Claims 11 & 109

IN THE MATTER OF : An Agreement dated December 16, 1977

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT
OF THE PROVINCE OF MANITOBA,
OF THE FIRST PART,

- and -

THE MANITOBA HYDRO-ELECTRIC BOARD,
OF THE SECOND PART,

- and -

THE NORTHERN FLOOD COMMITTEE, INC.,
OF THE THIRD PART,

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As Represented by THE MINISTER OF INDIAN
AFFAIRS AND NORTHERN DEVELOPMENT,
OF THE FOURTH PART;

AND BETWEEN:

THE CROSS LAKE FIRST NATION
as represented by
PIMICIKAMAK CREE NATION
CLAIMANT,

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA, THE MANITOBA HYDRO-ELECTRIC BOARD, and HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT
RESPONDENTS.
(CLAIM 11)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA, and HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT
RESPONDENTS.
(CLAIM 109)

AND IN THE MATTER OF INTERIM COSTS

APPEARING: D. Hodgson and A. Orkin for the Claimant
J. Edmond and K. Murphy for the Respondent Hydro
T. Krienke for the Respondent Manitoba
C. Henderson for the Respondent Canada

AWARD

A hearing was held on June 26th, 2000, dealing with cost issues in relation to two Claims, 109 and 11. A number of issues were raised, but the Parties seek answers to the following questions at this time:

Are the disbursements related to travel to and from the Province of Manitoba reasonable costs to be born by the Respondents under the Interim Cost Orders in these Claims?

Is that part of Counsel's travel time related to travel to and from Manitoba, a reasonable cost to be born by the Respondents under the Interim Cost Orders in these Claims, and if so, what is a reasonable rate?

What is an appropriate hourly rate to be charged by Counsel acting for the Claimants in these Claims?

The accounts indicate that there are three lawyers, two senior and one junior, heavily involved on behalf of the Claimants in these Claims. Is there a duplication in the work being done on behalf of the Claimants?

As I understand it, there was also an objection to certain disbursements charged in regard to the participation of experts. Apparently some of those disbursements are accepted while others remain contentious. The Parties have indicated that they intend to discuss the specifics of particular entries in the legal service accounts and I will leave the matter of disbursements related to experts to the Parties for elaboration and clarification in the course of their discussions. Hopefully the Parties will be able to reach a consensus once the details of those disbursements are made available. The Parties may of course return and present any matters they are unable to resolve.

The Accounts

The accounts submitted are substantial.

The account in Claim 109 covers the period from May 1, 1999, to January 31, 2000. The fees are $77,155.50, with disbursements of $42,225.51 making a total of $119,381.01.

This bill was sent out March 22, 2000.

The account in Claim 11 covers the period from October 1, 1999, to April 30, 2000. The fees are $129,681.50, with disbursements of $44,349.66, to a total of $174,031.16.

This bill was sent to the Respondents on June 9, 2000.

Protocol

There is a Memorandum of Understanding ("the Protocol") dealing with interim costs issues, dated February 20, 1992, that is presently in effect.

That Protocol was derived from an Award in Claim 110, dated November 23, 1989. That Award provides some background to cost issues and the NFA:

> APPEARING:
> G. Hannon and D. McKinnon for Attorney-General of Manitoba
> B. Shields for Attorney-General of Canada
> I.D. Frost for Manitoba Hydro
> K. Young counsel for the Northern Flood Committee and others
> V. Savino counsel for the Cross Lake Indian Band and others
>
> AWARD
>
> These proceedings convened on October 10th, 1989, to hear argument and/or evidence on an Application brought under Claim 110 and filed September 27th, 1989. Other discussions with the appearances noted above were held including one on October 31st, 1989 at which D. N. MacIver, Counsel for the Community Association of South Indian Lake and others, was also in attendance.
>
> This Application, brought by Manitoba Hydro, seeks an Order from the Arbitrator as to various issues in relation to the payment of the Claimants' interim

legal costs incurred in preparing and advancing Claim 110. The principal matter is a determination as to a reasonable rate to be charged by Counsel for the Claimants.

A good deal of the Parties' time and energy and the previous and present Arbitrator's time and energy has been spent on payment of accounts. This is so in large measure because of the special provisions of the Agreement that provide the Arbitrator with a discretion to order the Respondents to pay interim legal costs incurred by the Claimants in the furtherance of a claim. The difficulty inherent in such an arrangement is the verification of statements of account. In the usual solicitor-client relationship the client directs counsel and pays for the work done pursuant to the direction. Under the exceptional provisions of the Agreement the Claimants direct and the Respondents pay. This has of course caused frustration for the Respondents who are not entitled to exercise any control over the legal services for which they must pay.

