

Order No. 118/19

**AWARD OF COSTS TO THE
CONSUMERS ASSOCIATION OF CANADA (MANITOBA)
FOR THEIR INTERVENTION IN THE
MANITOBA HYDRO 2019/20 GENERAL RATE APPLICATION**

August 19, 2019

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

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1.0 Introduction

By this Order, the Public Utilities Board of Manitoba (Board) approves an award of costs of \$185,604.25 to the Consumers Association of Canada (Manitoba) and Winnipeg Harvest (Consumers Coalition or the Coalition) for their intervention in Manitoba Hydro's 2019/20 General Rate Application.

This Order on the Costs Application by the Consumers Coalition will be more detailed than the Costs Orders for the other Interveners to the Manitoba Hydro 2019/20 General Rate Application as there was a significant increase between the original Consumer Coalition Cost Estimate and the Final Costs Application. The Consumers Coalition maintains the increase arose because of the Supplement Manitoba Hydro filed on February 14, 2019.

2.0 Background

By letter dated November 12, 2018 Manitoba Hydro wrote the Public Utilities Board to advise of its intention with respect to the filing of a 2019/20 General Rate Application (GRA) and to seek comment from the Board of Hydro's proposal as to the process for the GRA process.

On November 21, 2018 the PUB wrote all the parties of record, including Mr. Williams and Ms Dilay for the Consumers Coalition, with some comments on the proposed process. The Board letter included the following comments about Intervener Applications and Costs:

“The Board has determined that the 2019/20 Hydro GRA will follow the process for Intervener Applications and Costs set out in the attached Intervener Costs Policy, including the attached revised Intervener Application form and Intervener Costs Application spreadsheet. Questions in relation to these forms should be directed to Board Counsel.”

The attachments to the letter included the following:

- Intervener Application Form
- Board Template for Intervener Cost Estimate and Final Costs Award Application with columns for Cost Estimate. Estimate Amendment 1, Estimate Amendment 2 and Final Costs Application (“Board Template of Costs”)
- Board Template for Intervener Requests for Advance of Funds; and
- Intervener Costs Policy for Manitoba Hydro 2019/20 General Rate Application (the “Costs Policy”)

The attachments were also placed on the Board web site.

The Board approved the Consumers Coalition as an Intervener in Board Order 1/19. In that Order the Board stated:

“Within 10 days of the issuance of this Order, approved Interveners are to submit their detailed cost estimates for their intervention, including their consultants and expert witnesses, using the cost estimate spreadsheet available on the Board’s website. Cost estimates that are incomplete or prepared improperly will be returned to the Intervener.

The Board is prepared to receive and consider applications for cost awards from Assembly of Manitoba Chiefs, Consumers Coalition, and Manitoba Industrial Power Users Group. Subject to the Board’s full discretion over cost awards and the eligibility requirements relating to hearing participation, the Board finds that the Interveners approved by this Order meet the eligibility criteria for cost awards.

Cost estimates and applications for cost awards must be prepared in accordance with the Board’s Intervener Costs Policy for Manitoba Hydro’s 2019/20 GRA. As indicated during the Pre-Hearing Conference, Interveners

are to use the fillable Excel spreadsheet available on the Board's website for preparing and filing cost estimates and applications for cost awards. The filing of Intervener cost estimates does not guarantee or disqualify an Intervener from eligibility for a cost award. Any comments provided by Board staff on Intervener cost estimates are not binding on the Intervener or the Board. All cost awards, whether an Advance of Funds or a final costs award, are in the sole discretion of the Board and all applications for cost awards will be considered by the Board in accordance with the criteria set out in Section 3.0 of the Intervener Costs Policy. Should any approved Intervener seeking an award of costs determine that its scope of participation in the proceeding or its final cost application will deviate or differ materially from its cost Order No. 1/19 January 2, 2019 estimate, the Intervener is to notify the Board forthwith. Unless there are exceptional circumstances, Interveners will not be approved for such deviations or differences without the required prior written notification of the Board.” (emphasis added)

3.0 Intervener Costs Policy

Pursuant to Section 56 of The Public Utilities Board Act the Board has jurisdiction to award costs of, and incidental to, any proceeding before the Board. For this hearing, the Board adopted an “Intervener Costs Policy” (the Policy). The purpose of this Policy was to set out the Board's procedures for considering requests for Intervener costs and to provide guidance to Interveners on how to apply for funding of costs for participation in Board Proceedings.

