Prunelle Thibault-Bédard, Avocate Inc.
2267, rue Aylwin
Montréal, QC, H1W 3C7
514-792-6138
prunelle@droitenvironnement.com

THIBAULT-BÉDARD
AVOCATE

BY EMAIL AND MAIL

February 27, 2017

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

RE: The Board's Investigation and Hearing into Supply Issues and Power Outages on the Island Interconnected System – Response to the parties' comments on Motion to rescind or amend P.U. 2 (2017)

Ladies and Gentlemen:

As requested by the Board in its correspondence dated February 6th, 2017, Grand Riverkeeper Labrador, Inc. (GRK) is hereby responding to comments issued by the parties with regards to its Motion to rescind or amend P.U. 2 (2017), filed February 2nd, 2017.

1. Grounds and threshold for reconsideration

Power to reconsider a decision is intimately linked to the principle of *functus officio*, which states that once an agency has fulfilled its mandate by the rendering of a decision, it loses competence on the matter, its function being completed. The principle of *functus officio* ensures the finality of decision, a principle that Newfoundland Labrador Hydro (Hydro) appeals to in its comments. The Supreme Court of Canada has however recognized that "[i]ts application in respect to administrative tribunals which are subject to appeal only on a point of law must thus be more flexible and less formalistic."[1] The power to reconsider one's decision has been acknowledge by the courts, both in the presence and absence of a legal provision habilitating the agency to do so. Where no habilitating provision exists, the implicit power to reconsider a decision is subject to the higher threshold confirmed by the Supreme Court of Canada in *Chandler* v. *Alberta Association of Architects*[2] (Chandler).

Where the power to reconsider a decision is explicitly granted by the law, as is the case with the *Public Utilities Act*[3] (PUA), many scenarios are possible, which have an impact

[1] *Chandler* v. *Alberta Association of Architects,* [1989] 2 R.C.S. 848, at p. 861.
[2] *Supra*.
[3] RSNL1990, Ch. P-47.

Prunelle Thibault-Bédard, Avocate Inc.
2267, rue Aylwin
Montréal, QC, H1W 3C7
514-792-6138
prunelle@droitenvironnement.com

THIBAULT-BÉDARD
AVOCATE

on the applicable threshold. The legislator may grant the agency power to reconsider its decisions without specifying any grounds for such revision. This kind of provision must receive a broad interpretation, taking into account the particular context of the legislation concerned.[4] The legislator may also frame the power to reconsider very generally, allowing the agency to reconsider for valid reasons or to correct any mistake, without giving details on what kind of reasons or mistakes will be considered sufficient grounds for reconsideration. Finally, the legislator may state specific grounds for reconsideration as well as give directions to the threshold that is to be applied. The Quebec Court of Appeal has recognized that such provisions are more restrictive, the power of the agency to reconsider a decision being limited to the conditions specifically mentioned in the provision.[5] The cases cited by Hydro in its February 15th, 2017 comments belong to that third scenario.

In arguing for a "high threshold for reconsideration of a decision",[6] Hydro cites examples of decisions made pursuant to s. 43 of the *Ontario Municipal Board Act*[7] (OMBA). Although similar in language to s. 76 of the *Public Utilities Act*[8] (PUA), both provisions differ in the amount of details provided in their respective regulations as to the threshold and criteria applicable to the remedy. In particular, rule 115.01 of the *Rules of Practice and Procedure* of the Ontario Municipal Board, quoted by Hydro in its comments, very specifically states that:

> **115.01 The Exercise of the Chair's Discretion** The Chair may exercise his/her discretion and grant a request and order either a rehearing of the proceeding or a motion to review the decision only if the Chair is satisfied that the request for review raises a convincing and compelling case that the Board:
> (a) acted outside its jurisdiction;
> (b) violated the rules of natural justice or procedural fairness, including those against bias;
> (c) made an error of law or fact such that the Board would likely have reached a different decision;
> (d) heard false or misleading evidence from a party or witness, which was discovered only after the hearing and would have affected the result; or

