

September 23, 2013

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**Via Electronic Mail and Courier**

Newfoundland and Labrador Board  
of Commissioners of Public Utilities  
120 Torbay Road  
P.O. Box 21040  
St. John's, NL A1A 5B2

**Attention: Ms. G. Cheryl Blundon, Director of Corporate Services  
and Board Secretary**

Dear Ms. Blundon:

**Re: 2013 Hydro Application for Approval of RSP rules and components of rates to be  
charged to Industrial Customers (the "2013 RSP Application").**

1 These are the submissions of the Island Industrial Customers Group, Corner Brook Pulp and  
2 Paper Limited, North Atlantic Refining Limited and Teck Resources Limited, (the "IIC Group"), in  
3 respect of the 2013 RSP Application.

4 **Section 5.1 of the EPCA**

5 The IIC Group state from the outset that the ambit of their submissions are restricted by the  
6 Orders-in-Council OC2013-089, as amended by OC2013-207 (the "Orders-in-Council"). The  
7 Orders-in-Council give directions to the Board which circumscribe the jurisdiction of the Board in  
8 how it may resolve the issues and challenges posed by the 2013 RSP Application.

9 The Orders-in-Council have been made under the authority of section 5.1 of the Electrical  
10 Power Control Act, 1994, (the "EPCA") which provides:

11 **Direction to board**

12 **5.1** Notwithstanding sections 3 and 4 of the Act and the provisions of the  
13 Public Utilities Act, the Lieutenant-Governor in Council may direct the public  
14 utilities board with respect to the policies and procedures to be implemented by  
15 the board with respect to the determination of rate structures of public utilities  
16 under the Public Utilities Act and, without limiting the generality of the foregoing,  
17 including direction on the setting and subsidization of rural rates, the setting of  
18 industrial rates in Labrador, the fixing of a debt-equity ratio for Hydro, and the  
19 phase in, over a period of years from the date of coming into force of this section,  
20 of a rate of return determination for Hydro, and the board shall implement those  
21 policies and procedures.

22

It is important to note that the sections of the EPCA referenced in the “notwithstanding” clause of section 5.1 state as follows:

**Power policy**

3. It is declared to be the policy of the province that

(a) 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,

**Implementing Policy**

4. In carrying out its duties and exercising its powers under this Act or under the *Public Utilities Act*, the public utilities board shall implement the power policy declared in section 3, and in doing so shall apply tests which are consistent with generally accepted sound public utility practice.

Similarly, section 5.1 of the EPCA provides that a direction given under its authority is to be implemented by the Board notwithstanding the provisions of the *Public Utilities Act*. This can only be interpreted as including the provisions of section 73 of the *Public Utilities Act*, which states

**Equality of rates**

73. (1) All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the board may by regulation declare what shall constitute substantially similar circumstances and conditions.

(2) The taking of tolls, rates and charges contrary to this section and the regulations is prohibited.

Given the sweeping nature of the authority granted under section 5.1 of the EPCA to direct the Board, it would be of little avail to argue that the effect of those directions will be that rates charged to some of Hydro's customers will not be reasonable, or will be unjustly discriminatory, or will not be consistent with generally accepted sound public utility practice, or will result in some of Hydro's customers paying different rates notwithstanding being under substantially similar circumstances and conditions in respect of service of the same description.

It is in the context of the foregoing constraints that the following submissions of the IIC Group are made and are to be understood.

**Principles applicable to the interpretation of Orders-in-Council**

It is submitted that the following statement of the law with respect to the interpretation of orders-in-council, as expressed in **Canada (Attorney General) v. Anishnabe of Wauzhushk Onigum Band, 2002 CanLII 15761 (ON SC)**, is applicable to the interpretation of the Orders-in-Council in the present matter:

**General Principles:**

[59] Orders in Council are viewed as legislative in nature and therefore subject to interpretation in the same manner as any other enactment of the legislature. [See: *CSP Fouds Ltd. et al v. CTC et al* [1983] 1 F.C. 55 (C.A.)]

[60] The general approach to statutory interpretation was succinctly expressed by Dickson J. (as he then was) who stated the following in *Jodrey's Estate v. Province of N.S.* [[1980] 2 S.C.R. 774 at p. 807]

The correct approach, applicable to statutory interpretation generally, is to construe the legislation with reasonable regard to its object and purpose and to give it such interpretation as best ensures the attainment of such object and purpose.

