



RULING ON MOTION

IN THE MATTER OF an application by New Brunswick Power Corporation with respect to proposed changes to its rate structure, rate classes and rate design.

(Matter No. 357)

June 30, 2017

Ruling on Motion

A. Introduction

- [1] Ms. Carolanne Power, an intervener in this Matter represented by her counsel Mr. Peter Hyslop, filed a Notice of Motion (Motion) on June 12, 2017 seeking an order that New Brunswick Power Corporation (NB Power) pay her costs, including legal fees, professional fees and all necessary and proper expenses incurred in presenting evidence and advancing submissions on behalf of the residential rate class. In his written submission, Mr. Hyslop clarified that the Motion was for intervener funding.
- [2] Mr. Hyslop submits that the New Brunswick Energy and Utilities Board (Board) has the authority to grant this relief. He states that the issues raised in NB Power's rate design application are of public importance and will impact all rate classes, particularly the residential rate class, well into the future. Mr. Hyslop further submits that Ms. Power's intervention is meritorious and without funding, her opportunity to pursue her case would be forfeited.

B. Issue

- [3] The issue to be considered is whether the Board has the jurisdiction to grant intervener funding to Ms. Power, and if so, should it be granted in the present circumstances.

C. Analysis and Conclusion

- [4] It is a well understood legal principle that the Board is a creature of statute and, as such, cannot exceed the power that is granted by its enabling statute. In order for the Board to award intervener funding it must have the jurisdiction to do so. This jurisdiction can be found in either the express provisions of a statute or by necessary implication.
- [5] Mr. Hyslop cites subsection 28(1) of the *Energy and Utilities Board Act*, S.N.B. 2006, c. E-9.18 (EUB Act), which states:

28(1) The Board has all the powers, rights and privileges as are vested in The Court of Queen's Bench of New Brunswick in relation to the attendance, swearing and examination of witnesses, the production and inspection of records or documents, the enforcement of its orders, the entry on and inspection of property and other matters necessary or proper for the due exercise of its jurisdiction.

- [6] By way of his written submission, Mr. Hyslop concedes that there is no express provision in either the *Electricity Act*, S.N.B. 2013, c. 7 or the EUB Act that would provide for intervener funding.
- [7] The Board finds that the above language does not expressly provide the Board with the jurisdiction to make an award of this nature.
- [8] The question then becomes whether subsection 28(1) of the EUB Act, or the wording and scheme of that legislation generally, by necessary implication, provides the Board with the jurisdiction to award intervener funding.
- [9] Mr. Hyslop submits that intervener funding is a matter of practical necessity, in order to have the participation of its largest rate class, if the Board is to carry out its fundamental function to approve just and reasonable rates.
- [10] The doctrine of necessary implication has been considered by several courts, including the Supreme Court of Canada. In the decision of *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, the Supreme Court held as follows:

70 It is well established that a statutory body enjoys not only the powers expressly conferred upon it, but also by implication all powers that are reasonably necessary to accomplish its mandate: Halsbury's Laws of England (4th ed. 1995), vol. 44(1), at para. 1335. In other words, the powers of a statutory court or tribunal extend beyond the express language of its enabling legislation to the powers necessary to perform its intended functions: *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, 1989 CanLII 67 (SCC), [1989] 1 S.C.R. 1722.

71 Consequently, the function of a statutory body is of principal importance in assessing whether it is vested with an implied power to grant the remedy sought. Such implied powers are found only where they are required as a matter of practical necessity for the court or tribunal to accomplish its purpose: *National Energy Board Act (Can.) (Re)*, 1986 CanLII 4033 (FCA), [1986] 3 F.C. 275 (C.A.). While these powers need not be absolutely necessary for the court or tribunal to realize the objects of its statute, they must be necessary to effectively and efficiently carry out its purpose: *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Bell Canada*, supra; *Macaulay and Sprague*, supra, vol. 4, at p. 29-2...

- [11] It is noteworthy that a provision, almost identical to subsection 28(1) of the EUB Act, was considered by the Federal Court of Appeal in the decision of *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C.R. 275. In that case, the Court held that there was neither an express nor implied authority that gave the National Energy Board the jurisdiction to award

intervener funding. The Court stated at paragraph 9:

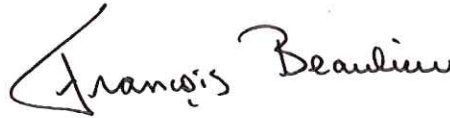
[9] "...the Board has effectively operated for many years without awarding costs. It can, therefore, hardly be said that such a power is "necessary" for the exercise of its jurisdiction."

- [12] Similar to the National Energy Board, this Board has functioned for a long time without awarding costs or intervener funding. Most of this Board's proceedings have had active participation by a number of intervenors. As stated in *National Energy Board Act (Can.) (Re), supra*, while it may be argued that a Board would operate more effectively with that power, such a circumstance does not make such a power necessary to its exercise of jurisdiction.
- [13] There is no question that Mr. Hyslop would bring a meaningful contribution to the proceedings. He is a seasoned lawyer and has skillfully fulfilled the role of Public Intervener in the past, effectively challenging the revenue requirement on behalf of all ratepayers. In addition, the Board benefits from having several interventions, all of which allow the Board to analyze the evidence and information from different views and perspectives. However, the Board concludes that it cannot be implied that intervener funding is of practical necessity in order to accomplish its jurisdiction.
- [14] As a result of the foregoing, the Board finds that it does not have jurisdiction to grant intervener funding. The motion is, therefore, denied.

Dated in Saint John, New Brunswick, this 30th day of June, 2017.

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Raymond Gorman, Q.C.
Chairperson

A handwritten signature in black ink, reading 'Francois Beaulieu', written over a horizontal line.

Francois Beaulieu
Vice-Chairperson

A handwritten signature in blue ink, reading 'Michael Costello', written over a horizontal line.

Michael Costello
Member