

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

**IN THE MATTER OF** an Application  
by Newfoundland and Labrador Hydro for the  
approval, pursuant to Section 70(1) and 76 of  
the Act, of the Rate Stabilization Plan components  
of the rates to be charged to Industrial Customers.

**Submissions by**  
**Abitibi-Consolidated Company of Canada**

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## Table of Contents

INTRODUCTION .....	1
RELEVANT BACKGROUND FACTS AND BOARD ORDERS .....	1
SUB-ISSUE 1: GUIDANCE IN LEGISLATION AND CASE AUTHORITIES.....	4
Relevant Legislative Framework .....	4
Jurisdictional Impact of Interim vs Final Rates .....	6
Refunds for Overpayments made under Interim Rates set by the Interim Orders .....	6
Refunds for Overpayments made under Final Rates set by the Final Orders .....	8
The Board’s Powers as Recognized in Re NFLD PUB. ....	8
Alberta Board Powers Recognized in Calgary v. Alberta Board. ....	11
The Board’s Inherent Power to Deal with Unjust Rates .....	12
SUB-ISSUE 2: GENERALLY ACCEPTED SOUND PUBLIC UTILITY PRACTICE .....	13
SUB-ISSUE 3: VESTED RIGHTS .....	14
SUB-ISSUE 4: IMPACT OF CERTAIN PAST BOARD ORDERS AND FILINGS .....	15

## 1 INTRODUCTION

- 2 1. By way of its June 2, 2010 letter to the Board of Commissioners of Public Utilities, the  
3 Applicant Newfoundland and Labrador Hydro has raised an issue for consideration by the  
4 Board. Broadly framed, the issue is:

5 Does the Board have the jurisdiction to issue an order which changes how the Rate  
6 Stabilization Plan (RSP) operated before the date of the order and, if so, does this  
7 jurisdiction extend to any aspect of the operation of the RSP, including the rate charged  
8 to customers, the determination of the balance(s) in the RSP, and how these balances are  
9 allocated to customers or customer classes?

- 10 2. There are several sub-aspects of the issue to be addressed, each of which Abitibi-  
11 Consolidated Company of Canada (“Abitibi”) sets out more fully and addresses in the  
12 following sections.

- 13 3. Abitibi’s principal interest in the Application lies in securing a refund of amounts it paid,  
14 by way of the Historic Plan Repayment (as hereinafter defined), toward the elimination of  
15 the Historical RSP Balance (as hereinafter defined) beyond the point at which the  
16 Historical RSP Balance had been retired. In this regard, Abitibi paid approximately  
17 \$2.3 million toward the present credit in the Historical RSP Balance.

- 18 4. Preliminary to the Application, the Board has requested submissions on its jurisdictional  
19 and legal authority to make the orders sought, which submissions Abitibi now provides.

- 20 5. In Abitibi’s submission, as will be developed more fully below, the Board has full  
21 jurisdiction to order that overpayments made to Historical RSP Balance by Abitibi be  
22 returned to it.

## 23 RELEVANT BACKGROUND FACTS AND BOARD ORDERS

- 24 6. Abitibi submits the following background facts are relevant to the matters presently  
25 before the Board.

26 (a) Hydro has made an application (the “Application”) to the Board for approval of  
27 hydro rates applicable to an industrial customer class of hydro consumers (the  
28 “Industrial Customers”).

29 (b) Abitibi was previously an Industrial Customer, but ceased to be an Industrial  
30 Customer when or soon after its Grand Falls mill closed.

1 (c) A rate stabilization plan ("RSP") was established by Hydro for Newfoundland  
2 Power and the Industrial Customers in order to smooth rates for certain variations  
3 between actual and estimated costs of providing power.

4 (d) In December 2003, pursuant to order P.U. 40 (2003), the Board approved  
5 amendments to the RSP, which amendments included the addition of a section  
6 dealing with the repayment of historical plan balances (the "Historical RSP  
7 Balance"). By Board Order, an outstanding deficit in the RSP was to be repaid by  
8 the Industrial Customers by way of a additional rate payment over 5 years, which  
9 5-year period commenced January 1, 2003 and ended December 2007 ("Historic  
10 Plan Repayment").

11 (e) The Historical RSP Balance was fully retired during October 2007. However,  
12 despite the repayment of the Historical RSP Balance, the Industrial Customers'  
13 rates did not change and Abitibi (together with all other Industrial Customers)  
14 continued to pay the Historic Plan Repayment.

