



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Blockchain Labrador Corporation v. Board of
Commissioners of Public Utilities*, 2025 NLCA 35

Date: October 27, 2025

Docket Number: 202401H0002

BETWEEN:

BLOCKCHAIN LABRADOR CORPORATION

APPELLANT

AND:

BOARD OF COMMISSIONERS OF PUBLIC
UTILITIES

FIRST RESPONDENT

AND:

NEWFOUNDLAND AND LABRADOR HYDRO

SECOND RESPONDENT

Coram: F.P. O'Brien, K.J. O'Brien and G.L.C. Noel JJ.A.

Tribunal Appealed From: Newfoundland and Labrador Board of
Commissioners of Public Utilities
(No. P.U. 34(2023))

Appeal Heard: May 13, 2025

Judgment Rendered: October 27, 2025

Reasons for Judgment by: K.J. O'Brien, J.A.
Concurred in by: F.P. O'Brien and G.L.C. Noel JJ.A.

Counsel for the Appellant: Paul Dicks, K.C. and Megan Reynolds
Counsel for the First Respondent: Michael Collins
Counsel for the Second Respondent: Daniel Simmons

Authorities Cited:

CASES CITED: *Buckle v. Newfoundland and Labrador Board of Commissioners of Public Utilities*, 2022 NLCA 28; *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8; *City of St. John's v. St. John's International Airport Authority*, 2017 NLCA 21, leave to appeal to SCC refused, 37580 (27 March 2017); *Labrador City (Town) v. Newfoundland and Labrador Hydro Inc.*, 2004 NLCA 61; *Groenwelt v. Burwell* (1738), 91 E.R. 134, 1 Salk 144, *R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw*, [1951] EWCA Civ 1; *Re Toronto Newspaper Guild, Local 87, American Newspaper Guild (C.I.O.) and Globe Printing Company*, 1951 CanLII 145 (ON SC), aff'd [1953] 2 S.C.R. 18; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, [2021] 3 S.C.R. 107; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Smith v. The Appeal Commission*, 2023 MBCA 23; *Wongkingsri v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2022 ABQB 545; *Zarooben v. Workers' Compensation Board*, 2021 ABQB 232, aff'd 2022 ABCA 50; *Consumer Advocate v. Board of Commissioners of Public Utilities*, 2022 NLCA 39; *Consumer Advocate v. Board of Commissioners of Public Utilities*, 2021 NLCA 50; *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *R. v. Liverpool Corporation, ex parte Liverpool Taxi Feet Operators Association*, [1972] 2 QB 299; *Campbell v. Saskatchewan (Workers' Compensation Board)*, 2012 SKCA 56; *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, leave to appeal to SCC refused, 29390 (20 March 2003); *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633.

STATUTES CONSIDERED: *Public Utilities Act*, RSNL 1990, c. P-47, ss. 4.1, 99(1), 101; *Electrical Power Control Act*, 1994, SNL 1994, c. E-5.1, ss. 3, 4, 5.2; *Interpretation Act*, RSNL 1990, c. I-19, s. 16.

REGULATIONS CONSIDERED: *Board of Commissioners of Public Utilities Regulations, 1996*, NLR 39/96, s. 22.

RULES CONSIDERED: *Court of Appeal Rules*, NLR 38/16, r. 10(2).

K.J. O'Brien, J.A.:

[1] Blockchain Labrador Corporation (“Blockchain”) seeks leave to appeal and, if leave is granted, to appeal an order of the Board of Commissioners of Public Utilities (the “Board”) in which the Board approved Newfoundland and Labrador Hydro’s (“NL Hydro”) application to implement, amongst other things, a non-firm rate for customers on the Labrador Interconnected System (the “Application”).

[2] Appeals of the Board’s orders are limited to questions of jurisdiction or law and require leave of this Court. The Board has asked this Court to interpret “questions of jurisdiction” broadly so as to cover all potential grounds of judicial review of the Board’s orders.

OVERVIEW

[3] A basic understanding of firm and non-firm power is helpful to understand the Application and this decision. Simply put, firm power is electricity that is always available for the customer, except for on rare occasions such as scheduled maintenance or unforeseen power outages. Non-firm power is not guaranteed to always be available for the customer and, even when it is available, it is not as reliable as firm power because it may be subject to curtailment on very short notice. These are not official definitions.

