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<p>1 (2:02 p.m.)</p> <p>2 CHAIRMAN:</p> <p>3 Q. Thank you and good afternoon. I'd rather be</p> <p>4 golfing, I don't know about you, But anyway, I</p> <p>5 guess we have to go through this. I'd like</p> <p>6 to, first of all, welcome everybody here to</p> <p>7 motions day, this afternoon. We do have a</p> <p>8 motion from the Industrial Customers which</p> <p>9 will be the business on our agenda for this</p> <p>10 evening. Looking out there, I don't think we</p> <p>11 need too many introductions. I do understand</p> <p>12 that Ms. Janet Henley Andrews will not be</p> <p>13 continuing on in the proceeding with us and</p> <p>14 Mr. Seviour, is it, will be -</p> <p>15 MR. SEVIOUR:</p> <p>16 Q. That's correct. And I will be here for at</p> <p>17 least the coming month. Whether or not Ms.</p> <p>18 Andrews rejoins the hearing at some point down</p> <p>19 the road is still an open issue. So I will be</p> <p>20 here for the commencement of this hearing and</p> <p>21 throughout.</p> <p>22 CHAIRMAN:</p> <p>23 Q. Thank you, sir, and welcome.</p> <p>24 MR. SEVIOUR:</p> <p>25 Q. Thank you.</p>	<p>1 CHAIRMAN:</p> <p>2 Q. And I think Mr. Kelly, good day, sir, I don't</p> <p>3 think you and I have been in the same room</p> <p>4 together. I know I think you've probably been</p> <p>5 in the room with my colleagues here, but not</p> <p>6 with me. I've read your name many times in</p> <p>7 transcripts and what have you. And I say</p> <p>8 hello to you, as well.</p> <p>9 KELLY, Q.C.:</p> <p>10 Q. It's a pleasure to be back, Mr. Chair.</p> <p>11 CHAIRMAN:</p> <p>12 Q. Thank you. You may wish to introduce the man</p> <p>13 on your right. I don't recognize -</p> <p>14 KELLY, Q.C.:</p> <p>15 Q. Present with me is Mr. Lorne Henderson of</p> <p>16 Newfoundland Power.</p> <p>17 CHAIRMAN:</p> <p>18 Q. Mr. Henderson, how are you and welcome, sir.</p> <p>19 MR. HENDERSON:</p> <p>20 Q. Good, thank you.</p> <p>21 CHAIRMAN:</p> <p>22 Q. Before we get started, are there any</p> <p>23 preliminary matters?</p> <p>24 MS. NEWMAN:</p> <p>25 Q. No, Chair, Commissioners, there are none.</p>
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<p>1 CHAIRMAN:</p> <p>2 Q. Okay. As I said, the business before us is an</p> <p>3 application from the Industrial Customers</p> <p>4 relative to the evidence of EES Consulting and</p> <p>5 Len Waverman for filing with the Board. And</p> <p>6 the motion is with regard to the expert</p> <p>7 report, I guess, commissioned by the Board to</p> <p>8 be excluded from evidence. And I'll ask--we</p> <p>9 do have responses from Newfoundland and</p> <p>10 Labrador Hydro with respect to this motion and</p> <p>11 we have a response as well from Newfoundland</p> <p>12 Power. We have no written response from</p> <p>13 either the Consumer Advocate or Labrador City-</p> <p>14 Wabush, and I trust we'll probably hear from</p> <p>15 you by way of oral submission this afternoon.</p> <p>16 So without further ado I'll ask the Industrial</p> <p>17 Customers, Mr. Hutchings, would you be</p> <p>18 introducing the motion, please?</p> <p>19 HUTCHINGS, Q.C.:</p> <p>20 Q. Thank you, Mr. Chair. This application</p> <p>21 addresses the somewhat troubled question that</p> <p>22 we've had to deal with previously with respect</p> <p>23 to the role of Board counsel in proceedings of</p> <p>24 this nature.</p> <p>25 As outlined in the Application, the</p>	<p>1 position of the Industrial Customers is that</p> <p>2 it is not, except in very unusual</p> <p>3 circumstances, appropriate for Board counsel</p> <p>4 to be participating essentially as a party</p> <p>5 before the Board itself in a proceeding of</p> <p>6 this nature. In this instance evidence has</p> <p>7 been produced from both EES Consulting and</p> <p>8 Leonard Waverman which Board counsel has</p> <p>9 indicated she intends to file with the Board</p> <p>10 as if it were the same sort of evidence that</p> <p>11 any other party would be filing in respect of</p> <p>12 this hearing. And this evidence, as outlined</p> <p>13 in the Application and in the table of</p> <p>14 contents of EES evidence, clearly deals with</p> <p>15 the substantive issues that are coming before</p> <p>16 the Board in respect of this Application. It</p> <p>17 is not evidence such as Grant Thornton</p> <p>18 produces for the benefit of the Board after</p> <p>19 examination of books of account and so on</p> <p>20 which has been traditionally the case for as</p> <p>21 long as any of us, I think, can recall with</p> <p>22 respect to items of this nature, but this is</p> <p>23 evidence that deals with specific substantive</p> <p>24 issues that are coming before the Board in</p> <p>25 this matter and takes positions with respect</p>

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<p>1 HUTCHINGS, Q.C.:</p> <p>2 to them and reads very much like any other</p> <p>3 evidence or report of an expert that the Board</p> <p>4 would see in connection with this matter.</p> <p>5 The difficulty that that presents is one</p> <p>6 of reasonable apprehension of bias, as the</p> <p>7 legal term goes. The question is whether all</p> <p>8 the "parties" to the proceeding are, in fact,</p> <p>9 on a level playing field when we are faced</p> <p>10 with a situation of Board counsel attempting</p> <p>11 to file a report which, in its own text, says</p> <p>12 it's being presented on behalf of the Board of</p> <p>13 Commissioners of Public Utilities of</p> <p>14 Newfoundland and Labrador. Quite clearly, the</p> <p>15 Board of Commissioners of Public Utilities of</p> <p>16 Newfoundland and Labrador is the judge in this</p> <p>17 case and not a party. And it is in our view</p> <p>18 not appropriate that evidence be presented on</p> <p>19 behalf of the Board.</p> <p>20 This comes back, as I say, to the</p> <p>21 troubled issue of the role of Board counsel.</p> <p>22 And obviously the Board has and should have</p> <p>23 counsel to provide it with legal advice in</p> <p>24 respect of its proceedings. And obviously the</p> <p>25 Board must have trust in that counsel, it must</p>	<p>1 have a solicitor/client relationship with that</p> <p>2 counsel. The difficulty that this gives rise</p> <p>3 to, however, is that when this particular</p> <p>4 counsel, who is the Board's counsel, produces</p> <p>5 a witness, then this level of independence</p> <p>6 which Board counsel is required to have is</p> <p>7 inevitably passed on to the witnesses who may</p> <p>8 be called by Board counsel. There is simply</p> <p>9 too close an association between the Board,</p> <p>10 the Board counsel and the witness to allow for</p> <p>11 a perception of equality among the various</p> <p>12 witnesses who will be coming before the Board.</p> <p>13 The Board needs to have a particular and close</p> <p>14 relationship with its counsel. And it is</p> <p>15 simply not to be assumed and the reasonable</p> <p>16 person, in our submission, would take it that</p> <p>17 the relationship between a witness called by</p> <p>18 Board counsel who has that special position of</p> <p>19 trust with the Board will not be seen to be on</p> <p>20 a level playing field with the other</p> <p>21 witnesses.</p> <p>22 There are situations where the Board may</p> <p>23 wish to ensure that certain topics are covered</p> <p>24 in evidence that the parties themselves, for</p> <p>25 whatever reason, are not covering, but that's</p>
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<p>1 not the case here. In the case of EES</p> <p>2 Consulting, for instance, this is cost of</p> <p>3 service evidence. Each of the principal</p> <p>4 parties here, Hydro, obviously, Newfoundland</p> <p>5 Power, the Consumer Advocate and the</p> <p>6 Industrial Customers as well as the Labrador</p> <p>7 City in connection with the issues that</p> <p>8 interests them have all produced cost of</p> <p>9 service experts before the Board. There is,</p> <p>10 in this case, no gap in the evidentiary record</p> <p>11 which would require that the Board step in to</p> <p>12 add this evidence to what the parties will put</p> <p>13 before the Board.</p> <p>14 We have provided to you the extract from</p> <p>15 the Steineike text where--which deals with the</p> <p>16 role of independent counsel to the tribunal.</p> <p>17 And I just want to highlight a couple of</p> <p>18 points from that test for your consideration.</p> <p>19 On the first page of the extract at the</p> <p>20 bottom paragraph the point is made very</p> <p>21 specifically that independent counsel are</p> <p>22 unusual legal creatures. They are not</p> <p>23 parties, nor are they part of the tribunal.</p> <p>24 However, by purporting to offer evidence on</p>	<p>1 the substantive issues and take issue with the</p> <p>2 positions of other parties, "independent</p> <p>3 counsel" in this instance would be becoming a</p> <p>4 party. The role of counsel as described in</p> <p>5 this article, I think, is useful for the Board</p> <p>6 to take into consideration. The notion that</p> <p>7 before the hearing there should be an</p> <p>8 orientation for Board members, particularly</p> <p>9 those who many not have heard such hearings</p> <p>10 before, which is not the case in the present</p> <p>11 matter as this case obviously is experienced.</p> <p>12 But nonetheless, that is an essential part of</p> <p>13 the role of independent Board counsel.</p> <p>14 Then the article goes ahead to deal with</p> <p>15 the question of preparation for a specific</p> <p>16 hearing. And it is noted on page 216 in the</p> <p>17 top paragraph that independent counsel is</p> <p>18 retained to be an advisor to, not an advocate</p> <p>19 for the tribunal. And that's in the context</p> <p>20 of whether he's in a position to communicate</p> <p>21 to the tribunal everything that he knows. And</p> <p>22 quite clearly, if he's in receipt of</p> <p>23 information that is not properly before the</p> <p>24 tribunal on the record, such information</p> <p>25 should not be passed on to the Board.</p>

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<p>1 HUTCHINGS, Q.C.:</p> <p>2 Also on page 216 under the heading of</p> <p>3 "Bias issues" it is quite clear, and the</p> <p>4 article suggests, independent counsel, as the</p> <p>5 name suggests, must be neutral. Where a</p> <p>6 tribunal's counsel has an inappropriate</p> <p>7 connection to one of the parties an appearance</p> <p>8 of bias exists that could nullify the</p> <p>9 proceedings. And there is reference there to</p> <p>10 the case in the Alberta Court of Appeal where</p> <p>11 advisors to the Board were associated with one</p> <p>12 of the parties and the Court determined that</p> <p>13 there was an appearance of bias. And they go</p> <p>14 on also to deal with the Mitchell case out of</p> <p>15 the Manitoba Court. I won't deal with those</p> <p>16 cases in detail. They don't raise the</p> <p>17 specific point, that issue here, but they do</p> <p>18 illustrate how far courts have gone to protect</p> <p>19 the integrity of the process by ensuring that</p> <p>20 wherever an apprehension of bias exists, a</p> <p>21 remedy is available.</p> <p>22 At page 219 the article deals with the</p> <p>23 role of independent counsel during the</p> <p>24 hearing. And clearly, under paragraph 2,</p> <p>25 nature of the role of independent counsel</p>	<p>1 during the hearing, the learned author says,</p> <p>2 "Independent counsel's role is to provide</p> <p>3 advice to the tribunal. He or she should not</p> <p>4 act as if he were a member of the tribunal or</p> <p>5 its chair. Neither should he or she</p> <p>6 participate in the proceedings as if he or she</p> <p>7 were a party. Otherwise the principal of audi</p> <p>8 alterum partum may be breached." And that, of</p> <p>9 course, is the principal that provides for a</p> <p>10 fair hearing before an independent tribunal in</p> <p>11 order for there to be a valid determination by</p> <p>12 any tribunal to which the rules of natural</p> <p>13 justice will apply.</p> <p>14 (2:16 p.m.)</p> <p>15 The author goes on to discuss the Brett</p> <p>16 case in Ontario. And point four of the</p> <p>17 factors considered in there which is shown on</p> <p>18 page 220 is that one of the complaints against</p> <p>19 independent counsel in that case is that</p> <p>20 independent counsel appeared to argue as</p> <p>21 counsel favourable to the prosecution.</p> <p>22 Now, there's no prosecution involved in</p> <p>23 this, but nonetheless, if Board counsel is</p> <p>24 putting on the record evidence that favours</p> <p>25 one or the other or one or more of the</p>
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<p>1 particular parties who are before the Board,</p> <p>2 this point has equal validity, in our</p> <p>3 submission.</p> <p>4 The case--the author goes on then to</p> <p>5 consider the Adair case, halfway down page</p> <p>6 220. And in that instance the tribunal's</p> <p>7 counsel made known a strong view that the</p> <p>8 action of the nurses who were subject to</p> <p>9 discipline in that instance was illegal and</p> <p>10 took a position that was not taken by any</p> <p>11 other party. The Court said, and the</p> <p>12 quotation is in the text, "Solicitors advising</p> <p>13 boards have been told more than once by this</p> <p>14 Court and by the Court of Appeal that when</p> <p>15 they descend into the area the impression may</p> <p>16 be left that the person facing discipline</p> <p>17 charges is not just being judged by the body</p> <p>18 appointed by the legislature, but as well,</p> <p>19 perhaps even chiefly, by a solicitor hired to</p> <p>20 give advice to the Board. Such conduct by the</p> <p>21 solicitor creates an appearance, the</p> <p>22 appearance of unfairness." So, as the text</p> <p>23 goes on to say, "Prudent independent counsel</p> <p>24 strive to act only as and to maintain the</p> <p>25 appearance of acting only as advisors to the</p>	<p>1 tribunal." And one of the solicitations or</p> <p>2 counsels given in that article at the bottom</p> <p>3 of page 220, item 5 is to refrain from arguing</p> <p>4 with parties, but rather address his or her</p> <p>5 advice to the tribunal. And inevitably, if</p> <p>6 Board counsel is calling a witness to put</p> <p>7 specific positions on substantive issues</p> <p>8 before the Board, he will be at odds with</p> <p>9 certain of the other parties. He will be</p> <p>10 descending into the area and becoming as if he</p> <p>11 were a party. And that is, in our view,</p> <p>12 clearly not the role of independent counsel.</p> <p>13 Page 221 under "Advising the Tribunal and</p> <p>14 Content of the Advice", in the second</p> <p>15 paragraph it is clear, he says, "For example,</p> <p>16 independent counsel should not provide advice</p> <p>17 suggesting how the tribunal should decide the</p> <p>18 merits of the case." In our submission, no</p> <p>19 more should independent counsel call evidence</p> <p>20 which is suggesting to the Board how the</p> <p>21 merits of the case should be determined.</p> <p>22 The point is made again at the bottom of</p> <p>23 the paragraph on page 222 just before the</p> <p>24 issue of form of the advice where the note is</p> <p>25 that if the intervention by counsel is</p>