15 (f) As a result of the continued Historic Plan Repayment, prior to the closure of the  
16 Grand Falls mill, Abitibi believes that it had overpaid its share of the Historical  
17 RSP Balance by approximately \$2.3 million (the "Overpayment").

18 7. Relevant to the proceeding now before the Board are, in Abitibi's submission, the  
19 following past Board Orders:

20 (a) P.U. 4 (2005): In January 2005, the Board approved the final 2005 rates that  
21 would apply to Industrial Customers as of January 1, 2005 ("Final Order 1"),  
22 including RSP rates payable and recognizing P.U. 40 (2003).

23 (b) P.U. 2 (2006): In January 2006, the Board approved the final 2006 rates that  
24 would apply to Industrial Customers as of January 1, 2006 ("Final Order 2"),  
25 including RSP rates payable, other than for Aur Resources Inc. for whom the  
26 Board approved the rates on an interim basis effective January 27, 2006.

27 (c) P.U. 31 (2006): In October 2006, the Board approved the final rates that would  
28 apply to Industrial Customers as of October 1, 2006 ("Final Order 3), including

1 RSP rates payable, other than for Aur Resources Inc. for whom the Board  
2 approved the rates on an interim basis (see order P.U. 1 (2007) which makes clear  
3 that this order was on an interim basis for Aur Resources Inc.).

4 (d) P.U. 41 (2006): In December 2006, the Board approved certain interim rates that  
5 would apply to Hydro's customers (including Industrial Customers) as of January  
6 1, 2007 ("Final Order 4"). We note the interim rates were made final by Board  
7 order P.U. 8 (2007) (discussed below).

8 (e) P.U. 3 (2007): In January 2007, the Board approved interim rates for Industrial  
9 Customers as of January 1, 2007 ("Final Order 5"). We note that the interim rates  
10 were made final by Board order P.U. 8 (2007) (discussed below).

11 (f) P.U. 8 (2007): In April 2007, the Board made the interim rates in Final Order 4  
12 and Final Order 5 final ("Final Order 6" and, collectively with Final Order 1,  
13 Final Order 2, Final Order 3, Final Order 4, and Final Order 5, the "Final Orders")

14 (g) P.U. 34 (2007): In December 2007, the Board approved interim rates that would  
15 apply to Industrial Customers as of January 1, 2008 ("Interim Order 1"), including  
16 RSP rates payable.

17 (h) P.U. 37 (2008): In December 2008, the Board approved interim rates that would  
18 apply to Industrial Customers from January 1, 2009 to March 31, 2009 ("Interim  
19 Order 2"), including RSP rates payable.

20 (i) P.U. 6 (2009): In January 2009, the Board approved the continuation of rates for  
21 Industrial Customers on an interim basis until such time as the Board makes a  
22 final order with respect to rates ("Interim Order 3" and, collectively with Interim  
23 Order 1 and Interim Order 2, the "Interim Orders").

24 8. Since December 2007, the Board has not made a final order with respect to rates payable  
25 by the Industrial Customers, and the Application is for the purpose of finalizing interim  
26 rates for Industrial Customers.

**SUB-ISSUE 1: GUIDANCE IN LEGISLATION AND CASE AUTHORITIES**

9. The sub-issue, as framed by Hydro in its June 2, 2010 letter to the Board is:

Does legislation or common law give the Board any specific relevant authority or alternatively, restrict the Board's authority?

10. The Board's jurisdiction, of course, stems from its enabling legislation. The scope of such jurisdiction, including clarification and limitation, is understood more fully by assessing the manner in which that legislation, and similar enabling statutes in other jurisdictions, has been interpreted by Canadian courts.

**Relevant Legislative Framework**

11. The Board is an independent, quasi-judicial regulatory body appointed by the Lieutenant Governor in Council and operates primarily under the authority of the *Public Utilities Act*, R.S.N. 1990 c. P-47 (the "PUA").

12. Pursuant to the *Electrical Power Control Act* 1994, S.N.L. 1994 c. E-5.1 (the "EPCA") the Board is empowered to regulate Hydro and is required to implement the power policy contained in Section 3 of the EPCA, which includes the policy that "the rates to be charged, either generally or under specific contracts, for the supply of power within the province (i) should be reasonable and not unjustly discriminatory...".

13. In general, the Board is responsible for the regulation of the electric utilities in the province to ensure that the rates charged are just and reasonable, and that the service provided is safe and reliable.

