September 12th, 2003

Board of Commissioners of
Public Utilities
Prince Charles Building
120 Torbay Road
P.O. Box 21040
St. John's, NF
A1A 5B2

Attention: Ms. G. Cheryl Blundon

Dear Ms Blundon:

Re: Application by Industrial Customers

Attached is an original plus ten copies of Hydro's Reply to the Application by the Industrial Customers concerning the evidence of EES Consulting and Len Waverman dated September 5th, 2003.

Yours truly,

Maureen P. Greene, Q.C.
Vice-President Human Resources,
General Counsel & Corporate Secretary

MPG/dp

Copies:

Dennis Browne, Q.C.
Consumer Advocate
Browne Fitzgerald Morgan & Avis
Terrace on the Square
Level III
P.O. Box 23135
St. John's, NL
A1B 4J9

Mr. Ian Kelly, Q.C./Mr. Gerard Hayes
Legal Counsel
Newfoundland Power Inc.
55 Kenmount Road
P.O. Box 8910
St. John's, NL
A1B 3P6

Mr. Colm Seviour/Ms. Meg Gillis
Legal Counsel, Industrial Customers
Stewart McKelvey Stirling Scales
Cabot Place
100 New Gower Street
P.O. Box 5038
St. John's, NL
A1C 5V3

Joseph S. Hutchings, Q.C.
Legal Counsel, Industrial Customers
Poole Althouse
P.O. Box 812
49-51 Park Street
Corner Brook, NL
A2H 6H7

Edward Hearn, Q.C.
Legal Counsel, Town of Labrador City & Town of Wabush
Miller & Hearn
450 Avalon Drive
P.O. Box 129
Labrador City, NL
A2V 2K3

IN THE MATTER OF the
Public Utilities Act, (R.S.N. 1990, Chapter P-47 (the "Act")

AND IN THE MATTER OF a General Rate Application (the "Application") by Newfoundland and Labrador Hydro for approvals of, under Section 70 of the Act, changes in the rates to be charged for the supply of power and energy to Newfoundland Power, Rural Customers and Industrial Customers; and under Section 71 of the Act, changes in the Rules and Regulations applicable to the supply of electricity to its Rural Customers.

TO: The Board of Commissioners of Public Utilities (the "Board")

THE REPLY of Newfoundland and Labrador Hydro ("Hydro") to the Application of Abitibi Consolidated Inc. (Grand Falls), Abitibi Consolidated Inc. (Stephenville), Corner Brook Pulp & Paper Limited, North Atlantic Refining Limited and Voisey's Bay Nickel Company Limited concerning evidence of EES Consulting and Len Waverman states:

1. Hydro's position with respect to the Application is that it should be dismissed.

2. The grounds for the position taken in this Reply are as follows:

   (a) The role of Board Hearing Counsel is not limited in the manner stated in paragraph 2 (a) of the Application. The role of Board Hearing Counsel may include a number of activities, including advising the Board about procedural issues and applicable law relevant to the nature of the proceeding. In addition, the Board Hearing Counsel also has a broader role to ensure that all relevant issues are appropriately before the Board and may enquire through Requests for Information and through cross-examination with respect to evidence of any party. This role also includes the ability to lead evidence on issues arising in the Application.

(b) The simple fact that a witness is called by Board Hearing Counsel does not, by itself, give rise to a reasonable apprehension of bias as stated in paragraph 2 (b) of the Application.

(c) It has been the practice of this Board in past hearings for Board Hearing Counsel to lead evidence on issues arising in the Application through expert reports such as the report of Dr. John Wilson on cost of service issues filed in Hydro's 2001 General Rate Application where positions were advocated by Dr. Wilson on cost of service issues. Generally experts called by Board Hearing Counsel are viewed no differently than experts called by other parties to the proceeding.

