P.U. 32 (2003)

IN THE MATTER OF the *Electrical Power Control Act*, 1994 (the "*EPCA*") and the *Public Utilities Act* R.S.N. 1990, Chapter P-47 (the "*Act*");

AND IN THE MATTER OF an application by Newfoundland and Labrador Hydro ("Hydro") for approval of, *inter alia*, rates to be charged its customers (the "Application");

AND IN THE MATTER OF a motion by Hydro's Industrial Customers seeking an order to exclude certain evidence.

Before:

Robert Noseworthy
Chair and Chief Executive Officer

Darlene Whalen, P. Eng.
Vice-Chair

G. Fred Saunders
Commissioner

Background

Hydro filed an application with the Board of Commissioners of Public Utilities (the "Board") on May 21, 2003 for an Order of the Board approving, among other things, the proposed rates for the various customers of Hydro to be effective January 1, 2004. A public hearing into the matter is scheduled to begin on October 6, 2003. Registered intervenors for the proceeding are the Consumer Advocate, Mr. Dennis Browne, Q.C.; Newfoundland Power Inc.; Hydro's Industrial Customers, namely Corner Brook Pulp and Paper Limited, Abitibi Consolidated Company of Canada-Stephenville and Grand Falls Divisions, North Atlantic Refining Limited and Voisey's Bay Nickel Company Limited; and the Towns of Labrador City and Wabush.

As part of the pre-hearing process and as required by the Board's Procedural Order P.U. 24 (2003) parties to the proceeding filed reports of the expert witnesses they intend to call. The Board's Hearing Counsel proposed to file expert reports from EES Consulting and from Mr. Leonard Waverman. Because of concerns raised by some of the parties the Board's expert reports were not filed as part of the hearing record but were distributed among counsel.

On September 5, 2003 the Industrial Customers filed a motion with the Board seeking an order that the expert's reports proposed to be filed by Board Hearing Counsel be excluded from evidence on the basis that the filing of such reports raises concerns with respect to an apprehension of bias. As part of the motion a copy of the Table of Contents from the report of EES Consultants was filed. Hydro and Newfoundland Power filed written responses to the motion. The Board heard from the parties on the motion on September 16, 2003.

Issues

The specific issue before the Board is whether the introduction of the evidence of Mr. Leonard Waverman and EES Consulting by Board Hearing Counsel will offend the principles of natural justice and cause an apprehension of bias to be raised. Implicit in this issue is the question as to whether the Board has the authority to retain experts, and to call expert evidence during a proceeding.

Board Authority

The Board's jurisdiction and powers to deal with matters brought before it, and the manner of dealing with such matters, can be found, either expressly or impliedly, within the statutes conferring jurisdiction on and governing the operation of the Board. While setting out certain powers with respect to retention of consultants and experts, the legislation does not expressly confer upon the Board the ability to lead evidence in a proceeding. Rather the Board's authority is implicit in Subsection 6.(11) and Section 118 of the *Act*. Subsection 6.(11) allows the Board to employ those persons that it requires or considers advisable for purposes of carrying out the *Act*. Subsection 118.(2) states that the Board has, in addition to the powers specified in the *Act*, all additional implied and incidental powers which may be appropriate or necessary to carry out the powers specified in the *Act.* The question then becomes whether it is appropriate or necessary for the Board to call witnesses to discharge its duties and responsibilities under the *Act* and the *EPCA*.

Both Hydro and Newfoundland Power highlighted the differences between the quasi-judicial nature of the Board and the courts. The Board's legislative mandate is set out in the *EPCA* and the *Act* and provides for broad powers of regulatory supervision of public utilities in the province. In discharging its mandate the Board is required to implement the power policy of the province as set out in the *EPCA*. Therefore the Board must at all times be concerned with not only the interests of the parties before it on a matter, but must also take into account a broader responsibility in the public interest. In its argument, Hydro referenced Macaulay and Sprague, "Practice and Procedure Before Administrative Tribunals" at page 17-26 where the authors state:

> *"In administrative proceedings, a tribunal is generally required to make a decision which determines not only the rights of the parties before it, but, even more important, the impact on the public at large. The public interest component of administrative decision-making makes it clear that it is very important for an administrative tribunal to appoint its own expert witness. All administrative tribunals are, however, creatures of statute. It is arguable, therefore, that the empowering legislation of each tribunal must 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 resolving matters that affect the public interest."*

The nature of the issues before the Board in a rate setting proceeding also suggests that it is necessary and appropriate for the Board Counsel to submit expert evidence. Rate hearings are complex and technical involving a number of expert witnesses on specialized subject areas. The purpose of the hearing is to gather relevant and useful evidence and argument so as to allow the Board to fulfill its statutory mandate and make an informed, fact based decision on the matter before it. The Board may benefit from additional evidence brought forward by its staff or experts to ensure that the issues are fully and comprehensively addressed. Macaulay and Sprague also stated at page 17-27:

> *"The issue is clearly most germane to proceedings involving complex technical matters which require the assistance of an expert. In such proceedings, it is not only common for the parties to have called expert witnesses to testify on their behalf, but also for the particular tribunal to possess a certain degree of expertise in the area. However, even where a board may take notice of opinions within its own specialized knowledge or experience, it is not uncommon to find issues and subjects that go beyond its own qualifications. As a result, all tribunals should claim access to an inherent right to call their own expert witnesses to ensure a complete and satisfactory record of their proceedings, especially where the matter impacts upon the public interest. This will curtail the bias and confusion that flows naturally from the adversarial process."*