Section 2.0 of the Policy includes:

- 2.3 Costs awarded shall be at the sole discretion of the Board.
- 2.4 The Board may award only a portion of the costs being sought by an Intervener.

Sections 3.1 and 3.2 of the Policy describe Intervener eligibility for a cost award and the Board's principles in determining the amount of the cost award:

- 3.1 In any proceeding the Board may award costs to be paid to any Intervener who has:
- (a) 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;
 - (b) participated in the hearing in a responsible manner and cooperated with other Interveners who have common objectives in the outcome of the proceedings in order to avoid a duplication of intervention;
 - (c) represented interests beyond their sole business interest; and
 - (d) a substantial interest in the outcome of the proceeding and represents the interests of a substantial number of ratepayers.
- 3.2 In determining whether the Intervener should receive the amount of costs sought in a costs application, the Board may consider whether the Intervener did one or more of the following:
- (a) made reasonable efforts to ensure that the intervener's evidence was not unduly repetitive of evidence presented by another intervener;
 - (b) made reasonable efforts to cooperate with other interveners to reduce the duplication of evidence and questions or to combine the intervener's submission with that of similarly interested interveners; and

- (c) needed legal or technical assistance to take part in the proceeding;

Section 3.3 (g) and (h) of the Policy states as follows:

3.3 The Board may award an amount of costs that is less than the amount sought in a costs application, including an award of no costs, where the Board determines that the Intervener did one of more of the following:

- (g) the Intervener failed to provide notification of a material difference in the amount of the Intervener's cost estimate or the scope of the Intervener's participation at the time the material difference should reasonably have been anticipated;
or
- (h) such other factor(s) as the Board considers relevant.

(emphasis added)

Section 5.2 of the Policy states as follows:

The Board expects Interveners to use professional services in a cost-effective manner and to make efforts to avoid duplication of services among legal counsel, consultants, specialists and expert witnesses. The Board may adjust cost awards where any duplication appears to have occurred.

Section 9.2 of the Policy sets out provisions on Intervener Cost Estimates. Included are the following:

9.2.7 The filing of Intervener cost estimates and the Board staff's review of Intervener cost estimates does not guarantee or disqualify an Intervener from eligibility for a cost award. Any comments from Board staff on Intervener cost estimates are not binding on the Intervener or the Board. All cost awards, whether an Advance of

Funds or a final cost award, are in the sole discretion of the Board and all applications for cost awards will be considered by the Board in accordance with the criteria in Section 3.0.

9.29 Interveners shall notify the Board of material differences or deviations in the amount of a cost estimate and/or the scope of the Intervener's participation in the proceeding, with an explanation as to the reason for the difference or the deviation.

Section 9.4 of the Policy sets out provisions on Application for a Final Costs Award. Section 9.4.4 states as follows:

An application for a final costs award must include an explanation for any increase in costs about the amount contained in the Intervener's cost estimate. The Board may reduce a final costs award where an Intervener failed to provide notification of a material difference or deviation in the amount of a cost estimate or the scope of the Intervener's participation, as provided in Section 3.3(g). (emphasis added)

The same documents were referenced in Board staff's May 28, 2019 email to approved Interveners to the Manitoba Hydro GRA by way of link to PUB web site following the conclusion of the GRA hearing. Interveners were directed to file cost submissions within 30 days from the release of the Board final Order.

The Policy removes the Board from considering the original cost estimate with all discussions to flow between Board staff and the Interveners. Section 9.2.7 states in part:

The filing of Intervener cost estimates and the Board staff's review of Intervener cost estimates does not guarantee or disqualify an Intervener from eligibility for a cost award. Any comments from Board staff on Intervener cost estimates are not binding on the Intervener or the Board.

The Board is at arm's length until the Final Costs Application is complete and the Board can determine the value of the Intervener's participation in assisting the Board. The Policy

for the GRA was adopted to provide a structured approach which would allow the Intervener to amend or refine its cost estimate during the process. It was intended to avoid surprises at the end of the hearing and the need for the Board and its staff to undertake a detailed review of the Intervener's costs.

The Policy was adopted to avoid the exact situation before the Board in this Application for an Award of Costs.

Section 9.2.7 also provides that:

All cost awards, whether an Advance of Funds or a final cost award, are in the sole discretion of the Board and all applications for cost awards will be considered by the Board in accordance with the criteria set in 3.0.