In order to allow for verification of accounts and to assure prompt payment the following procedure was agreed to by the Parties in a Memorandum of Understanding dated December 9, 1986:

The Parties by their counsel agree that regarding Payment of Accounts Pursuant to Orders for Interim Costs and Expenses, it is intended that all accounts submitted pursuant to orders for interim cost and expenses should be dealt with as follows:

1. Prior to submission to the respondents, the claimants shall acknowledge in writing that they have reviewed the accounts and that they approve the accounts for payment.

2. Each respondent shall pay their respective portions of legal accounts within sixty days of receipt of said accounts unless a respondent objects to an account or requests further information.

3. The respondents have the right to make such inquiries as they deem necessary in reviewing a legal account. Information in regard to accounts shall be provided by counsel to the claimants unless an objection is raised.

4. In the event of any dispute with respect to the above a reference may be made to the Arbitrator.

Unfortunately this procedure has not proved to be sufficient to deal with all aspects of the issue and requires some extension.

I believe it to be self-evident that time spent on the issue of payment of accounts would be better spent resolving the outstanding substantive issues addressed in the Agreement.

In order to promote the orderly payments of accounts pursuant to orders for interim costs and expenses, not only in Claim 110, but in regards to all other claims as well, I find it appropriate to set out my views as to what I consider to be a reasonable rate structure, and an appropriate billing practice, as follows.

The hourly rate paid to senior counsel will not exceed $150.00 per hour. Counsel with fewer than ten years at the Bar will work at a reduced rate, commensurate with experience. Transportation time of counsel will be paid at a reduced rate on an individual basis to a maximum of $50.00 per hour. The total maximum daily fee will be $1200.00.

Only the hours necessary to reasonably further and advance the claim will be compensated. Counsel fees will not be paid on these accounts as the hourly rate is intended to provide full compensation.

Counsel may submit accounts every thirty days and will submit accounts every sixty days for all work done within the immediately preceding billing period. Such accounts will include an explanation of the services rendered and the time involved. Such accounts will include all disbursements necessarily incurred in the handling of the file.

Each Respondent shall pay their respective portions of legal accounts within sixty days of receipt of said accounts unless a Respondent objects to an account or requests further information. Any objections or requests for information by a Respondent must be made within twenty-one days.

Interest will be paid on all accounts approved for payment and not paid within sixty days of receipt of said accounts. Interest will be at Bank of Montreal (Winnipeg, Main Branch) Prime Rate plus 2%. Any delay in payment attributable to a failure on the part of Counsel for a Claimant to respond in a timely fashion to a legitimate request for information may affect the time at which interest starts or the interest rate.

This decision is to take effect as follows:

(a) All accounts submitted subsequent to September 27th, 1989, the date the Notice of Application, are affected by this decision.

(b) All accounts submitted prior to September 27th, 1989, and not paid, or partially paid at a rate below the rate set out herein, are subject to the rate set out herein.

(c) All accounts submitted prior to September 27th, 1989, and paid in full, or partially paid at a rate above the rate set out herein, are approved.

A Reference may be made to the Arbitrator in the event of any dispute with respect to the above or in the event of any difficulty with respect to its implementation.

The rates set out herein are subject to amendment. An Application may be made to the Arbitrator so that changes in economic and/or other relevant conditions may be reflected in the rates. An Application to amend rates may be brought not more than once every six months.

This Award is intended to extend, not to replace, the Parties' Memorandum of Understanding above noted.

Dated, this 23rd day of November, A.D. 1989.

I note that this Award was not appealed.

The 1992 Protocol was an update of my Claim 110 Award, and reads as follows:

MEMORANDUM OF UNDERSTANDING

RE: PAYMENT OF ACCOUNTS PURSUANT TO ORDERS FOR INTERIM COSTS AND EXPENSES

WHEREAS on December 9, 1986, the Parties by their counsel agreed upon a Memorandum of Understanding regarding the payment of accounts pursuant to Orders for Interim Costs and Expenses;

AND WHEREAS on November 23, 1989, the Northern Flood Agreement Arbitrator made an Award (the "Award") in the matter of Claim 110 and the payment of interim legal costs which Award was confirmed by the Arbitrator on February 16, 1990;

AND WHEREAS the Award specifically stated that it was intended to extend, not to replace, the Parties' Memorandum of Understanding;

AND WHEREAS the Parties wish to achieve an understanding regarding the payment of accounts pursuant to Orders for Interim Costs and Expenses;

The Parties by their counsel agree that all accounts submitted pursuant to Orders for Interim Costs and Expenses shall be dealt with as follows:

1. Prior to submission to the respondents, the claimants shall acknowledge in writing that they have reviewed the accounts and that they approve the accounts for payment.