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<p>1 HUTCHINGS, Q.C.:</p> <p>2 excessive, tribunal's counsel risks creating</p> <p>3 the appearance of descending into the arena</p> <p>4 and interfering with the adversarial process.</p> <p>5 And quite clearly, that is something that is</p> <p>6 not contemplated under our law as it reflects</p> <p>7 the issue of bias.</p> <p>8 It's interesting to note that 223,</p> <p>9 rather, at the bottom, in talking of the final</p> <p>10 address to the tribunal, in the second</p> <p>11 paragraph there, the author says, "The final</p> <p>12 address by tribunal's counsel can be similar</p> <p>13 to but not identical to a jury address by a</p> <p>14 trial judge." And that is quite a different</p> <p>15 thing than advocating for a particular</p> <p>16 position even if it is a position that has</p> <p>17 been put by a witness called by such counsel.</p> <p>18 And that creates the very issue itself because</p> <p>19 the witness has been called by that counsel.</p> <p>20 Quite clearly, as the commentary goes on on</p> <p>21 page 224, "Independent counsel can identify</p> <p>22 issues but should not comment on matters of</p> <p>23 weight or discretion that are for the tribunal</p> <p>24 to decide." And obviously the points go on in</p> <p>25 terms of the inappropriateness of legal</p>	<p>1 counsel participating in or being present for</p> <p>2 the deliberations of the tribunal.</p> <p>3 There are a number of illustrations we</p> <p>4 can refer to, to show the nature of the</p> <p>5 problems that this is creating. Even in your</p> <p>6 opening this afternoon, Mr. Chair, you</p> <p>7 referred to responses coming from Newfoundland</p> <p>8 Power and from Newfoundland Hydro. But, if we</p> <p>9 look at the situation that we're in here,</p> <p>10 essentially the Industrial Customers are the</p> <p>11 applying party and Board counsel is the</p> <p>12 responding party. The responding party has</p> <p>13 not filed any response to this Application.</p> <p>14 One might suggest that it's not being</p> <p>15 contested and should simply go on that basis,</p> <p>16 but clearly, other parties have an interest.</p> <p>17 But this is illustrative of the fact that</p> <p>18 simply by proffering this evidence Board</p> <p>19 counsel is putting one of the parties, in this</p> <p>20 instance the Industrial Customers, essentially</p> <p>21 in the position of making an application</p> <p>22 against the Board. And this is the Board</p> <p>23 before whom we are appearing, which is</p> <p>24 intended to be neutral and fair and impartial</p> <p>25 toward us, yet we are effectively put in the</p>
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<p>1 position of making an application against the</p> <p>2 Board. Equally, the two utilities here, by</p> <p>3 filing responses, are put in the position of</p> <p>4 defending the Board and defending the position</p> <p>5 that the Board, through its counsel, has</p> <p>6 taken. It is quite clearly not the situation</p> <p>7 that is contemplated by the legislation which</p> <p>8 contemplates an independent fair and impartial</p> <p>9 tribunal sitting apart from and above and</p> <p>10 beyond and untouched by the adversarial</p> <p>11 process over which it presides. But the lines</p> <p>12 are being seriously blurred here and the</p> <p>13 parties are being put in seriously prejudicial</p> <p>14 positions. It may well be that these</p> <p>15 utilities--and one would assume, quite</p> <p>16 frankly, that these utilities would not be</p> <p>17 interested in having what amounts to</p> <p>18 additional intervenor evidence put before the</p> <p>19 Board. But the Board's evidence is</p> <p>20 effectively intervenor evidence. It is</p> <p>21 evidence that is being filed presumably to</p> <p>22 counter, at least in part, something that one</p> <p>23 or more of these utilities, and more</p> <p>24 particular, Hydro, I suspect, want the Board</p> <p>25 to do. But, the utilities, nonetheless, are</p>	<p>1 before you now, according to their filed</p> <p>2 submissions, defending your right, the Board's</p> <p>3 right, or Board's counsel's right to have this</p> <p>4 additional material which may be contrary to</p> <p>5 their interests come before you. And</p> <p>6 obviously the utilities have, perhaps, even a</p> <p>7 greater interest in ensuring that they are not</p> <p>8 put in a position where they are perceived as</p> <p>9 acting against or against the wishes of the</p> <p>10 Board. But it is an untenable position, in my</p> <p>11 submission, Mr. Chair. Obviously we are all</p> <p>12 here as parties and we want all to exhibit the</p> <p>13 greatest respect for the Board and we don't</p> <p>14 want to be taking positions that are</p> <p>15 unnecessarily contrary to the way the Board</p> <p>16 wishes to proceed. But effectively, given</p> <p>17 that someone in the name of the Board is</p> <p>18 coming before this tribunal and offering</p> <p>19 substantive evidence on issues before the</p> <p>20 Board, we are put in the position of having to</p> <p>21 react.</p> <p>22 Hydro's reply in the matter speaks of the</p> <p>23 notion that Board hearing counsel may offer</p> <p>24 evidence. The extract from Macauley and</p> <p>25 Sprague which is attached, with respect,</p>

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<p>1 HUTCHINGS, Q.C.:</p> <p>2 doesn't directly address that issue. The--in</p> <p>3 Chapter 10 there just before the enumerated</p> <p>4 portions on page 10-1 the test reads, "In this</p> <p>5 chapter assume that counsel may carry out the</p> <p>6 following activities." And the ninth</p> <p>7 enumerated item is, "Lead evidence recommended</p> <p>8 by tribunal staff, usually expert evidence, on</p> <p>9 issues arising in the application." Now, that</p> <p>10 is no more than an assumption. Fine. Let's</p> <p>11 accept it for the purpose of argument that</p> <p>12 that is a correct statement, although in the</p> <p>13 text it is no more than an assumption. Quite</p> <p>14 clearly there is room for evidence to be</p> <p>15 recommended by tribunal staff and lead before</p> <p>16 the Board. And I mean, this is the type of</p> <p>17 evidence that we've had from Grant Thornton,</p> <p>18 or specifically tasked by the Board to review</p> <p>19 accounts and produce some type of report that</p> <p>20 we've seen. Equally, we have the type of</p> <p>21 report which Grant Thornton has filed on the</p> <p>22 rate stabilization plan, for instance, which</p> <p>23 does nothing more than identify the issues and</p> <p>24 suggest the Board may wish to consider this,</p> <p>25 the Board may wish to consider that, the Board</p>	<p>1 may wish to look at this point, identifying</p> <p>2 issues. That's fine. And that is sufficient</p> <p>3 to establish, if you will, if you need to</p> <p>4 establish the validity of the notion that</p> <p>5 Board staff can lead evidence. But it does</p> <p>6 not, in our submission, wipe away all of the</p> <p>7 jurisprudence which tells us that a</p> <p>8 reasonable apprehension of bias will arise</p> <p>9 where evidence is led on the specific issues,</p> <p>10 the substantive issues before the Board by</p> <p>11 someone who purports to speak on behalf of the</p> <p>12 Board.</p> <p>13 The second extract that was provided</p> <p>14 later from Hydro, which I understand is from</p> <p>15 the same text, addresses the notion that--and</p> <p>16 this is the point made in the first paragraph,</p> <p>17 "It's not surprising that there has been</p> <p>18 considerable debate over whether a court ought</p> <p>19 to be able to appoint an expert witness of its</p> <p>20 own." And quite clearly, the rule in Canada</p> <p>21 is that that is not to occur and judges have</p> <p>22 been overturned for so doing, as you can see</p> <p>23 by reading this particular extract. What we</p> <p>24 have at the end of this at page 1727 is a</p> <p>25 recommendation of the author.</p>
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<p>1 It's not purporting to be a statement of</p> <p>2 law. It merely says, "as a result, all</p> <p>3 tribunals should claim access to an inherent</p> <p>4 right to call their own expert witnesses to</p> <p>5 ensure a complete and satisfactory record of</p> <p>6 the proceeding, especially where the matter</p> <p>7 impacts upon the public interest." This is an</p> <p>8 opinion on a question of public policy from</p> <p>9 this particular author, but the author, to</p> <p>10 give him his due, when we come back to page</p> <p>11 1726, makes it very clear that the answer to</p> <p>12 this question has to be found within the</p> <p>13 statutory provisions that apply to the</p> <p>14 particular tribunal in question, and I've</p> <p>15 distributed to other counsel, this afternoon,</p> <p>16 some extracts from the Public Utilities Board</p> <p>17 Act of the Province of Alberta and I have</p> <p>18 additional copies here.</p> <p>19 This is to assist you in putting into</p> <p>20 context the references, both in this article</p> <p>21 and in the case attached to the Newfoundland</p> <p>22 Power submissions, with respect to the</p> <p>23 legislative provisions that apply in the</p> <p>24 Province of Alberta. You will see that, in</p> <p>25 footnote 71, in the Hydro submission, page</p>	<p>1 1726, there's a reference to The Public</p> <p>2 Utilities Board Act there, SA 1980, Chapter</p> <p>3 P37, Section 19. That has now become Section</p> <p>4 21 of the Revised Statutes of Alberta, 2000,</p> <p>5 Chapter P45, and that is the second section</p> <p>6 that is reproduced there. The first section</p> <p>7 that's reproduced is what was Section 14 of</p> <p>8 the Act which is referred to in the Re: Public</p> <p>9 Utilities Board Act case that's attached to</p> <p>10 Mr. Kelly's submission, and I'll get back to</p> <p>11 that later.</p> <p>12 But, for our purposes, we need to focus</p> <p>13 upon the intent of the legislature in</p> <p>14 determining how the Board is to proceed in</p> <p>15 respect of these matters, and overlay that</p> <p>16 with the rules of natural justice, to ensure</p> <p>17 there is no apprehension of bias. In the</p> <p>18 context of what Hydro has submitted here, and</p> <p>19 there is a note that the Board did call Dr.</p> <p>20 Wilson in the previous hearing. I recall also</p> <p>21 that the Board, at one stage in the course of</p> <p>22 the previous hearing or the preparation for</p> <p>23 it, proposed to call a cost of capital</p> <p>24 witness, who had some connection previously</p> <p>25 with one of the utilities, and ultimately, the</p>