[61] The author Sullivan in the text *Driedger on the Construct of Statutes* (3d) states that the "ordinary meaning rule" has been summarized as follows:

1) It is presumed that the ordinary meaning of a legislative text is the intended or most appropriate meaning, in the absence of a reason to reject it, the ordinary meaning prevails.

2) Even where the ordinary meaning of a legislative text appears to be clear, the courts must consider the purpose and scheme of the legislation, and the consequences of adopting this meaning. They must take into account all relevant indicators of legislative meaning.

3) In light of these additional considerations the court must adopt an interpretation in which the ordinary meaning is modified or rejected. That interpretation, however, must be plausible; that is, it must be one the words are reasonably capable of bearing.

**Previous Orders-in-Council**

It is submitted that, in considering the objects and purposes of the Orders-in-Council, due consideration needs to be given to the statement (in paragraph 2 of OC2013-089) that the amount credited to the industrial customers' Rate Stabilization Plan is the "amount required to phase-in industrial customer rates, based on Newfoundland and Labrador Hydro's General Rate Application."

In P.U. 9 (2013), the Board noted the following (at page 2, lines 34-41):

*Order No. P.U. 34 (2007), effective January 1, 2008, continued the existing 2007 rates for all Hydro's Island Industrial Customers, on an interim basis. These rates have been in effect since that Order.*

*A decision from the Court of Appeal on the Board's jurisdiction to deal with the balance in the Industrial Customer RSP was issued June 19, 2012. The Board has been directed by Government that it can only deal with Industrial Customers' rates in the context of a general rate application from Hydro, which Government has now directed Hydro to file by April 15, 2013.*

The IIC Group understand that subsequent direction, or directions, from Government extended the time for Hydro's filing of its GRA, which was ultimately filed on July 30, 2013, concurrently with the 2013 RSP Application.

Hydro, starting at page 4, line 22 of its Evidence in the 2013 RSP Application, notes that the Application is being made in the context of the earlier directions given to the Board:

*Over the 2011 to 2013 period, Government issued OCs related to electricity matters before the Board. On April 19, 2011 an OC was issued to the Board to "defer all matters currently before the Board pertaining to Industrial Customer rates and rate adjustments and to consider those matters in the context of the General Rate Application process." As stated in the Introduction, direction has now been received regarding the allocation of the RSP Surplus and implementing a phase-in of new IC rates over the 2013 to 2015 period. As well, Hydro has now filed its GRA.*

OC2013-089 can only be reasonably interpreted in the context of Government's previous directions to the Board that the rates in effect for the industrial customers since January 1, 2008 were to be considered in the context of the General Rate Application process.

**The 2013 RSP Application and January 1, 2008 to August 31, 2013 industrial customer rates**

Hydro's 2013 RSP Application has been filed in the context of its General Rate Application. The 2013 RSP Application is integral to the General Rate Application process.

The Orders-in-Council impose strict time frames for the implementation of their directions to reallocate the January 1, 2007 to August 31, 2013 accumulated Load Variation (the Rate Stabilization Plan Surplus) component of the Rate Stabilization Plan and to credit the respective RSPs of the industrial customers and Newfoundland Power with their respective allocations, and to commence the rate phase-in for industrial customers, including a differential rate for Teck Resources which the Board did not implement by its preliminary order P.U. 26 (2013), effective September 1, 2013.

The Orders-in-Council direct that "Effective September 1, 2013, Island industrial customer rates will no longer be frozen." They do not direct the Board to engage in a process of adjusting the rates paid by the industrial customers prior to that date.

What do these directions mean for interim rates paid by the industrial customers between January 1, 2008 and August 31, 2013?

Hydro, by the 2013 RSP Application, interprets the direction given by the Orders-in-Council as, in all respects, removing from the Board's consideration how (in the words of the OC2013-089, as amended) "*the January 1, 2007 to August 31, 2013 accumulated Load Variation (the Rate Stabilization Plan Surplus) component of the Rate Stabilization Plan*" could have factored in any proposed adjustment of January 1, 2008 to August 31, 2013 industrial customer rates. In Hydro's interpretation, the load variation component, as a factor (through the RSP) in January 1, 2008 to August 31, 2013 industrial customer rates, has been fixed and entirely disposed of by the Orders-in-Council.

