September 16, 2003 M	ulti-Page TM NL Hydro 2003 General Rate Application
Pag	ge 1 Page 2
1 (2:02 p.m.)	1 CHAIRMAN:
2 CHAIRMAN:	2 Q. And I think Mr. Kelly, good day, sir, I don't
3 Q. Thank you and good afternoon. I'd rather be	3 think you and I have been in the same room
4 golfing, I don't know about you, But anyway, I	4 together. I know I think you've probably been
5 guess we have to go through this. I'd like	5 in the room with my colleagues here, but not
6 to, first of all, welcome everybody here to	6 with me. I've read your name many times in
7 motions day, this afternoon. We do have a	7 transcripts and what have you. And I say
8 motion from the Industrial Customers which	8 hello to you, as well.
9 will be the business on our agenda for this	9 KELLY, Q.C.:
10 evening. Looking out there, I don't think we	10 Q. It's a pleasure to be back, Mr. Chair.
need too many introductions. I do understand	11 CHAIRMAN:
12 that Ms. Janet Henley Andrews will not be	12 Q. Thank you. You may wish to introduce the man
13 continuing on in the proceeding with us and	13 on your right. I don't recognize -
14 Mr. Seviour, is it, will be -	14 KELLY, Q.C.:
15 MR. SEVIOUR:	15 Q. Present with me is Mr. Lorne Henderson of
16 Q. That's correct. And I will be here for at	16 Newfoundland Power.
 16 Q. That's context. And I will be here for at 17 least the coming month. Whether or not Ms. 	17 CHAIRMAN:
Andrews rejoins the hearing at some point dowr	
the road is still an open issue. So I will be	19 MR. HENDERSON:
	20 Q. Good, thank you.
-	20 Q. GOOU, mank you. 21 CHAIRMAN:
21 throughout.	
22 CHAIRMAN:	22 Q. Before we get started, are there any
23 Q. Thank you, sir, and welcome.	23 preliminary matters?
24 MR. SEVIOUR:	24 MS. NEWMAN:
25 Q. Thank you.	25 Q. No, Chair, Commissioners, there are none.
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1 CHAIRMAN:	1 position of the Industrial Customers is that
2 Q. Okay. As I said, the business before us is an	2 it is not, except in very unusual
3 application from the Industrial Customers	3 circumstances, appropriate for Board counsel
4 relative to the evidence of EES Consulting and	4 to be participating essentially as a party
5 Len Waverman for filing with the Board. And	5 before the Board itself in a proceeding of
6 the motion is with regard to the expert	6 this nature. In this instance evidence has
7 report, I guess, commissioned by the Board to	7 been produced from both EES Consulting and
8 be excluded from evidence. And I'll askwe	8 Leonard Waverman which Board counsel has
9 do have responses from Newfoundland and	9 indicated she intends to file with the Board
10 Labrador Hydro with respect to this motion and	10 as if it were the same sort of evidence that
11 we have a response as well from Newfoundland	any other party would be filing in respect of
12 Power. We have no written response from	12 this hearing. And this evidence, as outlined
13 either the Consumer Advocate or Labrador City	- 13 in the Application and in the table of
14 Wabush, and I trust we'll probably hear from	14 contents of EES evidence, clearly deals with
15 you by way of oral submission this afternoon.	15 the substantive issues that are coming before
16 So without further ado I'll ask the Industrial	16 the Board in respect of this Application. It
17 Customers, Mr. Hutchings, would you be	17 is not evidence such as Grant Thornton
18 introducing the motion, please?	18 produces for the benefit of the Board after
19 HUTCHINGS, Q.C.:	19 examination of books of account and so on
20 Q. Thank you, Mr. Chair. This application	20 which has been traditionally the case for as
addresses the somewhat troubled question that	21 long as any of us, I think, can recall with
22 we've had to deal with previously with respect	respect to items of this nature, but this is
to the role of Board counsel in proceedings of	23 evidence that deals with specific substantive
24 this nature.	24 issues that are coming before the Board in
25 As outlined in the Application, the	this matter and takes positions with respect
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Page 5 Page 6 1 HITCHINGS, Q.C. 1 have a solicitor/client relationship with that 2 to them and reads very much like any other 2 counsel. The difficulty that this gives rise 3 evidence or report of an expert that the Board 3 to, however, is that when this particular 4 would see in connection with this matter. 4 counsel. Who is the Board is counsel, produces 5 The difficulty that that presents is one 6 which Board counsel. The reguired to have is 7 legal term goes. The question is whether all 7 inevitably passed on to the witnesses who may 9 on a level playing field when we are faced 9 too close an association between the Board. 12 it's being presented on behall of the Board of 13 The Board meeds to have a particular and close 14 Newfoundland and Labrador. Quite clearly, the 14 relationship with is counsel. And it is 15 Board counsel is not view 17 the Relationship between a witness called by 16 Commissioners of Public Utilities of 13 the leationship between a witness called by 16 Nexfoundlan and Lab			u-i age	112 Hydro 2005 Ocherar Rate Application
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24 However, by purporting to offer evidence on 24 tribunal on the record, such information	22		22	· · ·
	23	· · ·		
25 should not be passed on to the Board.	24	However, by purporting to offer evidence on	24	
			25	should not be passed on to the Board.

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	Page 9		Page 10
	JTCHINGS, Q.C.:	1	during the hearing, the learned author says,
2	Also on page 216 under the heading of	2	"Independent counsel's role is to provide
3	"Bias issues" it is quite clear, and the	3	advice to the tribunal. He or she should not
4	article suggests, independent counsel, as the	4	act as if he were a member of the tribunal or
5	name suggests, must be neutral. Where a	5	its chair. Neither should he or she
6	tribunal's counsel has an inappropriate	6	participate in the proceedings as if he or she
7	connection to one of the parties an appearance	7	were a party. Otherwise the principal of audi
8	of bias exists that could nullify the	8	alterum partum may be breached." And that, of
9	proceedings. And there is reference there to	9	course, is the principal that provides for a
10	the case in the Alberta Court of Appeal where	10	fair hearing before an independent tribunal in
11	advisors to the Board were associated with one	11	order for there to be a valid determination by
12	of the parties and the Court determined that	12	any tribunal to which the rules of natural
13	there was an appearance of bias. And they go	13	justice will apply.
14	on also to deal with the Mitchell case out of		6 p.m.)
15	the Manitoba Court. I won't deal with those	15	The author goes on to discuss the Brett
16	cases in detail. They don't raise the	16	case in Ontario. And point four of the
17	specific point, that issue here, but they do	17	factors considered in there which is shown on
18	illustrate how far courts have gone to protect	18	page 220 is that one of the complaints against
19	the integrity of the process by ensuring that	19	independent counsel in that case is that
20	wherever an apprehension of bias exists, a	20	independent counsel appeared to argue as
21	remedy is available.	21	counsel favourable to the prosecution.
22	At page 219 the article deals with the	22	Now, there's no prosecution involved in
23	role of independent counsel during the	23	this, but nonetheless, if Board counsel is
24	hearing. And clearly, under paragraph 2,	24	putting on the record evidence that favours
25	nature of the role of independent counsel	25	one or the other or one or more of the
	Page 11		Page 12
1	particular parties who are before the Board,	1	tribunal." And one of the solicitations or
2	this point has equal validity, in our	2	counsels given in that article at the bottom
3	submission.	3	of page 220, item 5 is to refrain from arguing
4	The casethe author goes on then to	4	with parties, but rather address his or her
5	consider the Adair case, halfway down page	5	advice to the tribunal. And inevitably, if
6	220. And in that instance the tribunal's	6	Board counsel is calling a witness to put
7	counsel made known a strong view that the	7	specific positions on substantive issues
8	action of the nurses who were subject to	8	before the Board, he will be at odds with
9	discipline in that instance was illegal and	9	certain of the other parties. He will be
10	took a position that was not taken by any	10	descending into the area and becoming as if he
11	other party. The Court said, and the	11	were a party. And that is, in our view,
12	quotation is in the text, "Solicitors advising	12	clearly not the role of independent counsel.
13	boards have been told more than once by this	13	Page 221 under "Advising the Tribunal and
14	Court and by the Court of Appeal that when	14	Content of the Advice", in the second
15	they descend into the area the impression may	15	paragraph it is clear, he says, "For example,
16	be left that the person facing discipline	16	independent counsel should not provide advice
17	charges is not just being judged by the body	17	suggesting how the tribunal should decide the
18	appointed by the legislature, but as well,	18	merits of the case." In our submission, no
19	perhaps even chiefly, by a solicitor hired to	19	more should independent counsel call evidence
20	give advice to the Board. Such conduct by the	20	which is suggesting to the Board how the
21	solicitor creates an appearance, the	21	merits of the case should be determined.
22	appearance of unfairness." So, as the text	22	The point is made again at the bottom of
23	goes on to say, "Prudent independent counsel	23	the paragraph on page 222 just before the
24	strive to act only as and to maintain the	24	issue of form of the advice where the note is
25	appearance of acting only as advisors to the	25	that if the intervention by counsel is
			$\mathbf{D}_{a} = 0$ $\mathbf{D}_{a} = 12$

Discoveries Unlimited Inc., Ph: (709)437-5028

Sep	tember 16, 2003 N	/Iulti-Page ¹	^M NL Hydro 2003 General Rate Application
	Pag	je 13	Page 1
1 H	IUTCHINGS, Q.C.:	1	counsel participating in or being present for
2	excessive, tribunal's counsel risks creating	2	the deliberations of the tribunal.
3	the appearance of descending into the arena	3	There are a number of illustrations we
4	and interfering with the adversarial process.	4	can refer to, to show the nature of the
5	And quite clearly, that is something that is	5	problems that this is creating. Even in your
6	not contemplated under our law as it reflects	6	opening this afternoon, Mr. Chair, you
7	the issue of bias.	7	referred to responses coming from Newfoundland
8	It's interesting to note that 223,	8	Power and from Newfoundland Hydro. But, if we
9	rather, at the bottom, in talking of the final	9	look at the situation that we're in here,
10	address to the tribunal, in the second	10	essentially the Industrial Customers are the
1	paragraph there, the author says, "The final	11	applying party and Board counsel is the
12	address by tribunal's counsel can be similar	12	responding party. The responding party has
13	to but not identical to a jury address by a	13	not filed any response to this Application.
14	trial judge." And that is quite a different	14	One might suggest that it's not being
15	thing than advocating for a particular	15	contested and should simply go on that basis,
16	position even if it is a position that has	16	but clearly, other parties have an interest.
17	been put by a witness called by such counsel.	17	But this is illustrative of the fact that
8	And that creates the very issue itself because	18	simply by proffering this evidence Board
9	the witness has been called by that counsel.	19	counsel is putting one of the parties, in this
20	Quite clearly, as the commentary goes on on	20	instance the Industrial Customers, essentially
20	page 224, "Independent counsel can identify	20	in the position of making an application
22	issues but should not comment on matters of	21	against the Board. And this is the Board
22	weight or discretion that are for the tribunal	22 23	before whom we are appearing, which is
23 24	to decide." And obviously the points go on in	23	intended to be neutral and fair and impartial
24 25	terms of the inappropriateness of legal	24	toward us, yet we are effectively put in the
25			
1	-	ge 15	Page 1
1	position of making an application against the	1	before you now, according to their filed
2	Board. Equally, the two utilities here, by	2	submissions, defending your right, the Board's
3	filing responses, are put in the position of	3	right, or Board's counsel's right to have this
4	defending the Board and defending the position		additional material which may be contrary to
5	that the Board, through its counsel, has	5	their interests come before you. And
6	taken. It is quite clearly not the situation	6	obviously the utilities have, perhaps, even a
7	that is contemplated by the legislation which	7	greater interest in ensuring that they are not
8	contemplates an independent fair and impartial		put in a position where they are perceived as
9	tribunal sitting apart from and above and	9	acting against or against the wishes of the
10	beyond and untouched by the adversarial	10	Board. But it is an untenable position, in my
1	process over which it presides. But the lines	11	submission, Mr. Chair. Obviously we are all
2	are being seriously blurred here and the	12	here as parties and we want all to exhibit the
3	parties are being put in seriously prejudicial	13	greatest respect for the Board and we don't
4	positions. It may well be that these	14	want to be taking positions that are
15	utilitiesand one would assume, quite	15	unnecessarily contrary to the way the Board
16	frankly, that these utilities would not be	16	wishes to proceed. But effectively, given
17	interested in having what amounts to	17	that someone in the name of the Board is
8	additional intervenor evidence put before the	18	coming before this tribunal and offering
9	Board. But the Board's evidence is	19	substantive evidence on issues before the
20	effectively intervenor evidence. It is	20	Board, we are put in the position of having to
21	evidence that is being filed presumably to	21	react.
22	counter, at least in part, something that one	22	Hydro's reply in the matter speaks of the
23	or more of these utilities, and more	23	notion that Board hearing counsel may offer
24	particular, Hydro, I suspect, want the Board	24	evidence. The extract from Macauley and
25	to do. But, the utilities, nonetheless, are	25	Sprague which is attached, with respect,