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<p>1 HUTCHINGS, Q.C.:</p> <p>2 Board determined not to call any cost of</p> <p>3 capital witness at the previous hearing,</p> <p>4 largely, I think, on the basis that everyone</p> <p>5 else was calling a cost of capital witness and</p> <p>6 it simply wasn't necessary.</p> <p>7 But, if we look at and compare the</p> <p>8 legislative provisions in the Public Utilities</p> <p>9 Act to what exists elsewhere, the powers that</p> <p>10 exist here are found, firstly, in Section 6,</p> <p>11 and let's look first at sub 11, which says</p> <p>12 "the Board may employ legal counsel,</p> <p>13 accountants, engineers, stenographers or other</p> <p>14 persons that it may require or consider</p> <p>15 advisable for the purpose of carrying out this</p> <p>16 Act, and the wages, salaries or compensation</p> <p>17 of those persons shall be paid by the Board</p> <p>18 and shall form part of the annual expenses of</p> <p>19 the Board." We also need to look at sub 10 of</p> <p>20 Section 6, which provides that Lieutenant</p> <p>21 Governor in Council may appoint technical or</p> <p>22 other assistants to attend upon and advise the</p> <p>23 Board, where requested by the Board to do so.</p> <p>24 (2:32 p.m.)</p> <p>25 So there is clearly a legislative intent</p>	<p>1 that where the Board perceives a need to have</p> <p>2 assistance and advise from technical or other</p> <p>3 persons, then there is provision to request</p> <p>4 the Lieutenant Governor in Council to appoint</p> <p>5 such persons accordingly. The only other</p> <p>6 references to counsel, engineers, valuers</p> <p>7 and so on in the Act is found in Section 65</p> <p>8 and Section 90, and you don't really need to</p> <p>9 look at those right now, because all that they</p> <p>10 talk about there is how to deal with the cost</p> <p>11 of these people. But the other two sections</p> <p>12 of the Act that I think are helpful in</p> <p>13 determining the ultimate resolution of this</p> <p>14 are Section 20, which provides the Board with</p> <p>15 power to make, revoke and alter rules and</p> <p>16 regulations for its practice and procedure,</p> <p>17 and provides, specifically, and this is</p> <p>18 significant, that the rules and regulations,</p> <p>19 when approved by the Lieutenant Governor in</p> <p>20 Council shall have the force of law.</p> <p>21 The other point within the Act that I</p> <p>22 think we need to keep in mind is the provision</p> <p>23 of Section 117 that provides for the</p> <p>24 appointment of a Consumer Advocate, and I'll</p> <p>25 return to that a little later.</p>
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<p>1 With respect to the Act therefore, there</p> <p>2 is no clear contemplation within the Act that</p> <p>3 the Board would be out calling its own</p> <p>4 witnesses before it, in the context of a</p> <p>5 hearing, and the provisions of the</p> <p>6 regulations, you will see, are quite</p> <p>7 consistent with the notion that the Board</p> <p>8 would not be doing that. If you look at</p> <p>9 Sections 18 and 19 of the regulations, which</p> <p>10 under Section 20 of the Act have the force of</p> <p>11 law, "the order of participants at a public</p> <p>12 hearing shall, unless otherwise determined by</p> <p>13 the Board, be as follows: first, presentation</p> <p>14 of evidence by the applicant, cross-</p> <p>15 examination and so on, followed by second,</p> <p>16 presentation of evidence by an intervenor,</p> <p>17 followed by cross-examination and so on,</p> <p>18 followed by (c) argument from the applicant</p> <p>19 and the intervenor and other persons." The</p> <p>20 Act specifically goes on, or the regulations</p> <p>21 rather go on in Section 19 to say that "no</p> <p>22 cross-examination shall be permitted, other</p> <p>23 than cross-examination by or on behalf of an</p> <p>24 applicant, an intervenor or the Board or its</p> <p>25 staff," and further says "a witness may be</p>	<p>1 questioned throughout the proceeding by the</p> <p>2 Board or by Board staff."</p> <p>3 So it was felt necessary to put in the</p> <p>4 regulation a specific power to allow the Board</p> <p>5 to cross-examine witnesses. Quite clearly, in</p> <p>6 our submission, had the intent been that the</p> <p>7 Board was to be calling witnesses itself,</p> <p>8 there would have been a specific provision to</p> <p>9 that effect, and there is none, either in the</p> <p>10 Act or in the regulation. Quite clearly, the</p> <p>11 regulation contemplates evidence from the</p> <p>12 applicant and intervenors and that's it, and</p> <p>13 the regulation goes out of its way to make it</p> <p>14 clear that the Board or Board staff may engage</p> <p>15 in cross-examination.</p> <p>16 I'll deal finally with--well, before I</p> <p>17 leave the legislative scheme, I think it is</p> <p>18 significant to note the provision for</p> <p>19 appointment of a consumer advocate. That</p> <p>20 takes away any suggestion that the Board need</p> <p>21 involve itself in the creation of evidence to</p> <p>22 protect the consumers generally in the</p> <p>23 province. You're all aware of the legislative</p> <p>24 history wherein there was, at one time, a</p> <p>25 consumer representative appointed to the Board</p>

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<p>1 HUTCHINGS, Q.C.:</p> <p>2 itself. That no longer exists obviously.</p> <p>3 What the legislature has now decreed is that</p> <p>4 there shall be a consumer advocate and</p> <p>5 Government has gone out of its way and taken</p> <p>6 the time and energy to appoint a consumer</p> <p>7 advocate, who has gone out of his way and</p> <p>8 taken the time and energy to go out and retain</p> <p>9 experts and bring a case before the Board on</p> <p>10 behalf of consumers of the province. So this</p> <p>11 is not a situation where there is an</p> <p>12 unrepresented constituency that the Board</p> <p>13 needs to protect or fill in any gap in respect</p> <p>14 of. The parties that before the Board here</p> <p>15 represent all of the interests that are</p> <p>16 affected by the Board's decisions and</p> <p>17 accordingly, there is no need for any</p> <p>18 additional experts or evidence to be called in</p> <p>19 the name of the Board.</p> <p>20 As regards the position of Newfoundland</p> <p>21 Power, in paragraph 1B of its presentation it</p> <p>22 says, "in order to fulfil its statutory</p> <p>23 mandate, the Board may retain counsel and</p> <p>24 consultants to present evidence, touching on</p> <p>25 one or more subjects or issues in relation to</p>	<p>1 the matter before it." With respect, we do</p> <p>2 not see, in any of the statutory or regulatory</p> <p>3 provisions that apply to the Board, the right</p> <p>4 for the Board to present evidence. It may</p> <p>5 seek technical assistance by having the</p> <p>6 Lieutenant Governor in Council appoint someone</p> <p>7 to do that. It may retain counsel and</p> <p>8 engineers and other experts, but there is, in</p> <p>9 our submission, no contemplation in the Act</p> <p>10 that there be evidence presented in the manner</p> <p>11 that is so suggested here.</p> <p>12 The case from the Alberta Court of</p> <p>13 Appeal, I think, highlights the real concern</p> <p>14 about apprehension of bias in this instance.</p> <p>15 On page 4 of 4, in paragraph 13, the Court</p> <p>16 remarks, "it is a dangerous policy to put Mr.</p> <p>17 Drazen in the position where he is at once</p> <p>18 advisor and witness." And we would suggest,</p> <p>19 Mr. Chair, that it is a dangerous policy to</p> <p>20 put Board counsel in the position where he is,</p> <p>21 at once, advocate and advisor to the Board in</p> <p>22 this regard.</p> <p>23 The basic complaint that we are left</p> <p>24 with, Mr. Chair, is that Board is intended to</p> <p>25 be fair and impartial and not to be involved</p>
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<p>1 in the controversy which necessarily rages</p> <p>2 before it in an adversarial proceeding. By</p> <p>3 having counsel who is suppose to be</p> <p>4 independent counsel to the Board and who is</p> <p>5 supposed to play the role of independent</p> <p>6 counsel, as described in the Steineike</p> <p>7 article, descending into the fray, in the name</p> <p>8 of the Board, calling witnesses who take</p> <p>9 substantive positions on the issue before the</p> <p>10 Board, we are left with the real danger that</p> <p>11 that witness is clothed with the aura of</p> <p>12 independence which counsel must be clothed</p> <p>13 with, which Board counsel must be clothed</p> <p>14 with, and because that independence and</p> <p>15 neutrality is intended to and does place Board</p> <p>16 counsel above the fray, hence, witnesses</p> <p>17 associated with Board counsel are inevitably,</p> <p>18 in our submission, going to be seen to be</p> <p>19 something more than other witnesses who, quite</p> <p>20 clearly, are brought before the Board by</p> <p>21 parties who have specific interests and who</p> <p>22 are giving evidence in support of the specific</p> <p>23 positions taken by the parties. The lines</p> <p>24 between parties and the Board are being</p> <p>25 unnecessarily blurred, where, in this case, it</p>	<p>1 is unnecessary for the Board to have a cost of</p> <p>2 service witness or a witness giving the</p> <p>3 evidence, such as Mr. Waverman is giving. In</p> <p>4 that situation, where there isn't a gap, the</p> <p>5 witness is not necessary. The perception will</p> <p>6 be that the Board, through its counsel, has an</p> <p>7 agenda of its own in respect of this matter.</p> <p>8 And that is not, in any sense, a reflection</p> <p>9 upon any Board member or upon Board counsel,</p> <p>10 and as the cases have said, and you can see it</p> <p>11 in the articles and cases that are before you,</p> <p>12 it is not a question of whether or not the</p> <p>13 bias actually exists. It's a question of</p> <p>14 whether the reasonable person would apprehend</p> <p>15 such a bias, and that is the concern that we</p> <p>16 have.</p> <p>17 It is unnecessary to have this evidence</p> <p>18 before the Board. There is sufficient</p> <p>19 evidence from the parties who are supposed to</p> <p>20 be calling evidence, and, in our submission,</p> <p>21 there is no legislative mandate for so doing.</p> <p>22 In those circumstances, we would ask that this</p> <p>23 evidence not be received. Those are our</p> <p>24 submissions, Mr. Chair.</p>

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<p>1 CHAIRMAN:</p> <p>2 Q. Thank you very much, Mr. Hutchings. I'll ask</p> <p>3 my colleagues on the panel if they have any</p> <p>4 questions at the end of each presentation.</p> <p>5 COMMISSIONER WHALEN:</p> <p>6 Q. I don't have any right now. I might have some</p> <p>7 after we hear the other submissions.</p> <p>8 CHAIRMAN:</p> <p>9 Q. Mr. Saunders?</p> <p>10 COMMISSIONER SAUNDERS:</p> <p>11 Q. No questions.</p> <p>12 CHAIRMAN:</p> <p>13 Q. Thank you. Good afternoon, Ms. Greene, Mr.</p> <p>14 Young.</p> <p>15 HUTCHINGS, Q.C.:</p> <p>16 Q. I'd assume Board counsel would go next as the</p> <p>17 responding party, Mr. Chair, but we're in your</p> <p>18 hands obviously.</p> <p>19 MS. NEWMAN:</p> <p>20 Q. Yes, Mr. Chairman, I would comment that, as</p> <p>21 the parties are aware, Board counsel is not</p> <p>22 really a responding party in this application.</p> <p>23 I still view my role as very much advising the</p> <p>24 Board and I will propose that I continue to do</p> <p>25 that by going last, as is the ordinary case,</p>	<p>1 and as set out in the rules for procedure, I'm</p> <p>2 specifically listed as going last. So I</p> <p>3 propose to merely complete the record here</p> <p>4 today and I think it's appropriate for counsel</p> <p>5 for Hydro to begin and we follow our usual</p> <p>6 order that way.</p> <p>7 GREENE, Q.C.:</p> <p>8 Q. Hydro are certainly prepared to go first, but</p> <p>9 has I had indicated to counsel for the Board</p> <p>10 yesterday, as this issue deals with the role</p> <p>11 of Board counsel, I also agree with the</p> <p>12 applicant that Board counsel should respond to</p> <p>13 the motion and I had anticipated actually that</p> <p>14 the Board counsel would be filing a reply and</p> <p>15 would be speaking first. However, if it</p> <p>16 convenient and acceptable to the Board, Hydro</p> <p>17 is prepared to go first.</p> <p>18 The sole issue here before the Board this</p> <p>19 afternoon is whether the Board counsel has a</p> <p>20 right to call expert evidence in this</p> <p>21 particular hearing. Mr. Hutchings, in his</p> <p>22 comments, has raised other issues with respect</p> <p>23 to conduct of Board counsel, and I share the</p> <p>24 concern of the Industrial Customers with</p> <p>25 respect to the appropriate role for Board</p>
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<p>1 counsel and that Board counsel should not</p> <p>2 enter into the fray and become an adversarial</p> <p>3 party to the proceeding, as that is not the</p> <p>4 role of Board counsel. I don't think that is</p> <p>5 the full question that's before the panel. The</p> <p>6 question before the Board this afternoon is</p> <p>7 the right to call expert evidence and whether</p> <p>8 that, by itself, raises a reasonable</p> <p>9 apprehension of bias so that Board counsel may</p> <p>10 not in any normal circumstance call expert</p> <p>11 evidence.</p> <p>12 And before dealing with that question,</p> <p>13 which I believe is the question before the</p> <p>14 Board, I think it's helpful to have some</p> <p>15 discussion and I would like to make some</p> <p>16 comments with respect to the role of the Board</p> <p>17 in a regulatory proceeding such as the one</p> <p>18 before the Board here, because I do think</p> <p>19 there is a difference between the pure</p> <p>20 adversarial nature arising in a judicial court</p> <p>21 proceeding and the role the Board plays here</p> <p>22 in its regulatory role.</p> <p>23 The Board is not simply deciding a</p> <p>24 dispute between litigants, as is usually the</p> <p>25 case in a court matter. And if we were in</p>	<p>1 Court, I probably would be opposing the</p> <p>2 motion, because it obviously is simpler if I</p> <p>3 have less experts to deal with and less issues</p> <p>4 raised. So from that perspective, yes, Hydro</p> <p>5 probably would, if we were in Court, and</p> <p>6 dealing with only one issue, that may well be</p> <p>7 the case. However, here, we must look at the</p> <p>8 broader mandate the Board has under the</p> <p>9 existing legislation.</p> <p>10 The Public Utilities Board must not only</p> <p>11 decide specific issues between parties to a</p> <p>12 hearing, but they have a broader role with</p> <p>13 respect to the public interest. There are two</p> <p>14 specific sections of the legislation I would</p> <p>15 like to refer to. The first is Section 16 of</p> <p>16 the Public Utilities Act, under which the</p> <p>17 Board has general supervision of public</p> <p>18 utilities and may make all necessary inquiries</p> <p>19 and keep itself informed as to compliance by</p> <p>20 the utility with the law.</p> <p>21 The second legislative provision I draw</p> <p>22 the attention of the Board to is the</p> <p>23 Electrical Power Control Act, and specifically</p> <p>24 Section 3 and 4. Section 3 of that Act sets</p> <p>25 out very broad electrical power policy for the</p>