As the Court of Appeal noted in their 2012 Decision with respect to the load variation component of the Rate Stabilization Plan, this "factor swamps the other factors in terms of magnitude" [para. 118 of the 2012 Court of Appeal decision].

If Hydro's interpretation that the load variation component, as a factor (through the RSP) in January 1, 2008 to August 31, 2013 industrial customer rates, has been fixed and entirely disposed of by the Orders-in-Council is accepted, would interpreting the Orders-in-Council as having fixed the January 1, 2008 to August 31, 2013 industrial customer rates as they are be an interpretation that best ensures the attainment of the objects and purposes of the Orders-in-Council?

The IIC Group, by the Request for Information process, attempted to elicit evidence from Hydro that might assist in answering these questions.

## **Hydro's Responses to the Requests for Information**

Hydro, in reply to the question posed by PUB-NLH-4 that Hydro provide, from the Orders-in-Council, evidence that January 1, 2008 to August 31, 2013 industrial customer rates should be made final effective September 1, 2013 without further review of the Board, simply stated that "*The Orders in Council do not provide such evidence.*"

Hydro, in reply to the question posed by PUB-NLH-6 that Hydro provide its explanation as to why it believes that January 1, 2008 to August 31, 2013 industrial customer rates should be made final effective September 1, 2013 without further review of the Board, identified 5 factors that the Hydro considered in arriving at that belief. Three of those factors are directly derived from the Orders-in-Council (i.e. factors (ii), (iii) and (v)), and the first factor was the history of industrial customer rates, and the related matter of RSP load variation, having been before the Board for a number of years. (As previously noted in these submissions, Government has given previous direction to the Board that this "history" is to be addressed in the context of Hydro's GRA process.)

Hydro's responses to PUB-NLH-4 and PUB-NLH-6 were contradictory. As well, PUB-NLH-6 did not explain why the factors identified in its response led to Hydro's belief that that January 1, 2008 to August 31, 2013 industrial customer rates should be made final effective September 1, 2013 without further review of the Board. The IIC Group, by the Request for Information process, was obliged to attempt to elicit further evidence to clarify Hydro's position, and to attempt to identify the implications of January 1, 2008 to August 31, 2013 industrial customer rates being adjusted by a further review of the Board.

Hydro's responses to many of the IIC Group's 2<sup>nd</sup> round of RFIs (IC-NLH-10, IC-NLH-11, IC-NLH-12, IC-NLH-13, IC-NLH-18, IC-NLH-21, IC-NLH-23) were to the effect that the information sought by the RFI did not need not to be provided, based on the following justification (or slight variations thereof):

*Since the total amount of the accumulated Load Variation component of the RSP for the period January 1, 2007 to August 31, 2013 is integral to the rates policy direction given it should not be altered. Therefore, it is Hydro's position that rates and related matters should be finalized at this time without further review. Refer also to the response to CA-NLH-20. [underlining added]*

Hydro's response to IC-NLH-24 makes clear that the "rates policy direction" to which it is "integral" to finalize January 1, 2008 to August 31, 2013 industrial customer rates without further review is the same "rates policy direction" that underpins Hydro's position that the remaining balance of "the January 1, 2007 to August 31, 2013 accumulated Load Variation (the Rate Stabilization Plan Surplus) component of the Rate Stabilization Plan" transferred to the credit of Newfoundland Power's RSP can only be defined as the \$111 million calculated by Hydro, without consideration of whether there are other rate components that need to be addressed before determining what is "the Rate Stabilization Plan Surplus". In Hydro's interpretation, both steps are integral to the rates policy direction given by the Board.