[4] Serge Lafontaine et Dominique Rousseau, « Le pouvoir de révision en droit administratif », dans Service de la formation permanente, Barreau du Québec, *Développement récents en droit administratif (1995)*, Cowansville, Éditions Yvon Blais, p. 209, at p. 213.
[5] *Épiciers Unis Métro-Richelieu Inc.* c. *Régie des alcools, des courses et des jeux*, [1996] R.J.Q. 608. See in particular Justice Rothman's comments at p. 612 and 613.
[6] Board's Investigation and Hearing Supply Issue and Power Outages on the Island Interconnected - GRK Motion to Rescind or Amend Order No. P.U. 2(2017) - Hydro's Comments, February 15, 2017, at p. 3
[7] R.S.O. 1990, c. O.28
[8] RSNL 1990, c. P-47

Prunelle Thibault-Bédard, Avocate Inc.
2267, rue Aylwin
Montréal, QC, H1W 3C7
514-792-6138
prunelle@droitenvironnement.com

THIBAULT-BÉDARD
AVOCATE

(e) should consider evidence which was not available at the time of the hearing, but that is credible and could have affected the result.

The same goes for the other case cited by Hydro,[9] decided under the *Ontario Energy Board Act*,[10] (OEBA). Rule 64.01 of the *Rules of Practice and Procedure* of the Ontario Energy Board, in force at the time, provided that in respect of a motion brought under Rule 62 (Motion to review or rehear any matter or to rescind or vary any order), the Board shall determine the "threshold" question of whether the matter should be reheard or reviewed or whether there is reason to believe the order should be rescinded or varied. Rule 63.01(a) listed grounds for a motion under Rule 62, including: error of law or jurisdiction, including a breach of natural justice; error in fact; a change in circumstances; new facts that have arisen; facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and an important matter of principle that has been raised by the order or decision.

In contrast with the rules under the OMBA and OEBA, which provide their respective board with explicit lists of grounds under which a motion for reconsideration may be granted, s. 28(1) of the PUB's Regulations only provides that:

> **28.** (1) Applications for re-opening an application after final submission, or for rehearing after final order, must state the grounds upon which the application is based if the application to re-open the matter to receive further evidence, the nature and purpose of the evidence must be stated if the application is for a rehearing or argument, the applicant must state the findings of fact or of law claimed to be erroneous and a brief statement of the alleged error.

It consequently cannot be argued that the threshold for reconsideration applied in the cases cited by Hydro can be directly applied to the case at hand, the Newfoundland and Labrador legislator having made the decision to word the habilitating provision differently. A further distinction between these cases can be made based on circumstances, which the Supreme Court in Chandler recognized to be relevant in determining whether a rehearing is appropriate.[11] In the OEBA case, granting the motion would have meant reopening a Targeted O&M performance based regulation regime merely a few months into its three years term. The Board deemed that the PBR was new and was to be given a chance to work. The Board however agreed with the moving

---

[9] *IN THE MATTER OF the Ontario Energy Board Act, 1998; AND IN THE MATTER OF an Application by The Consumers' Gas Company Ltd., carrying on business as Enbridge Consumers Gas, for an Order or Orders approving or fixing rates for the sale, distribution, transmission, and storage of gas; AND IN THE MATTER OF a Motion for Review and Variance by the Industrial Gas Users Association, the Consumers' Association of Canada, and the Vulnerable Energy Consumers Coalition*, 1999-0001, Decision (June 29, 2000) at para. 4.13

[10] 1998, S.O. 1998, c. 15, Sched. B

[11] Supra note 1.

Prunelle Thibault-Bédard, Avocate Inc.
2267, rue Aylwin
Montréal, QC, H1W 3C7
514-792-6138
prunelle@droitenvironnement.com

THIBAULT-BÉDARD
AVOCATE

parties that the outsourcing plan of the company, which had not been disclosed with sufficient details and in due time, was significant and could have an overall impact on cost of service components other than O&M expenses. The Board stated that the company could not avoid scrutiny of these items by choosing to implement the outsourcing plan during the test year after the conclusion of the rates proceeding. On the basis of those circumstances, the Board was "not convinced that the extensive review requested by the moving parties is necessary. This is especially true where there may be other remedies available."[12] (emphasis added) The Board then goes on to order the company to establish a deferral account to record the impact of the outsourcing plan on all items supporting the determination of the revenue requirement, except operating and maintenance expenses, and to discuss the specific line items and the method of calculation of the amount for each line item with the Board's Energy Returns Officer. Such circumstances do not exist in our case. Reconsidering the Board's decision to exclude GRK's evidence would not send an ongoing process back to square one. The only remedy that will prevent a breach of GRK's right to be heard is for its evidence to be admitted.