14. The power of the Board with respect to setting final rates is set out in section 70(1) of the PUA:

70(1). A public utility shall not charge, demand, collect or receive compensation for a service preformed by it whether for the public or under contract until the public utility has first submitted for the approval of the board a schedule of rates, tolls and charges and has obtained the approval of the board and the schedule of rates, tolls and charges so approved shall be filed with the board and shall be the only lawful rates, tolls and charges of the public utility, until altered, reduced or modified as provided in the this Act.

15. The power of the Board with respect to changing rates is set out in section 71 of the PUA:

1 71. A public utility shall submit for the approval of the board the rules and regulations  
2 which relate to its services, and amendments to them, and upon approval by the board  
3 they are the lawful rules and regulations of the public utility until altered or amended by  
4 order of the board.

5 16. The power of the Board with respect to interim orders is set out in section 75 of the PUA:

6 75(1). The board may make an interim order unilaterally and without public hearing or  
7 notice approving with or without modification, a schedule of rates, tolls and charges  
8 submitted by a public utility, upon the terms and conditions that it may decide.

9 (2) The schedule of rates, tolls and charges approved under subsection (1) are the only  
10 lawful rates, tolls and charges of the public utility until a final order is made by the board  
11 under section 70.

12 (3) The board may order that the excess revenue that was earned as a result of an interim  
13 order made under the subsection (1) and not confirmed by the board be

14 (a) refunded to the customers of the public utility; or

15 (b) placed in a reserve fund for the purpose that may be made by the board.

16 (emphasis added)

17 17. The Board's power to alter or amend rates, or other order of the Board, is set out in  
18 section 76 of the PUA:

19 76. The Board may upon notice to the public utility and after hearing as provided in this  
20 Act, by order rescind, alter or amend an order fixing rates, tolls, charges or schedules or  
21 other order made by the board ....

22 18. The Board's power to deal with reserve funds is set out in section 80(1) of the PUA:

23 80(1). A public utility is entitled to earn annually a just and reasonable return as  
24 determined by the board on the rate base as fixed and determined by the board for each  
25 type or kind of service supplied by the public utility but where the board by order  
26 requires a public utility to set aside annually a sum for or towards an amortization fund or  
27 other special reserve in respect of a service supplied, and does not in the order or in a  
28 subsequent order authorize the sum or part of it to be charged as an operating expense in  
29 connection with the service, the sum or part of it shall be deducted from the amount  
30 which otherwise under this section the public utility would be entitled to earn in respect  
31 of the service, and the net earnings from the service shall be reduced accordingly.

32 (emphasis added)

33 19. The Board's power to deal with unjust rates is set out in section 87(1) of the PUA:

34 87(1). Where upon an investigation the rates, tolls, charges or schedules are found to be  
35 unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or in  
36 violation of this Act, the board has the power to cancel those rates, tolls, charges or  
37 schedules and declare void all contracts or agreements, either oral or written, dealing with

1           them upon and after a day named by the board, and to determine and by order substitute  
2           those rates, tolls or schedules that are reasonable.

3           (emphasis added)

- 4   20.     In addition to the above, Section 118 of the PUA makes clear that the PUA is to be  
5           interpreted broadly with respect to the power of the Board:

6           118(1). This Act shall be interpreted and construed liberally in order to accomplish its  
7           purposes, and where a specific power or authority is given the board by this Act, the  
8           enumeration of it shall not be held to exclude or impair a power or authority otherwise in  
9           this Act conferred on the board.

10          (2) The board created has, in addition to the powers specified in this Act, all additional,  
11          implied and incidental powers which may be appropriate or necessary to carry out all the  
12          powers specified in this Act.

- 13   21.     Clearly, there is ample statutory guidance and flexibility supporting the Board in its  
14           approach to the Application. Moreover, Canadian caselaw helps clarify and confirm the  
15           scope of the Board’s jurisdiction in addressing matters such as the Application, as  
16           discussed below.

## 17   **Jurisdictional Impact of Interim vs Final Rates**

- 18   22.     It appears that the basis of the Board’s jurisdiction under the PUA to revise rates and  
19           issue a refund to Abitibi for the Overpayment may be influenced by an assessment of  
20           whether the matter under review stems from an Interim Order or a Final Order. As a  
21           result, Abitibi has addressed each circumstance in the following sections.