Hydro's responses to the IIC Group RFIs were, in effect, a summation, and are best understood in the context, of a longer explanation provided by Hydro in response to CA-NLH-20. We submit that the essence of that explanation is found in the following passage (lines 18-27):

*The Board has been directed to divide the balance of the RSP Surplus with \$49 million to the IC RSP and the balance to Newfoundland Power's RSP. A review of PUB-NLH-7 shows the allocation of the RSP balance in accordance with the directive. In light of this directive on the distribution of the RSP balance between the customer classes, and the fact that this approach will effect a complete treatment of this issue by using all of the RSP balance that can properly be under consideration, Hydro believes that further evidence on the matter is unnecessary. Since the directive has been issued, all matters concerning the distribution of the RSP balance have been resolved and the interim rates can now be made final without further review. [underlining added]*

The IIC Group submits that if Hydro had actually provided the information requested by IC-NLH-10, IC-NLH-11, IC-NLH-12, IC-NLH-13, IC-NLH-18, IC-NLH-21, IC-NLH-23, then the impossibility of finalizing the amount of the transfer credit to Newfoundland Power's RSP without also finalizing January 1, 2008 to August 31, 2013 industrial customer rates would have been laid bare.

The IIC Group submits that the transfer credit to Newfoundland Power's RSP cannot be finalized at the amount calculated by Hydro without also finalizing January 1, 2008 to August 31, 2013 industrial customer rates as they are. Is this a result that best ensures that the objects and purposes of the Orders-in-Council are attained?

**1 The objects and purposes of the Orders-in-Council**

2 The manifest objects and purposes the Orders-in-Council are to reallocate the January 1, 2007  
3 to June 30, 2013 accumulated Load Variation (the Rate Stabilization Plan Surplus) component  
4 of the Rate Stabilization Plan and to credit the respective RSPs of the industrial customers and  
5 Newfoundland Power with their respective allocations, and to commence the rate phase-in for  
6 industrial customers, including a differential rate for Teck Resources.

7 However, in the context of previous Government directions to the Board that the rates in effect  
8 for the industrial customers since January 1, 2008 were to be considered in the context of the  
9 General Rate Application process, it is submitted that the interpretation that best ensures that  
10 the objects and purposes of the Orders-in-Council are attained is that all issues in respect of  
11 rates in effect for the industrial customers since January 1, 2008 and up to August 31, 2013 be  
12 finalized, just as all issues in respect of the load variation component of those rates are intended  
13 to be finalized.

14 Rates paid by industrial customers since January 1, 2008 could not be adjusted without the  
15 ability to consider the relationship of the load variation component to those interim rates  
16 (including the interim RSP rules), as the sole reason they were made interim was to address  
17 issues arising from the load variation component. That consideration is not possible if the  
18 remaining balance of the load variation component transferred to the credit of Newfoundland  
19 Power's RSP is fixed. That consideration is only possible if Hydro's responses to IC-NLH-10, IC-  
20 NLH-11, IC-NLH-12, IC-NLH-13, IC-NLH-18, IC-NLH-21, IC-NLH-23 and CA-NLH-20 are  
21 rejected, and if Hydro is required to provide the information and evidence requested by those  
22 RFIs (and others not included in this list), so that the Board would have the necessary  
23 evidentiary record before it to consider such adjustments.

24 Going down the path of considering adjustments to the rates in effect for the industrial  
25 customers since January 1, 2008 and up to August 31, 2013 would inject a great measure of  
26 uncertainty into how to implement the previous Government directions to the Board that the  
27 rates in effect for the industrial customers since January 1, 2008 were to be considered in the  
28 context of the General Rate Application process. The IIC Group submit that interpreting the  
29 Orders-in-Council in such way as to permit such uncertainty to arise would not be an  
30 interpretation that best ensures the attainment of the objects and purposes of the Orders-in-  
31 Council. The IIC Group accepts that addressing the issues arising from a consideration of  
32 adjustments to the rates in effect for the industrial customers since January 1, 2008 and up to  
33 August 31, 2013 would have the potential to "swamp" the objects and purposes of the Orders-  
34 in-Council. The IIC Group, given the constraints imposed by the directions in the Orders-in-  
35 Council, and the sweeping effect of those directions in light of section 5.1 of the EPCA, accept  
36 that the best means of ensuring the attainment of the objects and purposes of the Orders-in-  
37 Council is for the rates in effect for the industrial customers since January 1, 2008 and up to  
38 August 31, 2013 to be made final as they are.