bepte	mber 10, 2005	Multi-1 a	ige 111 Hydro 2005 General Rate Application
	Р	age 17	Page 18
1 HU	ICHINGS, Q.C.:	1	may wish to look a this point, identifying
2	doesn't directly address that issue. The in	2	issues. That's fine. And that is sufficient
3	Chapter 10 there just before the enumerated	3	to establish, if you will, if you need to
4	portions on page 10-1 the test reads, "In this	4	establish the validity of the notion that
5	chapter assume that counsel may carry out the	5	Board staff can lead evidence. But it does
6	following activities." And the ninth	6	not, in our submission, wipe away all of the
7	enumerated item is, "Lead evidence recommende	d 7	juris prudence which tells us that a
8	by tribunal staff, usually expert evidence, on	8	reasonable apprehension of bias will arise
9	issues arising in the application." Now, that	9	where evidence is lead on the specific issues,
10	is no more than an assumption. Fine. Let's	10	the substantive issues before the Board by
11	accept it for the purpose of argument that	11	someone who purports to speak on behalf of the
12	that is a correct statement, although in the	12	Board.
13	text it is no more than an assumption. Quite	13	The second extract that was provided
14	clearly there is room for evidence to be	14	later from Hydro, which I understand is from
15	recommended by tribunal staff and lead before	15	the same text, addresses the notion thatand
16	the Board. And I mean, this is the type of	16	this is the point made in the first paragraph,
17	evidence that we've had from Grant Thornton,	17	"It's not surprising that there has been
18	or specifically tasked by the Board to review	18	considerable debate over whether a court ought
19	accounts and produce some type of report that	19	to be able to appoint an expert witness of its
20	we've seen. Equally, we have the type of	20	own." And quite clearly, the rule in Canada
21	report which Grant Thornton has filed on the	21	is that that is not to occur and judges have
22	rate stabilization plan, for instance, which	22	been overturned for so doing, as you can see
23	does nothing more than identify the issues and	23	by reading this particular extract. What we
24	suggest the Board may wish to consider this,	24	have at the end of this at page 1727 is a
25	the Board may wish to consider that, the Board	25	recommendation of the author.
	Р	age 19	Page 20
1	It's not purporting to be a statement of	1	1726, there's a reference to The Public
2	law. It merely says, "as a result, all	2	Utilities Board Act there, SA 1980, Chapter
3	tribunals should claim access to an inherent	3	P37, Section 19. That has now become Section
4	right to call their own expert witnesses to	4	21 of the Revised Statutes of Alberta, 2000,
5	ensure a complete and satisfactory record of	5	Chapter P45, and that is the second section
6	the proceeding, especially where the matter	6	that is reproduced there. The first section
7	impacts upon the public interest." This is an	7	that's reproduced is what was Section 14 of
8	opinion on a question of public policy from	8	the Act which is referred to in the Re: Public
9	this particular author, but the author, to	9	Utilities Board Act case that's attached to
10	give him his due, when we come back to pa	.ge 10	Mr. Kelly's submission, and I'll get back to
11	1726, makes it very clear that the answer to	11	that later.
12	this question has to be found within the	12	But, for our purposes, we need to focus
13	statutory provisions that apply to the	13	upon the intent of the legislature in
14	particular tribunal in question, and I've	14	determining how the Board is to proceed in
15	distributed to other counsel, this afternoon,	15	respect of these matters, and overlay that
16	some extracts from the Public Utilities Board	l 16	with the rules of natural justice, to ensure
17	Act of the Province of Alberta and I have	17	there is no apprehension of bias. In the
18	additional copies here.	18	context of what Hydro has submitted here, and
19	This is to assist you in putting into	19	there is a note that the Board did call Dr.
20	context the references, both in this article	20	Wilson in the previous hearing. I recall also
21	and in the case attached to the Newfoundlan	d 21	that the Board, at one stage in the course of
100	Doming and main and an and be an and the state	1.0.0	the marries hearing of the marries for f

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Power submissions, with respect to the