### 22   ***Refunds for Overpayments made under Interim Rates set by the Interim Orders***

- 23   23.     As set out above in Section 75 of the PUA, the PUA specifically grants the Board the  
24           statutory authority to order any excess revenue earned from interim rates (i.e. amounts  
25           over and above final rate) to be refunded to customers.

- 26   24.     In *Newfoundland (Board of Commissioners of Public Utilities) (Re)* [1998] N.J. No. 168  
27           (“Re NFLD PUB”) [Tab 1] the Newfoundland and Labrador Court of Appeal specifically  
28           acknowledges that Section 75(3) enables the Board to deal with funds obtained by  
29           utilities under interim orders, and not confirmed by a final order, by either refunding such  
30           amounts to customers or placing such amounts into a reserve account (see, in particular,  
31           paragraphs 87 and 93). Other decisions have also upheld credits or refunds resulting  
32           from adjustments to interim rates (see, for example, *Bell Canada v. Canada (Canadian*

1       *Radio-Television and Telecommunications Commission*), [1989] 1 S.C.R. 1722 (“Bell  
2       Canada”)).

3       25.     In addition, the Board has previously exercised its power to issue refunds under interim  
4       orders in the following cases:

5             (a)     See Board order P.U. 1 (2007). In the case of Aur Resources Inc. (“Aur”) the  
6             Board had approved interim rates for Aur applicable from January 27, 2006 which  
7             included Historic Plan Repayment. However, the Board recognized that Aur  
8             Resources should not be paying the Historic Plan Repayment “on the principal of  
9             cost causation” because “all costs being recovered in the Industrial Customer RSP  
10            Historical Plan are costs incurred by the Industrial Customers prior to 2004.” As  
11            a result, the Board revised the interim rates that were previously applied to Aur to  
12            deduct the Historic Plan Repayment and approve a refund/credit to Aur for the  
13            difference.

14           (b)     See Board order P.U. 20 (1997-98) (the “RSP Adjustment Order”). In the case of  
15           the province’s adoption of harmonized sales tax (“HST”), the Board had  
16           previously approved reduced interim rates to Newfoundland Power and rural  
17           customers to pass on savings from the adoption of the HST, but had failed to  
18           make similar adjustments to the rates charged to Industrial Customers. Hydro  
19           proposed to reduce Industrial Customer rates to reflect HST savings on a go  
20           forward basis, but also to credit HST savings in the amount of \$359,000 to  
21           Industrial Customers during the past period of April 1, 1997 to March 31, 1998.  
22           As a result, the Board approved the amount of \$359,000 be credited to the  
23           Industrial Customers by subtracting such amount from the balance owing under  
24           the RSP.

25       26.     Based on the above, it is clear to Abitibi that the Board has the jurisdiction and legal  
26       authority to revise the interim rates and to order the refund of any portion of the  
27       Overpayment that was made by Abitibi under the interim rates approved by the Interim  
28       Orders (being all rates charged from January 1, 2008 to the present).

***Refunds for Overpayments made under Final Rates set by the Final Orders***

27. While the PUA does not express the same clear statutory authority with respect to refunds for final orders as it does for interim orders, Abitibi submits that the Board’s authority to refund the Overpayment made by Abitibi under the Final Orders is nonetheless quite clear.

28. Abitibi’s submissions to the effect that the Board does have the jurisdiction and legal authority to order a refund in this case are fully set out below and grounded in:

- (a) the jurisdiction and legal authority of the Board as enunciated by the CA in *Re NFLD PUB*;
- (b) the analogous jurisdiction and legal authority over deferral accounts addressed in *Calgary v. Alberta Board*; and
- (c) the Board’s authority to deal with unjust or unreasonable rates in section 87(1) of the PUA.

*The Board’s Powers as Recognized in Re NFLD PUB.*

29. In *Re NFLD PUB* the Newfoundland and Labrador Court of Appeal (the “CA”) was asked to determine, among other things, whether the Board had the jurisdiction and legal authority to set a maximum rate of return for Newfoundland Light and Power Co. Ltd. (“Nfld Power”) under the PUA.

30. On the CA answering this first question affirmatively, its examination would necessarily turn to an assessment of whether Nfld Power exceeded such maximum rate of return. If so, the CA was seized with determining whether the Board had the jurisdiction and legal authority to order the excess amount be used:

- (a) to reduce the future revenue of Nfld Power (i.e., reduce future rates);
- (b) to establish a reserve fund; or
- (c) to require a rebate payment from Nfld Power to consumers.

