

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

IN THE MATTER OF the *Judicial Review Procedure Act*, RSO 1990,
c J.1;

AND IN THE MATTER OF a decision of the Ontario Energy Board
dated June 15, 2016 in EB-2016-0050 being an application by
Ontario Hydro Inc. for an application for approval to purchase Great
Lakes Power Inc.

B E T W E E N:

ALGOMA COALITION

Applicant

and

ONTARIO ENERGY BOARD

Respondent

**NOTICE OF APPLICATION
TO DIVISIONAL COURT FOR JUDICIAL REVIEW**

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following page.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar at the place of hearing requested by the Applicant. The Applicant requests that this application be heard at: **The Court House, 155 Elm Street, Sudbury, Ontario.**

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the Applicant's application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN TO IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: July 15 2016

Issued by:


Registrar

Address of

Court office: 420 Queen Street East, Suite 100
Sault Ste. Marie, ON P6A 1Z7

TO Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
Toronto, Ontario, Canada
M4P 1E4

AND TO Attorney General of Ontario (*as required by subsection 9(4) of the Judicial Review Procedure Act*)
Crown Law Office – Civil
720 Bay Street
8th Floor
Toronto, Ontario M7A 2S9

APPLICATION

1. The applicant makes application for:

- (a) an Order setting aside the decision of the Ontario Energy Board (the “Board”) dated June 15, 2016, which denied the Applicant’s costs for the totality of their participation as an intervenor in matter EB-2016-0050;
- (b) costs of this Application;
- (c) such further and other relief as the applicant may request and this Honourable Court deem just.

2. The grounds for the application are:

- 1. The applicant, Algoma Coalition (the Coalition), is comprised of a number of member municipalities each of which is both serviced by, and a customer of, Algoma Power Inc. (“API”) both North and East of Sault Ste. Marie.
 - 2. On April 19, 2016, the Coalition filed its Notice of Intervention with the Ontario Energy Board (the “Board”) in respect of application EB-2016-0050. Specifically, through its Notice of Intervention, the Coalition applied for intervenor status and cost eligibility in relation to Algoma Power Inc.’s (“API’s”) proposal for applying a change to the rate design for customers in the R1 class.
 - 3. In support of its application, the Coalition cited its multiple interventions in previous API applications and the fact that the Coalition participated in the API Stakeholder proceeding as evidence of its significant involvement and interest in the workings of API.
- a. *Procedural Order No. 1: The Registrar Denies the Coalition Eligibility for an Award of Costs***
- 4. On May 18, 2016, the Registrar issued Procedural Order No. 1, under which the Board granted the Coalition’s application for intervenor status, but denied it eligibility for an award of costs.
 - 5. The Registrar’s expressed reason for denying the Coalition cost eligibility was that, under section 3.05(i) of its *Practice Direction on Cost Awards*, a municipality, individually or in a group is not eligible for an award of costs. The Board reasoned that

because the Coalition represents the interests of a group of municipalities it was, therefore, ineligible for an award of costs.

b. The Coalition Appealed the Registrar's Decision

6. The Coalition appealed the Registrar's decision requesting, *inter alia*, the approval of its request for eligibility for costs in accordance with the Coalition's April 9, 2016 Notice of Intervention.
7. The numerous grounds for the Coalition's appeal included:
 - The Registrar erred by considering section 3.05(i) in isolation from sections 3.04 and 3.06 of the Practice Direction.
 - In making a determination whether a party is eligible or ineligible for costs, section 3.04(d) functions to allow the Board to consider "any other factor the Board considers relevant to the public interest." The Registrar erred by not giving consideration to the public interest served by the Board hearing from a wide variety of affected interests especially those interests of Northern Ontario ratepayers who are isolated, marginalized, and lack the financial resources to individually participate. This is Coalition's *raison d'être*, namely to give voice to those who would otherwise be unrepresented before the Board and, in so doing, overcoming an important access to justice barrier.
 - The Board's concern for reducing barriers to access is fundamental to its "Giving Ontario Energy Consumers a Stronger Voice" initiative. The stated goal of this initiative is "to empower Ontario's energy consumers by providing them with more opportunities to actively engage in the OEB's decision making process."
 - Further, given the Registrar's finding that the Coalition's members are direct customers of the applicant or are the beneficiaries of its services, the Registrar erred in failing to consider section 3.06. This section provides that "[n]otwithstanding section 3.05, a party which falls into one of the categories listed in section 3.05 *may be eligible for a cost award if it is a customer of the applicant*" (emphasis added). It should be noted that the Coalition also represents the interests of its members' ratepayers who are themselves directly affected by this application and, therefore, an important stakeholder group and direct customers for the purposes of this proceeding.
 - Similarly, the Registrar erred by failing to consider section 3.07, which provides that, in special circumstances a party that falls into one of the categories in

section 3.05 is eligible for an award of costs. As noted in paragraph 11 above and in the Coalition's Notice of Intervention, its ability to intervene in Board proceeding depends entirely upon its ability to recover its associated costs. The Coalition's intervention is the only way its members' voices may be heard as its members' interests are not otherwise represented.