4.0 Application

The Consumers Coalition cost estimate filed January 18, 2019 ("Cost Estimate") projected disbursements of \$1000 and legal and consulting fees of \$157,220, broken down as follows:

- Byron Williams and Katrine Dilay (legal) \$39,200;
- Darren Rainkie/Kelly Derksen (consulting) \$106, 320; and
- William Harper (consulting \$11,700).

On July 4, 2019 the Consumers Coalition filed its Application for an Award of Costs at the Manitoba Hydro 2019/20 General Rate Application.

The Final Cost Application is \$219,617.50, some \$62,397.50 higher than the Cost Estimate. The requested fees are as follows:

- Byron Williams and Katrine Dilay (legal) \$38,560;
- Darren Rainkie/Kelly Derksen (consulting) \$159,120; and

- William Harper (consulting \$21,937.50).

The first notice of higher Cost Estimates was in an April 15, 2019 email from Coalition Counsel to Board Staff which stated:

“The purpose of this email is to advise that our experts (Mr. Harper, Ms. Derksen and Mr. Rainkie) are significantly over their estimated hours for their tasks to date on the Hydro 2019/20 rate application.

The two primary reasons for the increase in hours are:

1. The MH update in the middle of the process which was never contemplated in the budgets provided to the PUB; and
2. The development of much more extensive evidence than was contemplated in our budget estimate.

While we are trying to rationalize the expenditures within our internal budget (e.g. through potentially lower legal costs), we expect there will be additional costs claimed.”

Board staff replied on April 16, 2019 by email that

“In accordance with 9.2.9 of the Intervener Policy...

“Interveners shall notify the Board of material differences or deviations in the amount of a cost estimate and/or the scope of the intervener’s participation in the proceedings, with an explanation as to the reason for the difference or deviation.”

Should the Coalition determine that their budget requirements will be exceeded, they should file with Board staff a budget amendment to their original cost estimate. The Excel spreadsheets used in preparing your original cost estimate contain columns for cost estimate amendments.

The cost estimate amendment spreadsheet should be provided with a clear explanation as to the reasons for the amendment. The Board will consider the reasons for additional costs in their review of the final Cost Application.”

The Consumers Coalition did not file the cost estimate amendments on the Board Template of Costs; it only filled in the columns for the Original Cost Estimate and the Final Costs Application at the time it filed its Application for an Award of Costs.

This was confirmed in later correspondence on July 24, 2019 where the Board Secretary asked Coalition Counsel by email if the Coalition had filed an amended spreadsheet estimate with Board staff. The Coalition responded by email stating that they did not file a cost amendment spreadsheet. The email went on to say:

“As indicated in our letter sent yesterday, we were not in a position to provide a detailed revised budget at that time given that:

- i. the Coalition’s legal team was actively managing its team to increase efficiencies and limit further cost overruns and, as a result, the estimated additional costs for expert consultants were uncertain; and
- ii. The Coalition was trying to rationalize expenditures within its internal budget, for example through potentially lower legal costs.

As a result, we filed the costs amendment spreadsheet along with our final costs application, including detailed explanations as to the reasons for the additional costs.”

Coalition Counsel stated they understood from the Board staff email that additional costs would be considered by the Board in the review of the final Costs Application.

The legal costs for the Consumers Coalition are not at issue as the total hours for services provided by Mr. Williams and Ms Dilay were the same in both the Cost Estimates and Final Costs Application, although there was a reallocation of actual hours of service

between them. As indicated in Coalition Counsel's April 15, 2019 email, and through comparing the Cost Estimates to the Final Cost Application, the Consumers Coalition experts (Mr. Harper, Ms. Derksen and Mr. Rainkie) were significantly over their estimated hours for their tasks.

In its July 4, 2019 costs submission the Consumers Coalition acknowledged the increased costs. It stated:

"In April 2019, the Consumers Coalition advised Public Utilities Board ("PUB") staff that its expert consultant costs were expected to be higher than originally estimated. No amended estimated (sic) was provided at that time given that there was a possibility that the budget could be reconciled within the Consumers Coalition's overall budget, including through lower than estimated legal fees."

The Consumers Coalition stated that the increase in its costs was due to the updated application filed by Manitoba Hydro on February 14, 2019, after first round information requests were filed and answered. They maintained that much of the work completed before February 14, 2019 had to be redone given "the material change in circumstances and the new documents that needed to be reviewed." The Coalition also identified specific tasks required to reconcile the information filed before and after February 14, 2019. It completed its Overview by stating: "While the Consumers Coalition is of the view that the total costs incurred would be just and reasonable, it believes the proposed application for costs appropriately straddles the line between efficiency, fairness and enforcing fidelity to original budgets."