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<p>1 GREENE, Q.C.:</p> <p>2 Province. Under Section 4 of that Act, the</p> <p>3 Board is to apply that public policy statement</p> <p>4 in all issues and proceedings before the</p> <p>5 Board. So the role of the Board is broader in</p> <p>6 the sense that it does not only decide the</p> <p>7 specific interests that litigants may bring</p> <p>8 before or adversarial parties, but it must</p> <p>9 take into account a broader responsibility in</p> <p>10 the public interest, as referred to in Section</p> <p>11 16 of the Act and Sections 3 and 4 of the</p> <p>12 Electrical Power Control Act.</p> <p>13 In carrying out its responsibilities and</p> <p>14 its mandate, the Board does have the right to</p> <p>15 retain staff, including counsel, to assist.</p> <p>16 The role of Board counsel, in Hydro's</p> <p>17 submission, is not limited in the manner set</p> <p>18 out in paragraph 2A of the application by the</p> <p>19 Industrial Customers. As we stated in our</p> <p>20 paragraph 2A, yes, the Board counsel is to</p> <p>21 advise the Board with respect to issues of</p> <p>22 procedure, with respect to issues of</p> <p>23 jurisdiction, with respect to issues of</p> <p>24 substantive law on matters arising in the</p> <p>25 proceeding. But as well, it has become the</p>	<p>1 practice before this Board, as well as at</p> <p>2 other administrative tribunals, that the Board</p> <p>3 may and will become involved with respect to</p> <p>4 request for information to all parties, with</p> <p>5 respect to cross-examining witnesses and in</p> <p>6 fact, with respect to leading evidence.</p> <p>7 The chapter from Macauley that was</p> <p>8 attached with respect to our reply does set</p> <p>9 out a number of duties for Board counsel, and</p> <p>10 I believe that that has become the accepted</p> <p>11 practice before this Board, as well as in</p> <p>12 other regulatory boards. While Mr. Hutchings</p> <p>13 pointed out, the introduction did, in Chapter</p> <p>14 10, I believe it was, say that you could</p> <p>15 assume the Board had a right to call evidence,</p> <p>16 I think if we looked at Chapter 17, that Mr.</p> <p>17 Hutchings has also referred to, that textbook</p> <p>18 deals specifically with the right of</p> <p>19 administrative tribunals to lead expert</p> <p>20 evidence, and I think, if we refer here to</p> <p>21 page 17-26 of Chapter 17, the text of Macauley</p> <p>22 on Practice and Procedure Before</p> <p>23 Administrative Tribunals, I think there is a</p> <p>24 paragraph here that's very relevant to the</p> <p>25 specific issue before the panel that I would</p>
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<p>1 like to refer to.</p> <p>2 So it's page 17-26 of Chapter 17, which</p> <p>3 was distributed yesterday, and it is the</p> <p>4 second full paragraph beginning on that page.</p> <p>5 There it is stated, "in administrative</p> <p>6 proceedings, a tribunal is generally required</p> <p>7 to make a decision which determines, not only</p> <p>8 the rights of the parties before it, but even</p> <p>9 more important, the impact on the public at</p> <p>10 large. The public interest component of</p> <p>11 administrative decision making makes it clear</p> <p>12 that it is very important for an</p> <p>13 administrative tribunal to have the power to</p> <p>14 appoint its own expert witnesses. All</p> <p>15 administrative tribunals are, however, creates</p> <p>16 of statute. It is arguable therefore that the</p> <p>17 empowering legislation of each tribunal must</p> <p>18 stipulate if, and when, an expert may be</p> <p>19 appointed. On the other hand, since</p> <p>20 administrative tribunals are generally</p> <p>21 considered to be masters of their own practice</p> <p>22 and procedure, they may have an inherent power</p> <p>23 to appoint witnesses and experts to assist in</p> <p>24 resolving matters that affect the public</p> <p>25 interest."</p>	<p>1 With respect to the issue of the</p> <p>2 legislation, Mr. Hutchings has referred you to</p> <p>3 the Public Utilities Act, where in subsection</p> <p>4 11 of section 6, the Board does have the right</p> <p>5 to retain advisors. Mr. Hutchings, in my</p> <p>6 view, has narrowly interpreted that section</p> <p>7 and when you apply the Interpretation Act,</p> <p>8 which is to give a fair and liberal</p> <p>9 interpretation to the section, I believe it is</p> <p>10 clear that the Board does have a right to</p> <p>11 retain expert evidence under its own</p> <p>12 legislation. Mr. Hutchings has already</p> <p>13 referred you to the last paragraph in that</p> <p>14 chapter, which I had also intended to refer</p> <p>15 you to.</p> <p>16 Mr. Hutchings has suggested that the fact</p> <p>17 that Board counsel is calling expert evidence</p> <p>18 by itself raises a reasonable apprehension of</p> <p>19 bias to the point that the Board should not</p> <p>20 allow it, and I think Mr. Hutchings is going a</p> <p>21 bit too far with respect to the statement.</p> <p>22 The mere calling of the evidence by itself</p> <p>23 does not create the apprehension of bias.</p> <p>24 There may be other matters that occur after</p> <p>25 the calling of the evidence or during a</p>

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<p>1 GREENE, Q.C.:</p> <p>2 hearing where the apprehension of bias may be</p> <p>3 raised, but not the simple filing of an expert</p> <p>4 report and the actual calling of the expert.</p> <p>5 And as I pointed out already, there have been</p> <p>6 instances before this Board where the Board</p> <p>7 has called expert evidence. The one that I</p> <p>8 refer to in my reply was in Hydro's last 2001</p> <p>9 General Rate Application, where Dr. Wilson was</p> <p>10 called by Board counsel to speak with</p> <p>11 recommendations on specific issues for cost of</p> <p>12 service matters, and I believe there are other</p> <p>13 examples from Newfoundland Power's proceedings</p> <p>14 as well.</p> <p>15 (2:53)</p> <p>16 So it is Hydro's position that, in the</p> <p>17 appropriate circumstances, the law recognizes</p> <p>18 that Board counsel may call expert evidence</p> <p>19 and that it has the right to do so. However,</p> <p>20 that doesn't mean, of course, that an expert</p> <p>21 or a witness has to be called on every issue.</p> <p>22 An assessment must be made as to whether it is</p> <p>23 necessary for the Board to have a full</p> <p>24 understanding of all the issues before it or</p> <p>25 an expert or a witness to be called by Board</p>	<p>1 counsel, and that, of course, is a decision to</p> <p>2 be made by Board counsel in conjunction with</p> <p>3 Board staff. As the Industrial Customers</p> <p>4 pointed out in their application and in their</p> <p>5 argument, and as we agreed to in our reply,</p> <p>6 with respect to the cost of service issue, all</p> <p>7 of the parties to the proceeding have retained</p> <p>8 cost of service experts. I would also like to</p> <p>9 point out that there was a generic cost of</p> <p>10 service hearing in 1993, and again, in the</p> <p>11 2001 GRA, there were a number of--actually,</p> <p>12 all the parties there as well had cost of</p> <p>13 service experts, where the issues were again</p> <p>14 reviewed and decisions were made by the Board</p> <p>15 in 2001. So those types of things, which is</p> <p>16 the issues before the Board in the specific</p> <p>17 application, whether the other parties do have</p> <p>18 experts called who will speak to all of the</p> <p>19 issues, including issues in the public</p> <p>20 interest, and as to the nature of the issues,</p> <p>21 those are the sorts of factors that must be</p> <p>22 taken into account in the assessment as to</p> <p>23 whether it is required for the Board to call</p> <p>24 expert evidence on any particular issue.</p> <p>25 However, the mere fact that it is the</p>
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<p>1 Board counsel is calling an expert is not, by</p> <p>2 itself, enough to raise a reasonable</p> <p>3 apprehension of bias, in Hydro's position, and</p> <p>4 we believe that that is the law as referred to</p> <p>5 in the textbooks that we have filed, the</p> <p>6 chapters from the textbook that we have filed,</p> <p>7 as well as the practice before this Board, as</p> <p>8 well as the practice that is, to our</p> <p>9 knowledge, in other jurisdictions.</p> <p>10 We do believe, as I said earlier, that</p> <p>11 the role of Board counsel is a sensitive role</p> <p>12 and great care has to be taken to ensure that</p> <p>13 Board counsel does not enter into the fray and</p> <p>14 does not appear to become an adversarial party</p> <p>15 to the proceeding. However, we do not believe</p> <p>16 that that issue is raised with respect to the</p> <p>17 issue of right to call expert evidence.</p> <p>18 So in summary, Hydro's position, with</p> <p>19 respect to what we believe is the narrow issue</p> <p>20 before the Board, which is the right of the</p> <p>21 Board hearing counsel to call an expert, we</p> <p>22 believe: that the application of the</p> <p>23 Industrial Customers should be dismissed; that</p> <p>24 the mere calling of expert evidence does not</p> <p>25 raise a reasonable apprehension of bias in the</p>	<p>1 manner suggested; and for that reason, we</p> <p>2 believe the application should be dismissed.</p> <p>3 Thank you.</p> <p>4 CHAIRMAN:</p> <p>5 Q. Thank you, Ms. Greene. Good afternoon, Mr.</p> <p>6 Browne, I guess I go to next.</p> <p>7 BROWNE, Q.C.:</p> <p>8 Q. Mr. Chairman, members of the Board, the</p> <p>9 legislation does not require that the Public</p> <p>10 Utilities Board be an expert panel. There's</p> <p>11 no requirement for a cost of service expert or</p> <p>12 cost of capital expert or an economist or a</p> <p>13 forecaster or a member of any other</p> <p>14 professional group to be a member of the</p> <p>15 Board. And yet, the Board has to shift</p> <p>16 through volumes of evidence from experts,</p> <p>17 together with legal argument at the end of</p> <p>18 every case. In recent years, there have been</p> <p>19 parties before the Board besides the</p> <p>20 proponent. Other parties bring on their own</p> <p>21 experts and the Board has a choice of which</p> <p>22 expert testimony to accept. Whether the Board</p> <p>23 can cherry pick among the experts to decide if</p> <p>24 they will accept one portion of one expert and</p> <p>25 another portion of another is a matter of law.</p>

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<p>1 BROWNE, Q.C.:</p> <p>2 Here, we have the spectre of Board</p> <p>3 counsel dealing with issues which the</p> <p>4 proponent and other parties are themselves</p> <p>5 dealing with. We had the same instance in</p> <p>6 2001. Our position there was that Board</p> <p>7 counsel ought to limit their role and not get</p> <p>8 involved by calling evidence. The only case</p> <p>9 in which the Board counsel could assist, the</p> <p>10 Board's financial advisors traditionally have</p> <p>11 been unique witnesses, because they have</p> <p>12 access to the books of the companies, which</p> <p>13 other parties do not.</p> <p>14 Our position is the same as it was in</p> <p>15 2001. It ought not to be allowed. The other</p> <p>16 parties are calling cost of service experts</p> <p>17 and cost of capital experts. Board counsel's</p> <p>18 role should be limited to examining the</p> <p>19 witnesses that are brought forward.</p> <p>20 There is a more particular problem, I</p> <p>21 think, in reference to these matters, and it's</p> <p>22 really unclear in law. You have here an</p> <p>23 internal counsel and an external counsel, and</p> <p>24 I can understand the confusion. Some</p> <p>25 tribunals have their internal counsel for an</p>	<p>1 internal purpose, to assist the Board in legal</p> <p>2 matters after the matters have been argued</p> <p>3 publicly, and the parties never hear from the</p> <p>4 internal legal counsel. They only hear from</p> <p>5 the external legal counsel. I assume, in this</p> <p>6 instance, the intention was that the external</p> <p>7 legal counsel would be Mr. Kennedy and the</p> <p>8 internal legal counsel would be Ms. Newman.</p> <p>9 But yet, there seems to be a hybrid of that</p> <p>10 before this Board. We find Ms. Newman</p> <p>11 speaking publicly on matters of law, which, I</p> <p>12 think, ought to be addressed by your external</p> <p>13 counsel. The internal counsel should hear all</p> <p>14 the arguments. Then if the Board needs</p> <p>15 assistance during their deliberations on</p> <p>16 matters of law, or any kind of clarification</p> <p>17 as to the position of the parties, they can</p> <p>18 seek that clarification from their internal</p> <p>19 legal counsel. I think there's been confusion</p> <p>20 between these two roles, since we saw internal</p> <p>21 legal counsel and external legal counsel both</p> <p>22 appearing at these hearings.</p> <p>23 (3:01 p.m.)</p> <p>24 So we support the application of the</p> <p>25 Industrial Customers in this particular</p>
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<p>1 instance, and we would suggest that the Board</p> <p>2 clarify the roles of internal and external</p> <p>3 counsel, for their own benefit and for the</p> <p>4 benefit of us all. Thank you very much.</p> <p>5 CHAIRMAN:</p> <p>6 Q. Thank you, Mr. Browne. If the Panel has any</p> <p>7 questions, perhaps they could interject as we</p> <p>8 proceed through. Good afternoon, Mr. Kelly.</p> <p>9 KELLY, Q.C.:</p> <p>10 Q. Thank you, Chair, Commissioners. Newfoundland</p> <p>11 Power's position in this matter in response to</p> <p>12 the application by the Industrial Customers is</p> <p>13 based upon a matter of principle. It is not</p> <p>14 based upon any view of the correctness or</p> <p>15 otherwise of the particular evidence which is</p> <p>16 before you and it is certainly not based upon</p> <p>17 any sense of defending the Board or any</p> <p>18 similar concept as suggested by Mr. Hutchings.</p> <p>19 Rather, it's based upon the principle of the</p> <p>20 proper operation of the regulatory regime as</p> <p>21 set out in the Public Utilities Act.</p> <p>22 This application is premised on the</p> <p>23 argument that the Board hearing counsel is</p> <p>24 limited to providing advice to the Board and</p> <p>25 that the Board through its hearing counsel</p>	<p>1 cannot call its own evidence without creating</p> <p>2 a reasonable apprehension of bias. In our</p> <p>3 respectful submission, that is an incorrect</p> <p>4 principle for a regulatory body such as this</p> <p>5 Board operating under the Public Utilities</p> <p>6 Act. Both the Public Utilities Act and the</p> <p>7 Electric Power Control Act require this Board</p> <p>8 to implement broad issues of public power</p> <p>9 policy. The Board is regulatory in nature.</p> <p>10 It is not deciding a dispute between the</p> <p>11 parties. You are not acting as a judge, as</p> <p>12 Mr. Hutchings suggested in his argument, but</p> <p>13 as a regulatory. There is a very good</p> <p>14 discussion Macauley and Sprague in Sections 14</p> <p>15 and 18 which have not reproduced, but I urge</p> <p>16 those chapters on you in their entirety for</p> <p>17 the difference between a court and a</p> <p>18 regulatory body. You'll also find a good</p> <p>19 discussion, of course, in the Newfoundland</p> <p>20 Court of Appeal decision in the Stated Case</p> <p>21 where the Court points out a continuing</p> <p>22 regulatory role and function of this</p> <p>23 particular Board. The board is required,</p> <p>24 obviously, to address matters not simply in</p> <p>25 the interest of any of the parties before it</p>