The PUA corresponds to the second scenario of habilitating power to reconsider a decision: a very general power based on erroneous findings of law or fact, where such errors are not further defined. Accordingly, the Board's power to reconsider its decision is broader than that of the OMB or OEB. An abundant jurisprudence recognizes that the failure to consider or admit relevant evidence constitute a substantive mistake that can allow for reconsideration of a decision, as it constitutes a violation of natural justice.[13] Although a lot of those decisions concern the failure to take into account relevant evidence presented at the hearing, striking out GRK's evidence at this preliminary stage would have the exact same consequence; preventing any consideration of GRK's relevant evidence. As pointed out by the Consumer Advocate in his letter dated February 13, 2017, "an administrative tribunal's refusal to admit evidence can amount to a reviewable error of law". Section two of this letter will address the relevance of GRK's evidence. It is GRK's strongly held position that its evidence is relevant and the following comments are based on that premise.

Hydro contends that the exclusion of GRK's evidence does not deprive it of its right to be heard as GRK "would continue to be permitted to make statements in any public hearing for this inquiry, cross-examine witnesses, raise objections, etc." GRK respectfully disagrees. How can GRK ensure that the Board's review of the adequacy and reliability

[12] p. 16
[13] See notably : Société canadienne des postes c. Commission d'appel en matière de lésions professionnelles, D.T.E. 88T-317 (C.S.); Howe v. Institute of Chartered Accountants of Ontario, 1994 CanLII 3360 (ON CA); *Université du Québec à Trois-Rivières* c. *Larocque*, [1993] 1 R.C.S. 471.

Prunelle Thibault-Bédard, Avocate Inc.
2267, rue Aylwin
Montréal, QC, H1W 3C7
514-792-6138
prunelle@droitenvironnement.com

of the system after commissioning of the Muskrat Falls generating facility and the Labrador Island Link takes into account the various risks associated with the unavailability of some or all of the planned energy and capacity from the Muskrat Falls project, the issues based on which GRK has been granted intervenor status, when any statement, question or objection relating to those risks will most likely be met by an objection from Hydro on the ground that they are based on evidence that has been stricken out? How can GRK effectively make statements and cross-examine witnesses if it cannot rely on its evidence to support its statements and questions? Most importantly, how can the Board determine whether the risks represented by the Muskrat Falls' development are properly taken into account by Hydro without hearing any evidence as to the nature and extend of those risks? In *Université du Québec à Trois-Rivière* c. *Larocque*,[14] the Supreme Court ruled that failing to take into account evidence on the cause of a dismissal when deciding a wrongful dismissal case "quite clearly amounts to a breach of natural justice." In the same case, the Supreme Court also quotes Professor Garant:

> [TRANSLATION] A tribunal must be cautious, however, as it is much more serious to refuse to admit relevant evidence than to admit irrelevant evidence, which may later be rejected in the final decision. The practice of a tribunal taking objections to evidence "under advisement" where possible, and when the party making them does not absolutely insist on having a decision right then, is usually advisable; it does not in any way contravene natural justice.[15]

In this context, the exclusion of all of GRK's relevant evidence is a breach of its right to be heard and is valid ground for a reconsideration of the Board's decision.

Lastly, GRK would like to respond to Hydro's comment that granting the remedy requested by GRK would be highly prejudicial to Hydro, and possibly to all intervenors, on the grounds that parties will need an adequate opportunity to respond and will need to consider filing evidence in response, cross-examining the GRK expert(s) and replying to this evidence. Although GRK would not object if Hydro requested the permission to file additional evidence, it is worth noting that the calendar of the hearing provides for all evidence to be filed on the same day, and did not plan for any rebuttal evidence to be filed. It thus appears that to this date, the Board expects the parties to deal with each other's evidence through cross-examination, a standard process that is not prejudicial to the parties.

2. Relevance of GRK's evidence

[14] [1993] 1 R.C.S. 471.
[15] P. Garant, *Droit administratif*, vol. 2, Le contentieux (3rd ed. 1991), at p. 231, as quoted in *supra*.