(d) With respect to paragraph 2 (d) of the Application, Hydro acknowledges the position of the Industrial Customers that all parties to the proceeding have retained cost of service experts. The fact that all the parties to the proceeding have retained cost of service experts is undoubtedly a factor which should be taken into account by Board Hearing Counsel in determining the need to also lead expert evidence on cost of service issues. As well, the fact that the cost of service methodology was extensively reviewed in a 1993 generic cost of service hearing and again in Hydro's 2001 General Rate Application should also be a factor that is considered in determining whether it is necessary for Board Hearing Counsel to also lead evidence with respect to these types of issues.

3. At the hearing of this Application Hydro may rely on Chapter 10 of Practice and Procedure before Administrative Tribunals authored by Macaulay and Sprague, a copy of which is attached.

Dated at St. John's, Newfoundland and Labrador, this 12th day of September, 2003.

_____

Maureen P. Greene, Q.C.
Vice-President
Newfoundland & Labrador Hydro

c.c. Dennis Browne, Q.C.
Consumer Advocate
Browne Fitzgerald Morgan & Avis
Terrace on the Square
Level III
P.O. Box 23135
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Miller & Hearn
450 Avalon Drive
P.O. Box 129
Labrador City, NL
A2V 2K3

MPG/mgw
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Macaulay + Sprague
Vol. 1

PRACTICE AND PROCEDURE BEFORE
- Administrative Tribunals

10

Bias, The Role Of Counsel And The Agency

10.1 COUNSEL'S FUNCTIONS

While this chapter is written as a broad discussion of the role of a counsel for a hearing, it also discusses bias in a general way, applying to tribunal members as well.

The mandate of most agencies differs, as does the way in which they carry out their procedures. Most agencies have an internal solicitor often called "board solicitor". Some agencies go outside to engage a counsel for all major cases or a specific case. Some tribunals engage what they call "Special Counsel" in all but the most straight-forward cases believing that the public interest is best served in this fashion. What works for one agency may not work for another. However, parts of the chapter, hopefully, will be of assistance to most boards in at least a limited way.

In this chapter, assume that counsel may carry out the following activities:

(1) advise the panel of the board hearing the matter (the "panel") about procedure and applicable law before the hearing commences;

(2) assist the board secretary in preparing necessary notices;

(3) review the applicant's submission to identify issues arising from the applicant's proposal and to develop a strategy for dealing with the matter as a whole;

(4) prepare written interrogatories in conjunction with tribunal staff, if any, to obtain information from the applicants and the intervenors on their submissions in an attempt to expand upon and clarify them;

(5) conduct pre-hearing conferences and recommend, along with counsel acting for the applicant and other interested parties, procedures to be adopted at the hearing, including the order of cross-examination;

(6) take advice from tribunal staff, if any, about the factual elements of the positions taken by the applicant and any intervenors and make decisions based on that advice as to the position to be taken in the hearing;

(7) cross-examine witnesses called on behalf of the applicant and the intervenors in conjunction with advice received from board staff;

(8) receive directions, if any, about evidentiary matters from the panel from time to time in order to clarify issues;

(9) lead evidence recommended by tribunal staff, usually expert evidence, on issues arising in the application;

(10) assist unrepresented intervenors in presenting their evidence before the tribunal;

(11) advise the panel in private, as requested from time to time, about legal and procedural issues; preferable to do this in public; (The tribunal solicitor can often as easily perform this function.)

(12) make submissions of fact and law and mixed fact and law at the conclusion of the hearing; (Some boards do not have counsel do this.)

(13) act for the agency in any court proceeding brought by intervenors, applicants or others, either during or after the reasons for decision have been delivered; and

(14) advise the panel about the contents of any stated case which may be necessary from time to time in the hearing.

The standard form retainer which counsel and the agency execute is set out in Appendix 10.1.

10.2 THE LEGISLATION

There does not appear to be any general applicable legislation relating to the role of counsel appearing before government boards and tribunals. Each agency is governed by its mandating legislation, no provision of which usually bears directly on the question of the role of counsel. There are, however, a number of sections which usually deal directly or indirectly with counsel and the nature of hearings before a tribunal, such as:

> The agency may appoint from time to time one or more persons having technical or special knowledge of any matter in question to inquire into and report to the agency and to assist the agency in any capacity in respect of any matter before it.