**39 The alternative submissions of the IIC Group**

40 If the Board does not accept that the best means of ensuring the attainment of the objects and  
41 purposes of the Orders-in-Council is for the rates in effect for the industrial customers since  
42 January 1, 2008 and up to August 31, 2013 to be made final as they are without further review  
43 by the Board, then the IIC Group wish to make abundantly clear their position that:

1. the remaining balance of the load variation component transferred to the credit of Newfoundland Power's RSP cannot be fixed until that further review by the Board is completed;
2. Hydro must be required to provide the information and evidence requested by IC-NLH-10, IC-NLH-11, IC-NLH-12, IC-NLH-13, IC-NLH-18, IC-NLH-21, IC-NLH-23 and CA-NLH-20 (and by such other RFIs in response to which Hydro did not provide the requested information) as part of such a full review by the Board; and
3. the foregoing is not contrary to the Orders-in-Council, as if the Board can interpret the Orders-in-Council in such a manner that the rates in effect for the industrial customers since January 1, 2008 and up to August 31, 2013 cannot be made final until further review of those interim rates, then such further review would necessarily engage the load variation component of those interim rates (as they were only made interim to address the load variation component).

#### **New load variation component rules**

By the 2013 RSP Application, Hydro is proposing that effective starting from September 1, 2013, the Rate Stabilization Plan ("RSP") rules related to the allocation of the load variation be modified such that the year-to-date net load variation for both Newfoundland Power and the Industrial Customers be allocated among the customer groups based upon energy ratios.<sup>1</sup>

The IIC Group has previously submitted evidence (e.g., the 2003 GRA) that the load variation component was an anomaly among regulated utilities and led to an inappropriate allocation of risk<sup>2</sup>. The IIC Group recommended that there be no load variation provision in the RSP whatsoever. The Consumer Advocate submitted evidence that major aspects of the RSP required complete re-design as it was "inefficient" and instead an approach was needed to "better allocate risks between the utilities and customers"<sup>3</sup>.

The approach proposed by the 2013 RSP Application for calculating the load variation is the same approach that was proposed by Hydro in its June 30, 2006 report on the RSP, and was included in the items for negotiation in the 2006 GRA. That approach was not adopted out of the 2006 GRA negotiations with customers, as it was not the preferred solution. Instead a negotiated settlement was reached on October 20, 2006 in respect of the RSP issues in that GRA that provided for:

1. A continuation of the RSP load variation rules as then in place, pending a detailed review.
2. A review process was to be initiated to review, among other things, the design objectives for the RSP, and specifically "the necessity of a load variation component of the RSP".

The contemplated review process was to include a technical conference to occur as soon as possible and in no event later than October 31, 2007.

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<sup>1</sup> 2013-07-30 RSP Application, page 2-3

<sup>2</sup> IIC Evidence of C.F Osler and P. Bowman, September 2, 2003.

<sup>3</sup> CA Evidence of C. Douglas Bowman, September 5, 2003.



While that review process was initiated, the process was ultimately sidelined by the inability of Hydro to complete the process, as set out in detail in the response to CA-NLH-6 (a re-filing of NP-NLH-1 and NP-NLH-2 from the IIC RSP proceeding in 2009). The response to CA-NLH-6 sets out a lengthy series of correspondence between Hydro and the Board indicating the extreme delays that characterized that review. Despite the effort of parties, the prioritization of other issues (such as the NP Demand Rate Report<sup>4</sup>), the interference of other priority issues (such as IFRS<sup>5</sup>) as well as other issues such as illnesses and retirements delayed that process for almost 2 years, from a 2007 deadline, into 2009 when the Board ultimately removed the item from the regulatory calendar<sup>6</sup>. Despite the extra time, the substantive issues among the parties were simply unable to be properly aired in a manner that allowed for debate through to a logic and consistent conclusion.

At this time, there remain substantive concerns regarding the load variation provision of the RSP, yet the potential for common ground as to possible solutions may very well exist. These concerns were raised in 2003 and 2006, and have not yet been properly addressed. Despite efforts of the parties, Hydro was not able to complete the work of the working group on the RSP out of the last GRA. It is at best unfortunate for Hydro to now revert to its original 2006 position which was the basis of substantive disagreement, and suggest it be implemented as part of a limited scope process.

In the context of the current application, which is a limited scope application to implement the OICs, there is no urgency to implement changes to the go-forward RSP. According to current rules, the RSP rider for NP will not be adjusted until July 1, 2014, and the RSP rider for the IIC, which is slated to occur for January 1, 2014, requires substantive discussion about implementation details, of which the load variation provision applicable to the September-December 2013 period is but a minor detail, if it affects the RSP rider at all.