Prunelle Thibault-Bédard, Avocate Inc.
2267, rue Aylwin
Montréal, QC, H1W 3C7
514-792-6138
prunelle@droitenvironnement.com

THIBAULT-BÉDARD
AVOCATE

In its letter dated February 15th, 2017, Hydro's position is largely based on the assumption that GRK's evidence is not relevant to this investigation. It quotes MacAulay and Sprague[16] who posit that in administrative proceedings, attempts are frequently made to enter evidence that is irrelevant and that refusing to allow such evidence does not offend the principles of fairness. It also quotes the Board as it said, in P.U. 15(2014), that it will exercise its discretion to strike out any matters which are irrelevant, and comments that it has full authority to do so. GRK is not contesting the Board's authority to strike out irrelevant evidence. Rather, its position is that considerations on how irrelevant evidence should be dealt with do not apply to GRK's evidence, which is clearly relevant, given the scope of this investigation.

It is not GRK's intent to restate here what it has already submitted to the Board in previous submissions relating to the relevance of its evidence. However, in its comments, Hydro once again only quotes certain parts of P.U. 15 (2014) and omits others, leading it to flawed conclusions as to the nature and extend of GRK's intervention allowed by the Board. It appears that in granting Hydro's motion to exclude GRK's evidence, the Board has also erroneously relied on a partial appreciation of P.U. 15 (2014).

In this order, in addition to the passage quoted by Hydro to the effect "that the issues in the matter should not be extended to the construction, legal, contractual and physical risks of the Muskrat Falls' development", the Board also states that:

> The Board notes that Grand Riverkeeper Labrador, Inc.'s reply submission states its intent is to ensure that the Board's review of the adequacy and reliability of the system after commissioning of the Muskrat Falls generating facility and the Labrador Island Link takes into account the various risks associated with the unavailability of some or all of the planned energy and capacity from the Muskrat Falls. The Board is satisfied that this stated interest may fall within the issues to be addressed in this investigation and hearing and that Grand Riverkeeper Labrador, Inc. should be granted intervenor status on this basis.

Prima facie, there is a contradiction between those two quotes, as the former seeks to exclude virtually all risks related to the Muskrat Falls' development, while the latter allows for the consideration of some of those risks. The interpretation maxim *generalia specialibus non derogant* may be of help in alleviating this apparent contradiction. Indeed, this maxim states that in legal interpretation, the provisions of a general statute must yield to those of a special one. Although not faced with the interpretation of two different statutes, we are faced with the interpretation of two statements of an order that carries important legal consequences. The passage quoted by Hydro, that "the issues in the matter should not be extended to the construction, legal, contractual and physical

[16] Robert MacAulay and James Sprague, *Hearings Before Administrative Tribunals*, looseleaf (Toronto: Carswell, 2012) at page 17-6.42

Prunelle Thibault-Bédard, Avocate Inc.
2267, rue Aylwin
Montréal, QC, H1W 3C7
514-792-6138
prunelle@droitenvironnement.com

risks of the Muskrat Fall's development", is very broad and should not be interpreted without regard for more specific statements made by the Board in the very same order, such as the one quoted above, which recognizes the relevance of the "various risks associated with the unavailability of some or all of the planned energy and capacity from the Muskrat Falls".

The two statements must be interpreted in a way that allows for the more specific one to produce its full effects. In this context, GRK submits that the correct interpretation of P.U. 15 (2014), and thus of the scope of the inquiry as it applies to GRK's intervention, is that risks associated with the unavailability of some or all of the planned energy and capacity from the Muskrat Falls are relevant to this investigation, evenif they also constitute construction, legal, contractual and physical risks of the Muskrat Fall's development. In other words, the Board is not to be concerned with the various risks of the Muskrat Falls development, except insofar as such risks are associated with the unavailability of some or all of the planned energy and capacity from the Muskrat Falls, in a way that would affect the adequacy and reliability of the Island Interconnected system.