Such a section empowers an agency to appoint counsel to assist it with respect to any legal or procedural issues arising out of matters coming before it. No explicit restriction is placed on the point in a proceeding at which such assistance may be rendered.

Other sections of mandating legislation may provide that:

> The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact; or

Where a proceeding before the Board is commenced by the filing of an application, the Board shall proceed by order; or

Where a proceeding before the Board is commenced by a reference to the Board by a Minister, the Board shall proceed in accordance with the requirement; or

Where a proceeding before the Board is commenced by requirement of the Governor or Lieutenant Governor in Council, the Board shall proceed in accordance with the requirement; or

The Board of its own motion may, and upon the request of the Governor or the Lieutenant Governor in Council shall, inquire into, hear and determine any matter that under this Act or the regulations it may upon an application inquire into, hear and determine, and in so doing the Board has and may exercise the same powers as upon an application; or

The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. (This is a boiler-plate section of major importance).

Other sections may grant powers, rights and privileges which are vested in a superior or the Supreme Court or a court of record or provide that, with certain exceptions, the board is not to make any order until it has held a public hearing. The board may be required to prepare and provide written reasons for its decisions in those instances where an application has been opposed or where the applicant so requests. In deciding a matter, the board may be required to make findings of fact based on evidence adduced at its hearings. The burden of proof at a hearing may be upon the applicant.

Some legislation enables an agency to make its own rules of practice and procedure, whereas other legislation may permit the same to be made by the agency, subject to the approval of cabinet. Some legislation permits a board discretion to fix costs; other acts prohibit it. Most legislation permits a board to rehear or review any application before reaching a decision and perhaps vary or rescind orders which it has issued.

The mandating legislation may permit a board to state a case for the opinion of the court on a question of law. Petitions are usually provided to the court from orders of a board on questions of law or jurisdiction. Petitions are sometimes permitted to the cabinet.

The question arises: to what extent counsel may advise a board during its deliberations before a decision is rendered? The principal concern limiting the role of counsel is that he or she may conduct part of the hearing as an adversary to the applicant or to intervenors. In so doing, *counsel must not act in a manner that will raise an appearance of bias.*

10.3 BIAS

There is a prodigious body of case law based on the maxim that no party shall be a judge in his own case. It is clear that anyone with a personal or pecuniary

interest in the outcome of a case is disqualified from acting as a judge. This legal principle does not apply to the role of board counsel.

The classic exposition is that of Lord Hewart C.J., in *R. v. Sussex Justices, Ex parte McCarthy.*[1]

The breadth of the test set out in *Sussex Justices* has been cut down in subsequent English cases, so that a real likelihood of bias rather than a mere suspicion of it is required to strike down a decision. See: *Frome United Breweries Company, Ltd. v. Bath Justices;*[2] *R. v. Camborne Justices, Ex parte Pearce*; [3] see also: *R. v. Meyer*; [4] *R. v. Walker* (1968).[5]

Lord Denning, M.R., commented as follows in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lennon*:

> It (the Court) does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was so impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit . . . Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough . . . There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other.[6]

S.A. de Smith made the following statement in *Judicial Review of Administrative Action*:

> If . . . it is alleged that the adjudicator has made himself a partisan, or is to be suspected of partisanship, by reason of his words or deeds or his association with a party who is instituting or defending the proceedings before him, the courts will not hold him to be disqualified unless the circumstances point to a real likelihood or reasonable suspicion of bias.[7]

A real likelihood of bias entails at least a substantial possibility of bias as based on the reasonable apprehensions of a reasonable man fully apprised of the facts. The pendulum may now be swinging toward a test of reasonable suspicion of bias which is founded on the apprehensions of a reasonable man who has taken reasonable steps

1 *R. v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, [1923] All E.R. Rep. 233, 27 Cox C.C. 590 (Div.Ct.) at K.B. p. 259.