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<p>1 KELLY, Q.C.:</p> <p>2 including, for that matter, the</p> <p>3 representations of the Consumer Advocate, but</p> <p>4 in a much broader sense of what is in the</p> <p>5 public interest in accordance with the</p> <p>6 parameters set out in the Act for the public</p> <p>7 power policy of the Province.</p> <p>8 The standard practice across the country</p> <p>9 has been for Boards, such as this particular</p> <p>10 type of Board engaged in regulatory practice</p> <p>11 to call its own experts through counsel. I</p> <p>12 did give you two extracts from Macauley and</p> <p>13 Sprague. The first is from Section 14.6</p> <p>14 dealing with the Ontario Energy Board and you</p> <p>15 will note down in the second paragraph from</p> <p>16 the bottom that the OEB separates counsel from</p> <p>17 the Panel before, during and after the</p> <p>18 hearing. In this way, the OEB insures that</p> <p>19 the staff that takes position and submits</p> <p>20 argument is free to balance the record, either</p> <p>21 through cross-examination or by presenting its</p> <p>22 own direct evidence through outside witnesses.</p> <p>23 In addition, it is very clear that what the</p> <p>24 Panel has been told, apart from its own</p> <p>25 special knowledge, because it is put on the</p>	<p>1 record. It is equally clear that there is no</p> <p>2 contacts between staff, counsel, consultants</p> <p>3 and the Panel hearing the case. And that is a</p> <p>4 correct approach as to how matters should</p> <p>5 proceed.</p> <p>6 The next paragraph which I won't read</p> <p>7 talks about the fact that the OEB then takes</p> <p>8 the position that that satisfies reasonable</p> <p>9 apprehension of bias tests.</p> <p>10 And the other paragraph that I'd refer</p> <p>11 you to from Macauley and Sprague is in Section</p> <p>12 18(2) and the paragraph, the third paragraph</p> <p>13 down that says, "it is worth nothing that many</p> <p>14 regulatory agencies employ what is known as a</p> <p>15 future test year. An agency in that case may</p> <p>16 well want to test the applicant's forecast of</p> <p>17 such things as the prime bank rate, CPI,</p> <p>18 interest rates, sometimes stream flows, the</p> <p>19 cost of gas or coal and the lake level or peak</p> <p>20 demands". All sounds vaguely familiar to what</p> <p>21 we're dealing with here. "Thus an agency</p> <p>22 frequently will retain one or more consultants</p> <p>23 to provide it with assistance in these and</p> <p>24 other areas. An agency may not want to</p> <p>25 standby and rubber stamp an applicant's</p>
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<p>1 forecast of future events". And you could</p> <p>2 also add the point that the Board is not stuck</p> <p>3 with views from any other party, whether it be</p> <p>4 either intervenors at all. The Board is</p> <p>5 entitled to have a full balanced record even</p> <p>6 if that means that the Board wishes to have</p> <p>7 evidence itself, it is entitled to call that</p> <p>8 evidence through hearing counsel.</p> <p>9 That has certainly been the practice of</p> <p>10 this Board in the past, certainly in my</p> <p>11 experience before this Board over a number of</p> <p>12 years, the Board has called evidence. Going</p> <p>13 back to the 1998 hearing, the Board called it</p> <p>14 own cost of capital witnesses, notwithstanding</p> <p>15 that other parties also had cost of capital</p> <p>16 witnesses. In this particular case, I would</p> <p>17 observe that Mr. Waverman's evidence, in</p> <p>18 particular, fulfils an interesting function in</p> <p>19 pointing out the--or presenting evidence as to</p> <p>20 how a -</p> <p>21 BROWNE, Q.C.:</p> <p>22 Q. Mr. Kelly, I'd object because the Board hasn't</p> <p>23 seen Mr. Waverman's evidence and it's been</p> <p>24 kept from the Board.</p> <p>25 KELLY, Q.C.:</p>	<p>1 Q. I don't intend to get into the details, but my</p> <p>2 point was simply that it fills a niche that is</p> <p>3 useful for the Board to hear. It's not to say</p> <p>4 that we believe it is totally acceptable</p> <p>5 evidence, but it is evidence that is useful to</p> <p>6 the Board.</p> <p>7 Now, the test that all this flows from</p> <p>8 is, does it create a reasonable apprehension</p> <p>9 of bias for the Board to retain its own</p> <p>10 consultants and experts? And the short answer</p> <p>11 to that is you will not find a case directly</p> <p>12 on point because the point seems so clearly</p> <p>13 established in the law that boards of this ilk</p> <p>14 can retain such people that there is no case</p> <p>15 directly on point. The best case that you can</p> <p>16 find, in my respectful submission is the case</p> <p>17 from the Alberta Court of Appeal which I have</p> <p>18 provided to the Board and which is attached to</p> <p>19 the submission. And just to set the framework</p> <p>20 for that case, let me first refer you to your</p> <p>21 own Public Utilities Act. Mr. Hutchings</p> <p>22 referred you quite correctly to Section 6(11),</p> <p>23 "that the Board may employ legal counsel,</p> <p>24 accountants, engineers, stenographers and</p> <p>25 other persons that it may require or consider</p>

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<p>1 KELLY, Q.C.:</p> <p>2 advisable for the purpose of carrying out this</p> <p>3 Act. And the wages, salaries or compensation</p> <p>4 of those persons shall be paid by the Board,</p> <p>5 et cetera". Not that it's the word</p> <p>6 compensation; it's not simply wages and</p> <p>7 salaries. Those persons can be retained in</p> <p>8 whatever manner is appropriate through hearing</p> <p>9 counsel and they are paid by the Board, not</p> <p>10 the Lieutenant Governor in Council. So,</p> <p>11 subsection 10, even on the face of it, does</p> <p>12 not limit subsection 11, but if there were any</p> <p>13 doubt about the correctness of that position,</p> <p>14 the answer is clearly provided by the</p> <p>15 legislature in Section 118. We do not have to</p> <p>16 go to the Interpretation Act as Ms. Greene</p> <p>17 suggests. The legislature here has provided</p> <p>18 that "this Act shall be interpreted can</p> <p>19 construed liberally in order to accomplish its</p> <p>20 purposes and where a specific power or</p> <p>21 authority is given the Board by this Act, the</p> <p>22 enumeration of it shall not be held to exclude</p> <p>23 or impair a power or authority otherwise in</p> <p>24 this Act conferred on the Board". So,</p> <p>25 subsection 10, Mr. Hutchings section does not</p>	<p>1 limit subsection 11 and sub 2, "the Board</p> <p>2 created has, in addition to the power</p> <p>3 specified in this Act, all additional implied</p> <p>4 and incidental powers which may be appropriate</p> <p>5 or necessary to carry out all the power</p> <p>6 specified in this Act". So, it's a broad</p> <p>7 power that the Board is given.</p> <p>8 And you will also note Section 16 which</p> <p>9 is the section giving the Board the continuing</p> <p>10 control and supervision that Ms. Greene</p> <p>11 referred to. And the scope of those sections</p> <p>12 is well illustrated by the Court of Appeal's</p> <p>13 decision in the Stated Case. And that takes</p> <p>14 me to the decision of the Alberta Court of</p> <p>15 Appeal which I think is important for three</p> <p>16 points which this Board should ultimately take</p> <p>17 out of it. First, the facts of this case.</p> <p>18 Northwestern Utilities were before the Board</p> <p>19 on a general rate application. The Industrial</p> <p>20 Customers had called a Mr. Drazen, who I</p> <p>21 understand will also be a witness in this</p> <p>22 proceeding or may well be a witness in this</p> <p>23 proceeding for one of the other parties. At</p> <p>24 the same time, Mr. Drazen had been retained as</p> <p>25 a consultant by the Board on certain matters.</p>
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<p>1 So, Northwestern Utilities raised a question</p> <p>2 of reasonable apprehension of bias. And even</p> <p>3 on those facts, the Court did not conclude</p> <p>4 that there was a reasonable apprehension of</p> <p>5 bias and certainly those facts go beyond what</p> <p>6 we have in this case. Dealing with the</p> <p>7 reasonable apprehension of bias, the Court of</p> <p>8 Appeal dealt with that at paragraph 11 of the</p> <p>9 decision which is on page 3 of 4. And the</p> <p>10 Court said this, "we agree that a reasonably</p> <p>11 well informed person could properly fear,</p> <p>12 based solely on the fact of the retainer, that</p> <p>13 the Board has great confidence in Drazen and</p> <p>14 his skills. We do not accept that this fact</p> <p>15 alone permits a reasonable apprehension that</p> <p>16 the Board thinks he is better than other</p> <p>17 experts. He may have been chosen over others</p> <p>18 for many reasons, as for example,</p> <p>19 availability. Moreover, and this is perhaps</p> <p>20 the most important point, moreover, the</p> <p>21 respect shown by the retainer would not, of</p> <p>22 itself, raise an apprehension in the mind of a</p> <p>23 reasonable and well informed person that the</p> <p>24 Board would, as a result of its high opinion</p> <p>25 of Drazen, prejudice a case by unthinkingly</p>	<p>1 preferring his evidence". And just to apply</p> <p>2 that to this case, certainly in this</p> <p>3 particular case, it does not raise an</p> <p>4 apprehension in the mind of reasonable and</p> <p>5 well informed persons that the Board would</p> <p>6 simply because hearing counsel will call</p> <p>7 evidence from particular witnesses, that this</p> <p>8 Board would prejudice a case by unthinkingly</p> <p>9 preferring that evidence. Certainly that</p> <p>10 would not be appropriate. That's the first</p> <p>11 point, that merely calling the evidence itself</p> <p>12 and retaining the consultants does not raise a</p> <p>13 reasonable apprehension of bias.</p> <p>14 The second point is the one at paragraph</p> <p>15 13 and Mr. Hutchings referred to this. "It is</p> <p>16 a dangerous"--I'll read beginning three lines</p> <p>17 down--"it is a dangerous policy to put Mr.</p> <p>18 Drazen in the position where he is at once</p> <p>19 advisor and witness. Assume, for example,</p> <p>20 that he has met regularly and privately with a</p> <p>21 member of the panel while his testimony is</p> <p>22 under consideration by that member. No matter</p> <p>23 how much the member protests that the merits</p> <p>24 were never discussed, a well informed person</p> <p>25 can reasonably fear that these private</p>

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<p>1 KELLY, Q.C.:</p> <p>2 dealings might lead to try or to hesitate to</p> <p>3 cause himself and Mr. Drazen the awkwardness</p> <p>4 of rejection of his testimony". And the point</p> <p>5 out of that is the point which I've made in</p> <p>6 our submission, that it is important when the</p> <p>7 Board is hearing submissions from or through</p> <p>8 hearing counsel that it keep scrupulously</p> <p>9 separate, the hearing panel, from any contact</p> <p>10 with those witnesses, except through the</p> <p>11 hearing process in this forum where</p> <p>12 examination and cross-examination can take</p> <p>13 place in an open hearing.</p> <p>14 And that's the third point, that need to</p> <p>15 maintain separation and there's no evidence,</p> <p>16 at least that I'm aware of and no submission</p> <p>17 has been made, that that separation has been</p> <p>18 breached in this case. And the point which</p> <p>19 I'll paraphrase comes from paragraphs 14 and</p> <p>20 15 which is that if this Board were to</p> <p>21 determine that there was a reasonable</p> <p>22 apprehension of bias, the Alberta Court says,</p> <p>23 "the conclusion is not to strike the</p> <p>24 evidence"--which is the first sentence of</p> <p>25 paragraph 14--"but rather in paragraph 15, if</p>	<p>1 there was some apprehension that the panel was</p> <p>2 improperly tainted, it is to replace those</p> <p>3 members who had been so improperly tainted",</p> <p>4 not to simply reject the evidence outright.</p> <p>5 And so, in our respectful submission, the</p> <p>6 hearing counsel maintaining that important</p> <p>7 degree of separation that, in fact, Mr. Browne</p> <p>8 for the Consumer Advocate, referred to the</p> <p>9 same point, the need to keep an appropriate</p> <p>10 separation between hearing counsel and</p> <p>11 witnesses from the Board panel including the</p> <p>12 Board's general counsel, in that sense, that</p> <p>13 separation is important. But there is not</p> <p>14 evidence that any such breach has taken place</p> <p>15 in this case that would raise any apprehension</p> <p>16 of bias. And certainly the Alberta Court of</p> <p>17 Appeal decision itself, I think, makes it</p> <p>18 reasonably clear that the mere retaining of</p> <p>19 experts and the quality of experts by the</p> <p>20 Board is not, in and of itself, reasonable</p> <p>21 apprehension reasonable apprehension of bias.</p> <p>22 So, the proper position as we would see</p> <p>23 it is that the evidence should be presented,</p> <p>24 it should be cross-examined, it should be</p> <p>25 tested and then the weight, if any, because at</p>
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<p>1 the end of the day the Board may chose to</p> <p>2 reject it, the weight, if any, should be</p> <p>3 assigned by the Board panel as it deems</p> <p>4 appropriate just as any other evidence called</p> <p>5 by any other participant in the hearing.</p> <p>6 Those, Mr. Chairman, are our submissions on</p> <p>7 behalf of Newfoundland Power.</p> <p>8 CHAIRMAN:</p> <p>9 Q. Thank you, Mr. Kelly. Good afternoon, Mr.</p> <p>10 Hearn?</p> <p>11 HEARN, Q.C.:</p> <p>12 Q. Mr. Chairman.</p> <p>13 CHAIRMAN:</p> <p>14 Q. When you're ready, please.</p> <p>15 HEARN, Q.C.:</p> <p>16 Q. We have only a very few comments to make. In</p> <p>17 general, we support the application and would</p> <p>18 want to be associated with the remarks of my</p> <p>19 learned friend, Mr. Hutchings and also the</p> <p>20 remarks of the Consumer Advocate. We also</p> <p>21 acknowledge and agree with the comments of Ms.</p> <p>22 Greene of Hydro to the effect that Board</p> <p>23 counsel, the role of Board counsel is a very</p> <p>24 sensitive one and I think that's inherent in</p> <p>25 the comments been made by Mr. Kelly as well.</p>	<p>1 And I suppose the one question we would have</p> <p>2 in relation to the application, while</p> <p>3 supporting it, would be whether or not it's</p> <p>4 framed too broadly. Because I think what one</p> <p>5 looks--without getting into the substantive</p> <p>6 comment of the evidence to be called, what's</p> <p>7 proposed here is not any type of niche</p> <p>8 evidence that's clarifying a point where</p> <p>9 there's little evidence being called. Rather,</p> <p>10 we see, from the Table of Contents which is</p> <p>11 attached to the application of my learned</p> <p>12 friend, Mr. Hutchings, we see wide ranging</p> <p>13 contents and comments on virtually every issue</p> <p>14 with recommendations on virtually every issue.</p> <p>15 And I think that if there is a situation where</p> <p>16 this evidence goes to far, the Board may not</p> <p>17 have to decide in this case whether there's</p> <p>18 any case in which you can call experts, but</p> <p>19 you can decide that this type of expert</p> <p>20 evidence that's proposed that's meant to be</p> <p>21 from the Table of Contents, and I won't go</p> <p>22 further that terms on the substantive things,</p> <p>23 but from the Table of Contents to be</p> <p>24 discursive recommendations on virtually every</p> <p>25 issue before the Board. Then I think it would</p>