1 31. The majority of the CA makes it clear that, by virtue of the language in section 118 of the  
2 PUA:

3 (a) the PUA should be given a broad and liberal interpretation;

4 (b) the Board has a broad discretion and large jurisdiction; and

5 (c) a specific statutory power need not be identified to carry out an action as long as  
6 the action is "said to be 'appropriate or necessary' to carry out an identified  
7 statutory power and can be broadly said to advance the purposes and policies of  
8 the legislation" (see paragraph 36 of Re NFLD PUB).

9 32. The majority of the CA found that the Board's jurisdiction to set the rate of return  
10 included the power to set a range of permissible rates of return for the utility.

11 33. It is important to note that, while the majority of the CA supported the general principle  
12 of non-retroactivity, the majority of the CA did hold that applying a definition of excess  
13 revenue to a prior order does not result in the revision of the prior order.

14 34. In particular the CA stated:

15 There is no revisiting and revision of a prior order respecting the allowable return on rate  
16 base. The examination of actual results in the context of a comparison with the  
17 previously prescribed rate merely leads to enforcement of the original order. Any  
18 decision by the Board with respect to disposition of the excess revenue will therefore not  
19 retroactively interfere with past revenues which the utility assumes belong to it and which  
20 may be disbursed to shareholders or otherwise spend. Given the concept of excess  
21 revenue, as explained in this option, the utility knows in advance that it is not entitled to  
22 excess revenue so defined and may institute whatever accounting practices are necessary  
23 to segregate and deal with such revenues pending direction from the Board.

24 35. The majority of the CA found that even though the PUA does not explicitly provide the  
25 power to refund or create a reserve fund from excess amounts under a final order in  
26 Section 70(1) of the PUA (as is the case is for interim orders under Section 75), it does  
27 not mean that such powers are not available. This is because, as the CA expressed it, the  
28 "power to deal with excess revenue is in the nature of the regulatory scheme the Board is  
29 required to administer" (see paragraph 93 of Re NFLD PUB).

1 36. Further, the majority goes on to say that the Board is always engaged in an exercise of  
2 balancing the interests of consumers with those of the utilities and that the “Board having  
3 identified that an excess exists, must deal with it in furtherance of the objectives of the  
4 legislation” (emphasis added) (see paragraph 94 of Re NFLD PUB). At paragraph 97 of  
5 Re NFLD PUB, the majority of the CA holds that:

6 ... bearing in mind the approach to interpretation mandated by section 118(2) of the Act,  
7 the Board must of necessity have broad powers to deal with revenues earned by a utility  
8 in excess of the prescribed rate of return. In as much as the ascertainment of the  
9 existence of excess revenues can only be made following a subsequent review, any order  
10 dealing with excess revenue will of necessity have certain retrospective elements about it.  
11 But that is not the same as saying that an order dealing with excess revenue ascertained  
12 by application of a pre-existing concept of what constitutes excess revenue is a  
13 retroactive order.

14 37. The majority of the CA found that, where a public utility earned a rate of return annually  
15 in excess of the just and reasonable rate of return as determined by the Board, the Board  
16 could require the public utility to either use the excess earnings to reduce its subsequent  
17 revenue requirements, to place the excess earnings in reserve funds, or to rebate excess  
18 earnings to its customers.

19 38. In his dissent, Justice O’Neill of the CA set out his view that the Board does not have the  
20 power to retroactively recover funds out of the general funds of a utility and that once  
21 funds have been earned by a utility they remain the property of the utility. However, he  
22 further indicated his view that where the utility was required to hold the money in a  
23 reserve fund, the utility would by implication be aware that such money should not be  
24 treated as its general revenue and, as a result, the Board would have the authority to order  
25 customer refunds out of a reserve fund (see paragraphs 174 and 175).

26 39. In summary, Re NFLD PUB recognizes that the Board has an analogous power to refund  
27 to customers under Section 70(1) of the PUA as is otherwise available to it with respect  
28 to interim orders under Section 75 of the PUA. The decision strongly supports Abitibi’s  
29 submission that the Board has the authority to order a refund from a final order of rates,  
30 where such refunded amount is otherwise excess revenue of a utility.

31 40. In the case at hand, Abitibi submits that Hydro has not earned the funds received in the  
32 Overpayment and as a result Hydro is not entitled to retain those funds as revenue. The

1 Board's jurisdiction and legal authority to deal with such funds extends from its broad  
2 powers to regulate the revenues of Hydro and set rates in accordance with the intentions  
3 of the PUA.