The Coalition submission addressed the factors for awarding costs by setting out its position that the Coalition made a significant contribution, that it participated in a reasonable manner, it had insufficient resources (not a factor for the Costs Policy adopted for this hearing), that it had a substantial interest and the total costs claimed were just and reasonable.

In relating their efforts to reduce costs, the Coalition stated that it split up work amongst the team of experts to draft information requests and review information request responses and it assigned different parts of evidence to the three experts that ultimately came together in one comprehensive evidentiary package.

The Coalition also provided specific comments about different members of the Coalition team and provided a breakdown of hours and compares the time allocated pre-and post April 14, 2019 and a comparison of the original and final cost estimates in certain instances.

5.0 Manitoba Hydro's Comments

Manitoba Hydro stated that the Coalition should have provided the PUB an amended estimate in April, 2019 for its review and comments given the size of the increase of the costs. It further stated the Coalition had “ample opportunity, prior to incurring the additional costs, to request an increase for their budget and failed to do so” (not part of the process for the Costs Policy for this hearing). Manitoba Hydro challenged the additional hours for estimated time for discovery and preparation of evidence after reviewing the timesheets for Mr. Rainkie and Ms Dilay. Similarly with Mr. Harper, Manitoba Hydro questions the dramatic increase in Mr. Harper's hours when all of the work was done after the update. Manitoba Hydro set out a table with the proposed combined hours for Rainkie/Derksen. They recommended a reduction in hours from 663 hours (\$159,120) in the Coalition Final Cost Application to 493 hours (\$108,460), some 50 hours more than the 443 hours (\$106,320) in the Coalition's original Cost Estimate.

Manitoba Hydro recommended that Mr. Harper's hours be reduced by one hour from 51 hours (\$11,200) rather than 52 hours (\$12, 480) in the original Cost Estimate, much less than the 97.5 hours (\$23,400) in the Coalition Final Cost Application.

6.0 Consumer Coalition Response

In its letter of July 23, 2019 the Coalition stated that Manitoba Hydro did not acknowledge the 100 hour reduction in time which the Coalition offered for the time estimate overruns which it said were not generated by the Supplement filing. It also stated that Manitoba Hydro mischaracterized the Coalition filing and wanted its experts to write off considerable time that were the result of the additional work required. The Coalition took the position that:

- (a) the February 14, 2019 Supplement was a fundamental revamp or update the GRA, not a supplement to previously filed material;
- (b) the suggestion by Manitoba Hydro the update had a limited impact on Intervener evidence preparation is flawed;
- (c) the ability of Intervener experts to quickly finalize intervener evidence is heavily dependent on assessments developed during the information request phase; and
- (d) a fundamental update to an application mid-way through a regulatory process has a significant impact on the time spent to draft Intervener evidence.

The Coalition reiterated the assessment and analysis were wasted and had to be re-done, that Manitoba Hydro failed to recognize the impact on the expert assessments and evidence developed in the earlier steps in the process and on the process for preparing the evidence for the hearing.

7.0 Board Findings

The Board finds that the Consumer Coalition meets the requirements for a cost award, in that it has:

- (a) 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;
- (b) participated in the hearing in a responsible manner and cooperated with other Interveners who have common objectives in the outcome of the proceedings in order to avoid a duplication of intervention;
- (c) represented interests beyond their sole business interest; and
- (d) a substantial interest in the outcome of the proceeding and represents the interests of a substantial number of ratepayers.

The Board agrees with the position set out on page 2 of the Consumers Coalition response:

“Manitoba Hydro’s filing of February 14, 2019 was not a supplemental filing but, rather, a complete and fundamental overhaul of its original rate application, changing the very nature of the reasons underlying the application and all of the figures related to the revenue and expense items that make up Manitoba Hydro’s revenue requirement, with the exception of O&A. This represented a material update to the application, not merely a supplement to materials already filed.”

Manitoba Hydro moved from a net loss of \$28 million loss to \$64 million net income without any rate increase, a turnaround of \$92 million. The major assumptions in the projections in the GRA filing proved much more positive in the Supplement filing 2 ½ months later. It is understandable that an Intervener may be required to repeat and seek additional work from its experts as a result.

Given the “complete and fundamental overhaul of its [Manitoba Hydro’s] original rate application” in the Coalition’s above reference, it was incumbent on the Coalition to notify the Board shortly after the time of the filing of the Supplement and to complete an estimate amendment #1 on the Board Template of Costs.