2. Each respondent shall pay their respective portion of accounts within sixty days of receipt of said account unless a respondent objects to an account, or portion thereof, or requests further information.

3. The respondents have the right to make such reasonable inquiries as they deem necessary in reviewing the account. Information in regard to accounts shall be provided by counsel to the claimants unless the information sought is privileged. A reference may be made to the Arbitrator in the event that counsel to the claimants declines to provide information or fails to provide sufficient information.

4. Subject to paragraphs 5 and 6 hereof, interest will be paid on all accounts approved by the claimants for payment and not paid within sixty days of receipt of said accounts by the respondents. The rate of interest to be charged shall be the same rate as prescribed, from time to time, by the Law Society of Manitoba for overdue accounts for legal services.

5(1). Interest will not be paid upon:

(a) an account where a respondent reasonably objects to the entire account;

(b) that portion of an account where a respondent has raised a reasonable objection;

5(2). Interest charges upon outstanding balances shall commence 60 days after the resolution of any objection in the event all or a portion of an account remains unpaid.

6. Interest will not be paid on an account where delay in payment is attributable to a failure on the part of counsel for a claimant to respond in a timely fashion to a reasonable request for information.

7. The hourly rates to be paid to counsel for the claimants shall be:

0 - 5 years at the Bar - $75.00 - $110.00

5 - 10 years at the Bar - $125.00 - $150.00

10 - 15 years at the Bar - $150.00 - $175.00

Over 15 years - $175.00

8. Other than during hearings, no counsel for the claimants may charge more than $1400.00 per day per lawyer.

9. Transportation time of counsel for the claimants will be paid at the rate of $50.00 per hour and is not to form part of the maximum charges set out in paragraph 8 hereof. Transportation time shall include reasonable layover time.

10. Counsel may submit accounts every thirty days and will submit accounts every sixty days for all work done within the immediately preceding billing period. Such accounts will include all disbursements necessarily incurred in the handling of the file.

11. Counsel for the claimants shall not be entitled to contingency fees, counsel fees or bonuses of any kind.

12. This Memorandum of Understanding shall be effective upon the making of an Order of the Arbitrator in the form of Schedule "A" attached hereto.

13. In the event of any dispute with respect to the above a reference may be made to the Arbitrator.

This Memorandum of Understanding agreed to by each of the parties this 20th day of February, 1992.

This Protocol was given effect by my Order dated February 25, 1992:

UPON hearing counsel for the Northern Flood Committee, Inc. and counsel for each of the Manitoba Hydro-Electric Board, Her Majesty the Queen in Right of the Province of Manitoba and Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development, and upon being advised that all parties hereto consent to the making of this Order;

IT IS ORDERED THAT:

1. The Memorandum of Understanding, dated 20th February, 1992 be given effect and that the Memorandum of Understanding dated December 9, 1986 shall have no further force and effect and that the November 23, 1989 Award of the Arbitrator in the matter of Claim 110 and the payment of interim legal costs, is hereby vacated.

2. The Memorandum of Understanding, dated 20th February, 1992 (the "Memorandum of Understanding") shall apply retroactively to June 1, 1991, provided that where fees have been paid for work done after that date, no adjustments or additional payments shall be made by respondents until revised accounts have been submitted by the claimants reflecting the contents of the Memorandum of Understanding. Interest on revised accounts shall be paid in accordance with the Memorandum of Understanding.

3. The Memorandum of Understanding, dated December 9, 1986 shall be deemed to have ended on May 31, 1991.

4. Any Party may apply to the Arbitrator for an Order varying this Order.

Signed the 25 day of February, 1992.

I note that this Order was consented to as follows:

Consented to, as to form and content; Counsel for Canada, Counsel for the Northern Flood Committee, Counsel for the Norway House Band and the Cross Lake Indian Band on various claims, Counsel for the Nelson House Indian Band on various claims, and Counsel to the Northern Flood Committee on various claims

Consented to, as to form; Counsel for Manitoba Hydro and Counsel for Manitoba.

I note that not all Counsel involved with NFA matters at that time consented to this Order, not even "as to form" basis. I note also that this Order was not appealed.