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<p>1 HEARN, Q.C.: 2 be fair to say that that particular evidence 3 should not be received by the Board. Thank 4 you, Mr. Chairman. 5 CHAIRMAN: 6 Q. Thank you, Mr. Hearn. Ms. Newman, do you have 7 some comments? 8 (3:17 p.m.) 9 MS. NEWMAN: 10 Q. Yes, thank you, Mr. Chairman and 11 Commissioners. There's been much talk this 12 afternoon about the role of Board counsel and 13 Board hearing counsel. My suggestion is that 14 that's merely the conclusion that the Board 15 might reach after applying true legal test 16 which is at hand here, which is whether 17 there's an apprehension of bias. The role of 18 Board counsel, I guess, as far as it can go 19 before there is an apprehension of bias. So, 20 while we can discuss the particulars of the 21 rule itself, I don't think it's helpful to the 22 issue at hand here which is whether 23 introduction of this evidence by Board hearing 24 counsel will offend the principles of natural 25 justice and cause an apprehension of bias to</p>	<p>1 be raised. So, I don't propose to discuss the 2 role of counsel and how that might have 3 developed over the years. 4 What I will briefly do is just highlight 5 a couple of the authorities on the 6 apprehension of bias. And that's in the 7 submission of Hydro from Chapter 10 of 8 Macauley at page 10.4, there's a quote there 9 from Lord Denning in the middle of the page. 10 "The Court doesn't look to see whether there's 11 a real likelihood that he would or did, in 12 fact, favour one side at the expense of the 13 other. The Court looks at the impression 14 which would be given to other people. Even if 15 you were so impartial as could be, 16 nevertheless, if right minded persons will 17 think that in the circumstances, there was a 18 real likelihood of bias on his part, then he 19 should not sit. Nevertheless, there must 20 appear to be a real likelihood of bias, 21 surmise or conjecture is not enough. There 22 must be circumstances from which a reasonable 23 man would think that it's likely or probable 24 that the justice or chairman as the case may 25 be would or did favour one side unfairly at</p>
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<p>1 the expense of the other". And also I did 2 want to quote paragraph 9 of the decision 3 submitted by Newfoundland Power from the 4 Alberta Court of Appeal. Paragraph 9 says, 5 "the standard to be applied by the Board in 6 the circumstances is settled. It is an error 7 and probably jurisdictional error for a 8 tribunal or any member of it to allow itself 9 to be in the invidious situation where there 10 could be a reasonable apprehension which 11 reasonably well informed persons could 12 properly have of a biased appraisal and 13 judgment of the issues to be determined". So, 14 I think it fair to say that there can't--it's 15 not merely a possibility that somebody might 16 have an apprehension of bias, but it's a 17 probability that a reasonably well informed 18 person would have an apprehension of bias and 19 I think there's a distinction to be made 20 there. 21 The other issue that's been talked about 22 a bit this afternoon is what I have summarized 23 as relevance and redundancy. There's been 24 some allegation that the evidence that's being 25 proposed to be admitted has been addressed by</p>	<p>1 the other parties and is not necessary and may 2 be not relevant and would, in any event, be 3 redundant. It may be difficult for the Board 4 to make this assessment without having the 5 benefit of reviewing the evidence itself. And 6 so, it's possible that if the evidence is 7 admitted, the parties could come back and make 8 application to say that it is irrelevant, it 9 is redundant at that time. And the Board, 10 with a full view of the matter could make that 11 determination. 12 So, I guess I see two issues that have to 13 be decided by the Board today. One is, does 14 the proposed evidence, the fact that it's 15 being proposed by Board hearing counsel to so 16 far down the road of involvement by Board 17 hearing counsel that an apprehension of bias 18 is raised. And secondly, whether the Board 19 can, at this time or whether it's premature to 20 decide if the evidence itself is relevant or 21 redundant. 22 I did want to comment briefly on the case 23 law that was referred by counsel for the 24 Industrial Customers that's found in the 25 excerpt from Richard Steineike. And the</p>

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<p>1 MS. NEWMAN:</p> <p>2 couple of cases that are there and that the</p> <p>3 author uses as authority for his position, I</p> <p>4 would note, are from disciplinary tribunals.</p> <p>5 And I'm not sure that they're helpful to the</p> <p>6 decision that's before the Board here today</p> <p>7 because as economic regulators, I think we</p> <p>8 stand in a significantly different role than</p> <p>9 tribunal residing over disciplinary matter.</p> <p>10 Also, I did want to mention the inference</p> <p>11 that the Industrial Customer seems to suggest</p> <p>12 about the lack of specific authority for the</p> <p>13 Board hearing counsel to call a witness in the</p> <p>14 regulation. I would think that it would be</p> <p>15 dangerous to presume because it wasn't written</p> <p>16 in that Board hearing counsel is not entitled</p> <p>17 to call this evidence. I would note that it's</p> <p>18 my understanding that at the exact time that</p> <p>19 those regulations were drafted, the Board had</p> <p>20 a history of calling its own experts and in</p> <p>21 1996 did, in fact, call Doctor Wilson at that</p> <p>22 hearing. I don't know that it's correct, in</p> <p>23 fact. Those are all my comments.</p> <p>24 CHAIRMAN:</p> <p>25 Q. Thank you, Ms. Newman. Any questions of any</p>	<p>1 of the parties? Thank you. Ready to reply,</p> <p>2 Mr. Hutchings, please?</p> <p>3 HUTCHINGS, Q.C.:</p> <p>4 Q. Yes, just very briefly, Mr. Chair. In</p> <p>5 connection with the submissions that Board</p> <p>6 counsel has just made, in order to balance the</p> <p>7 references that are before the Court, I think,</p> <p>8 before the Board rather, you should also refer</p> <p>9 in addition to the items that my friend has</p> <p>10 just recently referred to, refer to page 127</p> <p>11 of the Steineike article which is attached to</p> <p>12 the application. And the reference there in</p> <p>13 the indented portion to what is called the</p> <p>14 classic case of R. v. Sussex Justices, ex</p> <p>15 parte McCarthy, interesting set of facts. The</p> <p>16 acting clerk to the Justices retired with them</p> <p>17 when they decided a criminal case as was the</p> <p>18 custom, always done, but the acting clerk was</p> <p>19 also a solicitor in private practice. And his</p> <p>20 partner was acting for the other side in the</p> <p>21 civil suit arising out of the same set of</p> <p>22 facts. Of course, the acting clerk may not</p> <p>23 have known of the connection or thought of it</p> <p>24 and his legal advice was non-existent. In</p> <p>25 fact, he said nothing. This was the precise</p>
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<p>1 context in which the Court gave the famous</p> <p>2 statement that "it is not merely of some</p> <p>3 importance, but of fundamental importance that</p> <p>4 justice should not only be done, but be</p> <p>5 manifestly, undoubtedly seen to be done". So,</p> <p>6 clearly here it is a question of the</p> <p>7 reasonable appearance of bias. And even in a</p> <p>8 case where demonstrably there was no bias and</p> <p>9 no effect because the tainted party said</p> <p>10 nothing to the tribunal, the Court would not</p> <p>11 allow such a situation to continue. So,</p> <p>12 balance that relative to the authorities that</p> <p>13 my friend has cited.</p> <p>14 In respect of the comments from both Ms.</p> <p>15 Greene and Mr. Kelly, it is not the Industrial</p> <p>16 Customers' position that Board hearing counsel</p> <p>17 can, on no occasion, call a witness. That</p> <p>18 obviously is not our position; never has been</p> <p>19 our position. Quite clearly we've referred to</p> <p>20 the Grant Thornton evidence and that's been</p> <p>21 referred to by others. And we've gone beyond</p> <p>22 and referred to the sort of report that Grant</p> <p>23 Thornton has done on the RSP and we have no</p> <p>24 difficulty with that. The issue is not</p> <p>25 whether the filing of evidence by Board</p>	<p>1 counsel by itself raises an apprehension of</p> <p>2 bias. The question is whether the filing of</p> <p>3 the particular evidence in question here as</p> <p>4 described in the Table of Contents in all the</p> <p>5 circumstances of the present case, raises and</p> <p>6 apprehension of bias. The comments of the</p> <p>7 Alberta Court of Appeal which my friend, Mr.</p> <p>8 Kelly, referred to do not tell us whether</p> <p>9 there were any other intervenors in that</p> <p>10 particular case. The only intervenor which</p> <p>11 appeared at the Court of Appeal level were the</p> <p>12 Industrial Rate Intervenor. Was this a case</p> <p>13 where the Board felt it had to call other</p> <p>14 witnesses because there was no Consumer</p> <p>15 Advocate, there was no representation</p> <p>16 whatsoever of any interest other than that of</p> <p>17 the Industrial Customers. We don't know; we</p> <p>18 can't tell from what we have before us.</p> <p>19 The issue that Mr. Kelly raised toward</p> <p>20 the end of his remarks about the remedy to be</p> <p>21 applied omits the fact that in the case in</p> <p>22 Alberta as noted in paragraph 4, the Board</p> <p>23 received the preliminary report of Mr. Drzen.</p> <p>24 We have managed to get ahead of that here. In</p> <p>25 Alberta, there was no choice. If there was a</p>

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<p>1 HUTCHINGS, Q.C.:</p> <p>2 remedy, the Board members would have had to</p> <p>3 have been replaced because they had seen the</p> <p>4 offending report. We managed to get ahead of</p> <p>5 that here and the Panel has not seen the</p> <p>6 offending report. So, quite obviously, the</p> <p>7 remedy here, rather than set aside the whole</p> <p>8 Panel is simply to put this evidence to one</p> <p>9 side and then the Panel could obviously never</p> <p>10 be affected by it. So, that's not a concern</p> <p>11 that the Board needs to have in this</p> <p>12 particular instance.</p> <p>13 In terms of the position relied upon by</p> <p>14 both Newfoundland Power and Newfoundland</p> <p>15 Hydro, relative to the Macauley, Sprague and</p> <p>16 Macauley position, the second extract and</p> <p>17 particularly 17-26, that Ms. Greene</p> <p>18 specifically referred to does, as I pointed</p> <p>19 out earlier, bring us back to the statute, all</p> <p>20 administrative tribunals are creatures of</p> <p>21 statute. It is arguable, therefore, that the</p> <p>22 empowering legislation of each tribunal must</p> <p>23 stipulate if and when an expert may be</p> <p>24 appointed. On the other hand, since</p> <p>25 administrative tribunals are generally</p>	<p>1 considered to be masters of their own practice</p> <p>2 and procedure, they may have an inherent power</p> <p>3 to appoint witnesses and experts in resolving</p> <p>4 matters that affect the public interest.</p> <p>5 While some tribunals are themselves empowered</p> <p>6 by statute to engage experts, and this is the</p> <p>7 part that Ms. Greene did not read, empowered</p> <p>8 to engage experts, technical consultants or</p> <p>9 advisors in proper circumstances, others may</p> <p>10 require that the appointment of an expert be</p> <p>11 made by an order of the Cabinet.</p> <p>12 So, the author here brings us back to the</p> <p>13 statute and that was my reason for reviewing</p> <p>14 the specific provisions of the Public</p> <p>15 Utilities Act and the regulations which are</p> <p>16 binding upon this Board and on us all.</p> <p>17 The provisions of Section 118, with</p> <p>18 respect, do not take this case outside of the</p> <p>19 ordinary rules of construction. And</p> <p>20 notwithstanding the suggestion that where a</p> <p>21 specific power or authority is given to the</p> <p>22 Board by the Act, the enumeration of it shall</p> <p>23 not be held to exclude or impair a power or</p> <p>24 authority otherwise in the Act conferred upon</p> <p>25 the Board. If you read that, you still need</p>
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<p>1 to find in the Act the power conferred--the</p> <p>2 power authority conferred on the Board. In</p> <p>3 6(11) which, and if my friend wants to get</p> <p>4 technical about provisions, the technical</p> <p>5 interpretation of provisions, the later</p> <p>6 provisions of the Statute take precedence over</p> <p>7 the earlier ones, but the Board may employ</p> <p>8 legal counsel, accountants, engineers,</p> <p>9 stenographers and other persons--obviously</p> <p>10 staff--whether they are compensated by wages</p> <p>11 or salaries or other compensation is</p> <p>12 incidental and I suggest gives no additional</p> <p>13 power to the Board. What is the purpose of</p> <p>14 having subsection 10 relative to technical and</p> <p>15 other assistance, if subsection 11 covers all</p> <p>16 of the issues. It is contrary to the rules of</p> <p>17 statutory interpretation to read out a</p> <p>18 section. Section 10 must be given some</p> <p>19 meaning and 10 must be read, in our</p> <p>20 submission, in the context of 11. And Section</p> <p>21 118 doesn't help to broaden that issue at all.</p> <p>22 In short, Mr. Chair, we do not ask--nor</p> <p>23 have we ever asked for an order that Board</p> <p>24 counsel never call a witness. When the</p> <p>25 application was filed, we had the evidence of</p>	<p>1 the EES Consulting. We did not have the</p> <p>2 evidence of Mr. Waverman, but we were lead to</p> <p>3 understand that it was cost of capital</p> <p>4 evidence, and accordingly, we refer to both.</p> <p>5 In our submission, the appropriate rule is</p> <p>6 that evidence by Board counsel should be</p> <p>7 limited to reports of specific investigations,</p> <p>8 such as the Grant Thornton financial report,</p> <p>9 or reports with respect to the RSP, such as</p> <p>10 the Board directed by done last time, and only</p> <p>11 then when such reports do no more than raise</p> <p>12 the issues and bring to the attention of the</p> <p>13 Board the issues that they need to consider,</p> <p>14 or in those niche cases, the GAP cases where</p> <p>15 there is a specific interest that is not being</p> <p>16 represented by the parties who are already</p> <p>17 before the Board. And in my submission, the</p> <p>18 onus should be on Board counsel to establish</p> <p>19 in advance, prior to the filing of any</p> <p>20 evidence, that the evidence proposed to be</p> <p>21 filed meets those criteria. That was how this</p> <p>22 matter developed in the first place. At a</p> <p>23 meeting of counsel, there was an understanding</p> <p>24 that other counsel would have an opportunity</p> <p>25 to review evidence proposed to be filed by</p>

