

BOARD OF COMMISSIONERS  
OF PUBLIC UTILITIES OF NEW BRUNSWICK

IN THE MATTER of an application by Enbridge  
Gas New Brunswick Inc. for approval of its rates  
and tariffs.

**DECISION ON COSTS**

During the course of the Enbridge Gas New Brunswick (EGNB) Rate Hearing the Board decided that the matter of cost awards to intervenors should be dealt with outside of the rate hearing, through a written process. Board Counsel sent a letter to all parties to confirm this process and to provide further directions from the Board as to particular matters to be addressed concerning the Board's exercise of discretion under subsection 86(1) of the *Gas Distribution Act, 1999*.

The Board invited parties to state their positions with respect to:

- (i) What principles should be applied in determining whether costs are awarded;
- (ii) What guidelines should be applied with respect to assessment of costs; and
- (iii) What procedures should be used for fixing or taxing costs.

Four parties filed written submissions, EGNB, the Province of New Brunswick (the Province), the Union of New Brunswick Indians (UNBI) and the City of Fredericton. Each of the parties was then allowed to submit written comments on the submissions from the other parties.

Principles in Awarding Costs

EGNB submitted that it should be an over-riding principle that it should not bear the costs of intervenors who are representing their own interests before this Board. It argued that the award of costs would discourage regulatory efficiency, undermine the Alternative Dispute Resolution process and ultimately result in higher rates for consumers.

EGNB noted that in other jurisdictions where costs are awarded, the utilities have much larger customer bases over which to spread such costs. An award of costs in New Brunswick with a small customer base would result in a greater burden per customer. It also suggested that the costs incurred in advancing a particular interest should be borne by the proponents of that interest, not by the utility.

The Province noted that the Board has discretion as to costs and it argued that the Board does not need to award costs and it need not explain why it refuses to award costs. It stated that the Board should aim for speedy, efficient and flexible decisions without adding to the price of natural gas for New Brunswick consumers.

Counsel for the Province reviewed at some length the practice in other jurisdictions, before recommending that the Board not award costs to help fund parties to the hearings. He argued that such cost awards would lead to longer hearings, without any improvement in public decision-making.

The Province argued that discretion with respect to costs should be exercised sparingly and only in “proper cases”, which might include; a landowner forced to hire a lawyer to argue for rerouting a pipeline for agricultural reasons, or a homeowner who needs a lawyer to pursue a valid safety concern.

The Province claimed that an indication at this time as to who might receive costs could be seen as fettering the Board’s discretion. As such, it suggested that the Board should indicate that it expects to award costs sparingly, only in appropriate circumstances, and that it will not fund parties to a hearing.

The UNBI noted that the *New Brunswick Rules of Court* permits an award of costs “as may be just”. It then concluded that since this Board has broader powers than the court, this Board at a minimum should be guided by the basic principle of a cost award “as may be just”. It also reviewed the criteria used by other Boards in Canada and developed a list of four principles that, it submitted, would be appropriate.

- 1) Interest
  - Does the intervenor have a substantial interest?
- 2) Ability to participate
  - Can the intervenor participate effectively without the award?
  - Is the intervenor a non-commercial / non-profit intervenor?
- 3) Contribution
  - Has the intervenor contributed to a better understanding of the issue by the Board?
- 4) Responsible participation
  - Has the intervenor incurred costs reasonable / prudently?
  - Has the intervenor participated responsibly?
  - Has the intervenor combined similar interests under one intervention?

The City of Fredericton adopted “the position and legal framework presented by the Union of New Brunswick Indians.”

#### Guidelines for Assessing Costs Procedure for Fixing and Taxing Costs

Both EGNB and the Province submitted that the Board should not pre-establish guidelines for either assessing costs or the fixing and taxing of costs. The Province suggested that such guidelines could be developed in future from those being used in other jurisdictions, but that at this time, nothing should be done beyond the decision in this case.

The UNBI position was that the practice in other jurisdictions should be used as a guide and that the Board should establish guidelines and procedures for the future, including the provision for advance costs.

The written comments by parties on the submissions of the other parties did not result in any changes of position or any new facts or suggestions that were persuasive to the Board. As such, although these submissions have been carefully reviewed, they are not summarized in this decision.

## DECISION

The Board is satisfied that it has complete discretion with respect to the exercise of its jurisdiction to award costs. The Board accepts that the practice of awarding intervenor costs is now an established practice in a number of Canadian jurisdictions. It understands however, that such awards were introduced only when extensive changes were taking place in those mature markets.

The legislation in New Brunswick is different from that in other provinces in that it establishes a fully competitive marketplace directly from a greenfield situation. In addition, conditions in New Brunswick are very different from those in other jurisdictions where cost awards are common, for example, the small number of customers in this province.

The Board has concluded, therefore, that it would be premature to adopt the processes and/or procedures used by other provinces. It would also be inappropriate, with a greenfield industry, for the Board to establish anything other than very broad guidelines for the awarding of costs at this time.

The Board agrees, therefore, with the position put forward by the Province. It will exercise its discretion to award costs sparingly and it will consider the specific interests of the party requesting costs as well as the interests of the customers who will ultimately be required to pay those costs through rates. Applications for cost awards will be dealt with on an individual basis, and if the Board finds that a cost award is justified, it will also decide whether the costs submitted should be fixed by the Board or taxed.

The Board wishes to issue broad guidelines to assist any party who might consider applying for costs in any proceedings before this Board. In setting these guidelines, the Board is ever mindful of the law with respect to fettering its discretion as set forth in DeSmith, Woolf and Jowell, *Judicial Review of Administrative Action* (5<sup>th</sup> Edition), at page 505:

“A decision-making body exercising public functions which is entrusted with a discretion must not, by the adoption of a fixed rule of policy, disable itself from exercising its discretion in individual cases. It may not “fetter” its discretion. . . .

The rule against fettering discretion by no means forbids bodies upon which discretionary power has been conferred to guide the implementation of that discretion by means of a policy or a rule. It directs attention to the *attitude* of the decision-maker, who must simply be prepared to make an exception to that rule or policy in a deserving case. Nor does the rule against fettering discretion focus upon the content of the hearing which must be afforded to persons interested in changing the decision-maker’s mind. The decision-maker must allow interested individuals the opportunity to persuade him to amend or deviate from the rule or policy”

The broad guidelines are as follows:

1. When applying for a cost award the applicant should demonstrate how it made a material contribution to a better understanding of the issues by the Board.
2. Any party who submits an application for costs should attempt to justify the request for costs on the basis of the public interest. This justification is most important where:
  - ◆ The intervention was not to protect a direct or pecuniary interest,

- ◆ The intervenor has funding from other sources, or could have been reasonably expected to obtain funding from other sources,
- ◆ The intervenor failed to make reasonable efforts to negotiate, and
- ◆ The costs of intervention requested are incremental to the normal operating costs of the intervenor.

Any party applying to the Board for costs need only serve the Board and the party against whom it is requesting the costs be assessed with a notice of motion.

DATED at the City of Saint John, New Brunswick, this 26<sup>th</sup> day of April, 2001.

BY THE BOARD

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Lorraine R. Légère  
Board Secretary  
Board of Commissioners of  
Public Utilities of New Brunswick