[4] At the time of the Application, Blockchain operated a cryptocurrency mining data center in Wabush and was a NL Hydro customer on the Labrador Interconnected System. Although Blockchain had applied to NL Hydro for 20 megawatts (MW) of firm power, NL Hydro had advised that there was inadequate firm capacity available to meet Blockchain’s request. In August 2018, the Board approved a temporary service agreement whereby NL Hydro would provide Blockchain 7.75 MW of power under certain conditions and on a temporary basis. The service was provided on a temporary basis because the power had already been committed to a mine, but the mining operations were not yet in full production, so the power was not yet needed.

[5] After NL Hydro filed the Application in September 2022, the temporary service agreement was amended and restated. The amended temporary service agreement terminated at the earliest of several dates, one of which was the effective date of the Board's Order determining the Application.

[6] After NL Hydro filed the Application, but before the Board decided it, the Lieutenant-Governor in Council made an Order in Council which exempted NL Hydro from supplying electrical energy on a firm basis to customers involved in cryptocurrency mining, subject to certain conditions (OC 2022-266). OC 2022-266 is a regulation made under the authority of section 4.1 of the *Public Utilities Act*, RSNL 1990, c. P-47 (the "PUA") and section 5.2 of the *Electrical Power Control Act, 1994*, SNL 1994, c. E-5.1 (the "EPCA").

[7] Following a process in which both NL Hydro and Blockchain participated, the Board substantially allowed the Application by issuing order P.U. 34(2023) (the "Order"). The Order approved a non-firm rate for customers on the Labrador Interconnected System. The Order sets out the Board's reasons for deciding as it did.

[8] If granted leave, Blockchain appeals the Order on the following grounds:

1. The Board denied it procedural fairness and natural justice by deciding the Application without conducting an oral hearing.
2. The Board erred by failing to consider and apply section 4 of the EPCA, which requires the Board to implement the power policy set out in section 3 of the EPCA.
3. The Board erred in interpreting OC 2022-266 as exempting NL Hydro from supplying Blockchain with electrical energy on a firm basis.
4. The Board erred by finding that 20 MW of power available on the Labrador Interconnected System in winter was properly considered non-firm power, subject to the new non-firm rate.
5. The Board erred by failing to decide if a contract existed between NL Hydro and Blockchain, pursuant to which NL Hydro was required to supply Blockchain with up to 20 MW of power when it became available.

[9] For the reasons that follow, I would not grant leave to appeal to Blockchain with respect to issues 4 and 5 because they are not questions of jurisdiction or law and there is no reasonable prospect of success. In doing so, I would reject the Board's request for an expanded interpretation of "questions of jurisdiction" under the PUA. For the remaining issues, I would grant leave to appeal but I would dismiss Blockchain's appeal.

LEAVE TO APPEAL

[10] Subsection 99(1) of the PUA gives a limited right of appeal of the Board's orders:

99 (1) An appeal lies to the Court of Appeal from an order of the board upon a question as to its jurisdiction or upon a question of law, but the appeal can be taken only by leave of a judge of the court, given upon an application presented within 15 days after the making of the decision and upon the terms that the judge may determine.

[11] As this Court noted in *Buckle v. Newfoundland and Labrador Board of Commissioners of Public Utilities*, 2022 NLCA 28, at paragraph 37, the leave requirement of subsection 99(1) is a substantive hurdle. Blockchain must establish for each issue raised that there is a reasonably arguable case for: (1) the conclusion that an issue of law or jurisdiction is involved, and (2) success on the merits (*Buckle*, at para. 39).

The Board argues for an expanded interpretation of "questions of jurisdiction"

[12] Before this Court, the Board argues for a broad interpretation of "questions of jurisdiction" in subsection 99(1). Although the Board submits that several of Blockchain's grounds of appeal do not raise "questions of law or jurisdiction" on a conventional interpretation, the Board urges this Court to consider them anyway.

[13] The Board's argument flows from a recent decision of the Supreme Court of Canada, *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8. In *Yatar*, the Supreme Court considered whether a tribunal decision could be judicially reviewed for questions of mixed fact and law when there was a statutory right of appeal limited to questions of law. The Court held that the limited statutory right of appeal on questions of law did not preclude judicial review on other grounds.

[14] The Board submits that allowing its orders to be reviewed both by judicial review and via statutory appeal frustrates the statutory purpose of resolving appeals promptly, noting that subsection 99(1) of the PUA requires an application for leave be taken within 15 days. The Board further submits that allowing both judicial review and statutory appeal is duplicative, wastes judicial resources, and risks giving appellants “two bites at the cherry”.