This interpretation does not only allow for a coherent reading of P.U. 15 (2014) as a whole, it also respects the scope of the investigation and hearing issues established in P.U. 3 (2014), where the Board stated:

> WHEREAS the Board has considered the lists of issues, submissions, written comments and presentations and has determined that it is appropriate and necessary to address how Hydro and Newfoundland Power will ensure adequacy and reliability on the Island Interconnected system over the short, medium and long-term, which will require analysis of the adequacy and reliability of the system after the commissioning of the Muskrat Falls generating facility and the Labrador Island Link; (emphasis added)

As noted in Hydro's letter, this inquiry relies upon section 7 of the *Electric Power Control Act, 1994,* S.N.L. 1994, c. E-5.1:

> (3) Where the public utilities board believes that producers and retailers collectively or individually will not be able to satisfy, in accordance with the power policy set out in section 3, the current or anticipated power demands of consumers in the province, the public utilities board may further inquire into the matter. (emphasis added)

In Schedule A to P.U. 3(2014), the Board set out the Investigation and Hearing Issues, which included:

Prunelle Thibault-Bédard, Avocate Inc.
2267, rue Aylwin
Montréal, QC, H1W 3C7
514-792-6138
prunelle@droitenvironnement.com

THIBAULT-BÉDARD
AVOCATE

> **2. Evaluation of Island Interconnected system adequacy and reliability up to and after the interconnection with the Muskrat Falls generating facility** (…)
>
> - Back-up generation and/or alternative supply requirements after interconnection
> - Other system planning, capital and operational issues which may impact adequacy and reliability before and after interconnection (emphasis added)

Reading these three sources together, it is clear that any foreseeable circumstances, including those of an operational nature, that would make producers unable to satisfy anticipated power demands, thereby calling into question the adequacy and reliability of the Island power system, are *a priori* relevant to the present investigation and inquiry. Excluding any and all risks that hold any connection to the Muskrat Falls development would prevent the Board from fully exercising its jurisdiction by obscuring risks and issues that affect the adequacy and reliability of the Island Interconnected System (IIS), and so are at the heart of this hearing and investigation.

There is no precise definition of relevant evidence, but it is generally understood as "evidence that is directly or indirectly related to a fact in dispute or discussion, and that allows for the progression of the inquiry; the evidence must also prove or make plausible the existence or inexistence of that fact."[17] (our translation) All three of the reports struck in P. U. 2(2017) are of this nature. The two Bernander reports[18] deal specifically with risks – indeed, with the very risks described in GRK's request for intervenor status, accepted by the Board in P.U. 15(2014). In its evidence, Hydro maintains that this risk is negligible, similar to that of all other hydroelectric infrastructure, because the principles of dam design are conservative.[19] GRK's expert evidence rebut that claim by maintaining that, on the contrary, due to the unique characteristics of the site and the inadequacy of Hydro's analysis thereof, the risks – both to the power supply and to human life – are in fact too substantial to be ignored. To be specific, Bernander's first report concluded:

> Thus a catastrophic landslide on the North Spur of the Muskrat Falls dam must still be treated as a possible, foreseeable event.[20]

---

[17] Yves Ouellette, *Des tribunaux administratifs an Canada, procédures et preuves*, Montréal, Éditions Thémis, 1997, p. 296.

[18] First report dated November 26, 2015, by Dr. S. Bernander entitled "Lower Churchill River Riverbank Stability Report" (First Bernander Report) and second report dated October 13, 2016, by Dr. S. Bernander entitled "Safety and Reliability of the Muskrat Falls Dam, in Light of the Engineering Report of 21 December 2015 by Nalcor/SNC Lavalin (Second Bernander Report).

[19] "The design principles for dam engineering design are sufficiently conservative that, consistent with all of Hydro's water retaining structures, the probability of an outage resulting from a dam failure to be used in a reliability study is negligible." GRK-NLH- 098, at p. 2.

[20] First Bernander Report, at p. 3.