Province of Alberta. You will see that, in

footnote 71, in the Hydro submission, page

legislative provisions that apply in the

22

23

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25

September 16, 2003

the previous hearing or the preparation for

with one of the utilities, and ultimately, the

witness, who had some connection previously

it, proposed to call a cost of capital

	Page 21		Page 22
1 HU	TCHINGS, Q.C.:	1	that where the Board perceives a need to have
2	Board determined not to call any cost of	2	assistance and advise from technical or other
3	capital witness at the previous hearing,	3	persons, then there is provision to request
4	largely, I think, on the basis that everyone	4	the Lieutenant Governor in Council to appoint
5	else was calling a cost of capital witness and	5	such persons accordingly. The only other
6	it simply wasn't necessary.	6	references to counsel, engineers, valuators
7	But, if we look at and compare the	7	and so on in the Act is found in Section 65
8	legislative provisions in the Public Utilities	8	and Section 90, and you don't really need to
9	Act to what exists elsewhere, the powers that	9	look at those right now, because all that they
10	exist here are found, firstly, in Section 6,	10	talk about there is how to deal with the cost
11	and let's look first at sub 11, which says	11	of these people. But the other two sections
12	"the Board may employ legal counsel,	12	of the Act that I think are helpful in
13	accountants, engineers, stenographers or other	13	determining the ultimate resolution of this
14	persons that it may require or consider	14	are Section 20, which provides the Board with
15	advisable for the purpose of carrying out this	15	power to make, revoke and alter rules and
16	Act, and the wages, salaries or compensation	16	regulations for its practice and procedure,
17	of those persons shall be paid by the Board	17	and provides, specifically, and this is
18	and shall form part of the annual expenses of	18	significant, that the rules and regulations,
19	the Board." We also need to look at sub 10 of	19	when approved by the Lieutenant Governor in
20	Section 6, which provides that Lieutenant	20	Council shall have the force of law.
21	Governor in Council may appoint technical or	21	The other point within the Act that I
22	other assistants to attend upon and advise the	22	think we need to keep in mind is the provision
23	Board, where requested by the Board to do so.	23	of Section 117 that provides for the
	32 p.m.)	24	appointment of a Consumer Advocate, and I'll
25	So there is clearly a legislative intent	25	return to that a little later.
	Page 23	:	Page 24
1	With respect to the Act therefore, there		questioned throughout the proceeding by the
2	is no clear contemplation within the Act that	2	Board or by Board staff."
3	the Board would be out calling its own	3	So it was felt necessary to put in the
4	witnesses before it, in the context of a	4	
5	hearing, and the provisions of the		regulation a specific power to allow the Board
		5	regulation a specific power to allow the Board to cross-examine witnesses. Ouite clearly, in
6	č	5	to cross-examine witnesses. Quite clearly, in
6 7	regulations, you will see, are quite		to cross-examine witnesses. Quite clearly, in our submission, had the intent been that the
	regulations, you will see, are quite consistent with the notion that the Board	6	to cross-examine witnesses. Quite clearly, in our submission, had the intent been that the Board was to be calling witnesses itself,
7	regulations, you will see, are quite consistent with the notion that the Board would not be doing that. If you look at	6 7	to cross-examine witnesses. Quite clearly, in our submission, had the intent been that the Board was to be calling witnesses itself, there would have been a specific provision to
7 8	regulations, you will see, are quite consistent with the notion that the Board	6 7 8	to cross-examine witnesses. Quite clearly, in our submission, had the intent been that the Board was to be calling witnesses itself, there would have been a specific provision to that effect, and there is none, either in the
7 8 9	regulations, you will see, are quite consistent with the notion that the Board would not be doing that. If you look at Sections 18 and 19 of the regulations, which	6 7 8 9	to cross-examine witnesses. Quite clearly, in our submission, had the intent been that the Board was to be calling witnesses itself, there would have been a specific provision to
7 8 9 10	regulations, you will see, are quite consistent with the notion that the Board would not be doing that. If you look at Sections 18 and 19 of the regulations, which under Section 20 of the Act have the force of law, "the order of participants at a public	6 7 8 9 10	to cross-examine witnesses. Quite clearly, in our submission, had the intent been that the Board was to be calling witnesses itself, there would have been a specific provision to that effect, and there is none, either in the Act or in the regulation. Quite clearly, the
7 8 9 10 11	regulations, you will see, are quite consistent with the notion that the Board would not be doing that. If you look at Sections 18 and 19 of the regulations, which under Section 20 of the Act have the force of	6 7 8 9 10 11	to cross-examine witnesses. Quite clearly, in our submission, had the intent been that the Board was to be calling witnesses itself, there would have been a specific provision to that effect, and there is none, either in the Act or in the regulation. Quite clearly, the regulation contemplates evidence from the
7 8 9 10 11 12	regulations, you will see, are quite consistent with the notion that the Board would not be doing that. If you look at Sections 18 and 19 of the regulations, which under Section 20 of the Act have the force of law, "the order of participants at a public hearing shall, unless otherwise determined by	6 7 8 9 10 11 12	to cross-examine witnesses. Quite clearly, in our submission, had the intent been that the Board was to be calling witnesses itself, there would have been a specific provision to that effect, and there is none, either in the Act or in the regulation. Quite clearly, the regulation contemplates evidence from the applicant and intervenors and that's it, and
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1 HUTCHINGS Q.C: 1 the matter before it." With respect, we do 2 itself. That no longer exists obviously. 1 3 What the legislature has now decreed is that 1 mot see, in any of the statutory or regulatory 4 there shall be a consumer advocate and 4 for the Board to present evidence. It may 5 Government has gone out of its way and 5 seckers and other experts, but there is, in 7 advocate, who has gone out of the way and 6 Lieutenant Governor in Council appoint someone 10 behalf of consumers of the province. So this 10 that there be evidence presented in the manner 11 is not a situation where there is an 12 The case from the Alberta Court of 12 unrepresented construency that the Board here 15 Appeal, I think, highights the real concern 14 afficted by the Board. 17 Appeal, I think, highights the real cont of 13 accordingly, there is no need for any 17 Drazen in the position where he is, at once 14 accordingly, there is no need for any 17 Mrc Chair, that it is a dangerous policy to 14 own appeal, of 4, in paragraph 13, the Court 18 advisor and		Page 25		Page 26
2 itself. That no longer exists obviously. 2 not see, in any of the staturory or regulatory 3 What the legislature has now decreed is that 4 for the Board to present evidence. It may 5 Government has gone out of its way and taken 5 for the Board to present evidence. It may 7 advocate, who has gone out of his way and taken the time and energy to go out and retain 5 seek technical assistance by having the 8 taken the time and energy to go out and retain 5 seek technical assistance by having the 10 behalf of consumers of the province. So this 10 out submission, no contemplation in the Act 11 is not a situation where there is an 12 The case from the Alberta Court of 12 affected by the Board's decisions and 12 The case from the Alberta Court of 13 anec of the Board. 16 affected by the Board's decisions and 16 14 additional experts or evidence, touching on 17 Drazen in the position where he is, at once, advisor and witness," And we would suggest, where he is, at once, advisor and witness," in adve would suggest, where here is, at once, advisor and witness," in adve would suggest, where here is, at once, advisor and witness," in adve or the Board. 18 14 bore, in an adv	1 HU'	-		0
3What the legislature has now decreed is that there shall be a consumer advocate and Government has gone out of its way and taken the time and energy to apopint a consumer a dvocate, who has gone out of his way and taken the time and energy to go out and retain experts and bring a case before the Board on behalf of consumers of the province. So this no cost burbation in the Act that is experts and bring a case before the Board on behalf of consumers of the province. So this unrepresented constituency that the Board in eneds to protect or fill in any gap in respect represent all of the interests that are represent all of the interests that are if a affected by the Board's decisions and a accordingly, there is no need for any a additional experts or evidence to be called in the name of the Board. if we have no evidence to be called in the name of the Board. if we have no evidence to be called in the name of the Board in statutory a mandate, the Board may retain counsel and consultants to present evidence, touching on the name of the Board and may retain counsel and to meet so revidence to be called in the name of the Board and who is supposed to play the rela of independent counsel, a described in the Stimekka for the advice, such as Mr. Waverman is giving, In that situation, where there isn't a gap, the with, which Board counsel must be clothed is untencessary for the Board dows a dows of a witness is clothed with the ara of is unnecessary to the Board dows a cost of service witness or a witness giving the service witness or a witness givin			2	· · · · · · · · · · · · · · · · · · ·
4there shall be a consumer advocate and Government has gone out of its way and taken the time and energy to appoint a consumer advocate, who has gone out of his way and taken the time and energy to go out and retain experts and bring a case before the Board on pexperts and other experts, but there is, in our submission, no contemplation in the Act that there he evidence presented in the manner that is so suggested here.10behalf of consumers of the province. So this our submission, no contemplation in the Act that there he evidence presented in the manner that is so suggested here.11is not a situation where there is an our submission, no contemplation in the Act that there he evidence presented in the manner that is so suggested here.12unrepresented constituency that the Board of The parties that before the Board here the name of the Board.13needs to protect or fill in any gap in respect additional experts or evidence to be called in additional experts or evidence to be called in the name of the Board.14additional experts or evidence to be called in the name of the Board.15respards the position of Newfoundland 22 says, "in order to fulfil its statutory 23 mandate, the Board may retain counsel and to present evidence, touching on 2425in the controversy which necessarily rages 2 before it na adversarial proceeding. By 3 having counsel to he Board and who is supposed to play the role of independent counsel, as described in the Sueneike a substantive positions on the issue before the substantive positions on the issue bef	3		3	
5Government has gone out of its way and taken the time and energy to appoint a consumer advocate, who has gone out of his way and atken the time and energy to go out and retain experts and bring a case before the Board on to behalf of consumers of the province. So this is not a situation where there is an 11 unrepresented constituency that the Board 12 unrepresented constituency that the Board 13 needs to protect or fill in any gap in respect represent all of the interests that are e affected by the Board's decisions and affected by the Board's decisions and affected by the Board. Power, in paragraph 1B of its presentation it 20 As regards the position of Newfoundland 21 power, in paragraph 1B of its presentation it 22 mandar, the Board may retain coursel and 23 moder to fulfil its statutory 24 moder to fulfil its statutory 25 o ne or more subjects or issues in relation to 25seek technical assistance by having the Lieutenant Governor in Council appoints oneone to do that. It may retain counsel and engineers and other experts, but there is, in our submission, no contemplation in the Act that its os suggested here. To accordingly, there is no need for any the name of the Board. 25suggested here. to Prove in an adversarial proceeding. By the independent counsel to the Board and who is supposed to bal the controversy which necessarily rages to fus auxies is clothed with the ara of time dependent counsel to the Board and who is supposed to play the role of independent to may beard to have a cost of service witness or a witness giving the e witness is on the cases have said, and you can see it in the struction of the sub of suppose to page 12seek technical assistance by having the current the sub of the suppose to be supposed to play the role of independent<	4		4	for the Board to present evidence. It may
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10Board, we are left with the real danger that10and as the cases have said, and you can see it11that witness is clothed with the aura of11in the articles and cases that are before you,12independence which counsel must be clothed12it is not a question of whether or not the13with, which Board counsel must be clothed13bias actually exists. It's a question of14with, and because that independence and14whether the reasonable person would apprehend15neutrality is intended to and does place Board15such a bias, and that is the concern that we16counsel above the fray, hence, witnesses16have.17associated with Board counsel are inevitably,17It is unnecessary to have this evidence18in our submission, going to be seen to be18before the Board. There is sufficient19something more than other witnesses who, quite19evidence from the parties who are supposed to20clearly, are brought before the Board by20be calling evidence, and, in our submission,	8	÷ •	8	And that is not, in any sense, a reflection
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17associated with Board counsel are inevitably, in our submission, going to be seen to be something more than other witnesses who, quite clearly, are brought before the Board by17It is unnecessary to have this evidence before the Board. There is sufficient evidence from the parties who are supposed to be calling evidence, and, in our submission,	16		16	have.
18in our submission, going to be seen to be18before the Board.There is sufficient19something more than other witnesses who, quite19evidence from the parties who are supposed to20clearly, are brought before the Board by20be calling evidence, and, in our submission,	17	associated with Board counsel are inevitably,	17	It is unnecessary to have this evidence
20 clearly, are brought before the Board by 20 be calling evidence, and, in our submission,	18	in our submission, going to be seen to be	18	before the Board. There is sufficient
20 clearly, are brought before the Board by 20 be calling evidence, and, in our submission,	19		19	evidence from the parties who are supposed to
	20		20	
21 parties who have specific interests and who 21 there is no legislative mandate for so doing.	21	parties who have specific interests and who	21	there is no legislative mandate for so doing.
22 are giving evidence in support of the specific 22 In those circumstances, we would ask that this	22	are giving evidence in support of the specific	22	
23 positions taken by the parties. The lines 23 evidence not be received. Those are our	23	positions taken by the parties. The lines	23	evidence not be received. Those are our
24 between parties and the Board are being 24 submissions, Mr. Chair.	24	between parties and the Board are being	24	submissions, Mr. Chair.
25 unnecessarily blurred, where, in this case, it	1	unnecessarily blurred where in this case it		

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]	Page 29		Page 30
1	CHAIRMAN:	-	1	and as set out in the rules for procedure, I'm
2	Q. Thank you very much, Mr. Hutchings. I'll a	ask	2	specifically listed as going last. So I
3	my colleagues on the panel if they have an	y	3	propose to merely complete the record here
4	questions at the end of each presentation.	-	4	today and I think it's appropriate for counsel
5	COMMISSIONER WHALEN:		5	for Hydro to begin and we follow our usual
6	Q. I don't have any right now. I might have so	me	6	order that way.
7	after we hear the other submissions.		7	GREENE, Q.C.:
8	CHAIRMAN:		8	Q. Hydro are certainly prepared to go first, but
9	Q. Mr. Saunders?		9	has I had indicated to counsel for the Board
10	COMMISSIONER SAUNDERS:		10	yesterday, as this issue deals with the role
11	Q. No questions.		11	of Board counsel, I also agree with the
12	CHAIRMAN:		12	applicant that Board counsel should respond to
13	Q. Thank you. Good afternoon, Ms. Greene,	Mr.	13	the motion and I had anticipated actually that
14	Young.		14	the Board counsel would be filing a reply and
1	HUTCHINGS, Q.C.:		15	would be speaking first. However, if it
16	Q. I'd assume Board counsel would go next as	the	16	convenient and acceptable to the Board, Hydro
17	responding party, Mr. Chair, but we're in yc		17	is prepared to go first.
18	hands obviously.		18	The sole issue here before the Board this
	MS. NEWMAN:		19	afternoon is whether the Board counsel has a
20	Q. Yes, Mr. Chairman, I would comment that	as	20	right to call expert evidence in this
21	the parties are aware, Board counsel is not		21	particular hearing. Mr. Hutchings, in his
22	really a responding party in this application.		22	comments, has raised other issues with respect
23	I still view my role as very much advising th		23	to conduct of Board counsel, and I share the
24	Board and I will propose that I continue to d		24	concern of the Industrial Customers with
25	that by going last, as is the ordinary case,		25	respect to the appropriate role for Board
		Page 31		Page 32
1	counsel and that Board counsel should no	-	1	Court, I probably would be opposing the
$\begin{vmatrix} 1\\2 \end{vmatrix}$	enter into the fray and become an adversaria		2	motion, because it obviously is simpler if I
3	party to the proceeding, as that is not the		3	have less experts to deal with and less issues
4	role of Board counsel. I don't think that is		4	raised. So from that perspective, yes, Hydro
5	the full question that's before the panel. The	-	5	probably would, if we were in Court, and
6	question before the Board this afternoon is		6	dealing with only one issue, that may well be
7	the right to call expert evidence and whether		7	the case. However, here, we must look at the
8	that, by itself, raises a reasonable	1	8	broader mandate the Board has under the
9	apprehension of bias so that Board counsel	may	9	existing legislation.
10	not in any normal circumstance call exper	•	10	The Public Utilities Board must not only
11	evidence.	ι	11	decide specific issues between parties to a
11	And before dealing with that question,		12	hearing, but they have a broader role with
12	which I believe is the question before the		12	respect to the public interest. There are two
13	Board, I think it's helpful to have some		13	specific sections of the legislation I would
14	discussion and I would like to make some	e	15	like to refer to. The first is Section 16 of
15	comments with respect to the role of the Bo		15	the Public Utilities Act, under which the
17	in a regulatory proceeding such as the one		17	Board has general supervision of public
17	before the Board here, because I do think		17	utilities and may make all necessary inquiries
18	there is a difference between the pure		18	and keep itself informed as to compliance by
1	adversarial nature arising in a judicial court		20	the utility with the law.
20 21	proceeding and the role the Board plays her		20	The second legislative provision I draw
	in its regulatory role.	Ū		the attention of the Board to is the
22	÷ •		22	
23	The Board is not simply deciding a dispute between litigents, as is usually the		23	Electrical Power Control Act, and specifically Section 3 and 4. Section 3 of that Act sets
24	dispute between litigants, as is usually the		24	
25	case in a court matter. And if we were in		25	out very broad electrical power policy for the

