application and Budget proposal did not make reference to a different commercial arrangement between counsel and AMC. As the Board did not receive a budget revision request for different legal hourly rates, the Board determines that the legal hourly rates included in AMC's approved budget are to be those used in the determination of AMC's total cost award. While the Board is mindful of AMC's financial limitations, the Board agrees with Manitoba Hydro that awarding an additional sum simply because there is room left in the budget is not reasonable.

Regarding the issue of AMC's invoice redactions, the Board finds that the costs included in AMC's partially unredacted Cost Application materials to be reasonable. Going forward, the Board finds that, where costs are shared with other client files, invoices submitted to the Board should only include those costs (and supporting documentation) applicable to the Board proceeding, thereby eliminating the need for redactions.

As a result, the Board approves a total cost award of \$148,027.88 (inclusive of taxes). Based on \$115,667.06 in interim costs paid out to date, the total balance owing is \$32,360.82 (inclusive of taxes).

Board decisions may be appealed in accordance with the provisions of Section 58 of *The Public Utilities Board Act*, or reviewed in accordance with Section 36 of the Board's Rules of Practice and Procedure. The Board's Rules may be viewed on the Board's website at www.pubmanitoba.ca.

6.0 IT IS THEREFORE ORDERED THAT:

1. The Application of the Assembly of Manitoba Chiefs for an award of costs BE AND IS HEREBY APPROVED in the total amount of \$148,027.88.
2. Manitoba Hydro is to pay Olthuis Kleer Townshend LLP, for work undertaken on behalf of the Assembly of Manitoba Chiefs, the holdback amount and final invoice amount of \$32,360.82.
3. Costs be payable by Manitoba Hydro to Olthuis Kleer Townshend LLP within 15 days of the date of this Order.

THE PUBLIC UTILITIES BOARD

"Robert Gabor, Q.C."
Chair

"Darren Christle MPA, BA, CCLP, P.Log, MCIT"
Secretary

Certified a true copy of Order No. 97/18
issued by The Public Utilities Board



Secretary