There remains a major GRA forum which is proceeding concurrent with the present review, which is an appropriate time and forum to discuss and resolve matters of substantive disagreement.

#### **The order to be made**

Based on the foregoing submissions (and on the basis that the IIC Group's alternative submissions do not come into play), the IIC Group respectfully submit that the Board should make the following orders:

#### **Industrial Customer Rates effective September 1, 2013**

1. With reference to paragraph 9 of the 2013 RSP Application, that effective September 1, 2013, the Industrial – Firm rate components be changed as set out in Schedule A to the Application;

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<sup>4</sup> E.g., see CA-NLH-6 page 20.

<sup>5</sup> See CA-NLH-6 page 23.

<sup>6</sup> CA-NLH-6 page

Load Variation Occurring after September 1, 2013

2. With reference to paragraph 10 of the 2013 RSP Application, the load variation that occurs for each customer class for the period from September 1, 2013 until such time that the Board determines in a further Order as part of the General Rate Application process, calculated according to Section B, subsection 1.2 of the Rate Stabilization Plan approved in Board Order P.U. 40(2003), be held in a separate account for disposition as determined in a future Order of the Board;

IIC interim rates to August 31, 2013

3. With reference to paragraph 11 of the 2013 RSP Application, that Island Industrial Customer interim rates from January 1, 2008 to August 31, 2013 be made final, as they are, without further review by the Board;

Proposed changes to RSP Rules

4. With reference to paragraph 12 of the 2013 RSP Application, that none of the proposed changes to the Rate Stabilization Plan set out in Schedule B to Hydro's Application be approved at this time, with the sole exception of **Section E: RSP Surplus, paragraph 1 August 31, 2013 Balance** only (with the modification that the reference therein to the "rules below" be amended to the "rules to be approved by future Order of the Board".)

In this regard, the IIC Group note that the calculation of subsequent phase-in rates will not be possible, as Hydro acknowledges at page 9, lines 12 -17 of its Application Evidence, until new base rates are approved by the Board in the GRA process, and will need to be addressed through the RSP in effect at that time. It is therefore premature, and unnecessary at this time, to approve the changes proposed by Schedule B to Hydro's Application in **Section E: RSP Surplus, paragraph 2 Island Industrial Customer RSP Surplus Balance**, and these changes can and should be addressed in the context of other changes to be considered for the RSP in the GRA process. In the alternative, if the **Section E: RSP Surplus, paragraph 2 Island Industrial Customer RSP Surplus Balance** charges are approved by the Board at this time, then the IIC Group submit that they should only be approved on an interim basis.

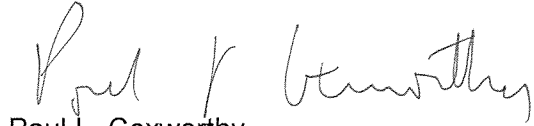
**Costs**

The Island Industrial Customer Group request an order for their costs of participating in this proceeding. As noted above, Hydro's Application and responses to the first round of RFIs did not present Hydro's justification for finalizing interim IC rates as they are (and in some respects were contradictory on this point). The lack of this justification is particularly difficult to understand since Hydro has been aware since at least April of this year of the direction being given by Government. The lack of justification made it necessary for the IIC Group to develop extensive RFIs to elicit a substantive explanation of Hydro's position. The IIC Group respectfully submit that these circumstances warrant an order for costs.

**All of which is respectfully submitted to the Board.**

Yours truly,

Stewart McKelvey

A handwritten signature in dark ink, appearing to read "Paul L. Coxworthy". The signature is fluid and cursive, with the first name "Paul" being more prominent than the last name "Coxworthy".

Paul L. Coxworthy

PLC/kmcd

- c. Mr. Geoffrey P. Young, Senior Legal Counsel, Newfoundland and Labrador Hydro
- Mr. Thomas J. Johnson, Consumer Advocate
- Mr. Gerard Hayes, Newfoundland Power
- Mr. Dean A. Porter, Poole Althouse
- Mr. Thomas O'Reilly, Q.C., Vale Newfoundland and Labrador Limited