4 41. In Abitibi's submission, the fact that the Overpayment was made into and would be paid  
5 out of a separate fund (being the RSP) rather than out of Hydro's general revenues,  
6 further supports the argument that Hydro has no rights to such revenue until it has been  
7 earned. Even more compelling, in Abitibi's submission, is that the Historic RSP Balance  
8 (to which the Historic Plan Repayments were directed) is distinct from RSP itself.  
9 Therefore, the amount of the Overpayment can even more easily be identified and should,  
10 in Abitibi's submission, properly be refunded.

11 Alberta Board Powers Recognized in Calgary v. Alberta Board.

12 42. Another important case, in Abitibi's submission, is *Calgary (City) v. Alberta (Energy and*  
13 *Utilities Board)* [2010] A.J. No. 449 ("Calgary v. Alberta Board") [Tab 2]. In this case,  
14 the Alberta Court of Appeal was considering the Alberta Board's jurisdiction to adjust  
15 deferral accounts to allow the natural gas utility to recover a lump sum from present  
16 consumers because of mistakes in accounting for past gas purchases by the utility over  
17 the past six years.

18 43. Abitibi notes that the actual order of the Alberta Board permitted (i) deferral accounts of  
19 customers in southern Alberta to be debited for prior cost understatements, and (ii)  
20 deferral accounts of customers in northern Alberta to be credited with prior cost  
21 overstatements. However, the decision only deals with the Alberta Board's authority  
22 with respect to debits from the deferral accounts, as no appeal from the Alberta Board's  
23 order was brought with respect to credits granted to customers in northern Alberta.

24 44. The majority of the Alberta Court of Appeal found that the Alberta Board's power to set  
25 just and reasonable rates allowed it to authorize the use of the deferred gas accounts to  
26 debit the lump sums from present consumers and that the Board's order did not constitute  
27 prohibited ratemaking.

28 45. In particular, the affected parties knew that the accounts would be used from time to time  
29 to alter gas rates based on later, actual gas costs. To support its decision the Alberta

1 Court of Appeal relied on the Supreme Court of Canada's decision in *Bell Canada v Bell*  
2 *Aliant Regional Communications*, 2009 SCC 40. In that case, the Supreme Court of  
3 Canada upheld a CRTC decision to order the disposition of funds that had accumulated in  
4 a deferral account. The Supreme Court of Canada's language, which was relied upon by  
5 the Alberta Court of Appeal, is:

6 ... the credits ordered out of the deferral accounts in the case before us are neither  
7 retroactive nor retrospective. They do not vary the original rate as approved, which  
8 included the deferral accounts, nor do they seek to remedy a deficiency in the rate order  
9 through later measures, since these credits or reductions were contemplated as a possible  
10 disposition of the deferral account balance from the beginning. These funds can properly  
11 be characterized as encumbered revenues, because the rates always remained subject to  
12 the deferral accounts mechanism established in the Price Caps Decision. The use of  
13 deferral accounts therefore precludes a finding of retroactivity or retrospectivity.  
14 Furthermore, using deferral accounts to account for the difference between forecast and  
15 actual costs and revenues has traditionally been held not to constitute retroactive rate-  
16 setting ..." (emphasis added by the Alberta Court of Appeal at para 53.)

17 46. On the issue of jurisdiction, the decision of the majority of the Alberta Court of Appeal in  
18 *Calgary v. Alberta Board* supports Abitibi's submission that the Board has the  
19 jurisdiction and legal authority to make adjustments to the RSP to reflect debits and  
20 credits.<sup>1</sup>

21 47. Particularly relevant to Abitibi's submissions is that the Board has previously used the  
22 RSP to process a credit to the Industrial Customers (see the RSP Adjustment Order  
23 above). This use of the RSP supports the argument that the parties know that the RSP  
24 may be adjusted to deal with debits and credits as needed.