		nu-i age	NL Hyuro 2003 General Nate Application
	Page	33	Page 34
1	GREENE, Q.C.:	1	practice before this Board, as well as at
2	Province. Under Section 4 of that Act, the	2	other administrative tribunals, that the Board
3	Board is to apply that public policy statement	3	may and will become involved with respect to
4	in all issues and proceedings before the	4	request for information to all parties, with
5	Board. So the role of the Board is broader in	5	respect to cross-examining witnesses and in
6	the sense that it does not only decide the	6	fact, with respect to leading evidence.
7	specific interests that litigants may bring	7	The chapter from Macauley that was
8	before or adversarial parties, but it must	8	attached with respect to our reply does set
9	take into account a broader responsibility in	9	out a number of duties for Board counsel, and
10	the public interest, as referred to in Section	10	I believe that that has become the accepted
11	16 of the Act and Sections 3 and 4 of the	11	practice before this Board, as well as in
12	Electrical Power Control Act.	12	other regulatory boards. While Mr. Hutchings
13	In carrying out its responsibilities and	13	pointed out, the introduction did, in Chapter
14	its mandate, the Board does have the right to	14	10, I believe it was, say that you could
15	retain staff, including counsel, to assist.	15	assume the Board had a right to call evidence,
16	The role of Board counsel, in Hydro's	16	I think if we looked at Chapter 17, that Mr.
17	submission, is not limited in the manner set	17	Hutchings has also referred to, that textbook
18	out in paragraph 2A of the application by the	18	deals specifically with the right of
19	Industrial Customers. As we stated in our	19	administrative tribunals to lead expert
20	paragraph 2A, yes, the Board counsel is to	20	evidence, and I think, if we refer here to
21	advise the Board with respect to issues of	21	page 17-26 of Chapter 17, the text of Macauley
22	procedure, with respect to issues of	22	on Practice and Procedure Before
23	jurisdiction, with respect to issues of	23	Administrative Tribunals, I think there is a
24	substantive law on matters arising in the	24	paragraph here that's very relevant to the
25	proceeding. But as well, it has become the	25	specific issue before the panel that I would
	Page 3	35	Page 36
1	like to refer to.	1	With respect to the issue of the
2	So it's page 17-26 of Chapter 17, which	2	legislation, Mr. Hutchings has referred you to
3	was distributed yesterday, and it is the	3	the Public Utilities Act, where in subsection
4	second full paragraph beginning on that page.	4	11 of section 6, the Board does have the right
5	There it is stated, "in administrative	5	to retain advisors. Mr. Hutchings, in my
6	proceedings, a tribunal is generally required	6	view, has narrowly interpreted that section
7	to make a decision which determines, not only	7	and when you apply the Interpretation Act,
8	the rights of the parties before it, but even	8	which is to give a fair and liberal
9	more important, the impact on the public at	9	interpretation to the section, I believe it is
10	large. The public interest component of	10	clear that the Board does have a right to
11	administrative decision making makes it clear	11	retain expert evidence under its own
12	that it is very important for an	12	legislation. Mr. Hutchings has already
13	administrative tribunal to have the power to	13	referred you to the last paragraph in that
14	appoint its own expert witnesses. All	14	chapter, which I had also intended to refer
15	administrative tribunals are, however, creates	15	you to.
16	of statute. It is arguable therefore that the	16	Mr. Hutchings has suggested that the fact
17	empowering legislation of each tribunal must	17	that Board counsel is calling expert evidence
18	stipulate if, and when, an expert may be	18	by itself raises a reasonable apprehension of
18 19	stipulate if, and when, an expert may be appointed. On the other hand, since	19	bias to the point that the Board should not
18 19 20	stipulate if, and when, an expert may be appointed. On the other hand, since administrative tribunals are generally	19 20	bias to the point that the Board should not allow it, and I think Mr. Hutchings is going a
18 19 20 21	stipulate if, and when, an expert may be appointed. On the other hand, since administrative tribunals are generally considered to be masters of their own practice	19 20 21	bias to the point that the Board should not allow it, and I think Mr. Hutchings is going a bit too far with respect to the statement.
18 19 20 21 22	stipulate if, and when, an expert may be appointed. On the other hand, since administrative tribunals are generally considered to be masters of their own practice and procedure, they may have an inherent power	19 20 21 22	bias to the point that the Board should not allow it, and I think Mr. Hutchings is going a bit too far with respect to the statement. The mere calling of the evidence by itself
18 19 20 21 22 23	stipulate if, and when, an expert may be appointed. On the other hand, since administrative tribunals are generally considered to be masters of their own practice and procedure, they may have an inherent power to appoint witnesses and experts to assist in	19 20 21 22 23	bias to the point that the Board should not allow it, and I think Mr. Hutchings is going a bit too far with respect to the statement. The mere calling of the evidence by itself does not create the apprehension of bias.
18 19 20 21 22	stipulate if, and when, an expert may be appointed. On the other hand, since administrative tribunals are generally considered to be masters of their own practice and procedure, they may have an inherent power	19 20 21 22	bias to the point that the Board should not allow it, and I think Mr. Hutchings is going a bit too far with respect to the statement. The mere calling of the evidence by itself

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1 GRE	ENE, Q.C.:	1	counsel, and that, of course, is a decision to
2	hearing where the apprehension of bias may be	2	5 5
3	raised, but not the simple filing of an expert	3	Board staff. As the Industrial Customers
4	report and the actual calling of the expert.	4	1 11
5	And as I pointed out already, there have been	5	
6	instances before this Board where the Board	6	I
7	has called expert evidence. The one that I	7	of the parties to the proceeding have retained
8	refer to in my reply was in Hydro's last 2001	8	1
9	General Rate Application, where Dr. Wilson was	9	point out that there was a generic cost of
10	called by Board counsel to speak with	10	service hearing in 1993, and again, in the
11	recommendations on specific issues for cost of	11	2001 GRA, there were a number ofactually,
12	service matters, and I believe there are other	12	all the parties there as well had cost of
13	examples from Newfoundland Power's proceedings	13	service experts, where the issues were again
14	as well.	14	reviewed and decisions were made by the Board
15 (2:5	3)	15	in 2001. So those types of things, which is
16	So it is Hydro's position that, in the	16	the issues before the Board in the specific
17	appropriate circumstances, the law recognizes	17	application, whether the other parties do have
18	that Board counsel may call expert evidence	18	experts called who will speak to all of the
19	and that it has the right to do so. However,	19	issues, including issues in the public
20	that doesn't mean, of course, that an expert	20	interest, and as to the nature of the issues,
21	or a witness has to be called on every issue.	21	those are the sorts of factors that must be
22	An assessment must be made as to whether it is	22	taken into account in the assessment as to
23	necessary for the Board to have a full	23	whether it is required for the Board to call
24	understanding of all the issues before it or	24	expert evidence on any particular issue.
25	an expert or a witness to be called by Board	25	However, the mere fact that it is the
	Page 39		Page 40
1	Board counsel is calling an expert is not, by	1	manner suggested; and for that reason, we
2	itself, enough to raise a reasonable	2	
3	apprehension of bias, in Hydro's position, and	3	Thank you.
4	we believe that that is the law as referred to	4	CHAIRMAN:
5	in the textbooks that we have filed, the	5	Q. Thank you, Ms. Greene. Good afternoon, Mr.
6	chapters from the textbook that we have filed,	6	
7	as well as the practice before this Board, as	7	BROWNE, Q.C.:
8	well as the practice that is, to our		
		8	Q. Mr. Chairman, members of the Board, the
9	-	8	
10	knowledge, in other jurisdictions.		legislation does not require that the Public
	-	9	legislation does not require that the Public Utilities Board be an expert panel. There's
10	knowledge, in other jurisdictions. We do believe, as I said earlier, that	9 10	legislation does not require that the Public Utilities Board be an expert panel. There's no requirement for a cost of service expert or
10 11	knowledge, in other jurisdictions. We do believe, as I said earlier, that the role of Board counsel is a sensitive role	9 10 11	legislation does not require that the Public Utilities Board be an expert panel. There's no requirement for a cost of service expert or
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Discoveries Unlimited Inc., Ph: (709)437-5028

Application

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1 BROWNE, Q.C.:		1	internal purpose, to assist the Board in legal
2 Here, we have the spectro		2	matters after the matters have been argued
3 counsel dealing with issues		3	publicly, and the parties never hear from the
4 proponent and other parties a		4	internal legal counsel. They only hear from
5 dealing with. We had the same		5	the external legal counsel. I assume, in this
6 2001. Our position there wa		6	instance, the intention was that the external
7 counsel ought to limit their ro	-	7	legal counsel would be Mr. Kennedy and the
8 involved by calling evidence.	-	8	internal legal counsel would be Ms. Newman.
9 in which the Board counsel co	ould assist, the	9	But yet, there seems to be a hybrid of that
10 Board's financial advisors trac	litionally have	10	before this Board. We find Ms. Newman
11 been unique witnesses, beca	use they have	11	speaking publicly on matters of law, which, I
12 access to the books of the co	mpanies, which	12	think, ought to be addressed by your external
13 other parties do not.		13	counsel. The internal counsel should hear all
14 Our position is the same a	s it was in	14	the arguments. Then if the Board needs
15 2001. It ought not to be allow	ed. The other	15	assistance during their deliberations on
16 parties are calling cost of ser	vice experts	16	matters of law, or any kind of clarification
and cost of capital experts. Be	pard counsel's	17	as to the position of the parties, they can
18 role should be limited to ex	amining the	18	seek that clarification from their internal
19 witnesses that are brought for	ward.	19	legal counsel. I think there's been confusion
20 There is a more particular	problem, I	20	between these two roles, since we saw internal
21 think, in reference to these ma	tters, and it's	21	legal counsel and external legal counsel both
22 really unclear in law. You	have here an	22	appearing at these hearings.
23 internal counsel and an extern	al counsel, and	23 (3:0	1 p.m.)
24 I can understand the confus	sion. Some	24	So we support the application of the
25 tribunals have their internal c	ounsel for an	25	Industrial Customers in this particular
	Page 43		Page 44
1 instance, and we would suggest t		1	cannot call its own evidence without creating
2 clarify the roles of internal and		2	a reasonable apprehension of bias. In our
3 counsel, for their own benefit a		3	respectful submission, that is an incorrect
			respectiul submission, mat is an incorrect
4 benefit of us all. Thank you very	much.	4	•
4 benefit of us all. Thank you very 5 CHAIRMAN:	much.	4 5	principle for a regulatory body such as this Board operating under the Public Utilities
5 CHAIRMAN:			principle for a regulatory body such as this
5 CHAIRMAN:6 Q. Thank you, Mr. Browne. If the	Panel has any	5	principle for a regulatory body such as this Board operating under the Public Utilities Act. Both the Public Utilities Act and the
 5 CHAIRMAN: 6 Q. Thank you, Mr. Browne. If the 7 questions, perhaps they could interpret the statement of the state	Panel has any erject as we	5 6	principle for a regulatory body such as this Board operating under the Public Utilities Act. Both the Public Utilities Act and the Electric Power Control Act require this Board
 5 CHAIRMAN: 6 Q. Thank you, Mr. Browne. If the 7 questions, perhaps they could int 8 proceed through. Good afternoor 	Panel has any erject as we	5 6 7	principle for a regulatory body such as this Board operating under the Public Utilities Act. Both the Public Utilities Act and the Electric Power Control Act require this Board to implement broad issues of public power
 5 CHAIRMAN: 6 Q. Thank you, Mr. Browne. If the 7 questions, perhaps they could interpret the statement of the state	Panel has any erject as we n, Mr. Kelly.	5 6 7 8	principle for a regulatory body such as this Board operating under the Public Utilities Act. Both the Public Utilities Act and the Electric Power Control Act require this Board
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	Page 45		Page 46
	LY, Q.C.:	1	record. It is equally clear that there is no
2	including, for that matter, the	2	contacts between staff, counsel, consultants
3	representations of the Consumer Advocate, but	3	and the Panel hearing the case. And that is a
4	in a much broader sense of what is in the	4	correct approach as to how matters should
5	public interest in accordance with the	5	proceed.
6	parameters set out in the Act for the public	6	The next paragraph which I won't read
7	power policy of the Province.	7	talks about the fact that the OEB then takes
8	The standard practice across the country	8	the position that that satisfies reasonable
9	has been for Boards, such as this particular	9	apprehension of bias tests.
10	type of Board engaged in regulatory practice	10	And the other paragraph that I'd refer
11	to call its own experts through counsel. I	11	you to from Macauley and Sprague is in Section
12	did give you two extracts from Macauley and	12	18(2) and the paragraph, the third paragraph
13	Sprague. The first is from Section 14.6	13	down that says, "it is worth nothing that many
14	dealing with the Ontario Energy Board and you	14	regulatory agencies employ what is known as a
15	will note down in the second paragraph from	15	future test year. An agency in that case may
16	the bottom that the OEB separates counsel from	16	well want to test the applicant's forecast of
17	the Panel before, during and after the	17	such things as the prime bank rate, CPI,
18	hearing. In this way, the OEB insures that	18	interest rates, sometimes stream flows, the
19	the staff that takes position and submits	19	cost of gas or coal and the lake level or peak
20	argument is free to balance the record, either	20	demands". All sounds vaguely familiar to what
21	through cross-examination or by presenting its	21	we're dealing with here. "Thus an agency
22	own direct evidence through outside witnesses.	22	frequently will retain one or more consultants
23	In addition, it is very clear that what the	23	to provide it with assistance in these and
24	Panel has been told, apart from its own	24	other areas. An agency may not want to
25	special knowledge, because it is put on the	25	standby and rubber stamp an applicant's
	Page 47		Page 48
1	forecast of future events". And you could	1 Q	. I don't intend to get into the details, but my
2	also add the point that the Board is not stuck	2	point was simply that it fills a niche that is
3	with views from any other party, whether it be	3	useful for the Board to hear. It's not to say
4	either intervenors at all. The Board is	4	that we believe it is totally acceptable
5	entitled to have a full balanced record even	5	evidence, but it is evidence that is useful to
6	if that means that the Board wishes to have	6	the Board.
7	evidence itself, it is entitled to call that	7	Now, the test that all this flows from
8	evidence through hearing counsel.	8	is, does it create a reasonable apprehension
9	That has certainly been the practice of	9	of bias for the Board to retain its own
10	this Board in the past, certainly in my	10	consultants and experts? And the short answer
11	experience before this Board over a number of	11	to that is you will not find a case directly
12	years, the Board has called evidence. Going	12	on point because the point seems so clearly
13	back to the 1998 hearing, the Board called it	13	established in the law that boards of this ilk
14	own cost of capital witnesses, notwithstanding	14	can retain such people that there is no case
15	that other parties also had cost of capital	15	directly on point. The best case that you can
16	witnesses. In this particular case, I would	16	find, in my respectful submission is the case
17	observe that Mr. Waverman's evidence, in	17	from the Alberta Court of Appeal which I have
18	particular, fulfils an interesting function in	18	provided to the Board and which is attached to
19	pointing out theor presenting evidence as to	19	the submission. And just to set the framework
20	how a -	20	for that case, let me first refer you to your
	WNE, Q.C.:	21	own Public Utilities Act. Mr. Hutchings
	. Mr. Kelly, I'd object because the Board hasn't	22	referred you quite correctly to Section 6(11),
23	seen Mr. Waverman's evidence and it's been	23	"that the Board may employ legal counsel,
24	kant from the Board	24	accountants, engineers, stenographers and
	kept from the Board. LY, Q.C.:	24	other persons that it may require or consider