The Industrial Customers argued that the fact that there are already a number of expert reports being presented to the Board on certain issues negates the necessity of Board Counsel having to also present expert evidence. However, in light of the broader public interest and to address the complexity of the issues, additional evidence may often be necessary. While the experts called by the parties may address specific topic areas, all the detailed issues and perspectives may not be addressed by these experts. Alternatively, an assessment exclusive of the competing interests of the parties may be of benefit to the Board in serving its broader public interest. The Board finds that it has the authority to call the proposed witnesses and will now address the issue of whether the calling of these witnesses raise a reasonable apprehension of bias.

Apprehension of Bias

The Industrial Customers argued that the calling of the two witnesses by Board Counsel raised an apprehension of bias. This position is outlined in Paragraph 2(b) of the motion:

> *"Where witnesses file reports, such as the EES Consulting report which has been distributed to counsel, which state that the evidence "is being presented on behalf of the Board of Commissioners of Public Utilities of Newfoundland and Labrador", there is an obvious concern with respect to the apprehension of bias. It is not reasonable to expect the informed objective observer of these proceedings to think that the Board can view "its own witnesses" in exactly the same manner as witnesses called by parties, but that it is the Board's obligation inherent in the principles of natural justice. A witness produced by the person whom the Board relies on to give it professional advice will necessarily be perceived as being something different from witnesses produced by the parties who are naturally and necessarily partisans attempting to advance their own interests. Board Counsel is intended to be independent counsel to the Board; witnesses called by Board Counsel will inevitably be endowed in the minds of the objective observer with that degree of independence and hence not be seen to be on a level playing field with witnesses produced by the parties with a real, pecuniary interest in the proceeding. The process is by law adversarial; a person held out as being above the controversy has an unfair advantage in the adversarial process which demeans the status of the actual parties."*

During argument the Industrial Customers stated that Board Counsel can call a witness but that the evidence called by Board Counsel should be limited to reports of specific investigations and only then when such reports do no more than raise issues, or where there is a gap in the evidence or a specific interest that is not being represented by the parties who are already before the Board. According to the Industrial Customers, a reasonably well-informed person would question why the Board was leading expert evidence on a specific subject matter when there are already a number of experts testifying unless the Board had a certain outcome in mind.

The Consumer Advocate argued that Board Counsel's role should be limited to examining witnesses that are brought forward by the parties, with the exception of the calling of the Board's Financial Consultants.

Counsel for the Towns of Labrador City and Wabush supported the motion of the Industrial Customers. It was submitted that the evidence in question should not be received by the Board since, as can be seen from the Table of Contents filed with the motion, the evidence is not intended to fill a gap or clarify a point but rather provides recommendations on every issue before the Board.

In Hydro's view the law recognizes that Board Counsel may call expert evidence and that it has the right to do so. Hydro submits that the fact that it is the Board's Counsel calling an expert is not, by itself, enough to raise an apprehension of bias.

Newfoundland Power also submitted that the Board has the legislative authority to retain experts and that merely calling the evidence itself and retaining the consultant does not raise a reasonable apprehension of bias.

After considering the positions of the parties, the Board does not accept that a reasonable apprehension of bias is raised by the Board calling witnesses to testify to more than reports of specific investigations. Neither is the Board satisfied that the fact there are already a number of witnesses being presented on a certain issue results in a likelihood of a reasonable apprehension of bias. There are many reasons why the Board may benefit from evidence in addition to that being provided by the parties. Hydro in its written brief made reference to Chapter 10 of Macaulay and Sprague "Practice and Procedure Before Administrative Tribunals" where the authors cite the decision of Lord Denning in **Metropolitan Properties C. (F.G.C.) Ltd. v. Lennon** [1969] 1 Q.B. 577 (CA) as follows:

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

The Board is not convinced that there is a real likelihood that the production of the reports of EES Consulting and of Mr. Leonard Waverman would raise an apprehension of bias in a reasonably well informed person.

To ensure that the calling of this type of evidence does not offend the principles of natural justice the Board has in place certain safeguards. The Board maintains a separation of its internal procedures to ensure institutional integrity, openness and fairness in relation to matters before it. Other safeguards include early and open disclosure of the evidence, an opportunity to issue information requests and cross-examine the witnesses and make submissions on the evidence. No party has suggested that these safeguards have not been observed in this instance. The Board finds that this creates a fair, open and transparent process and one that embodies the principles of natural justice.

The Board is satisfied that the calling of the evidence of EES Consulting Ltd. and Mr. Leonard Waverman does not raise a reasonable apprehension of bias and therefore will not exclude this evidence.

IT IS THEREFORE ORDERED THAT:

The motion of the Industrial Customers is denied.

DATED at St. John's, Newfoundland and Labrador, this 23rd day of September 2003.

Robert Noseworthy,
Chair & Chief Executive Officer.

Darlene Whalen, P.Eng.,
Vice-Chair.

G. Fred Saunders,
Commissioner.

G. Cheryl Blundon,
Board Secretary.