While it would be preferable for all Counsel to agree with all the provisions of the Protocol, including the prescribed rates, unanimity is not a prerequisite for an Order setting out rules promoting the orderly payment of accounts.

I think it important to recall that the rationale for the Protocol goes beyond the mere setting of rates.

Time limits for submitting an account can be important in the event that a Respondent wishes to check a particular entry on a billing. As time passes, it becomes increasingly difficult to provide details on questioned entries.

From the perspective of Counsel for a Claimant, a limit on the time the Responding Parties have to review an account provides assurance of prompt attention to the account.

As has been noted many times in various Awards, there is a need to strike a balance, to expedite the process of bill payment, and to avoid unnecessary and expensive argument.

The Protocol has generally worked very well, with few challenges relative to the number of bills submitted. Most bills are paid promptly, in accordance with Protocol (at least, I have not heard otherwise). The challenges that have been made have been in circumstances where it appeared reasonable to raise questions. In other words, challenges have not been frivolous or otherwise improper.

In my view, the Protocol has been a success. It has been in use, in one form or another, for more than ten years. Many issues raised at the hearing are ones that were wrestled with more than a decade ago. The present Protocol, if it were not respected, or failed to provide a viable process for dealing with fee issues, may need to change. It would however be a giant step backward to abandon it.

I note that there is a Memorandum of Understanding, dated February 27, 2000, which was to take effect April 6, 1999. It was received by the NFA office on or about May 16, 2000. Its provisions include an increased fee rate and other changes. The Parties have not appeared before me however, and there is no Order in place giving effect to this document. I will refer to this document as the "proposed protocol".

Substantive changes to the Protocol ought to be subject to approval by way of an Order. This was the procedure followed in 1992 and is the proper approach. I note that paragraph 16 of the proposed protocol indicates that it is to be effective upon the making of an Order. While the Parties may choose to follow any process they wish, I do not consider the proposed protocol to be part of the NFA process and enforceable there-under until it is given effect by way of an Order.

I am however prepared to give effect in this Award to the increases to the monetary provisions, which I take to be evidence as to what is considered to be reasonable fee rates.

In regard to the fees, the appropriate rates, as of April 6, 1999 are as follows:

0 - 5 years at the Bar - $85.00 - $120.00

5 - 10 years at the Bar - $135.00 - $160.00

10 - 15 years at the Bar - $160.00 - $185.00

Over 15 years - $190.00

Transportation time of a Counsel for a claimant will be paid at the rate of $60.00 per hour.

Any Party may make an Application for an Order to vary other provisions of the 1992 Protocol, in accordance with paragraph 4 of my Order giving effect to that Protocol.

Out of Province Counsel

There is nothing wrong in principle with a Claimant choosing to use a Counsel from outside of the Province of Manitoba. There are some very real challenges associated with this however.

Costs

One problem is increased costs and the questions that arise regarding the reasonableness of those costs.

There are significant costs associated with travel to and from Manitoba, including the cost of air fare and remuneration for the time spent in travel.

In this case, there is also the matter of the fee rates charged. Mr. Hodgson pointed out that some of his contemporaries in practise in Ontario charge out their time at a rate of $400 per hour. There is thus an argument in the present case that what is "reasonable" in relation to NFA work is the fee rates charged in the Toronto region of Ontario.

One must once again relate the matter of costs to the unique NFA process.

Scheduling

I note as well that difficulties related to scheduling accompany the involvement of out of Province Counsel.

Mr. Hodgson recapped a situation that arose which involved a request, made by Manitoba, for an adjournment. Mr. Hodgson became aware of the request while on route, after having started the day very early, and having driven and flown through difficult winter weather conditions. Mr. Hodgson harshly criticized the last minute request.

It is certainly not unheard of to have a late request for an adjournment. It may be that an agreement is at hand, which will make the hearing unnecessary. It goes without saying there may be valid reasons for such a request. It is also reasonable, of course, for other Counsel to oppose the granting of an adjournment.

What is exceptional in the present situation is that the attack on the request for an adjournment involves a failure on the part of Manitoba to take into account the difficulties faced by Mr. Hodgson in getting to the airport, and the wasted time and expense involved in travelling from the Toronto area to Winnipeg.

Thus, in addition to the usual type of arguments raised against the granting of an adjournment, there is the added "imperative" that the hearing must go on to avoid a waste of the time, trouble and expense involved in getting to the hearing.

Such an argument arises as a special feature of the involvement of out of province Counsel. It is not an argument available to local Counsel.