	Page 49		Page 50
1	KELLY, Q.C.:	1	limit subsection 11 and sub 2, "the Board
2	advisable for the purpose of carrying out this	2	created has, in addition to the power
3	Act. And the wages, salaries or compensation	3	specified in this Act, all additional implied
4	of those persons shall be paid by the Board,	4	and incidental powers which may be appropriate
5	et cetera". Not that it's the word	5	or necessary to carry out all the power
6	compensation; it's not simply wages and	6	specified in this Act". So, it's a broad
7	salaries. Those persons can be retained in	7	power that the Board is given.
8	whatever manner is appropriate through hearing	8	And you will also note Section 16 which
9	counsel and they are paid by the Board, not	9	is the section giving the Board the continuing
10	the Lieutenant Governor in Council. So,	10	control and supervision that Ms. Greene
11	subsection 10, even on the face of it, does	11	referred to. And the scope of those sections
12	not limit subsection 11, but if there were any	12	is well illustrated by the Court of Appeal's
13	doubt about the correctness of that position,	13	decision in the Stated Case. And that takes
14	the answer is clearly provided by the	14	me to the decision of the Alberta Court of
15	legislature in Section 118. We do not have to	15	Appeal which I think is important for three
16	go to the Interpretation Act as Ms. Greene	16	points which this Board should ultimately take
17	suggests. The legislature here has provided	17	out of it. First, the facts of this case.
18	that "this Act shall be interpreted can	18	Northwestern Utilities were before the Board
19	construed liberally in order to accomplish its	19	on a general rate application. The Industrial
20	purposes and where a specific power or	20	Customers had called a Mr. Drazen, who I
21	authority is given the Board by this Act, the	21	understand will also be a witness in this
22	enumeration of it shall not be held to exclude	22	proceeding or may well be a witness in this
23	or impair a power or authority otherwise in	23	proceeding for one of the other parties. At
24	this Act conferred on the Board". So,	24	the same time, Mr. Drazen had been retained as
25	subsection 10, Mr. Hutchings section does not	25	a consultant by the Board on certain matters.
	Page 51		Page 52
1	So, Northwestern Utilities raised a question	1	preferring his evidence". And just to apply
2	of reasonable apprehension of bias. And even	2	that to this case, certainly in this
3	on those facts, the Court did not conclude	3	particular case, it does not raise an
4	that there was a reasonable apprehension of	4	apprehension in the mind of reasonable and
5	bias and certainly those facts go beyond what	5	well informed persons that the Board would
6	we have in this case. Dealing with the	6	simply because hearing counsel will call
7	reasonable apprehension of bias, the Court of	7	evidence from particular witnesses, that this
8	Appeal dealt with that at paragraph 11 of the	8	Board would prejudge a case by unthinkingly
9	decision which is on page 3 of 4. And the	9	preferring that evidence. Certainly that
10	Court said this, "we agree that a reasonably	10	would not be appropriate. That's the first
11	well informed person could properly fear,	11	point, that merely calling the evidence itself
12	based solely on the fact of the retainer, that	12	and retaining the consultants does not raise a
13	the Board has great confidence in Drazen and	13	reasonable apprehension of bias.
14	his skills. We do not accept that this fact	14	The second point is the one at paragraph
15			
	alone permits a reasonable apprehension that	15	13 and Mr. Hutchings referred to this. "It is
16	alone permits a reasonable apprehension that the Board thinks he is better than other	15 16	13 and Mr. Hutchings referred to this. "It is a dangerous"I'll read beginning three lines
16 17	the Board thinks he is better than other		a dangerous"I'll read beginning three lines
		16	÷
17	the Board thinks he is better than other experts. He may have been chosen over others	16 17	a dangerous"I'll read beginning three lines down"it is a dangerous policy to put Mr.
17 18	the Board thinks he is better than other experts. He may have been chosen over others for many reasons, as for example, availability. Moreover, and this is perhaps	16 17 18	a dangerous"I'll read beginning three lines down"it is a dangerous policy to put Mr. Drazen in the position where he is at once advisor and witness. Assume, for example,
17 18 19	the Board thinks he is better than other experts. He may have been chosen over others for many reasons, as for example,	16 17 18 19	a dangerous"I'll read beginning three lines down"it is a dangerous policy to put Mr. Drazen in the position where he is at once
17 18 19 20	the Board thinks he is better than other experts. He may have been chosen over others for many reasons, as for example, availability. Moreover, and this is perhaps the most important point, moreover, the	16 17 18 19 20	a dangerous"I'll read beginning three lines down"it is a dangerous policy to put Mr. Drazen in the position where he is at once advisor and witness. Assume, for example, that he has met regularly and privately with a
17 18 19 20 21	the Board thinks he is better than other experts. He may have been chosen over others for many reasons, as for example, availability. Moreover, and this is perhaps the most important point, moreover, the respect shown by the retainer would not, of	16 17 18 19 20 21	a dangerous"I'll read beginning three lines down"it is a dangerous policy to put Mr. Drazen in the position where he is at once advisor and witness. Assume, for example, that he has met regularly and privately with a member of the panel while his testimony is under consideration by that member. No matter
17 18 19 20 21 22	the Board thinks he is better than other experts. He may have been chosen over others for many reasons, as for example, availability. Moreover, and this is perhaps the most important point, moreover, the respect shown by the retainer would not, of itself, raise an apprehension in the mind of a	16 17 18 19 20 21 22	a dangerous"I'll read beginning three lines down"it is a dangerous policy to put Mr. Drazen in the position where he is at once advisor and witness. Assume, for example, that he has met regularly and privately with a member of the panel while his testimony is
 17 18 19 20 21 22 23 	the Board thinks he is better than other experts. He may have been chosen over others for many reasons, as for example, availability. Moreover, and this is perhaps the most important point, moreover, the respect shown by the retainer would not, of itself, raise an apprehension in the mind of a reasonable and well informed person that the	16 17 18 19 20 21 22 23	a dangerous"I'll read beginning three lines down"it is a dangerous policy to put Mr. Drazen in the position where he is at once advisor and witness. Assume, for example, that he has met regularly and privately with a member of the panel while his testimony is under consideration by that member. No matter how much the member protests that the merits