Prunelle Thibault-Bédard, Avocate Inc.
2267, rue Aylwin
Montréal, QC, H1W 3C7
514-792-6138
prunelle@droitenvironnement.com

THIBAULT-BÉDARD
AVOCATE

And his second report concluded:

> [I]t is this Reviewer's assessment that safety factors based on this stress-strain model, including those offered in the [Nalcor] REPORT, are not well founded and cannot be accepted without further supporting evidence. The inevitable conclusion is that the safety and reliability of the Muskrat Falls dam have not been demonstrated.
>
> (…)
>
> Until and unless [these issues] are satisfactorily resolved, the reliability of the Muskrat Falls generating station in meeting the electrical needs of Newfoundland cannot be presumed.[21]

As neither of the witnesses has yet been heard or cross-examined, the Board is not in a position to appreciate the probative value of the evidence. It cannot lawfully decide by default in favour of one party by striking out the relevant evidence of another party. On that subject, Hydro makes the following comment:

> The GRK maintains that the Board committed an error in relying on "untested evidence", specifically Hydro's statement that that IIS reliability would not be impacted by a change in the timing of energy produced at Muskrat Falls. While the Board noted this statement by Hydro in its decision, it cannot be said to have relied on it as the basis of its decision. This assertion by Hydro can be questioned by the parties at any public hearing.[22] (references omitted)

Whether the Board relied or not on Hydro's statement as the basis of its decision is irrelevant, since in both cases, the result is the same: Hydro's position as to the risk of a failure at Muskrat Fall becomes the only position that is supported by evidence. To claim that GRK or any other party can adequately challenge that evidence without relying on evidence of their own is unrealistic.

Unless Hydro were to contend – and it has not – that the Island Interconnected system adequacy and reliability would be unaffected if the Muskrat Falls dam were to collapse, the risk identified by Dr. Bernander's evidence is relevant to the present investigation and hearing. The fact that to identify this risk, Dr. Bernander addressed engineering and construction issues associated with Nalcor's approach in relation to the North Spur is only accessory to its conclusions and does not affect their relevance.

[21] Second Bernander Report, at p. 1 and 2.
[22] Supra, note 6, at p. 6.

Prunelle Thibault-Bédard, Avocate Inc.
2267, rue Aylwin
Montréal, QC, H1W 3C7
514-792-6138
prunelle@droitenvironnement.com

As the reliability analyses presented by Hydro all presume the continued presence of the Muskrat Falls Generating Station, its total and permanent failure would obviously present grave challenges to the adequacy and reliability of the IIS.

Furthermore, in stating its decision to strike the Bernander reports, the Board misquoted – or modified without providing reasons – the investigation and hearing issues. As noted above, in P.U. 3(2014), it defined the hearing issues as including "**Evaluation of Island Interconnected system adequacy and reliability up to and after the interconnection with the Muskrat Falls generating facility".**

In P.U. 2(2017), however, its states that:

> Rather the Board must assess Hydro's management of the reliability and adequacy of the Island Interconnected system in advance of and upon interconnection with the Muskrat Falls generation facility.

Is the subject of the inquiry an "evaluation of Island Interconnected system adequacy and reliability", or is it an evaluation of "Hydro's management of the reliability and adequacy of the Island Interconnected system"? Hydro does not manage the Muskrat Falls Generating Station, so its failure – though it would inevitably and dramatically affect "Island Interconnected system adequacy and reliability" – might arguably not be relevant to an inquiry into "Hydro's management of the reliability and adequacy of the Island Interconnected system".

The GRK acknowledges that the Board is master of its own proceedings, and may amend the issue list in Order P.U. 3(2014) and so redefine the mandate it has given itself, but as stated by the Supreme Court of Canada in *Université du Québec à Trois-Rivières* c. *Larocque,* "the rule of autonomy in administrative procedure and evidence, widely accepted in administrative law, has never had the effect of limiting the obligation on administrative tribunals to observe the requirements of natural justice"[23], requirements that include that a decision be motivated. Thus, if the Board chooses to modify the list of Investigation and Hearing Issues it has set out, it must do so explicitly, and provide the reasons for so doing.

As to the Raphals Report, it differs in one important respect from the Bernander reports. While the Bernander reports address risk – something that *could* happen –, the Raphals report addresses fact: the consequences of something that *has happened* (the Quebec Superior Court declaratory judgment regarding the renewal of the Churchill Falls Power Contract).

[23] *Université du Québec à Trois-Rivières* c. *Larocque*, [1993] 1 R.C.S. 471.