[15] The Board acknowledges that the conventional interpretation of “questions of jurisdiction” does not include questions of policy, fact, or mixed fact and law. Recent decisions of this Court have interpreted the term narrowly. For example, in *City of St. John’s v. St. John’s International Airport Authority*, 2017 NLCA 21, leave to appeal to SCC refused, 37580 (27 March 2017), this Court held that the same expression in different legislation did not include factual determinations (at para. 35). And in *Labrador City (Town) v. Newfoundland and Labrador Hydro Inc.*, 2004 NLCA 61, at paragraph 10, this Court held that the weight to be accorded to expert evidence is not a question of law or jurisdiction pursuant to subsection 99(1) of the PUA.

[16] *Buckle* is another example. In *Buckle*, this Court interpreted subsection 99(1) narrowly in holding that the Board’s refusal to state a case to this Court under section 101 on the issue of whether a corporation was a “public utility” within the meaning of the PUA was not appealable under subsection 99(1). In *obiter dicta* the Court noted that if the Board decided that an entity was not a “public utility” in response to a properly submitted application requesting it to exercise its regulatory power, then that decision would be subject to statutory appeal under subsection 99(1) as a question of law or jurisdiction.

[17] Despite the conventional, modern interpretation, the Board submits that historically “jurisdiction” was broadly interpreted and formed the conceptual basis for all judicial oversight of inferior courts, citing *Groenwelt v. Burwell* (1738), 91 E.R. 134, 1 Salk 144; *R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw*, [1951] EWCA Civ 1, at 6-10; *Re Toronto Newspaper Guild, Local 87, American Newspaper Guild (C.I.O.)*; and *Globe Printing Company*, [1951] CanLII 145 (ON SC), aff’d [1953] 2 S.C.R. 18. While the Board acknowledges that these cases have been overtaken by more modern approaches to judicial review, the Board asks this Court to revive the broader, historical approach to “jurisdiction” to essentially mitigate the effects of *Yatar*. In short, the Board invites us to interpret “questions of jurisdiction” so broadly that it would encompass all potential grounds

of judicial review, leaving statutory appeal as the only avenue for review of the Board's orders.

[18] I would decline the Board's invitation. Before explaining why, however, I would acknowledge that the coexistence of judicial review and statutory appeal risks some duplication of judicial effort. This is particularly so when the statutory right of appeal is directly to this Court and judicial review is first done by the Supreme Court of Newfoundland and Labrador. I say "first done", because parties have the right to appeal a judicial review decision to this Court, and, if an appeal is taken, this Court will conduct the judicial review anew (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 46-47; and *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, [2021] 3 S.C.R. 107, at para. 10).

[19] However, the co-existence of judicial review and limited statutory appeal rights was exactly what was at issue in *Yatar*. Referring to its holding in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, that the legislative intent to restrict statutory rights of appeal does not, on its own, affect the availability of judicial review, the Court wrote in *Yatar*:

[48] This Court's precedent contemplates a person pursuing both a statutory appeal on questions of law and judicial review on questions of fact and mixed fact and law. In such an instance, as set out in *Vavilov*, at para. 37, the questions of law being appealed would be subject to review on a standard of correctness (see also *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235), and questions of fact and mixed fact and law would be subject to review on a standard of reasonableness on judicial review (see *Vavilov*).

[20] Although the statutory appeal provision at issue in *Yatar* only limited appeals to "questions of law", the Court's reasoning applies equally to appeal provisions that are limited to questions of law and jurisdiction. Both are reviewed on a correctness standard. At paragraph 44 of *Yatar*, the Court noted that other courts had determined that a statutory right of appeal does not alter the availability of judicial review, citing *Smith v. The Appeal Commission*, 2023 MBCA 23; *Wongkingsri v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2022 ABQB 545; *Zarooben v. Workers' Compensation Board*, 2021 ABQB 232, aff'd 2022 ABCA 50. All these cases involved an appeal right for questions of law and jurisdiction, not just law.

[21] Similar arguments to those made by the Board, were raised in *Yatar*. The Court responded to them as follows:

[65] It has been argued by both respondents that judicial review was not appropriate in the circumstances, as the legislative intent was to “streamline dispute resolution and reduce costs” (R.F., TD Insurance, at para. 61). Respectfully, I do not agree. Judicial economy is a legitimate concern. However, the countervailing consideration is to ensure that those whose interests are being decided by a statutory delegate have a meaningful and adequate means to challenge decisions that they consider to be unreasonable having regard to their substance and justification, or were taken in a way that was procedurally unfair.