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1 KELLY, Q.C.:	1	there was some apprehension that the panel was
2 dealings might lead to try or to hesitate to	2	improperly tainted, it is to replace those
3 cause himself and Mr. Drazen the awkwardness	3	members who had been so improperly tainted",
4 of rejection of his testimony". And the point	4	not to simply reject the evidence outright.
5 out of that is the point which I've made in	5	And so, in our respectful submission, the
6 our submission, that it is important when the	6	hearing counsel maintaining that important
7 Board is hearing submissions from or through	7	degree of separation that, in fact, Mr. Browne
8 hearing counsel that it keep scrupulously	8	for the Consumer Advocate, referred to the
9 separate, the hearing panel, from any contact	9	same point, the need to keep an appropriate
10 with those witnesses, except through the	10	separation between hearing counsel and
11 hearing process in this forum where	11	witnesses from the Board panel including the
12 examination and cross-examination can take	12	Board's general counsel, in that sense, that
13 place in an open hearing.	13	separation is important. But there is not
14 And that's the third point, that need to	14	evidence that any such breach has taken place
15 maintain separation and there's no evidence,	15	in this case that would raise any apprehension
16 at least that I'm aware of and no submission	16	of bias. And certainly the Alberta Court of
17 has been made, that that separation has been	17	Appeal decision itself, I think, makes it
18 breached in this case. And the point which	18	reasonably clear that the mere retaining of
19 I'll paraphrase comes from paragraphs 14 and	19	experts and the quality of experts by the
20 15 which is that if this Board were to	20	Board is not, in and of itself, reasonable
21 determine that there was a reasonable	21	apprehension reasonable apprehension of bias.
22 apprehension of bias, the Alberta Court says,	22	So, the proper position as we would see
23 "the conclusion is not to strike the	23	it is that the evidence should be presented,
24 evidence"which is the first sentence of	24	it should be cross-examined, it should be
25 paragraph 14"but rather in paragraph 15, if	25	tested and then the weight, if any, because at
Page 55		Page 56
Page 55 1 the end of the day the Board may chose to	1	Page 56 And I suppose the one question we would have
-	1 2	-
1 the end of the day the Board may chose to		And I suppose the one question we would have
 the end of the day the Board may chose to reject it, the weight, if any, should be 	2	And I suppose the one question we would have in relation to the application, while supporting it, would be whether or not it's framed too broadly. Because I think what one
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 the end of the day the Board may chose to reject it, the weight, if any, should be assigned by the Board panel as it deems appropriate just as any other evidence called by any other participant in the hearing. 	2 3 4 5	And I suppose the one question we would have in relation to the application, while supporting it, would be whether or not it's framed too broadly. Because I think what one lookswithout getting into the substantive comment of the evidence to be called, what's proposed here is not any type of niche
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	Page	57	Page 58
1 H	EARN, Q.C.:	1	be raised. So, I don't propose to discuss the
2	be fair to say that that particular evidence	2	role of counsel and how that might have
3	should not be received by the Board. Thank	3	developed over the years.
4	you, Mr. Chairman.	4	What I will briefly do is just highlight
5 0	HAIRMAN:	5	a couple of the authorities on the
6	Q. Thank you, Mr. Hearn. Ms. Newman, do you have	6	apprehension of bias. And that's in the
7	some comments?	7	submission of Hydro from Chapter 10 of
8 (3:17 p.m.)	8	Macauley at page 10.4, there's a quote there
· ·	IS. NEWMAN:	9	from Lord Denning in the middle of the page.
10	Q. Yes, thank you, Mr. Chairman and	10	"The Court doesn't look to see whether there's
11	Commissioners. There's been much talk this	11	a real likelihood that he would or did, in
12	afternoon about the role of Board counsel and	12	fact, favour one side at the expense of the
13	Board hearing counsel. My suggestion is that	13	other. The Court looks at the impression
14	that's merely the conclusion that the Board	14	which would be given to other people. Even if
15	might reach after applying true legal test	15	you were so impartial as could be,
16	which is at hand here, which is whether	16	nevertheless, if right minded persons will
17	there's an apprehension of bias. The role of	17	think that in the circumstances, there was a
18	Board counsel, I guess, as far as it can go	17	real likelihood of bias on his part, then he
18	before there is an apprehension of bias. So,		should not sit. Nevertheless, there must
		19	appear to be a real likelihood of bias,
20	while we can discuss the particulars of the	20	
21	rule itself, I don't think it's helpful to the	21	surmise or conjecture is not enough. There
22	issue at hand here which is whether	22	must be circumstances from which a reasonable
23	introduction of this evidence by Board hearing	23	man would think that it's likely or probable
24	counsel will offend the principles of natural	24	that the justice or chairman as the case may
25	justice and cause an apprehension of bias to	25	be would or did favour one side unfairly at
	0 II		
	Page		Page 60
1	Page the expense of the other". And also I did		Page 60 the other parties and is not necessary and may
1 2	Page the expense of the other". And also I did want to quote paragraph 9 of the decision	2 59 1 2	Page 60 the other parties and is not necessary and may be not relevant and would, in any event, be
1	Page the expense of the other". And also I did want to quote paragraph 9 of the decision submitted by Newfoundland Power from the	2 59 1 2	Page 60 the other parties and is not necessary and may be not relevant and would, in any event, be redundant. It may be difficult for the Board
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1 2 3	Page the expense of the other". And also I did want to quote paragraph 9 of the decision submitted by Newfoundland Power from the Alberta Court of Appeal. Paragraph 9 says, "the standard to be applied by the Board in	2 59 1 2 3	Page 60 the other parties and is not necessary and may be not relevant and would, in any event, be redundant. It may be difficult for the Board to make this assessment without having the benefit of reviewing the evidence itself. And
1 2 3 4	Page the expense of the other". And also I did want to quote paragraph 9 of the decision submitted by Newfoundland Power from the Alberta Court of Appeal. Paragraph 9 says,	2 59 1 2 3 4	Page 60 the other parties and is not necessary and may be not relevant and would, in any event, be redundant. It may be difficult for the Board to make this assessment without having the
1 2 3 4 5	Page the expense of the other". And also I did want to quote paragraph 9 of the decision submitted by Newfoundland Power from the Alberta Court of Appeal. Paragraph 9 says, "the standard to be applied by the Board in	2 59 1 2 3 4 5	Page 60 the other parties and is not necessary and may be not relevant and would, in any event, be redundant. It may be difficult for the Board to make this assessment without having the benefit of reviewing the evidence itself. And
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1 2 3 4 5 6 7 8 9	Page the expense of the other". And also I did want to quote paragraph 9 of the decision submitted by Newfoundland Power from the Alberta Court of Appeal. Paragraph 9 says, "the standard to be applied by the Board in the circumstances is settled. It is an error and probably jurisdictional error for a tribunal or any member of it to allow itself to be in the invidious situation where there	2 59 1 2 3 4 5 6 7 8 9	Page 60 the other parties and is not necessary and may be not relevant and would, in any event, be redundant. It may be difficult for the Board to make this assessment without having the benefit of reviewing the evidence itself. And so, it's possible that if the evidence is admitted, the parties could come back and make application to say that it is irrelevant, it is redundant at that time. And the Board,
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$ \begin{array}{c} 1\\2\\3\\4\\5\\6\\7\\8\\9\\10\\11\\12\\13\\14\\15\\16\\17\\18\\19\\20\\21\\22\end{array} $	Page the expense of the other". And also I did want to quote paragraph 9 of the decision submitted by Newfoundland Power from the Alberta Court of Appeal. Paragraph 9 says, "the standard to be applied by the Board in the circumstances is settled. It is an error and probably jurisdictional error for a tribunal or any member of it to allow itself to be in the invidious situation where there could be a reasonable apprehension which reasonably well informed persons could properly have of a biased appraisal and judgment of the issues to be determined". So, I think it fair to say that there can'tit's not merely a possibility that somebody might have an apprehension of bias, but it's a probability that a reasonably well informed person would have an apprehension of bias and I think there's a distinction to be made there. The other issue that's been talked about a bit this afternoon is what I have summarized	2 59 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	Page 60 the other parties and is not necessary and may be not relevant and would, in any event, be redundant. It may be difficult for the Board to make this assessment without having the benefit of reviewing the evidence itself. And so, it's possible that if the evidence is admitted, the parties could come back and make application to say that it is irrelevant, it is redundant at that time. And the Board, with a full view of the matter could make that determination. So, I guess I see two issues that have to be decided by the Board today. One is, does the proposed evidence, the fact that it's being proposed by Board hearing counsel to so far down the road of involvement by Board hearing counsel that an apprehension of bias is raised. And secondly, whether the Board can, at this time or whether it's premature to decide if the evidence itself is relevant or redundant. I did want to comment briefly on the case

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Septemb	er 16, 2003	Multi-	Page	NL Hydro 2003 General Rate Application
	Pa	age 61		Page 62
1 MS. NEV	WMAN:		1	of the parties? Thank you. Ready to reply,
2 c	ouple of cases that are there and that the		2	Mr. Hutchings, please?
3 a	uthor uses as authority for his position, I		3 HUTC	HINGS, Q.C.:
4 w	ould note, are from disciplinary tribunals.		4 Q.	Yes, just very briefly, Mr. Chair. In
5 A	and I'm not sure that they're helpful to the		5	connection with the submissions that Board
6 d	ecision that's before the Board here today		6	counsel has just made, in order to balance the
7 b	ecause as economic regulators, I think we		7 1	references that are before the Court, I think,
8 st	tand in a significantly different role than		8	before the Board rather, you should also refer
9 tr	ibunal residing over disciplinary matter.		9	in addition to the items that my friend has
10	Also, I did want to mention the inference	1	10	just recently referred to, refer to page 127
11 tł	hat the Industrial Customer seems to suggest	1	11	of the Steineike article which is attached to
12 a	bout the lack of specific authority for the	1	12	the application. And the reference there in
13 B	oard hearing counsel to call a witness in the	1	13 1	the indented portion to what is called the
14 re	egulation. I would think that it would be	1	14	classic case of R. v. Sussex Justices, ex
15 d	angerous to presume because it wasn't written	1	15]	parte McCarthy, interesting set of facts. The
16 ir	n that Board hearing counsel is not entitled	1	16	acting clerk to the Justices retired with them
17 to	call this evidence. I would note that it's	1	17	when they decided a criminal case as was the
18 n	ny understanding that at the exact time that	1	18	custom, always done, but the acting clerk was
19 tł	nose regulations were drafted, the Board had	1	19	also a solicitor in private practice. And his
20 a	history of calling its own experts and in	2	20]	partner was acting for the other side in the
21 1	996 did, in fact, call Doctor Wilson at that	2		civil suit arising out of the same set of
	earing. I don't know that it's correct, in			facts. Of course, the acting clerk may not
23 fa	act. Those are all my comments.	2		have known of the connection or thought of it
24 CHAIRM		2		and his legal advice was non-existent. In
25 Q. T	hank you, Ms. Newman. Any questions of any	2	25 :	fact, he said nothing. This was the precise
	Pa	age 63		Page 64
	ontext in which the Court gave the famous			counsel by itself raises an apprehension of
	tatement that "it is not merely of some			bias. The question is whether the filing of
	mportance, but of fundamental importance the	nat		the particular evidence in question here as
	astice should not only be done, but be			described in the Table of Contents in all the
	nanifestly, undoubtedly seen to be done". So	,		circumstances of the present case, raises and
1	learly here it is a question of the			apprehension of bias. The comments of the
	easonable appearance of bias. And even in a			Alberta Court of Appeal which my friend, Mr.
	ase where demonstrably there was no bias an			Kelly, referred to do not tell us whether
	o effect because the tainted party said			there were any other intervenors in that
	othing to the tribunal, the Court would not			particular case. The only intervenor which
	llow such a situation to continue. So,			appeared at the Court of Appeal level were the
	alance that relative to the authorities that			Industrial Rate Intervenors. Was this a case
	ny friend has cited.			where the Board felt it had to call other
14	In respect of the comments from both Ms.			witnesses because there was no Consumer
1	Breene and Mr. Kelly, it is not the Industrial			Advocate, there was no representation
	Customers' position that Board hearing couns			whatsoever of any interest other than that of
1	an, on no occasion, call a witness. That			the Industrial Customers. We don't know; we
	by b			can't tell from what we have before us.
	ur position. Quite clearly we've referred to		19	The issue that Mr. Kelly raised toward
	ne Grant Thornton evidence and that's been			the end of his remarks about the remedy to be
	eferred to by others. And we've gone beyon			applied omits the fact that in the case in
	nd referred to the sort of report that Grant			Alberta as noted in paragraph 4, the Board
	hornton has done on the RSP and we have r			received the preliminary report of Mr. Drazen.
	ifficulty with that. The issue is not			We have managed to get ahead of that here. In
25 W	whether the filing of evidence by Board	2	25	Alberta, there was no choice. If there was a