Prunelle Thibault-Bédard, Avocate Inc.
2267, rue Aylwin
Montréal, QC, H1W 3C7
514-792-6138
prunelle@droitenvironnement.com

THIBAULT-BÉDARD
AVOCATE

While this judgment *might* be overturned on appeal, that remains a hypothetical. Prior to the Superior Court judgment being issued, the Board declined to order Hydro to respond to RFIs based on the then hypothetical scenario that such a judgment might be issued.[24] The same treatment should be awarded to the now hypothetical possibility that this judgment may eventually be overturned on appeal (and not subsequently restored by the Supreme Court), and the effects of the judgment as it currently stands should be taken on face value and considered by the Board in its investigation, as clearly relevant to its subject matter.

Indeed, the carefully referenced and reasoned report produced by Mr. Raphals demonstrates that the power available from the Muskrat Falls Generating Station to meet capacity needs of the IIS is, in fact, far lower than the value ascribed to it by Hydro, which This means that Hydro availability and reliability analysis is deeply and fundamentally flawed.

The fact that, in his expert report, Mr. Raphals did not explore the precise implications of his findings with respect to the validity of Hydro's availability and reliability analysis in no way reduces their relevance. As noted earlier, GRK intends to make that relationship explicit through its non-expert evidence, which will be prefiled according to the calendar to be established by the Board. In its comments, Hydro states that: "Subsequent "added context" provided by a party seeking to "clarify" an expert's conclusions does not make relevant a document that has been found to be irrelevant." This shows a lack of consideration for the role of intervenors. Non-expert evidence is not "added context", it is one of the ways in which intervenors assist the Board in conducting its mandate, by informing it of the implications of the expert evidence on the matter before it, in the light of the interests represented by the intervenor and acknowledged as relevant by the Board. GRK cannot be penalized for following the process established by the Board and fulfilling its role as intervenor.

On a related topic, in response to GRK's comment that it "intends to provide additional evidence during the Phase 2 hearings", Hydro submits that the Reports are "but a prelude to a possible flood of additional evidence", which is "liable to deflect the Board from the issues in this inquiry."

These allegations are entirely unfounded. In s. 15(2) of the Rules of Procedure set out in Appendix D to P.U. 3(2014), the Board indicated that direct evidence must be limited to matters set out in the witness' prefiled testimony. There is no obligation in Board procedures or in common law that an intervenor's testimony be limited to expert testimony. Indeed, given the expert's duty of neutrality, experts generally avoid pronouncing directly on the subject of an inquiry. It is precisely the role of the intervenor

[24] P.U. 12 (2016).

Prunelle Thibault-Bédard, Avocate Inc.
2267, rue Aylwin
Montréal, QC, H1W 3C7
514-792-6138
prunelle@droitenvironnement.com

THIBAULT-BÉDARD
AVOCATE

to use the expert evidence, through direct testimony and pleadings, to inform the Board as to the implications of the expert report for the matter before it.

Should GRK attempt to submit evidence that is not relevant to the present inquiry and investigation, we are confident that Hydro will object and receive a fair hearing from the Board. GRK respectfully submits that it has no interest or intention to do so, and that Hydro's unfounded allegation has no place in the matter presently before the Board.

Finally, GRK's claim to the relevance of its evidence is supported by the comments issued by the Consumer Advocate in relation to GRK's Motion to rescind or Amend. The Consumer Advocate wrote:

> The Consumer Advocate submits that, insofar as the Island's Interconnected System will be reliant on the supply of energy via Muskrat Falls, any identifiable risks of potential failures in the delivery of Muskrat Fall's energy supply should be generally considered by PUB in planning the island's energy requirement post-Muskrat.[25]

As noted above, the Bernander reports identify just such a "risk of potential failures in the delivery of Muskrat Falls' energy supply". The Raphals report goes further, and demonstrates a predictable and – in the absence of a hypothetical appeals court decision or a hypothetical negotiated settlement with Hydro-Québec, neither of which can be assumed to occur – inevitable shortfall of capacity. This points to the possibility of *all* of Hydro's analyses demonstrating adequate capacity and reliability for the IIS after interconnection being flawed, and deeply so. Thus, his report goes to the very heart of the present inquiry and investigation.

For the above-mentioned reasons, as well as the reasons stated in its Motion dated February 2nd, 2017, GRK respectfully asks the Board to rescind Order P.U. 2(2017) or, in the alternative, to amended it to suspend judgment until after hearing the witnesses' testimony.

Please accept our very best regards,

Prunelle Thibault-Bédard

[25] Letter dated February 13th, 2017, at p. 1.