[22] Notably, the Court did not suggest interpreting limited statutory rights of appeals so broadly as to be unlimited. If the legislature wishes to encompass all types of errors in the right to appeal, it can choose to do so (*Yatar*, at para. 60). Until such time, the subsection 99(1) appeal right remains limited.

[23] Using the conventional interpretation of “questions of jurisdiction”, I will assess leave to appeal for each issue raised by Blockchain in turn.

1. The Board denied it procedural fairness and natural justice by deciding the Application without conducting an oral hearing.

[24] I would grant leave on this issue. Questions of procedural fairness and natural justice are questions of law or jurisdiction (*Consumer Advocate v. Board of Commissioners of Public Utilities*, 2022 NLCA 39, at para. 29; *Consumer Advocate v. Board of Commissioners of Public Utilities*, 2021 NLCA 50, at para. 6 (“*Consumer Advocate 2021*”); *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, at para. 19). Further, as will be discussed below, the procedure initially anticipated by the Board was not ultimately followed, and I am thus satisfied that there is a reasonably arguable case for success on the merits.

2. The Board erred by failing to consider and apply section 4 of the EPCA, which requires the Board to implement the power policy set out in section 3 of the EPCA.

3. The Board erred in interpreting OC 2022-266 as exempting NL Hydro from supplying Blockchain with electrical energy on a firm basis.

[25] These two issues are related, and to the extent that they engage extricable questions of law, I would grant leave to appeal for both.

[26] The interpretation of OC 2022-266, which is a regulation, is a question of law. Given that Blockchain argues that the Board failed to properly interpret other

legislation in interpreting OC 2022-266, there may be further extricable questions of law. For these extricable legal questions, I am satisfied that there is a reasonably arguable case for success on the merits.

[27] However, to the extent that Blockchain raises questions of mixed fact and law within these issues, I would not grant leave. For example, the Board's application of section 4 of the EPCA to the Application generally, is a question of mixed fact and law for which I would not grant leave. Blockchain does not allege any error in the Board's interpretation of section 4, but only in how it was applied to the facts of the Application.

4. The Board erred by finding that 20 MW of power available on the Labrador Interconnected System in winter was properly considered non-firm power, subject to the new non-firm rate.

[28] I would not grant leave to appeal for this issue. The Board's finding that the power in question is non-firm power is a factual finding made by the Board relying on evidence from NL Hydro. The Board did not apply any law in coming to this finding, which was squarely within its jurisdictional competence.

5. The Board erred by failing to decide if a contract existed between NL Hydro and Blockchain, pursuant to which NL Hydro was required to supply Blockchain with up to 20 MW of power when it became available.

[29] I would not grant leave to appeal for this issue. Some background is necessary to explain why.

[30] In its written submission to the Board, Blockchain asserted that the Application was contrary to contractual undertakings that NL Hydro had made to Blockchain. Blockchain submitted that in the spring of 2018, over four years before the Application was filed, NL Hydro had assured it that its request for 20 MW of power would be fulfilled once power was available and another customer's request for 1.25 MW of power, in the queue ahead of Blockchain's, was fulfilled. Based on these assurances, Blockchain asserted that it had made substantial capital investments. Blockchain further submitted that 20 MW of firm power was available and that, consequently, it should be accorded to Blockchain at the existing industrial rate, not at the non-firm rate subject of the Application.

[31] As a result of its finding that the 20 MW at issue was “non-firm” power and that there was no operationally viable firm capacity available in Labrador West, the Board did not accept that Blockchain should be accorded 20 MW of power (Order, at 11, lines 6-9). The Board wrote further that it made “no comment with respect to any contractual remedies that [Blockchain] may have in relation to contractual undertakings and representations which may have been made by [NL Hydro]” (Order at 11, lines 9-11).

[32] Although Blockchain suggests before this Court that the absence of an oral hearing prevented it from presenting evidence about NL Hydro’s contractual commitments, that is not the true thrust of this issue. The Board did not reject Blockchain’s claim to the 20 MW of power because of a lack of evidence about NL Hydro’s commitments. It rejected it because it found that there was no firm power available. As already noted, this was a factual finding that is not subject to appeal. Moreover, the Board was tasked with deciding the Application and it did not need to resolve Blockchain’s contractual dispute with NL Hydro to do so. Blockchain has not established any extricable question of law or any question of jurisdiction for this issue nor any reasonable likelihood of success.