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		u-i age	The Hydro 2005 Otherar Rate Application
	Page 6	5	Page 66
1 HU	ICHINGS, Q.C.:	1	considered to be masters of their own practice
2	remedy, the Board members would have had to	2	and procedure, they may have an inherent power
3	have been replaced because they had seen the	3	to appoint witnesses and experts in resolving
4	offending report. We managed to get ahead of	4	matters that affect the public interest.
5	that here and the Panel has not seen the	5	While some tribunals are themselves empowered
6	offending report. So, quite obviously, the	6	by statute to engage experts, and this is the
7	remedy here, rather than set aside the whole	7	part that Ms. Greene did not read, empowered
8	Panel is simply to put this evidence to one	8	to engage experts, technical consultants or
9	side and then the Panel could obviously never	9	advisors in proper circumstances, others may
10	by affected by it. So, that's not a concern	10	require that the appointment of an expert be
11	that the Board needs to have in this	11	made by an order of the Cabinet.
12	particular instance.	12	So, the author here brings us back to the
13	In terms of the position relied upon by	13	statute and that was my reason for reviewing
14	both Newfoundland Power and Newfoundland	14	the specific provisions of the Public
15	Hydro, relative to the Macauley, Sprague and	15	Utilities Act and the regulations which are
16	Macauley position, the second extract and	16	binding upon this Board and on us all.
17	particularly 17-26, that Ms. Greene	17	The provisions of Section 118, with
18	specifically referred to does, as I pointed	18	respect, do not take this case outside of the
19	out earlier, bring us back to the statute, all	19	ordinary rules of construction. And
20	administrative tribunals are creatures of	20	notwithstanding the suggestion that where a
21	statute. It is arguable, therefore, that the	21	specific power or authority is given to the
22	empowering legislation of each tribunal must	22	Board by the Act, the enumeration of it shall
23	stipulate if and when an expert may be	23	not be held to exclude or impair a power or
24	appointed. On the other hand, since	24	authority otherwise in the Act conferred upon
25	administrative tribunals are generally	25	the Board. If you read that, you still need
	Page 6	7	Page 68
			1 420 00
1	C C	1	-
	to find in the Act the power conferredthe		the EES Consulting. We did not have the
1 2 3	to find in the Act the power conferredthe power authority conferred on the Board. In	1	the EES Consulting. We did not have the evidence of Mr. Waverman, but we were lead to
2	to find in the Act the power conferredthe power authority conferred on the Board. In 6(11) which, and if my friend wants to get	1 2	the EES Consulting. We did not have the evidence of Mr. Waverman, but we were lead to understand that it was cost of capital
2 3 4	to find in the Act the power conferredthe power authority conferred on the Board. In 6(11) which, and if my friend wants to get technical about provisions, the technical	1 2 3 4	the EES Consulting. We did not have the evidence of Mr. Waverman, but we were lead to understand that it was cost of capital evidence, and accordingly, we refer to both.
2 3 4 5	to find in the Act the power conferredthe power authority conferred on the Board. In 6(11) which, and if my friend wants to get technical about provisions, the technical interpretation of provisions, the later	1 2 3 4 5	the EES Consulting. We did not have the evidence of Mr. Waverman, but we were lead to understand that it was cost of capital evidence, and accordingly, we refer to both. In our submission, the appropriate rule is
2 3 4 5 6	to find in the Act the power conferredthe power authority conferred on the Board. In 6(11) which, and if my friend wants to get technical about provisions, the technical interpretation of provisions, the later provisions of the Statute take precedence over	1 2 3 4 5 6	the EES Consulting. We did not have the evidence of Mr. Waverman, but we were lead to understand that it was cost of capital evidence, and accordingly, we refer to both. In our submission, the appropriate rule is that evidence by Board counsel should be
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1 HUTCHINGS, Q.C.:	1 perception, at that point, that the reasonable
2 Board counsel and be given the opportunity to	2 man would have a concern that bias may be
3 take objection to it, if necessary, before it	3 creeping into the picture. Those are my
4 actually got to the Board. If there were	4 comments, Mr. Chair.
5 evidence, such as the Grant Thornton reports	5 CHAIRMAN:
6 and so on, that go in without objection, then	6 Q. Thank you, Mr. Hutchings.
7 obviously there is no objection. But,	7 (3:35 p.m.)
8 anything beyond those accepted norms, in my	8 COMMISSIONER WHALEN:
9 submission, should be judged by the rule of	9 Q. Mr. Hutchings, could you just explain to me
10 whether or not it fills the GAP, it's in a	again where the reasonable apprehensionable
11 niche, it is necessary in order for the Board	11 bias arises? Is it in respect of the nature
12 to have a complete picture of the regulation	12 of the evidence itself, which you've seen and
13 that it is doing in the circumstances.	13 I haven't, or the fact that the evidence is
14 Because if it's not, if it's not filling a	14 being called by Board hearing counsel?
15 gap, if it's not a necessary piece of evidence	15 HUTCHINGS, Q.C.:
16 that the Board has to have in order to do its	16 Q. Well, it is a combination of both of those
job properly, then why is it being offered?	17 factors. I mean, the mere fact that it's
18 And that is a point to the concern that the	18 being called by Board hearing counsel does not
19 reasonable man on the street would have. Why	19 create a reasonable apprehension of bias.
20 is the Board soliciting evidence about matters	20 Obviously Board hearing counsel calls the
21 that everybody else has dealt with? And that	21 witness to put in the financial report from
22 leads to the concern not that the Board has an	22 Grant Thornton and other reports and no one
agenda, but could have an agenda. It's not	has a concern about a reasonable apprehension
24 that there is an allegation being made against	24 of bias. But when Board hearing counsel is
25 the Board, but merely that there is a	25 proffering evidence that deals specifically
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1 with the particular substantive issues that	1 counsel in the course of all of that, and in
2 the Board has to decide and in this case, is	2 those particular circumstances that we found
3 in respect of issues in which every other	3 ourselves at that time, that's not a matter
4 represented party, including the Consumer	4 that we chose to pursue. I would not
5 Advocate who has a very wide constituency in	5 necessarily concede that had we chosen to
6 this regard, has already called an expert, has	6 pursue it, it might not have beenthere might
7 already taken positions. In that situation,	7 not, in fact, have been an appropriate remedy
8 the apprehension is that there is something	8 to prevent that evidence from coming in.
9 going on behind the scenes that the Board, for	9 COMMISSIONER WHALEN:
10 some reason, wants to have another position	10 Q. Who, in your view, has to make the
11 other than the whole plethora of positions	11 determination that the evidence that's being
12 that are being put to it by every party who	12 put forward by Board hearing counsel is
13 has a legitimate legal interest in the matter.	13 necessary?
14 It's the whole combination of circumstances,	14 HUTCHINGS, Q.C.:
15 not any one circumstance.	15 Q. In my submission, Board hearing counsel will
16 COMMISSIONER WHALEN:	16 make a preliminary assessment of that and
 Q. In 2002, the Board hearing counsel called Dr. Wilson. The Industrial Customers didn't take 	17 distribute the evidence to other counsel and
	unless other counsel are in agreement thatthis is necessary, the Board will have to make
19 issue at the time with that.20 HUTCHINGS, Q.C.:	
20 HOTCHINGS, Q.C.: 21 Q. No, we did not. I mean, we had lots of issues	 a determination, as it's being asked to here, based on an outline or the table of contents
21 Q. No, we did not. I mean, we had lots of issues 22 at the 2002 hearing, as you recall, and that	21 based on an outline of the table of contents 22 of that evidence as to whether or not it's
22 at the 2002 hearing, as you recan, and that 23 was not one that we chose to pursue at that	appropriate for that evidence to go in. And
time. I mean, you know that there was some	24 I'm not dealing with the issue of relevance
25 considerable debate about the role of Board	 24 If in not dealing with the issue of relevance 25 here. The evidence is if it's not relevant,

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1	HUTCHINGS, Q.C.:	1	issue. Probably most appropriate that the
2	it's not going in anyway, once you see it.	2	
3	But what we're solely talking about here is an	3	
4	element of the notion of redundancy, yes, but	4	
5	redundancy which in the circumstances has an	5	issues the evidence is addressing. These are
6	implication of apprehension of bias.	6	
7	COMMISSIONER WHALEN:	7	CHAIRMAN:
8	Q. I'm not sure if that helps or not, but -	8	Q. I guess, it's more of a question, it's very
9	HUTCHINGS, Q.C.:	9	difficult to do that without seeing perhaps
10	Q. No, but I mean, what I'm trying to say is that	10	more than the table of contents of the
11	the onus is on Board counsel to establish to	11	evidence, and going through, to some degree,
12	the Board that there's a gap that needs to be	12	the proceeding itself to see if there is a gap
13	filled.	13	that does exist.
14	COMMISSIONER WHALEN:	14	HUTCHINGS, Q.C.:
15	Q. Establish to whom? To the parties before the	15	Q. Yes, and -
16	Board or to the Board?	16	CHAIRMAN:
17	HUTCHINGS, Q.C.:	17	Q. I guess what would be the standards or tests
18	Q. To the Board. I mean, unless there is	18	that you'd see for the Board in making that
19	agreement among the parties, in which case it	19	determination?
20	doesn't get to you, you don't need to decide	20	HUTCHINGS, Q.C.:
21	it, but if there is a disagreement on that, as	21	Q. Well, I mean, obviously the balance of the
22	there obviously is here, then the Board has to	22	
23	decide whether or not there is a gap that the	23	1 1
24	Board feels needs to be filled by a particular	24	5
25	piece of evidence addressing such and such an	25	look at its own record of the issues that it
	Page 75		Page 76
1	has already decided in other matters, and then	1	this afternoon's proceeding that the table of
2	compare the outline or table of contents of	2	contents doesn't do justice to the evidence in
3	the proposed evidence and determine whether or	3	terms of the issues that it addresses.
4	not there is something within that	4	COMMISSIONER WHALEN:
5	presentation of evidence that is going to add	5	
6	to the Board's ability to deal with the issue.	6	
7	Maybe you need something more than a mere	7	$\mathbf{J} = \mathbf{C}$
8	table of contents in some cases. Maybe you	8	
9	need a summary or something of that nature,	9	
10	but I'm simply suggesting that rather than	10	
11	risk having the Board tainted with evidence	11	bias?
12	that ultimately is shown not to be appropriate		HUTCHINGS, Q.C.:
13	for the Board's consideration, I think it's better for the Board to act with caution and	13	-
14			COMMISSIONER WHALEN:
15 16	seek out only the minimal amount of information that it needs. And obviously if	15 16	
10	Board hearing counsel makes a submission to	10	
18	the effect that there is basically no way the	17	
19	Board can determine this without seeing the	10	
20	whole of the evidence, then that's a matter	20	
20	that's open for the Boardit's open for the	20	that procedural path that you just took us,
22	Board to go that way. I think that's	22	
23	something to avoid, if possible. And it may	23	
24	not always be possible in every case. I		HUTCHINGS, Q.C.:
25	haven't heard any suggestion in the course of	25	
L		1	