25 *The Board's Inherent Power to Deal with Unjust Rates*

26 48. The Board's statutory power to deal with unjust rates is set out in section 87(1) of the  
27 PUA, as follows:

28 "Where upon an investigation the rates, tolls, charges or schedules are found to be unjust,  
29 unreasonable, insufficient or unjustly discriminatory, or to be preferential or in violation  
30 of this Act, the board has the power to cancel those rates, tolls, charges or schedules and

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<sup>1</sup> Although the Alberta Court of Appeal found that the Alberta Board had jurisdiction to use the deferral account to debit for prior costs, the Alberta Court of Appeal found the Alberta Board's decision was unreasonable and should be overturned, given the amount of the adjustment, the timeliness of the application, the responsibility of the utility for the failure of its accounting methods to recognize the additional costs, the foreseeability of the problem, and that current consumers who would bear the cost of the adjustment may not be the same consumers who received the service

1 declare void all contracts or agreements, either oral or written, dealing with them upon  
2 and after a day named by the board, and to determine and by order substitute those rates,  
3 tolls or schedules that are reasonable.” (emphasis added)

4 49. Given that section 71 and 76 of the PUA already provide the Board with the jurisdiction  
5 and legal authority to change rates and orders, Abitibi submits that section 87(1) gives the  
6 Board additional powers with respect to unjust, unreasonable or discriminatory rates.  
7 Based on the language of section 87(1), Abitibi submits that the Board has the authority  
8 to retroactively change final rates where such rates are unreasonable or unjust.

9 50. In the case at hand, Abitibi submits that Hydro’s continued charge of an amount in  
10 relation to the Historic Plan Repayment after the Historical RSP Balance had been retired  
11 was unreasonable and unjust as the Historic Plan Repayment was approved by the Board  
12 specifically to address historical costs incurred and outstanding.

13 51. Abitibi submits that it is a highly relevant consideration for the Board that the rates paid  
14 by Aur Resources Inc. have, since November 2007 by virtue of Order P.U. 1 (2007) been  
15 lower than those of other Industrial Customers (including Abitibi). The difference, of  
16 course, is that Aur Resources Inc. was exempted from making Historic Plan Repayments  
17 and, as a result, did not have to bear the cost of creating a surplus in the Historical RSP  
18 Balance.

19 52. Pursuant to section 87(1) the Board has the power to rescind the Final Orders and void  
20 contracts thereunder and make a subsequent order to substitute rates that are reasonable  
21 (i.e., that do not include the Historic Plan Repayment after the Historical RSP Balance  
22 had been retired).

23 **SUB-ISSUE 2: GENERALLY ACCEPTED SOUND PUBLIC UTILITY PRACTICE**

24 53. The sub-issue, as framed by Hydro in its June 2, 2010 letter to the Board is:

25 What would generally accepted sound public utility practice as set out in s. 4 of the  
26 EPCA require?

27 54. Section 4 of the *Electrical Power Control Act, 1994* mandates the Board to apply tests  
28 which are “consistent with generally accepted sound public utility practice.”

1 55. Abitibi submits that no principle of generally accepted sound public utility practice is  
2 offended, in any manner whatsoever, by returning the amount of its historical  
3 Overpayment to it.

4 56. It is a standard ratemaking principle that rates are developed on ‘test year’ forecast costs.  
5 This is embodied in section 3 of the EPCA, which establishes that the principle should be  
6 used where practicable.

7 57. Other fundamental ratemaking principles captured in the EPCA are those of equity,  
8 fairness and non-discrimination.

9 58. The RSP plan has three components:

10 (a) a fuel component;

11 (b) a hydraulic component; and

12 (c) a load variation component.

13 59. The fuel component is primarily a retrospective component but it does have a fuel rider  
14 based on the forecast price of No. 6 fuel oil. The hydraulic component is also  
15 retrospective in that rainfall cannot reliably be forecast over the time periods necessary in  
16 processes such as establishing electric rates.

17 60. The load variation component is unique to our system but is also calculated after the fact  
18 as it compares actual load to ‘cost-of-service’ load.

19 61. As a result of all of these factors, Abitibi submits that it is not possible to set rates for the  
20 RSP on a forecast basis. Consequently, for the RSP, Abitibi submits that fairness, equity  
21 and non-discrimination should be the Board’s overriding considerations.

22 **SUB-ISSUE 3: VESTED RIGHTS**

23 62. The sub-issue, as framed by Hydro in its June 2, 2010 letter to the Board is:

24 Are there any concerns in relation to vested rights, i.e. does the language of the RSP  
25 create a right/obligation in each of the customers or customer classes? If so, at what  
26 point does this right/obligation accrue? Does this mean that credits/debits allocated to  
27 each customer in accordance with the plan are the responsibility of or to the benefit of

1 customers in the class at the time of the accumulation or does the Board have the  
2 jurisdiction to order alternative disbursements of the balances?