[33] I will now consider the issues for which I would grant leave on the merits. As discussed above, the standard of review is correctness.

DID THE BOARD DENY BLOCKCHAIN PROCEDURAL FAIRNESS AND NATURAL JUSTICE BY DECIDING THE APPLICATION WITHOUT CONDUCTING AN ORAL HEARING?

[34] The PUA’s regulations permit, but do not require, an oral hearing (*Board of Commissioners of Public Utilities Regulations, 1996*, NLR 39/96, s. 22). Whether or not to hold an oral hearing is a matter within the Board’s discretion, subject only to the requirement that the Board meets its duty of procedural fairness to the parties (*Consumer Advocate 2021*, at para. 14). The scope or content of the duty is variable and depends on the context of the case.

[35] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraphs 23 to 28, the Supreme Court set out a non-exhaustive list of considerations for assessing the content of the duty of procedural fairness: 1. the nature of the decision made and the process followed in making it; 2. the statutory scheme under which the decision was made; 3. the importance of the decision to those affected; 4. the legitimate expectation of the party challenging the decision;

and 5. the procedural choices made by the decision maker, especially where the governing legislation allows for discretion on the part of the decision maker as to what procedures it will use.

Blockchain's arguments

[36] Blockchain concedes that the duty of procedural fairness does not generally require the Board to hold an oral hearing before deciding a matter such as the Application. However, Blockchain submits that if the Board intended not to have a hearing, it was obliged to advise Blockchain of that fact. Blockchain submits the Board did not communicate that there would not be an oral hearing and, further, communicated that there would be a technical conference, which was never held. Blockchain submits this made the process procedurally unfair. Blockchain states that it had a legitimate expectation, based on communications from the Board, that there would be an oral hearing, or at least that the process had not reached its conclusion and that a technical conference would be held. Blockchain also highlights the significance of the Order to its business. Considering the factors enumerated in *Baker*, Blockchain submits that it was entitled to a high degree of procedural fairness before the Board.

Chronology of events

[37] A chronological review of significant events will help explain Blockchain's position.

[38] In September 2022, NL Hydro filed the Application and in early October the Board published notice of it. The notice did not mention an oral hearing but explained that anyone could participate by becoming an intervenor, by making a presentation, or by submitting a letter of comment.

[39] Several parties intervened in the Application, including Blockchain. Blockchain's Notice of Intention to Participate, dated October 19, explained that Blockchain had initially applied to NL Hydro for 20 MW of firm power in 2017. The Notice also set out NL's Hydro's assurances to Blockchain in the Spring of 2018 that the 20 MW would be provided when it was available, Blockchain's position that there was currently 20 MW of firm power available, and Blockchain's request to the Board that it be granted the 20 MW of firm power "as was promised". The Notice of Intention to Participate indicated that Blockchain proposed to "show in evidence" matters such as the costs it had incurred in anticipation of the firm power and that it

would call and cross-examine witnesses at “any hearing on the Application that may be ordered by the Board”.

[40] On October 27, 2022, the Board sent an email to the parties stating that the “first step” in the review of the Application would be an introductory presentation by NL Hydro to the intervenors. The email also detailed the “initial schedule”, setting dates for: NL Hydro’s presentation, the filing of requests for information (“RFIs”), and the filing of NL Hydro’s Responses to RFIs. The email closed with, “Further process will be determined and scheduled following the completion of the request for information process. If you have any questions, you can contact [the email author] or the Board’s legal counsel, Jacqueline Glynn.”

[41] The RFI process is a written process regularly used by the Board to give parties an opportunity to pose questions to or seek additional information from NL Hydro or any other party.

[42] NL Hydro’s presentation on the Application took place on November 30, approximately 2 weeks later than anticipated in the initial schedule.

[43] On December 2, the Board wrote the parties to advise of the schedule for filing RFIs and responses to RFIs. The letter concluded, “Further process will be determined and scheduled following the completion of the request for information process”.

[44] On March 1, 2023, following review of the responses to the RFIs, the Board wrote the parties to advise that it required NL Hydro to clarify its position on several matters. The letter concluded, “Following clarification from Hydro on these issues, the Board will set a date for a technical conference. Each Party will be required to file a list of issues to be addressed by Hydro at the technical conference.”

