Claim 183A
Date of Award: Nov 12, 2008

IN THE MATTER OF: An Agreement dated December 16, 1977, known as The Northern Flood Agreement

BETWEEN: CROSS LAKE FIRST NATION as represented by Pimicikamak

Claimant

- and –

THE MANITOBA HYDRO-ELECTRIC BOARD

Respondent

APPEARANCES:

For the Claimant:	Ken Mandzuik
For Manitoba Hydro:	Jeff Hirsch
	Maria Grande
For Manitoba:	Tanys Bjornson
For Canada:	Jeff Echols

AWARD

Hon. R. Krindle, Arbitrator

[1] Pursuant to awards in this claim dated November 27, 2007 and January 28, 2008, I determined:

a) that the 1995 Interim Costs Order was not spent; and

b) that the governing principles relating to interim costs are as set out in the *Interim Costs Protocol* as subsequently varied to reflect the legal hourly rates set forth in the Memorandum of Understanding, dated February 27, 2000, which hourly rates were determined to constitute "reasonable fee rates" for interim costs in *Cross Lake v Manitoba Hydro, Claim 11 & 109,* July 24, 2000 (MacLean).

The claimant now seeks to vary the reasonable hourly rates fixed by that decision of July 24, 2000.

[2] Notice of this application has been given to all signing parties to the NFA. None of the First Nations other than Cross Lake First Nation expressed a desire to be heard on this issue. Canada and Manitoba appeared and were heard.

[3] In *Cross Lake v Manitoba Hydro, Claim 183A,* (January 28, 2000), I expressed concern, but did not find, that certain wording in earlier awards could be read to suggest that interim funding had effectively become full funding. I am satisfied, based upon the submissions in this motion, that such an outcome was never intended by the parties or by the decisions based upon their agreements. The distinction between interim and full funding remains part of the costs scheme under the NFA. It remains open to a claimant, at the conclusion of a claim, to seek an augmentation to the fee allowed on interim funding based upon the importance of the particular matter, the difficulty of the work involved, the results achieved, the efficiency with which the claim was advanced, and other pertinent factors.

[4] Counsel for the claimant has argued before me, as he did in the hearing that gave rise to the award of January 28, 2008, that the right to counsel of one own choice is rendered illusory if the reasonable interim rates allowable under the NFA are insufficient to permit the retainer of senior counsel practicing in a "mainstream law firm" as that phrase has come to be used in this matter. He does not argue that reasonable interim rates should be fixed on a case-by-case basis or on a firm-by-firm basis. He does argue, however, that whatever the general rates may be, they be sufficient to permit the retainer of a mainstream law firm charging their reasonable hourly rates for the services of senior counsel. The full hourly rates of such senior counsel would, according to the information placed before me, information which I accept as being accurate, fall within the range of $300 to $400 per hour.

[5] The historical determination of reasonable interim hourly rates under the NFA has been based on agreement of the parties and has reflected in a general sense the hourly rates paid from time to time by the Province of Manitoba to its outside counsel. It was never directly tied to the hourly rates paid by the Province. I note, in respect of the rates paid by the Province, that those are full and final rates. I note, also, that the Province is in a better position to control the number of hours expended by its outside counsel than is a respondent who has been ordered to pay on an interim basis for the hours expended by claimant's counsel under the NFA.

[6] Manitoba Hydro, Canada, and Manitoba have all referred to the recent decisions on advance costs from the civil courts, particularly the decision in *Okanagan Indian Band v British Columbia* [2003] S.C.J. No. 76 and *Little Sisters Book and Art Emporium v Canada* [2007] S.C.J. No. 2. Specific reference has been made to the restrictive terms of the order for advance funding in *Hagwilget Indian Band v Canada* [2008] F.C.J. No. 723 (Fed. Ct.).

[7] I recognize the caution that these decisions express regarding the need to balance access to justice concerns against the need to encourage the reasonable and efficient conduct of litigation, and the concern expressed that costs orders should not impose an unfair burden on responding parties. I noted in my earlier decision that there is not the same degree of exceptionality to interim funding under the NFA as there is to advance funding of public interest litigation. The parties to the NFA foresaw that interim funding would be necessary and negotiated that entitlement. I repeat that earlier observation. However, efficient conduct of claims is as desirable a result under the NFA as it is in the conduct of civil litigation. I find that, in order to help promote efficiency, the difference between the levels of interim funding and of full funding should be maintained.

[8] It may be that further efficiencies can be reached by the imposition of procedural controls within an interim costs order, although this is not the time to determine whether such controls are possible or desirable within the context of the NFA.

[9] The rate sought by claimant's counsel – a rate which I have previously found to be one he can reasonably command in the market place - is ordinarily, although not invariably, his full hourly rate. The rate sought exceeds what many other competent counsel who appear on NFA matters would normally command in the market place as their full and final rate on a well-handled piece of litigation. They are not all members of large downtown Winnipeg law firms. It is necessary for me to aim for some reasonable mid-point.

[10] I note the new rate-structure of the Province of Manitoba for outside counsel. As I have stated earlier, the Province's rate is a final rate and the hours of counsel are more

readily controlled by the client than they would be under the NFA interim rate structure. The Province's rates have been considered in the past and I consider them here.

[11] The parties to the NFA are, in 2008, operating under an hourly rate structure that was established by agreement in the year 1999. That agreement provided that it could be varied after the expiry of two years, but no application to vary the rate structure has been brought until now. That fact could indicate that counsel who appeared on NFA matters during those years were basically satisfied with the rates. On the other hand, I note that the consumer price index has gone up during those years and those increases have not been reflected in the interim hourly rates.

[12] I find the foregoing factors to be the more significant in my consideration of a the interim rate structure.

[13] The present hourly rates to be paid to counsel for the claimants who have obtained Interim Costs Orders are as follows:

0 – 5	years at the bar	$85-120
5-10	years at the bar	$135-160
10-15	years at the bar	$160-185
Over 15	years at the bar	$190

I find that an increase in hourly rates is warranted. I fix the new hourly rates, effective November 1, 2008, as follows:

Interpreters		$30
Paralegals		$45
Articling Students		$60
0-5	years at the bar	$100-145
5-10	years at the bar	$165-195
10-15	years at the bar	$195-225
Over 15	years at the bar	$230

[14] I decline to make this increase retroactive. I understand claimant's argument that there is a basis for distinguishing the accounts of claimant's counsel from those of other counsel in terms of retroactivity. However, it would be unfair to do so. It would effectively penalize those who submitted their accounts under Interim Costs Awards in accordance with the then prevailing rates and would invite counsel in future to submit accounts based on what the hoped the rates might ultimately become rather than what they are from time to time.

[15] These rates may be reviewed on motion of any party to the NFA no sooner than two years from the effective date of this increase.

SIGNED at Winnipeg, in Manitoba, this 12th day of November, 2008

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