Section 9.4.4 provides that the final costs award may be reduced where an Intervener failed to provide notification of a material difference or deviation in the amount of the cost estimate or the scope of the Intervener’s participation, as provided in Section 3.3(g). Section 3.3(g) sets the required period for notice “at the time the material difference should reasonably have been anticipated...”

The notice provide in Coalition Counsel’s note of April 15, 2019, two months after the filing of the Supplement, did not satisfy the requirements of 9.29. At the very least the Coalition should have filed the cost estimate amendment at that time.

The Board does not accept the Coalition’s submissions in Coalition Counsel’s later letter of July 24, 2019 that it was not in a position to provide a detailed revised budget at that time given that the legal team was trying to manage the team, increase efficiencies and reduce cost overruns and rationalize expenditures through the internal budget (by for example lowering legal expenses).

The Board has the sole discretion to award costs, including costs that are less than requested by a party to a hearing. In Order 100/18 the Board reduced the costs of Manitoba Industrial Power Users Group by approximately \$85,000 because it did not follow the costs policy in place for that GRA.

The Board has the authority to reduce the claim of the Consumers Coalition for anything greater than the original cost estimate as it ignored the requirement under Section 9.4.4 and 3.3(g) of the Intervener Costs Policy, to file notification when it should reasonably have known the material difference of scope or the cost estimate after the Supplement was filed, not some five months later.

At this time the Board is not prepared to reject a claim for an amount higher than the original Cost Estimate. It would be unfair to hold the Coalition to the Cost Estimate when the scope of the hearing changed as a result of the Supplement. The Board would have a different view of a request for a Final Costs Application where there was a significant increase in the Final Costs Application without a material change in the application of proceeding and with no Estimate Amendment filed at the time when the material difference should reasonably been anticipated, under Section 3.3(g) of the Costs Policy.

The onus is on the Intervener to satisfy the Board that its costs are just and reasonable and follow the Board's Intervener Costs Policy.

The Board has reviewed the Board Template of Costs filed by the Consumers Coalition as well as the time sheets filed by its expert consultants. The Board is not prepared to accept the increased amount proposed by the Coalition. It noted that the Final Costs Application of other Interveners to this General Rate Application were less than initially proposed, notwithstanding the filing of the Manitoba Hydro Supplement.

As to Mr. Williams and Ms Dilay, the Board accepts the request of legal fees of \$38,560 for Mr. Williams and Ms Dilay as well as disbursements of \$360.

As to Mr. Harper, the Board accepts that additional time was required for the discovery phase as a result of the Supplement from 28 to 47.75 hours. Mr. Harper's statement of time does not assist the Board in understanding what additional work was required in the preparation of evidence, from 20 hours to 49.25 hours and it is not prepared to accept that increase. The Board awards Mr. Harper \$15,356.25, rather than the requested \$21,937.50.

As to Mr. Rainkie/Ms Derksen, the Board accepts that additional time was required for the discovery phase as a result of the Supplement from 283 to 307.2 hours. The Board is not persuaded that the time required to prepare the evidence would approximately quadruple from 80 hours to 335.8 hours. It will reduce the preparation of evidence to 160 hours, double the original estimate. At the same time the time entries appear to reflect

the projections in the Cost Estimate than the Final Costs Application in relation to the breakdown for preparation to attend the hearing and prepare for argument. Finally, a comparison of the time entries for Mr. Rainkie and Ms Derksen for the period March 18, 2019 until April 29, 2019 sees days where it appears there is some duplicate work. Given these factors, the Board considers relevant under Section 3.3(h) of the Costs Policy, the Board awards Mr. Rainkie and Ms Derksen \$131,328.00, rather than the requested \$159,120

Total costs to Consumer Coalition: \$185,604.25

8.0 IT IS THEREFORE ORDERED THAT:

1. The Application of the Consumers Coalition for an award of costs BE AND IS HEREBY APPROVED in the total amount of \$185,604.25.
2. Costs shall be payable by Manitoba Hydro within thirty (30) days of this Order.
3. In the future, the Consumers Coalition shall follow the procedure in the Board policy on costs in place at the time, including, without limitation, in terms of notifying the Board of any change in cost estimates.

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.

THE PUBLIC UTILITIES BOARD

"Robert Gabor, Q.C."
Chair

"Rachel McMillin"
Assistant Associate Secretary

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Assistant Associate Secretary