2 *Frome United Breweries Company, Ltd. v. Bath J.J.*, [1926] A.C. 586, [1926] All E.R. Rep. 576 (H.L.).

3 *R. v. Camborne J.J. Ex parte Pearce*, [1954] 2 All E.R. 850, [1955] 1 Q.B. 41, [1954] 3 W.L.R. 415 (Div.Ct.).

4 *R. v. Meyer* (1875), 1 Q.B.D. 173 (Q.B.).

5 *R. v. Walker*, 63 W.W.R. 381, [1968] 3 C.C.C. 254 (Alta. C.A.).

6 *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*, [1969] 1 Q.B. 577 (C.A.) at p. 599.

7 de Smith, *Judicial Review of Administrative Action* (Stevens & Sons Ltd.: London, 1980) (4th ed.) at p. 251.

to inform himself of the material facts. The reasonable suspicion test looks primarily to outward appearances while the real likelihood test depends on the court's evaluation of probabilities. The tests share much in common and will yield the same result in a majority of cases, although de Smith remarks that their co-existence contributes to a greater judicial flexibility. The author comments further:

> It would be surprising, surely, if a court were to refuse to set aside a decision on the ground that a reasonable observer could not have discovered facts that subsequently came to light and which indicated to the court that there was a real likelihood of bias in the adjudicator.[8]

Dubin J.A., assumed a similar common sense position in *Re W.D. Latimer Co. and Bray* where he cited the following passage from Jackson, *Natural Justice*, (1973):

> It is hard to envisage, for example, a court holding that a reasonable man might properly suspect the existence of bias but that the court would not interfere because it has not convinced itself of a real likelihood of bias. In the end all turns on the view the court takes of the facts.[9]

In *R. v. Gough* (1993), 155 N.R. 81, [1993] 2 All E.R. 724 (H.L.) (at pp. 735-736 All E.R.) Lord Goff in the House of Lords (with whom the other Law Lords concurred) considered Lord Denning's comments in *Metropolitan Properties*:

> . . . Lord Denning MR looked at the circumstances from the point of view of a reasonable man, stating that there must be circumstances from which a reasonable man would think it 'likely or probable' that the justice, or chairman, was biased. Since however, the court investigates the actual circumstances, knowledge of such circumstances as are found by the court must be imputed to the reasonable man; and in the result it is difficult to see what difference there is between the impression derived by a reasonable man to whom such knowledge has been imputed and the impression derived by the court, here personifying the reasonable. It is true that Lord Denning MR expressed the test as being whether a reasonable man would think it 'likely or probable' that the justice or chairman was biased. If it is a correct reading of his judgment (and it is by no means clear on the point) that it is necessary to establish bias on a balance of probabilities, I for my part would regard him as having laid down too rigorous a test. In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required

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8 Supra, note 7, at p. 264.

9 *Re W.D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129, 52 D.L.R. (3d) 161 (C.A.) in which he cited (at (O.R.) p. 136) a passage from Jackson, *Natural Justice*, (1973).

> that any more rigorous criterion should be applied. Furthermore, the test as so stated gives sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose. Finally, there is, so far as I can see, no practical distinction between the test as I have stated it and a test which requires a real danger of bias, as stated in *R. v. Spencer; R. v. Smails* [1986] 2 All E.R. 928, [1987] A.C. 128. In this way, therefore, it may be possible to achieve a reconciliation between the test to be applied in cases concerned with justices and other members of inferior tribunals and cases concerned with jurors.

In my opinion, notwithstanding the different wording used by the House of Lords, the "real likelihood of bias" test endorsed in *R. v. Gough* is essentially the same test endorsed in Canada by the Supreme Court of Canada under the term "reasonable apprehension of bias".