[45] On May 1, the Board wrote the parties again. This letter is important and so I will reproduce its full content:

In previous correspondence, dated March 1, 2023, the Board indicated that it would set a date for a technical conference following clarification from Hydro on its position on certain issues. Due to scheduling issues, a technical conference could not be convened for several weeks. The Board has now determined that a second round of requests for information (“RFIs”) will be the next procedural step in this matter. The Board requests that any further RFIs be filed by Thursday, May 11, 2023, with responses to be filed by Thursday, May 25, 2023.

If you have any questions, please do not hesitate to contact the Board’s Legal Counsel, Ms. Jacqui Glynn, by email, [...], or by telephone [...].

[46] The second round of RFIs proceeded and the next communication to the parties from the Board was on July 27. Again, I will reproduce its entire content:

The Board has set the following schedule for filing of comments regarding above-noted application:

<u>Filing</u>	<u>Date</u>
Comments from Parties	Friday, August 18, 2023
Hydro’s Reply	Friday, August 25, 2023

If you have any questions, please do not hesitate to contact the Board’s Legal Counsel, Ms. Jacqui Glynn, by email, [...], or by telephone [...].

[47] Blockchain submitted written comments on August 18, in which it opposed the Application. As already noted, in the comments, Blockchain reviewed the spring 2018 emails and asserted that the Application was contrary to NL Hydro’s contractual commitments to Blockchain. It noted that it had made substantial capital investments based on NL Hydro’s commitment to it for 20 MW of power. It submitted that the Application unfairly favoured the mining industry over others. Blockchain also criticized the proposed rate structure and asserted that the Application ran contrary to NL Hydro’s legislated mandate as set out in subsections 3 (a) and (b) of the EPCA. Blockchain addressed OC 2022-266 and how it applied to Blockchain. The comments concluded, “Thank you for the opportunity to provide these comments. If there is anything further you require, please let us know.”

[48] NL Hydro filed its Reply as scheduled. Nothing further happened until the Order was issued on December 19, 2023.

The arguments of NL Hydro and the Board

[49] NL Hydro highlights that the statutory scheme gives the Board discretion as to whether to hold a hearing. It notes that the Board’s process is very different from the processes followed by courts. For example, the Board is permitted to make its own inquiries, receive unsworn evidence, and proceed without an oral hearing. NL Hydro submits that Blockchain overstates the importance of the Order to it by

focusing on the amount of power it says should be available to it, rather than on the rate for non-firm power, which was the subject of the Application. NL Hydro states that there was no legitimate basis for Blockchain to expect that the Board would hold an oral hearing. It says that Blockchain was due, at most, a moderate degree of procedural fairness.

[50] The Board similarly submits that Blockchain was due a moderate degree of procedural fairness. It submits that Blockchain's reasonable expectations ought to have been informed by the Board's indication that this was a routine or compliance application, for which presumably hearings are not normally held. The Board also notes that Blockchain was represented by experienced counsel, the proceedings continued for over a year, and at no time did Blockchain request an oral hearing, the opportunity to provide evidence, or any other additional procedures. The Board submits that its counsel was available for questions, as indicated in its letters, but that none were asked. Ultimately, the Board submits that Blockchain was treated fairly and participated significantly in the proceedings by filing over 100 RFIs and comprehensive written comments.

Analysis

[51] Had it not been for the Board's March 1, 2023 letter, which anticipated a technical conference, there would be no question that the Board's procedural choice not to hold an oral hearing would be upheld as fair. The statutory scheme gives the Board broad discretion as to the choice of procedure and the Board has significant expertise in the regulation of utilities and in evaluating applications of this nature. In these circumstances, considerable weight must be given to the Board's procedural choices. As noted in *Baker*:

[27] ... [T]he analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, *supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, *per* Gonthier J.

[52] Although the Order was important to Blockchain and its business, the Application was not focused on Blockchain's right to electrical power. The

Application was primarily to set the non-firm power rate in Labrador, so Blockchain was no more affected than other potential purchasers of that power.

[53] What is really at issue is whether the Board's communications created a legitimate expectation for Blockchain that there would be an oral hearing, such that the chosen procedure, which would otherwise have been fair, was rendered unfair. Ultimately, I am not persuaded that the procedure was rendered unfair, and I will explain why.

[54] From the outset, Blockchain understood that an oral hearing was not mandatory and was within the Board's discretion. In its Notice of Intention to Participate Blockchain referenced "any hearing on the Application that may be ordered by the Board".

[55] Early communications from the Board in October and December 2022 were clear that the procedure would not be decided in advance but would "be determined and scheduled following the completion of the request for information process". At no time did the Board state that there would be an oral hearing or suggest that there might be an oral hearing.