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<p>1 HUTCHINGS, Q.C.:</p> <p>2 Board counsel and be given the opportunity to</p> <p>3 take objection to it, if necessary, before it</p> <p>4 actually got to the Board. If there were</p> <p>5 evidence, such as the Grant Thornton reports</p> <p>6 and so on, that go in without objection, then</p> <p>7 obviously there is no objection. But,</p> <p>8 anything beyond those accepted norms, in my</p> <p>9 submission, should be judged by the rule of</p> <p>10 whether or not it fills the GAP, it's in a</p> <p>11 niche, it is necessary in order for the Board</p> <p>12 to have a complete picture of the regulation</p> <p>13 that it is doing in the circumstances.</p> <p>14 Because if it's not, if it's not filling a</p> <p>15 gap, if it's not a necessary piece of evidence</p> <p>16 that the Board has to have in order to do its</p> <p>17 job properly, then why is it being offered?</p> <p>18 And that is a point to the concern that the</p> <p>19 reasonable man on the street would have. Why</p> <p>20 is the Board soliciting evidence about matters</p> <p>21 that everybody else has dealt with? And that</p> <p>22 leads to the concern not that the Board has an</p> <p>23 agenda, but could have an agenda. It's not</p> <p>24 that there is an allegation being made against</p> <p>25 the Board, but merely that there is a</p>	<p>1 perception, at that point, that the reasonable</p> <p>2 man would have a concern that bias may be</p> <p>3 creeping into the picture. Those are my</p> <p>4 comments, Mr. Chair.</p> <p>5 CHAIRMAN:</p> <p>6 Q. Thank you, Mr. Hutchings.</p> <p>7 (3:35 p.m.)</p> <p>8 COMMISSIONER WHALEN:</p> <p>9 Q. Mr. Hutchings, could you just explain to me</p> <p>10 again where the reasonable apprehensible</p> <p>11 bias arises? Is it in respect of the nature</p> <p>12 of the evidence itself, which you've seen and</p> <p>13 I haven't, or the fact that the evidence is</p> <p>14 being called by Board hearing counsel?</p> <p>15 HUTCHINGS, Q.C.:</p> <p>16 Q. Well, it is a combination of both of those</p> <p>17 factors. I mean, the mere fact that it's</p> <p>18 being called by Board hearing counsel does not</p> <p>19 create a reasonable apprehension of bias.</p> <p>20 Obviously Board hearing counsel calls the</p> <p>21 witness to put in the financial report from</p> <p>22 Grant Thornton and other reports and no one</p> <p>23 has a concern about a reasonable apprehension</p> <p>24 of bias. But when Board hearing counsel is</p> <p>25 proffering evidence that deals specifically</p>
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<p>1 with the particular substantive issues that</p> <p>2 the Board has to decide and in this case, is</p> <p>3 in respect of issues in which every other</p> <p>4 represented party, including the Consumer</p> <p>5 Advocate who has a very wide constituency in</p> <p>6 this regard, has already called an expert, has</p> <p>7 already taken positions. In that situation,</p> <p>8 the apprehension is that there is something</p> <p>9 going on behind the scenes that the Board, for</p> <p>10 some reason, wants to have another position</p> <p>11 other than the whole plethora of positions</p> <p>12 that are being put to it by every party who</p> <p>13 has a legitimate legal interest in the matter.</p> <p>14 It's the whole combination of circumstances,</p> <p>15 not any one circumstance.</p> <p>16 COMMISSIONER WHALEN:</p> <p>17 Q. In 2002, the Board hearing counsel called Dr.</p> <p>18 Wilson. The Industrial Customers didn't take</p> <p>19 issue at the time with that.</p> <p>20 HUTCHINGS, Q.C.:</p> <p>21 Q. No, we did not. I mean, we had lots of issues</p> <p>22 at the 2002 hearing, as you recall, and that</p> <p>23 was not one that we chose to pursue at that</p> <p>24 time. I mean, you know that there was some</p> <p>25 considerable debate about the role of Board</p>	<p>1 counsel in the course of all of that, and in</p> <p>2 those particular circumstances that we found</p> <p>3 ourselves at that time, that's not a matter</p> <p>4 that we chose to pursue. I would not</p> <p>5 necessarily concede that had we chosen to</p> <p>6 pursue it, it might not have been--there might</p> <p>7 not, in fact, have been an appropriate remedy</p> <p>8 to prevent that evidence from coming in.</p> <p>9 COMMISSIONER WHALEN:</p> <p>10 Q. Who, in your view, has to make the</p> <p>11 determination that the evidence that's being</p> <p>12 put forward by Board hearing counsel is</p> <p>13 necessary?</p> <p>14 HUTCHINGS, Q.C.:</p> <p>15 Q. In my submission, Board hearing counsel will</p> <p>16 make a preliminary assessment of that and</p> <p>17 distribute the evidence to other counsel and</p> <p>18 unless other counsel are in agreement that</p> <p>19 this is necessary, the Board will have to make</p> <p>20 a determination, as it's being asked to here,</p> <p>21 based on an outline or the table of contents</p> <p>22 of that evidence as to whether or not it's</p> <p>23 appropriate for that evidence to go in. And</p> <p>24 I'm not dealing with the issue of relevance</p> <p>25 here. The evidence is if it's not relevant,</p>

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1 HUTCHINGS, Q.C.:
 2 it's not going in anyway, once you see it.
 3 But what we're solely talking about here is an
 4 element of the notion of redundancy, yes, but
 5 redundancy which in the circumstances has an
 6 implication of apprehension of bias.
 7 COMMISSIONER WHALEN:
 8 Q. I'm not sure if that helps or not, but -
 9 HUTCHINGS, Q.C.:
 10 Q. No, but I mean, what I'm trying to say is that
 11 the onus is on Board counsel to establish to
 12 the Board that there's a gap that needs to be
 13 filled.
 14 COMMISSIONER WHALEN:
 15 Q. Establish to whom? To the parties before the
 16 Board or to the Board?
 17 HUTCHINGS, Q.C.:
 18 Q. To the Board. I mean, unless there is
 19 agreement among the parties, in which case it
 20 doesn't get to you, you don't need to decide
 21 it, but if there is a disagreement on that, as
 22 there obviously is here, then the Board has to
 23 decide whether or not there is a gap that the
 24 Board feels needs to be filled by a particular
 25 piece of evidence addressing such and such an

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1 has already decided in other matters, and then
 2 compare the outline or table of contents of
 3 the proposed evidence and determine whether or
 4 not there is something within that
 5 presentation of evidence that is going to add
 6 to the Board's ability to deal with the issue.
 7 Maybe you need something more than a mere
 8 table of contents in some cases. Maybe you
 9 need a summary or something of that nature,
 10 but I'm simply suggesting that rather than
 11 risk having the Board tainted with evidence
 12 that ultimately is shown not to be appropriate
 13 for the Board's consideration, I think it's
 14 better for the Board to act with caution and
 15 seek out only the minimal amount of
 16 information that it needs. And obviously if
 17 Board hearing counsel makes a submission to
 18 the effect that there is basically no way the
 19 Board can determine this without seeing the
 20 whole of the evidence, then that's a matter
 21 that's open for the Board--it's open for the
 22 Board to go that way. I think that's
 23 something to avoid, if possible. And it may
 24 not always be possible in every case. I
 25 haven't heard any suggestion in the course of

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1 issue. Probably most appropriate that the
 2 Board not actually see the evidence in making
 3 that determination, but obviously be told--be
 4 outlined of what's in the evidence and what
 5 issues the evidence is addressing. These are
 6 not easy issues.
 7 CHAIRMAN:
 8 Q. I guess, it's more of a question, it's very
 9 difficult to do that without seeing perhaps
 10 more than the table of contents of the
 11 evidence, and going through, to some degree,
 12 the proceeding itself to see if there is a gap
 13 that does exist.
 14 HUTCHINGS, Q.C.:
 15 Q. Yes, and -
 16 CHAIRMAN:
 17 Q. I guess what would be the standards or tests
 18 that you'd see for the Board in making that
 19 determination?
 20 HUTCHINGS, Q.C.:
 21 Q. Well, I mean, obviously the balance of the
 22 evidence is on the record before the Board and
 23 the Board can look at the expert's reports
 24 that everyone else has filed. The Board can
 25 look at its own record of the issues that it

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1 this afternoon's proceeding that the table of
 2 contents doesn't do justice to the evidence in
 3 terms of the issues that it addresses.
 4 COMMISSIONER WHALEN:
 5 Q. Would you see the Board--I say the Board,
 6 would you see the panel in making such a
 7 judgment in advance of the proceeding, in
 8 terms of saying no, that evidence doesn't fill
 9 a gap or it's not necessary as being somehow
 10 being perceived equally as prejudicial or
 11 bias?
 12 HUTCHINGS, Q.C.:
 13 Q. Well -
 14 COMMISSIONER WHALEN:
 15 Q. I mean, to make that kind of a decision as to
 16 whether something is necessary and we haven't
 17 seen it, we're going to do it on the basis of
 18 something, or someone is going to tell us it
 19 might not be necessary, I mean, I just find it
 20 difficult at the outset to sort of go down
 21 that procedural path that you just took us,
 22 you know, without introducing another
 23 challenge to the Board, in terms of -
 24 HUTCHINGS, Q.C.:
 25 Q. There is an issue there in terms of whose