3 63. In Abitibi's submission, the weight of the various reported cases coupled with matters of  
4 generally accepted sound public utility practice supports the position that ratepayers in  
5 circumstances such as Abitibi have a recognized right to refund of such amounts.

6 64. Indeed, Abitibi submits that principles of (or analogous to) "cost causation" are relevant  
7 for assessment in the instant case. Specifically, by its Overpayment Abitibi has directly  
8 contributed to the existence of an identifiable surplus. To the extent that the principles of  
9 cost causation require the Board to assess which customer or class of customer has  
10 caused costs to be incurred for the purposes of setting appropriate rates, so too should the  
11 Board assess which customer or class of customer caused the present surplus in the  
12 Historic RSP Balance for the purposes of eliminating the surplus.

13 65. To the extent that concerns such as those set out in paragraph 63 may arise, Abitibi  
14 submits only that the Board should properly be concerned with infringing upon rights of  
15 overpaying ratepayers to a return of such overpayments rather than have such  
16 overpayments put to some other purpose.

17 66. Abitibi takes no position beyond this narrow issue of the Board ordering a refund of  
18 Overpayments by Abitibi on account of the Historical RSP Balance. To the extent this  
19 sub-issue may engage policy discussions beyond the scope of the Historical RSP, such  
20 discussions and considerations are beyond the scope of Abitibi's interest in the  
21 Application.

22 67. Abitibi submits that its contribution to the Historical RSP balance is discernible and  
23 capable of determination with a high degree of precision. In relation to the issue of how  
24 the surplus held within the Historical Plan Balance component of Hydro's RSP should be  
25 handled, considerations of equity and the avoidance of unjust rates militate strongly in  
26 favour of returning funds to the relevant payors.

27 **SUB-ISSUE 4: IMPACT OF CERTAIN PAST BOARD ORDERS AND FILINGS**

28 68. The sub-issue, as framed by Hydro in its June 2, 2010 letter to the Board is:

Does the issuance of Order Nos. P.U. 34 (2007), P.U. 37 (2008), P.U. 6 (2009), the filing of Hydro's application on June 30, 2009, or any other order of the Board impact the jurisdiction of the Board?

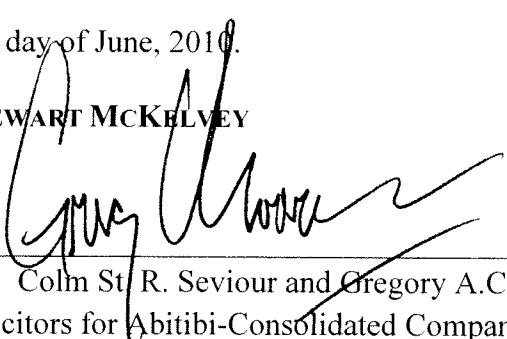
69. As a final submission, Abitibi confirms its view of past Board practice in relation to establishing rates. Specifically, it has been common for the Board to retrospectively approve the Industrial Customers' RSP rates during the month of January, to be effective on January 1 of that year. Although the retroactive portion of the particular Board Orders is only a matter of weeks, and Hydro has to wait until year end to determine its final actual costs, Abitibi submits that it has not always been practicable to base rates on forecasted costs.<sup>2</sup>

70. Notwithstanding the more general observation set out in paragraph 69, Abitibi submits that the broader impacts, if any, of past Board Orders and filings is fully addressed in preceding sections.

71. For clarity, Abitibi submits that the genesis of the Board's jurisdiction to address past interim orders differs from the Board's jurisdiction to address past final orders. In the result, however, Abitibi submits that the Board's jurisdiction as it relates to addressing historic overpayments in the RSP is clear: the Board has jurisdiction to order the return of Abitibi's historic Overpayments to it.

All of which is respectfully submitted, this 9<sup>th</sup> day of June, 2010.

STEWART MCKELVEY

For:   
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<sup>2</sup> See, for example, P.U. 3 (2007), P.U. 31 (2006), P.U. 2 (2006) and P.U. 4 (2005).

**TO:** Board of Commissioners of Public Utilities  
Attention: Cheryl Blundon

**AND TO:** Newfoundland Power  
Attention: Gerard Hayes

**AND TO:** Industrial Customers  
Attention: Joseph S. Hutchings and Paul L. Coxworthy

**AND TO:** Consumer Advocate (Thomas Johnson)

**AND TO:** Ottenheimer Baker  
Attention: Daniel Simmons

**AND TO:** Newfoundland Labrador Hydro  
Attention: Geoffrey Young