I would anticipate that the Responding Parties will be considerate and accommodating and take into account the special difficulties presented for out of province Counsel.

Efforts should be made to assure that communications take place in a timely way, with account taken of the realities of long distance travel. It is, however, wholly inappropriate to allow these special difficulties to play a role in determinations made under the NFA.

It would clearly be wrong to disallow an adjournment based upon the distance a Counsel had to travel: this would obviously give the Party represented by the distant Counsel an improper advantage, with other Parties effectively prevented from seeking an adjournment on short notice.

What this points to is the need to have preparations for any hearing made well in advance. This would include such essential matters as the proper scheduling and the timely filing of documents.

If one Party seeks to proceed with a matter without due regard to the availability of the Counsel handling the file for another Party, it may be that there is no one sufficiently conversant with the file to speak to the matter on behalf of that Party. A Party so disadvantaged would then, in all likelihood, seek an adjournment.

A problem of this sort could affect any Party, including the one Mr. Hodgson represents. If a hearing was set for a date on which he was unavailable, someone from his office may well be required to attend in Winnipeg to seek an adjournment.

Similarly, if documents arrive at the last minute, one or more of the Parties may seek an adjournment.

Of course if an adjournment is granted there will be time and effort wasted and of course thorny "reasonable costs" issues will arise. Who ought to bear the cost of the wasted time and effort?

It is in all cases necessary to be thoroughly prepared for a hearing, but it is especially critical, to avoid the wasted time and substantial expense, to be properly prepared for hearings involving out of town Counsel.

Court Appearances

There are also the difficulties facing out of Province Counsel related to appearing in the Manitoba Courts. Although there is no requirement that those appearing at NFA proceedings be qualified to practise law in Manitoba, in the event that an Award was appealed, out of Province Counsel without such a qualification would be unable to appear. This would necessitate the involvement of other Counsel.

Costs, scheduling, Court appearances, and other potential difficulties and challenges arise with the involvement of out of province Counsel in the NFA arbitration process. While these impediments ought not to inhibit, in theory at least, a Claimant's choice of Counsel, there clearly must be limits. Would it be appropriate for a Claimant to assemble an expert team of the "very best" international expert Counsel, from say, London, New York, and Mexico City? Although this is clearly a far-fetched example, reason dictates that there must be limits to allow the arbitration process to proceed in an expeditious, efficient manner, without the burden of exorbitant costs which may rival the compensation to be paid in relation to claims being advanced.

Disbursements for Travel

In the present circumstances, considering the distance to be traveled and the extensive participation of Counsel in the NFA process, reasonable disbursements related to travel to and from the Province of Manitoba will be allowed, provided of course that the disbursements are well documented and the travel is warranted in relation to the NFA arbitration process.

In the past such costs, in Claim 22 in particular, (as related to the participation of Mr. Paterson, a Counsel located in the Vancouver area), were not allowed. Counsel in the present cases are in a different situation in that they have a more extensive involvement in NFA matters, acting as they are in a number of Claims. I anticipate Counsel will avoid incurring travel costs except where travel is the only option, and that when travel is undertaken, a significant amount will be accomplished.

As to travel time rates, travel time will be allowed at the rate of $60 per hour.

If Counsel work on a flight, Counsel can bill for the time spent working in the normal way at the regular rate. Of course, such time billed would be in lieu of, not be in addition to, the $60 per hour travel allowance.

Fees - Hourly Rate

There was considerable discussion at the hearing related to the expertise that Counsel for the Claimant would bring to the Arbitration process and Mr. Hodgson and Mr. Orkin spoke about their backgrounds in support of their competence to handle NFA matters.

Mr. Hodgson indicated he intentionally delayed putting in the bill in order that his performance, and that of his firm, could be assessed.

He also criticized the implementation of the NFA to date as "half-assed" (I note that this is not a term used by other Counsel when appearing on NFA matters and although is not a term contained in every dictionary, the Gage Canadian Dictionary indicates it is a slang term meaning "incompetent, inefficient, or ineffective"). I take Mr. Hodgson's criticism as an indication, amongst other things, that he does not have high regard for the work done by previous Counsel and that he and his firm intend to do a good job.

I will say that many excellent Counsel appear in this forum, and have appeared over the years, and I do not consider Mr. Hodgson's performance to date to be extraordinary. In general, if I were to assess any Counsel's performance, the highest score would go to a Counsel who provided a well-reasoned substantive presentation and the lowest would go to one who placed too much emphasis upon bombast.