[56] Following the Board's March 1, 2023 letter, Blockchain would have legitimately expected that there would be a technical conference. But a technical conference is not an oral hearing, and the March 1 letter made no mention of an oral hearing.

[57] The parties take different views of the Board's May 1 letter. Blockchain states that its legitimate expectation that there would be a technical conference was not affected by the May 1 letter. NL Hydro and the Board state that Blockchain's legitimate expectation should have changed because the letter indicated that the technical conference was being replaced by a second round of RFIs. In my view, the letter is ambiguous.

[58] Certainly, the Board should not have sent an ambiguous letter. It should have taken more care to clearly communicate that it intended to substitute the technical conference with a second round of RFIs. However, I would not find that the Board's ambiguous communication about the technical conference is sufficient to establish a breach of procedural fairness for a failure to hold an oral hearing.

[59] First, the ambiguity of the May 1 letter was mitigated by the Board's July 27 letter, setting the schedule for filing comments on the Application. One would expect that comments would be sought only after all relevant information regarding the Application had been shared and explored. Moreover, unlike earlier letters, the July 27 letter did not mention any further procedural steps being anticipated or scheduled.

[60] Additionally, the Board's communications all indicated that its lawyer was available for questions. If Blockchain still expected a technical conference following the May 1 letter, upon receipt of the July 27 letter it should reasonably have questioned that expectation. It need only have called or emailed the Board's lawyer to get clarification. Yet it did not. Instead, it submitted comprehensive written comments that, on their face, appeared to fully address Blockchain's concerns with the Application. Nowhere in its comments did Blockchain state, or even suggest, that it still required more information from NL Hydro, that it expected a technical conference, or that it had evidence that it wished to present to the Board. Upon receipt of Blockchain's comments, the Board would not have reasonably known that Blockchain wanted to be heard further.

[61] This is not a case in which the Board promised an oral hearing and then failed to act upon it. Nor is it a case in which the Board proceeded to a final decision, knowing that one of the parties wanted to be heard further. This distinguishes it from cases such as *R. v. Liverpool Corporation, ex parte Liverpool Taxi Feet Operators Association*, [1972] 2 QB 299, and *Campbell v. Saskatchewan (Workers' Compensation Board)*, 2012 SKCA 56.

[62] For the doctrine of legitimate expectation to arise, the conduct of the decision maker must be "clear, unambiguous and unqualified". In *Agraira*, the Supreme Court of Canada wrote:

95 The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:

The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or

conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified. [Emphasis added.]

(D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §7:1710; see also *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, 2001 SCC 41, [2001] 2 S.C.R. 281 (S.C.C.), at para. 29; *Mavi v. Canada (Attorney General)*, 2011 SCC 30, [2011] 2 S.C.R. 504 (S.C.C.), at para. 68.)

96 In *Mavi*, Binnie J. recently explained what is meant by "clear, unambiguous and unqualified" representations by drawing an analogy with the law of contract (at para. 69):

Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.

[63] This is a case in which the Board was not as clear as it should have been about its decision to substitute an anticipated technical conference with a second round of RFIs. However, there was no "clear, unambiguous and unqualified" representation by the Board that there would be an oral hearing or any further opportunity for Blockchain to be heard following submission of its comments on the Application.

[64] The purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision maker (*Baker*, at para. 22). Blockchain was an experienced and sophisticated party before the Board. Its participation was comprehensive and meaningful. Blockchain knew from the beginning that there may not be an oral hearing, and it did not ask for one. The Board did not promise or even imply that there would be an oral hearing. The procedural choices the Board made were within its discretion to make.

[65] I would not find any breach of procedural fairness in these circumstances.

DID THE BOARD ERR BY FAILING TO CONSIDER AND APPLY SECTION 4 OF THE EPCA, WHICH REQUIRES THE BOARD TO

IMPLEMENT THE POWER POLICY SET OUT IN SECTION 3 OF THE EPCA?

DID THE BOARD ERR IN INTERPRETING OC 2022-266 AS EXEMPTING NL HYDRO FROM SUPPLYING BLOCKCHAIN WITH ELECTRICAL ENERGY ON A FIRM BASIS?