Sep		i-Page ^T	
	Page 77		Page
1 I	HUTCHINGS, Q.C.:	1	that would be a very extraordinary situation;
2	right to be heard is being trampled upon in	2	I doubt that it would come up, but I mean, if
3	that case.	3	you look at the record that's before you here
4 (COMMISSIONER WHALEN:	4	now, in terms of all the other expert's
5	Q. Sure, yes.	5	reports that have been filed and the table of
5 I	HUTCHINGS, Q.C.:	6	contents you have for this evidence, in the
7	Q. If it is simply Board hearing counsel, then,	7	circumstances of the present case, I would
3	you know, Board hearing counsel is not a party	8	suggest that you have what you need to make
)	to the proceeding in the same way that others	9	your decision.
0	are who, one would contemplate would run off	10 (3:4	5 p.m.)
1	to Court and say the Board is not doing its	11 CHA	JRMAN:
2	job. I mean, I don't think that's on the	12 Q	You seem to tie the apprehension of bias to
3	cards that Board hearing counsel is going to	13	the nature of the evidence and why would there
4	make an application to Court saying that the	14	be an apprehensionif there was a gap in the
5	Board is wrong and should be hearing my	15	evidence, for example, that would presumably,
5	evidence. So, I mean, from the point of view	16	based on your argument, that the Board hearing
7	of natural justice, I don't think you have an	17	counsel wouldcould indeed call evidence in
3	issue there. One could conceive, I suppose,	18	that matter. And I would presume there would
)	and I think it would be an extraordinary	19	be other counsels that may comment or question
)	unusual case, one could conceive of a	20	in relation to that evidence. Why would the
1	situation where at the end of all the other	21	Board bring to that particular piece of
2	evidence Board hearing counsel could come back	22	evidence any less apprehension of bias then
3	and say I can now demonstrate to you, Board,	23	they perhaps would in the case wheresimilar
4	that my evidence does in fact fill a gap. And	24	to this information here.
5	the issue could be revisited. I mean, I think		CHINGS, Q.C.:
-	Page 79		Page
1	Q. No, I mean, the apprehension is on the part of	1	different sides of an issue, why does the
2	the reasonable bystander. I think the	2	Board need then, another expert's report? And
3	reasonable bystander, looking at a situation	3	the reasonable bystander would sit back and
	where the Board says, yes, I mean, we need to		say, I don't understand, why is the Board
1 5	have the issue of the coincident peak on the	4 5	getting this report unless it wants a report
	Ramea system addressed and no cost of service	6	that's going to tell it what it wants to do
5	expert has addressed that, so we're going to		anyway, which is not what anybody else has
7		7	
3	go out and get a report on that because that's	8	told it. Is that not a reasonable position
))	something we need to know. The reasonable	9	for the reasonable bystander to take at that
)	bystander would say that makes perfectly good	10	stage? It's a puzzle as to why the Board
1	sense. That's an eminently sensible thing to	11	would want to have another report when it has
2	do, nobody else has raised it, there's nobody	12	five reports coming from all directions
3	here from Ramea or whatever, and that's	13	already. And that gives rise to an
4 -	something you need. But, if the Board has	14	apprehension that there's something else going
5	before it five expert's reports on the subject	15	on, and that's the apprehension that perhaps
5	of whether coincident peak verses non-	16	the Board may have prejudged the issue and
7	coincident peak should be used in a particular	17	wants to get a report that is in line with its
3	aspect of cost of service, why would the Board	18	own thinking. And that's the situation that
)	want to go out and get a sixth report, unless	19	you saw referred to in the case about whether
)	the Board had something in its mind about how	20	Courts were permitted to call witnesses of
1	it wanted this to come out in the first place;	21	their own. That was the result that the Court
2	hence, we need to go out and get a report that	22	of Appeal came to there, was that the judge
3	tells us something that none of these other	23	wanted this to come out a certain way, so he
4	reports are telling us. I mean, once you have	24	was going to call his own expert, and that's
5	a whole bunch of experts all weighing in on	25	the apprehension, it's the fear, it's the

1 HUTCHINGS, Q.C.: 1 this Board or is it someone off the street, I 2 concern that the reasonable bystander would 3 have if the Board already has a whole pile of 4 expert's reports, why does it need another one 5 HUTCHINGS, Q.C.: 5 advocating a particular view? 6 Q.A reasonably well-informed person about the 6 coMMISSIONER WHALEN: 6 obviously, that Board hearing counsel is not the 8 decider in this case. 9 associated with the Board. I mean, that is 9 HUTCHINGS, Q.C.: 9 as much perception aswell, more perception 10 Q. The judge was in the case you referred to, he 10 than reality in the instant case. There is 11 the day, but we're not callingwe're not 14 counsel. But even with respect to Board 13 was the trier and the decider at the end of 13 Board members, as opposed to Board hear 14 the day, but we're not callingwe're not 14 counsel. But even with respect to Board 15 leading this evidence, we're not calling 15 hearing counsel bystander, I think 16 evidence, it's being called through staff. Is 16 well-i	age 82
1 HUTCHINGS, Q.C.: 1 this Board or is it someone off the street, I 2 concern that the reasonable bystander would 3 have if the Board already has a whole pile of 4 expert's reports, why does it need another one 3 HUTCHINGS, Q.C.: 6 COMMISSIONER WHALEN: 6 OA reasonably well-informed person about the strend, it is board hearing counsel is not the 7 Q. But the Board hearing counsel is not the 7 associated with the Board. I mean, that is 8 decider in this case. 9 as much perception aswell, more perception 10 Q. Not ultimately, no. 10 than reality in the instant case. There is 11 COMMISSIONER WHALEN: 11 the possibility for distinguishing between the 12 Q. The judge was in the case you referred to, he 13 Board members, as opposed to Board hearing 13 was the trier and the decider at the end of 13 Board members, as opposed to Board hearing 14 the day, but we're not calling 16 associated with the Board, in the mind of the 14 the adsitiction there in your mind? 17 well-informed reasonable bystander, I think 18 HUTCHINGS, Q.C.: 18	0
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25 understands the procedure and operation of 25 when they were retained or who were the Page 83 Page 83	W
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	age 84
1 instructing parties or what they were told to 1 to be asked, nor can Boardand Board couns	el,
2 do, or how their evidence came forward. And 2 if they feel that there's a vacuum in their	
3 it's probably all a bit of a mystery, so I 3 evidence, they can put those questions to the	
4 guess counsel are erring on the side of 4 witnesses that have been retained by the	
5 caution, generally. We have our own experts, 5 parties.	
6 we know what our own experts are saying and we 6 COMMISSIONER SAUNDERS:	
7 know that for the most part, I'm certain that 7 Q. I have a question, Mr. Hutchings. I hope I	
8 they are independent, as most experts are, 8 don't make a speech to you, I wanted to make	e
9 they will give their points of view. However, 9 it a question, but when I read your submission	n
10 in this particular case, it is peculiar that 10 and the submission of Mr. Kelly and Ms.	
11 there were other parties retainedwe don't 11 Greene, there was one outstanding difference	,
12 know at what point they were retained, if they 12 to me. And that was in your submission, yo	
13were retained to fill a vacuum or maybe they13seemed to bring the Board and the Court close	er
14 were retained in anticipation of the vacuum, 14 together and the function of the two closer	
15 or they were retained after our own evidence 15 together. Now, the Board, as an economic	
16was in. It's all a bit of a conundrum, isn't16regulator, doesn't just sit back and go in	
17 it? And I think it would have been a lot more 17 behind closed doors and wait for the next	
18 prudent if the Board didn't get into this area 18 hearing. We are exposed, on a daily basis, to	
19 where parties are before the Board with their 19 papers, conferences, information from othe	
20 own experts. And it seems from ait seems to 20 Boards and interested observers, if you like,	
21 be a bit of a waste of time as well, not that 21 of the regulatory process. And I think we	
22 you're not hearing on certain issues, and I 22 have an obligation to the companies we	
23 don't think we can presume the evidence. If 23 regulate to stay as informed as possible. I	
24 experts are to testify before the Board, we 24 may have even read a paper by one of the	
25 can't anticipate what questions they're going 25 authors that we're talking about here today.	

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1 00	Page 85 DMMISSIONER SAUNDERS:		-
2	I don't recall it, but I may have. And it may	2	IUTCHINGS, Q.C.: Q. No. There's no question that the Board is
	have been the same paper that's being		-
3		3	what the Courts refer to as a specialized
4	presented at this hearing. I don't know that. But it seems to me that this Board is	4	tribunal and the Courts deal differently with
5		5	specialized tribunals who have particular
6	different than a Court in one very important	6	knowledge and should have particular knowledge
7	way, and that is, that I think we have an	7	and specialized knowledge of the area in which
8	obligation to all of the people we serve,	8	the Board operates, whether it's labour
9	including the public, of course, to gather as	9	relations or public utilities, or discipline
10	much information as we can get to make our	10	for doctors or nurses or whatever it may be.
11	decision. And if there's more information out	11	The point, however, is that while the Board
12	there that we believe should be brought	12	does have a duty to go out and inform itself
13	forward in this room to give us that extra	13	to the greatest extent possible, it also has a
14	knowledge, if you like, then I think we should	14	duty to comply with what are called rules of
15	do that. We should bring it in. Of course,	15	natural justice. And to that end, it must
16	we have to consider costs and what's	16	ensure that the parties who do appear before
17	reasonable and all of that, that's another	17	it, at hearings of this nature, are treated
18	side of the issue. But I do believe that when	18	with the same level of fairness that would be
19	you made your submission that you were	19	applicable in a Court. It doesn't have to
20	suggestingand correct me if I'm wrong, that	20	follow the same procedures, necessarily, as a
21	the Board is bound by the same rules as the	21	Court would follow, the Board doesn't
22	Court in that it can only consider the	22	necessarily have to do that, but the level of
23	information coming forward from the parties,	23	protection of the rights of the parties has to
24	like in a Court. Is that the impression that	24	be at the same range, in my submission. The
25	you wanted to leave with us?	25	point being that the parties who are here
	Page 87		Page
1	before you have real legal interests in what's	1	parties. We need to have a level field so
2	happening here. There is a broad public	2	that there is no concern about potential bias
3	interest in good regulation of public	3	or unfairness or any lack of the feeling
4	utilities, but in the present matter, Hydro is	4	within, and the perception by, and this is
5	looking for more money and we don't want to	5	what Sussex Justices, McCarthy is all about,
6	necessarily pay them more money, and that's a	6	it's the perception of fairness, as well as
7	real legal interest that we have, that the	7	actual fairness. And in a situation, such as
8	Consumers represented by Mr. Browne have, and	8	this, where the Board isor Board counsel who
	to a derivative of the extent, I guess,	9	is associated with the Board, is apparently
9	, ,	10	advocating the position on particular issues
	Newfoundland Power has. And they're issues as	10	
.0	Newfoundland Power has. And they're issues as between the Intervenors, as well as issues		
10 1	between the Intervenors, as well as issues	11	which may favour one Intervenor over another,
10 11 12	between the Intervenors, as well as issues between the Intervenors and Hydro itself. And	11 12	which may favour one Intervenor over another, or the Applicant over an Intervenor, or an
10 11 12 13	between the Intervenors, as well as issues between the Intervenors and Hydro itself. And it's not that simple in the sense that it's	11 12 13	which may favour one Intervenor over another, or the Applicant over an Intervenor, or an Intervenor over the Applicant, then that's not
10 11 12 13 14	between the Intervenors, as well as issues between the Intervenors and Hydro itself. And it's not that simple in the sense that it's not lower rates no matter what, I mean, there	11 12 13 14	which may favour one Intervenor over another, or the Applicant over an Intervenor, or an Intervenor over the Applicant, then that's not the level of fairness that, in our submission,
10 11 12 13 14 15	between the Intervenors, as well as issues between the Intervenors and Hydro itself. And it's not that simple in the sense that it's not lower rates no matter what, I mean, there are reliability concerns, there are a whole	11 12 13 14 15	which may favour one Intervenor over another, or the Applicant over an Intervenor, or an Intervenor over the Applicant, then that's not the level of fairness that, in our submission, the law requires.
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10 11 12 13 14 15 16 17	between the Intervenors, as well as issues between the Intervenors and Hydro itself. And it's not that simple in the sense that it's not lower rates no matter what, I mean, there are reliability concerns, there are a whole pile of issues and proper regulation is a concern of everyone as well. But where	11 12 13 14 15 16 0 17	which may favour one Intervenor over another, or the Applicant over an Intervenor, or an Intervenor over the Applicant, then that's not the level of fairness that, in our submission, the law requires.CHAIRMAN:Q. Thank you, Mr. Hutchings. Thank you very
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September 16, 2003	Multi-Page TM NL Hydro 2003 General Rate Application
September 16, 2003 1 Upon concluding at 4:00 p.m.	Multi-FageML Hydro 2003 General Rate ApplicationPage 89Page 901CERTIFICATE2I, Judy Moss Lauzon, do hereby certify that3the foregoing is a true and correct transcript in4the matter of Newfoundland and Labrador Hydro 20035General Rate Application on a motion by the6Industrial Customers relative to the Evidence of7EES Consulting and Len Waverman and was heard on8the 16th day of September, A.D., 2003 before the9Board of Commissioners of Public Utilities, Prince10Charles Building, St. John's, Newfoundland and11Labrador and was transcribed by me to the best of12my ability by means of a sound apparatus.13Dated at St. John's, NL this1416th day of September, 200315Judy Moss Lauzon16Discoveries Unlimited Inc.