The High Court of Australia in a somewhat skeptical judgment, *Ex parte Angliss Group*, emphasized the need for a "a suspicion of bias reasonably — and not fancifully — entertained by responsible minds."[10] The Court held at page 507:

> Those requirements of natural justice are not infringed by a mere lack of nicety, but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the subject-matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect of it.

The impression created in the mind of the reasonable man was also held to be crucial in *Re Golomb and College of Physicians and Surgeons of Ontario.*[11]

The Supreme Court of Canada has dealt with the question of bias on several occasions, of which the following are a few useful examples: *Szilard v. Szasz*[12] and *Ghirardosi v. Minister of Highways for British Columbia*[13]

In his judgment in *Committee for Justice and Liberty v. National Energy Board*, Laskin C.J.C. interpreted the foregoing decision in the following manner:

> This court in fixing on the test of reasonable apprehension of bias, as in *Ghirardosi v. Minister of Highways (B.C.)* . . . and again in *Blanchette v. C.I.S. Ltd.* . . . (where

10 *Ex parte Angliss Group*, [1969] A.L.R. 504.

11 *Re Golomb and College of Physicians and Surgeons of Ont.* (1976), 12 O.R. (2d) 73, 68 D.L.R. (3d) 25 (Div. Ct.).

12 *Szilard v. Szasz*, [1955] S.C.R. 3.

13 *Ghirardosi v. Minister of Highways for B.C.*, [1966] S.C.R. 367, 55 W.W.R. 750, 56 D.L.R. (2d) 469.

> Pigeon J. said . . . that "a reasonable apprehension that the Judge might not act in an entirely impartial manner is ground for disqualification"), was merely restating what Rand J. said in *Szilard v. Szasz* . . ., in speaking of the "probability or reasoned suspicion of biased appraisal and judgment, unintended though it be". This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies.[14]

The test in Canada therefore now appears to be whether there exists a reasonable apprehension of bias: see *Re Clark*.[15]

10.4 (TEXT DELETED.)

10.5 ASSISTING WITH DECISION DRAFTING

I discuss the extent to which counsel and staff may assist in the preparation of decisions and reasons later in this text in chapter 22.

10.6 RECOMMENDED GUIDELINES

The applicable legal principles and guidelines are recommended as follows:

NOTE: the Counsel is any counsel for the board who takes an open role in the hearing room.

(1) the relationship of counsel to the panel is governed by the common law concept or "apparent bias";

(2) the panel, in rendering its reasons for decisions in some hearings, is deciding tangentially substantial issues of fact and law between parties taking adversarial positions as well as determining matters based on the public interest;

(3) the panel must not, in its relationship, request advice in such a manner or under such circumstances that would leave an objective observer to conclude that there is a reasonable apprehension of bias; and

(4) a distinction must be made whether the advice is about procedure, fact, law or mixed fact and law, and whether the advice is given before or during the hearing or after the hearing has been concluded;

   (a) advice about procedure can be given in private at any time (it is preferable to do this publicly);

   (b) advice about facts or mixed fact and law ought not to be given at any time after the hearing commences except publicly, although the panel may, in private, request counsel to elicit evidence to clarify issues of fact in the open hearing (it is preferable to do so publicly);

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14 *Committee for Justice and Liberty v. Nat. Energy Board*, [1978] 1 S.C.R. 369, 9 N.R. 115, 68 D.L.R. (3d) 716, at D.L.R. p. 733.

15 *Re Clark* (1982), 38 O.R. (2d) 427 (Div. Ct.).

(c) advice about law can be given in private before or during the hearing, but ought not to be given by counsel after the hearing is concluded, except in accordance with the procedure hereinafter set out (any needed advice should be sought and received in public);

(d) if the panel needs legal advice from board counsel after the hearing has been concluded but during its deliberations, then it should seek the advice in writing and ask for submissions from all parties;

(e) under no circumstances should the counsel in the matter read or comment upon draft reasons for decision: and

(f) it follows from this latter guideline that counsel should never be asked or consent to write all or any part of any reasons for decisions.

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