- The fact that the Coalition has always participated responsibly in and brought a unique and valuable perspective to Board proceedings has never been disputed.
- Denying the Coalition eligibility for costs and thereby excluding small Northern Ontario municipalities and their ratepayers from having a voice in this proceeding is contrary to both the Growth Plan for Northern Ontario (enacted under the *Places to Grow Act, 2005*) and section 2 of the Rules which provide that the Rules be "construed in the *public interest* to secure the most *just*, expeditious, and efficient determination on the merits of every proceeding before the Board." (emphasis added).
- Specifically, the purpose of the Growth Plan for Northern Ontario is, *inter alia*, that the Provincial Government, businesses, municipalities, and other stakeholders, collaborate to enable decisions affecting northern communities be made "in ways that sustain a robust economy, build strong communities and promote a healthy environment and a culture of conservation". One of its guiding principles is delivering a network of infrastructure, including energy infrastructure, to support strong, vibrant northern communities. The Growth Plan for Northern Ontario recognizes that Northern Ontario is unique and calls for a new era of collaborative decision making to ensure northerners' future prosperity. As noted above, the Coalition submits that its intervention is essential to ensure northerners' collective voice is heard in this application and the only way this can occur is if it is granted cost eligibility.
- In addition, the rigid application of section 3.05 evinces bias on the part of the Registrar in making her decision to deny the Coalition cost eligibility. As an employee of the Board, the Registrar is undoubtedly aware that the Coalition has an active judicial review application on this same issue in respect of the Board's February 5, 2016 decision in EB-2015-0051. On this basis, the Coalition submits the Registrar failed to act impartially and that her decision was an unfair or malicious abuse of discretion.

c. The Board Decided to Uphold the Registrar's Decision

8. The Board issued its decision on the Coalition's appeal on June 15, 2016. The Board upheld the Registrar's decision based principally on its finding that the Registrar properly determined that the Coalition is, *prima facie*, ineligible for costs under section 3.05(i). Although the Board agreed with the Registrar's finding that the Coalition's ratepayer members are *customers* and, as such, satisfy section 3.03, no consideration was given to why the Registrar did not apply section 3.06 in light of this finding.
9. Further, the Board simply affirmed the Registrar's bald statement that "the OEB has considered whether, under section 3.07 of the Practice Direction, special circumstances exist and concludes that no circumstances exist in this particular case." The Board did not provide any supporting rationale for this affirmation despite the Coalition's substantial submissions to the contrary.
10. In its consideration of the Coalition's being granted costs awards in two decisions after the March 2012 amendment that brought in section 3.05(i), the Board does not provide any reason why the Coalition had been awarded costs in the amount of \$45,309.90 in EB-2014-0055. Instead, the Board speaks only to the cost award in EB-2015-0051 finding the costs awarded to the Coalition for its intervention in that proceeding and referring only to the Panel's decision that "cost eligibility was warranted in that specific proceeding."
11. The Board treated the Coalition's submissions on the application of the Growth Plan for Northern Ontario in a similarly dismissive manner. The Board agreed with the Coalition that "one of the guiding principles of the Plan is delivering a network of infrastructure, including energy infrastructure to support strong vibrant Northern Communities." The Board also implicitly agreed that granting the Coalition intervenor status and "the right to fully participate in the proceeding" was consistent with the Plan. Confusingly, however, the Board failed to consider the fact that the Coalition lacks the resources to meaningfully participate in the proceeding absent eligibility for an award of costs — the very reason for the Coalition's appeal.
12. Lastly, although the Board stated it was concerned about the seriousness of the Coalition's assertion that the Registrar failed to act impartially, it provided no analysis to support its finding that the Registrar acted appropriately. The Coalition submitted that the Registrar's rigid application of section 3.05 reflected an inherent bias in light of the fact that, as a Board employee, the Registrar was undoubtedly aware that the Coalition was, and is still, seeking judicial review of the Board's decision in EB-2015-0051 to award the Coalition only partial costs for its intervention in that proceeding. However, the Board simply reasoned that, because it found the Registrar "considered

the relevant factors” in the Practice Direction on Cost Awards”, the Registrar did not treat the Coalition unfairly or abuse her discretion in denying the Coalition eligibility for an award of costs.

13. By affirming the Registrar decision in the manner set out above, the Board exercised its discretion to deny the Coalition eligibility for an award of costs for its intervention in EB-2016-0050 for an improper purpose, with malice, and in bad faith.
14. Further, or in the alternative, the Board failed to consider relevant matters in the Coalition’s submissions and violated the duty to be fair and the rule against bias.
15. Rule 68 of the *Rules of Civil Procedure*, RRO 1990, Reg 194.
16. Section 2 of the *Judicial Review Procedure Act*, RSO 1990, c J.1.
17. The Board’s *Rules of Practice and Procedure* and *Practice Direction on Cost Awards*;

3. The following documentary evidence will be used at the hearing of the application:

- (a) The decision of the Board dated June 15, 2016 together with the pleadings filed and all things touching the matter before the Board.
- (b) Such further and other material as counsel may advise and this Honourable Court may permit.

Dated: July 15, 2016

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Algoma Coalition

COURT FILE NO.

27243 /16

IN THE MATTER OF the *Judicial Review Procedure Act*, R.S.O. 1990, c J.1;

ALGOMA COALITION V. ONTARIO ENERGY BOARD

SERVICE OF A COPY
ADMITTED THIS 19th DAY OF July 2016
Crown Law Office (Civil Law)
MINISTRY OF THE ATTORNEY GENERAL
FOR ONTARIO
Per. Christine La Time 9:47 AM
720 BAY STREET
TORONTO, ONTARIO M7A 2S9

ONTARIO
SUPERIOR COURT OF JUSTICE
(Proceedings commenced in the City
of Sault Ste. Marie, Ontario)

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