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<p>1 HUTCHINGS, Q.C.:</p> <p>2 right to be heard is being trampled upon in</p> <p>3 that case.</p> <p>4 COMMISSIONER WHALEN:</p> <p>5 Q. Sure, yes.</p> <p>6 HUTCHINGS, Q.C.:</p> <p>7 Q. If it is simply Board hearing counsel, then,</p> <p>8 you know, Board hearing counsel is not a party</p> <p>9 to the proceeding in the same way that others</p> <p>10 are who, one would contemplate would run off</p> <p>11 to Court and say the Board is not doing its</p> <p>12 job. I mean, I don't think that's on the</p> <p>13 cards that Board hearing counsel is going to</p> <p>14 make an application to Court saying that the</p> <p>15 Board is wrong and should be hearing my</p> <p>16 evidence. So, I mean, from the point of view</p> <p>17 of natural justice, I don't think you have an</p> <p>18 issue there. One could conceive, I suppose,</p> <p>19 and I think it would be an extraordinary</p> <p>20 unusual case, one could conceive of a</p> <p>21 situation where at the end of all the other</p> <p>22 evidence Board hearing counsel could come back</p> <p>23 and say I can now demonstrate to you, Board,</p> <p>24 that my evidence does in fact fill a gap. And</p> <p>25 the issue could be revisited. I mean, I think</p>	<p>1 that would be a very extraordinary situation;</p> <p>2 I doubt that it would come up, but I mean, if</p> <p>3 you look at the record that's before you here</p> <p>4 now, in terms of all the other expert's</p> <p>5 reports that have been filed and the table of</p> <p>6 contents you have for this evidence, in the</p> <p>7 circumstances of the present case, I would</p> <p>8 suggest that you have what you need to make</p> <p>9 your decision.</p> <p>10 (3:45 p.m.)</p> <p>11 CHAIRMAN:</p> <p>12 Q. You seem to tie the apprehension of bias to</p> <p>13 the nature of the evidence and why would there</p> <p>14 be an apprehension--if there was a gap in the</p> <p>15 evidence, for example, that would presumably,</p> <p>16 based on your argument, that the Board hearing</p> <p>17 counsel would--could indeed call evidence in</p> <p>18 that matter. And I would presume there would</p> <p>19 be other counsels that may comment or question</p> <p>20 in relation to that evidence. Why would the</p> <p>21 Board bring to that particular piece of</p> <p>22 evidence any less apprehension of bias then</p> <p>23 they perhaps would in the case where--similar</p> <p>24 to this information here.</p> <p>25 HUTCHINGS, Q.C.:</p>
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<p>1 Q. No, I mean, the apprehension is on the part of</p> <p>2 the reasonable bystander. I think the</p> <p>3 reasonable bystander, looking at a situation</p> <p>4 where the Board says, yes, I mean, we need to</p> <p>5 have the issue of the coincident peak on the</p> <p>6 Ramea system addressed and no cost of service</p> <p>7 expert has addressed that, so we're going to</p> <p>8 go out and get a report on that because that's</p> <p>9 something we need to know. The reasonable</p> <p>10 bystander would say that makes perfectly good</p> <p>11 sense. That's an eminently sensible thing to</p> <p>12 do, nobody else has raised it, there's nobody</p> <p>13 here from Ramea or whatever, and that's</p> <p>14 something you need. But, if the Board has</p> <p>15 before it five expert's reports on the subject</p> <p>16 of whether coincident peak verses non-</p> <p>17 coincident peak should be used in a particular</p> <p>18 aspect of cost of service, why would the Board</p> <p>19 want to go out and get a sixth report, unless</p> <p>20 the Board had something in its mind about how</p> <p>21 it wanted this to come out in the first place;</p> <p>22 hence, we need to go out and get a report that</p> <p>23 tells us something that none of these other</p> <p>24 reports are telling us. I mean, once you have</p> <p>25 a whole bunch of experts all weighing in on</p>	<p>1 different sides of an issue, why does the</p> <p>2 Board need then, another expert's report? And</p> <p>3 the reasonable bystander would sit back and</p> <p>4 say, I don't understand, why is the Board</p> <p>5 getting this report unless it wants a report</p> <p>6 that's going to tell it what it wants to do</p> <p>7 anyway, which is not what anybody else has</p> <p>8 told it. Is that not a reasonable position</p> <p>9 for the reasonable bystander to take at that</p> <p>10 stage? It's a puzzle as to why the Board</p> <p>11 would want to have another report when it has</p> <p>12 five reports coming from all directions</p> <p>13 already. And that gives rise to an</p> <p>14 apprehension that there's something else going</p> <p>15 on, and that's the apprehension that perhaps</p> <p>16 the Board may have prejudged the issue and</p> <p>17 wants to get a report that is in line with its</p> <p>18 own thinking. And that's the situation that</p> <p>19 you saw referred to in the case about whether</p> <p>20 Courts were permitted to call witnesses of</p> <p>21 their own. That was the result that the Court</p> <p>22 of Appeal came to there, was that the judge</p> <p>23 wanted this to come out a certain way, so he</p> <p>24 was going to call his own expert, and that's</p> <p>25 the apprehension, it's the fear, it's the</p>

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<p>1 HUTCHINGS, Q.C.:</p> <p>2 concern that the reasonable bystander would</p> <p>3 have if the Board already has a whole pile of</p> <p>4 expert's reports, why does it need another one</p> <p>5 advocating a particular view?</p> <p>6 COMMISSIONER WHALEN:</p> <p>7 Q. But the Board hearing counsel is not the</p> <p>8 decider in this case.</p> <p>9 HUTCHINGS, Q.C.:</p> <p>10 Q. Not ultimately, no.</p> <p>11 COMMISSIONER WHALEN:</p> <p>12 Q. The judge was in the case you referred to, he</p> <p>13 was the trier and the decider at the end of</p> <p>14 the day, but we're not calling--we're not</p> <p>15 leading this evidence, we're not calling</p> <p>16 evidence, it's being called through staff. Is</p> <p>17 there a distinction there in your mind?</p> <p>18 HUTCHINGS, Q.C.:</p> <p>19 Q. Well, I can see the possibility for a</p> <p>20 distinction, but I don't believe that the</p> <p>21 reasonable bystander would perceive that</p> <p>22 distinction.</p> <p>23 COMMISSIONER WHALEN:</p> <p>24 Q. Does your bystander have to be somebody who</p> <p>25 understands the procedure and operation of</p>	<p>1 this Board or is it someone off the street, I</p> <p>2 don't -</p> <p>3 HUTCHINGS, Q.C.:</p> <p>4 Q. A reasonably well-informed person about the</p> <p>5 process, but, you know, the concern being,</p> <p>6 obviously, that Board hearing counsel is</p> <p>7 associated with the Board. I mean, that is</p> <p>8 going to be the perception and we're talking</p> <p>9 as much perception as--well, more perception</p> <p>10 than reality in the instant case. There is</p> <p>11 the possibility for distinguishing between the</p> <p>12 decision of the judge, it being by analogy the</p> <p>13 Board members, as opposed to Board hearing</p> <p>14 counsel. But even with respect to Board</p> <p>15 hearing counsel, who is inevitably, as I say,</p> <p>16 associated with the Board, in the mind of the</p> <p>17 well-informed reasonable bystander, I think</p> <p>18 the apprehension continues to exist. You</p> <p>19 know, why does this person that's associated</p> <p>20 with the Board, want to have another expert's</p> <p>21 report when it's all been dealt with.</p> <p>22 BROWNE, Q.C.:</p> <p>23 Q. And Mr. Chairman, if I might, we don't know</p> <p>24 what instructions were given to these experts</p> <p>25 when they were retained or who were the</p>
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<p>1 instructing parties or what they were told to</p> <p>2 do, or how their evidence came forward. And</p> <p>3 it's probably all a bit of a mystery, so I</p> <p>4 guess counsel are erring on the side of</p> <p>5 caution, generally. We have our own experts,</p> <p>6 we know what our own experts are saying and we</p> <p>7 know that for the most part, I'm certain that</p> <p>8 they are independent, as most experts are,</p> <p>9 they will give their points of view. However,</p> <p>10 in this particular case, it is peculiar that</p> <p>11 there were other parties retained--we don't</p> <p>12 know at what point they were retained, if they</p> <p>13 were retained to fill a vacuum or maybe they</p> <p>14 were retained in anticipation of the vacuum,</p> <p>15 or they were retained after our own evidence</p> <p>16 was in. It's all a bit of a conundrum, isn't</p> <p>17 it? And I think it would have been a lot more</p> <p>18 prudent if the Board didn't get into this area</p> <p>19 where parties are before the Board with their</p> <p>20 own experts. And it seems from a--it seems to</p> <p>21 be a bit of a waste of time as well, not that</p> <p>22 you're not hearing on certain issues, and I</p> <p>23 don't think we can presume the evidence. If</p> <p>24 experts are to testify before the Board, we</p> <p>25 can't anticipate what questions they're going</p>	<p>1 to be asked, nor can Board--and Board counsel,</p> <p>2 if they feel that there's a vacuum in their</p> <p>3 evidence, they can put those questions to the</p> <p>4 witnesses that have been retained by the</p> <p>5 parties.</p> <p>6 COMMISSIONER SAUNDERS:</p> <p>7 Q. I have a question, Mr. Hutchings. I hope I</p> <p>8 don't make a speech to you, I wanted to make</p> <p>9 it a question, but when I read your submission</p> <p>10 and the submission of Mr. Kelly and Ms.</p> <p>11 Greene, there was one outstanding difference,</p> <p>12 to me. And that was in your submission, you</p> <p>13 seemed to bring the Board and the Court closer</p> <p>14 together and the function of the two closer</p> <p>15 together. Now, the Board, as an economic</p> <p>16 regulator, doesn't just sit back and go in</p> <p>17 behind closed doors and wait for the next</p> <p>18 hearing. We are exposed, on a daily basis, to</p> <p>19 papers, conferences, information from other</p> <p>20 Boards and interested observers, if you like,</p> <p>21 of the regulatory process. And I think we</p> <p>22 have an obligation to the companies we</p> <p>23 regulate to stay as informed as possible. I</p> <p>24 may have even read a paper by one of the</p> <p>25 authors that we're talking about here today.</p>

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<p>1 COMMISSIONER SAUNDERS:</p> <p>2 I don't recall it, but I may have. And it may</p> <p>3 have been the same paper that's being</p> <p>4 presented at this hearing. I don't know that.</p> <p>5 But it seems to me that this Board is</p> <p>6 different than a Court in one very important</p> <p>7 way, and that is, that I think we have an</p> <p>8 obligation to all of the people we serve,</p> <p>9 including the public, of course, to gather as</p> <p>10 much information as we can get to make our</p> <p>11 decision. And if there's more information out</p> <p>12 there that we believe should be brought</p> <p>13 forward in this room to give us that extra</p> <p>14 knowledge, if you like, then I think we should</p> <p>15 do that. We should bring it in. Of course,</p> <p>16 we have to consider costs and what's</p> <p>17 reasonable and all of that, that's another</p> <p>18 side of the issue. But I do believe that when</p> <p>19 you made your submission that you were</p> <p>20 suggesting--and correct me if I'm wrong, that</p> <p>21 the Board is bound by the same rules as the</p> <p>22 Court in that it can only consider the</p> <p>23 information coming forward from the parties,</p> <p>24 like in a Court. Is that the impression that</p> <p>25 you wanted to leave with us?</p>	<p>1 HUTCHINGS, Q.C.:</p> <p>2 Q. No. There's no question that the Board is</p> <p>3 what the Courts refer to as a specialized</p> <p>4 tribunal and the Courts deal differently with</p> <p>5 specialized tribunals who have particular</p> <p>6 knowledge and should have particular knowledge</p> <p>7 and specialized knowledge of the area in which</p> <p>8 the Board operates, whether it's labour</p> <p>9 relations or public utilities, or discipline</p> <p>10 for doctors or nurses or whatever it may be.</p> <p>11 The point, however, is that while the Board</p> <p>12 does have a duty to go out and inform itself</p> <p>13 to the greatest extent possible, it also has a</p> <p>14 duty to comply with what are called rules of</p> <p>15 natural justice. And to that end, it must</p> <p>16 ensure that the parties who do appear before</p> <p>17 it, at hearings of this nature, are treated</p> <p>18 with the same level of fairness that would be</p> <p>19 applicable in a Court. It doesn't have to</p> <p>20 follow the same procedures, necessarily, as a</p> <p>21 Court would follow, the Board doesn't</p> <p>22 necessarily have to do that, but the level of</p> <p>23 protection of the rights of the parties has to</p> <p>24 be at the same range, in my submission. The</p> <p>25 point being that the parties who are here</p>
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<p>1 before you have real legal interests in what's</p> <p>2 happening here. There is a broad public</p> <p>3 interest in good regulation of public</p> <p>4 utilities, but in the present matter, Hydro is</p> <p>5 looking for more money and we don't want to</p> <p>6 necessarily pay them more money, and that's a</p> <p>7 real legal interest that we have, that the</p> <p>8 Consumers represented by Mr. Browne have, and</p> <p>9 to a derivative of the extent, I guess,</p> <p>10 Newfoundland Power has. And they're issues as</p> <p>11 between the Intervenor, as well as issues</p> <p>12 between the Intervenor and Hydro itself. And</p> <p>13 it's not that simple in the sense that it's</p> <p>14 not lower rates no matter what, I mean, there</p> <p>15 are reliability concerns, there are a whole</p> <p>16 pile of issues and proper regulation is a</p> <p>17 concern of everyone as well. But where</p> <p>18 parties are before the Board in a formal</p> <p>19 hearing of this nature, their right to see the</p> <p>20 rules of natural justice applied is, as the</p> <p>21 Courts have said, of fundamental importance.</p> <p>22 It is not a situation where a party can be put</p> <p>23 in the position of appearing to be on an</p> <p>24 unlevel playing field, vis-a-vis other</p> <p>25 participants who are acting as if they are</p>	<p>1 parties. We need to have a level field so</p> <p>2 that there is no concern about potential bias</p> <p>3 or unfairness or any lack of the feeling</p> <p>4 within, and the perception by, and this is</p> <p>5 what Sussex Justices, McCarthy is all about,</p> <p>6 it's the perception of fairness, as well as</p> <p>7 actual fairness. And in a situation, such as</p> <p>8 this, where the Board is--or Board counsel who</p> <p>9 is associated with the Board, is apparently</p> <p>10 advocating the position on particular issues</p> <p>11 which may favour one Intervenor over another,</p> <p>12 or the Applicant over an Intervenor, or an</p> <p>13 Intervenor over the Applicant, then that's not</p> <p>14 the level of fairness that, in our submission,</p> <p>15 the law requires.</p> <p>16 CHAIRMAN:</p> <p>17 Q. Thank you, Mr. Hutchings. Thank you very</p> <p>18 much. This brings the proceeding to an end</p> <p>19 here today. We certainly acknowledge the</p> <p>20 sensitivity in terms of the timing of this,</p> <p>21 and we will endeavour to get a written</p> <p>22 decision out on this over the next day or two,</p> <p>23 possibly. Okay? Thanks very much</p> <p>24 HUTCHINGS, Q.C.:</p> <p>25 Q. Thank you, Mr. Chairman.</p>

<p>1 Upon concluding at 4:00 p.m.</p>	<p>Page 89</p> <p>1 CERTIFICATE</p> <p>2 I, Judy Moss Lauzon, do hereby certify that</p> <p>3 the foregoing is a true and correct transcript in</p> <p>4 the matter of Newfoundland and Labrador Hydro 2003</p> <p>5 General Rate Application on a motion by the</p> <p>6 Industrial Customers relative to the Evidence of</p> <p>7 EES Consulting and Len Waverman and was heard on</p> <p>8 the 16th day of September, A.D., 2003 before the</p> <p>9 Board of Commissioners of Public Utilities, Prince</p> <p>10 Charles Building, St. John's, Newfoundland and</p> <p>11 Labrador and was transcribed by me to the best of</p> <p>12 my ability by means of a sound apparatus.</p> <p>13 Dated at St. John's, NL this</p> <p>14 16th day of September, 2003</p> <p>15 Judy Moss Lauzon</p> <p>16 Discoveries Unlimited Inc.</p> <p>Page 90</p>