In any event it is not for me to assess the competence of a Counsel chosen by a Claimant and allow or disallow a Counsel's retention on that basis.

While I am not in a position to assign grades, I am charged with the duty of making determinations as to the reasonableness of costs, and the costs

Protocol has been incorporated into this process in order to deal with issues related to the review and orderly payment of accounts. The costs Protocol sets out the rate deemed to be reasonable in relation to rates to be charged.

In the matter of Claim 187, Mr. D. N. MacIvor requested a fee greater than that set out in the Costs Protocol, but that request was denied, as set out in my Award dated November 18, 1997.

Nothing in the presentation of the Counsel for the Claimant leads to a conclusion that an exception should be made regarding the fee rates to be charged by members of his firm. I am not in a position to set fees based upon my perception of the quality of a Counsel's performance nor do I deem it appropriate to make a determination as to reasonable fee rates based upon rates charged in jurisdictions other than Manitoba.

I am drawn to the conclusion that the fee rates set out on page 11 apply to Mr. Hodgson and his colleagues. There will be one exception, in relation to Mr. Orkin's rate, as set out below.

Duplication / Number of Counsel

There are a number of Counsel representing the Claimants billing time on these Claims. Is this number of Counsel excessive? Is there duplication of the work being done on behalf of the Claimants, for which the Respondents are being asked to pay?

Role of Various Counsel in Claims

It was indicated that Mr. Orkin is Counsel for the Claimant on these files, although, from the perspective of this arbitration process, these claims are being advanced by Mr. Hodgson, with assistance of Ms. Birenbaum, as junior Counsel. The Respondents are raising no objection to the participation of Mr. Hodgson and Ms. Birenbaum.

As to Mr. Orkin's participation, it was indicated he is acting as a representative of the First Nation in relation to a dispute resolution process

which is taking place outside of the NFA arbitration process. Apparently Mr. Orkin is in Cross Lake frequently, where he deals directly with his clients and provides instructions to Mr. Hodgson in relation to NFA arbitration matters. In these circumstances, it appears that there is a division of labour between Mr. Hodgson and Mr. Orkin which appears to all but eliminate duplication. In fact it would seem that such an arrangement would serve to minimize travel costs.

I take it that certain of the travel costs will be attributed to the talks being held, rather than the arbitration process. I am sure that accounts submitted will clearly set out how costs are attributed so as to avoid needless controversy.

A question was raised as to the appropriate fee rate for Mr. Orkin's services. As Mr. Orkin was called to the Ontario Bar in 1990 he is relatively "junior". However, in light of his background, I deem it appropriate to view his experience as commensurate with that of a counsel with over fifteen years experience and he is entitled to bill at the corresponding rate.

I would add that Mr. Orkin and Mr. Hodgson must avoid unnecessary duplication in serving their clients. The division of labour noted above is an appropriate use of resources. Care must be taken to avoid undue overlap in other efforts made to advance claims. It is not usual to have two senior Counsel attend at a hearing and one would expect such attendance to occur only in special circumstances. It is reasonable to expect consultation to occur between Mr. Orkin and Mr. Hodgson, but insofar as Mr. Hodgson is the Counsel charged with advancing the claims in relation to the NFA process, and he is competent to do so, it is anticipated that Mr. Orkin's participation should be relatively minor.

Hardship to Counsel for Claimants

Mr. Hodgson indicated that he had not received any payment in relation to the very large outstanding amount of the bills. He indicated that not only had he and his colleagues not been paid, but they were carrying significant expenses.

It is in some ways unfortunate that Mr. Hodgson ignored the Protocol. If the bill had been submitted earlier, these matters could have been dealt with more quickly and much of the problem associated with the delay in payment could have been avoided.

Insofar as Mr. Hodgson indicated that he anticipated problems with his initial billing, perhaps he should not be entirely surprised that payment has been slow to come.

I trust this covers the issues the Parties wanted dealt with at present. I anticipate Counsel will adjust and resubmit the account to reflect this Award and I further anticipate that discussions as to any particular items in dispute will be dealt with promptly.

It is appropriate, and I hereby Order, that any disbursements or fees not in dispute are to be paid promptly, in accordance with the time frame set out in the cost Protocol, or sooner if possible. Payment should only be delayed in relation to disbursements or fees which are in dispute.

Again, as to the unresolved issues, I urge the Parties to continue to work toward a mutually satisfactory solution.

Dated, this 24th day of July, A.D. 2000.

G. Campbell MacLean, Q.C.
Arbitrator