[66] I will analyze these issues together. It is helpful to begin with OC 2022-266, which reads in full:

Under the authority of section 4.1 of the Public Utilities Act and section 5.2 of the Electrical Power Control Act, 1994, the Lieutenant-Governor in Council hereby exempts Newfoundland and Labrador Hydro from sections 54 and 55 of the Public Utilities Act and section 3 of the Electrical Power Control Act, 1994, and its statutory obligation to supply electrical energy, on a firm basis only, to any applicant that is involved in computing or data processing load related to cryptocurrency mining, such as Bitcoin mining, blockchain processing, proof of work crypto mining, or other cryptographic uses applied to blockchains, subject to the following:

a) if energy and capacity become available that is surplus to Newfoundland and Labrador Hydro's forecast reliability and resource adequacy requirements and sufficient to provide service to the customers defined above, such customers can be supplied temporary firm service, on the condition that the provision of such service would not require new generation infrastructure in order to maintain system reliability; and

b) the exemption shall not apply to cryptocurrency mining applicants who were approved for and receiving service as a cryptocurrency mining customer at the time of the issuance of this Order in Council, as long as they continue to receive that service, and that any changes to such a customer's service, including an increase in connected load, would result in the customer being subject to the exemption.

[67] OC 2022-266 references sections 54 and 55 of the PUA. The details of those sections are not relevant to this appeal. Briefly stated, section 54 sets out when a public utility has a duty to supply electrical energy to premises and section 55 sets out when the Board may order a public utility to supply electrical energy to premises.

[68] OC 2022-266 references section 3 of the EPCA, but not section 4. Blockchain submits that the Board erred by failing to consider and apply section 4 of the EPCA. Nothing turns on this discrepancy because the two sections are inextricably linked. Section 3 sets out the Province's power policy. Section 4 requires the Board to

implement the power policy declared in section 3 in carrying out its duties and exercising its powers under the PUA.

[69] The Board considered OC 2022-266 for two purposes in the Order.

[70] The first was in response to Blockchain's submission that NL Hydro's proposal in the Application ran contrary to its legislated mandate, in particular EPCA subsection 3(a)(i) (that rates be reasonable and not discriminatory), subsection 3(a)(v) (that rates promote the development of industrial activity in Labrador), and subsection 3(b) (that power sources and facilities be managed and operated in a manner that allows open, non-discriminatory and non-preferential access). The Board rejected this submission (Order at 11, lines 36-39):

The Board is satisfied that the Application requests are not contrary to Hydro's legislated mandate given that OC2022-266 specifically exempts Hydro from section 3 of the EPCA, sections 54 and 55 of the [PUA], and its statutory obligation to supply electrical energy on a firm basis to cryptocurrency customers.

[71] Second, the Board considered OC 2022-266 in relation to Blockchain's submission that it was "an existing cryptocurrency mining customer" and thus entitled under OC 2022-266 to continue to receive 7.75 MW of power. The Board responded as follows (Order at 12, lines 7-21):

The Board does not accept that OC2022-266 entitles [Blockchain] to continue to receive its current 7.75 MW of power after the non-firm rates become effective. OC2022-266 exempts Hydro from its statutory obligation to supply electrical energy on a firm basis to cryptocurrency customers subject to two conditions. The first condition relates to circumstances where there is energy and capacity surplus to Hydro's forecast requirements which has become available which Hydro can provide on a temporary firm basis. The Board has accepted that the 20 MW of power projected to be available in the winter in Labrador West is properly considered non-firm power and as a result there is no surplus energy and capacity for Hydro to supply on a temporary firm basis. The second condition relates to existing customers. While [Blockchain] was an existing customer when the Order in Council was issued, upon the effective date of the non-firm rates its service agreement with Hydro will expire. This will result in a change in [Blockchain's] service and it will no longer be a customer of Hydro. As a result OC2022-266 will exempt Hydro from its obligation to provide firm service to [Blockchain]. The Board is satisfied that upon the effective date of the non-firm rates Hydro is exempted from its statutory obligation to supply electric energy to [Blockchain] on a firm basis.

[72] All legislation must be read in its entire context and in its grammatical and ordinary sense, harmoniously with the statutory scheme and object, and the intention of the legislators. Additionally, legislation must be considered remedial, and given the liberal construction and interpretation that best ensures the attainment of its objects according to its true meaning (*Interpretation Act*, RSNL 1990, c. I-19, s. 16; and *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, leave to appeal to SCC refused, 29390 (20 March 2003)). These rules of interpretation apply to statutes and regulations.

[73] OC 2022-266 represents a policy choice of government. Its language is clear and unambiguous. The government chose to exempt NL Hydro from its statutory obligations under section 3 of the EPCA and sections 54 and 55 of the PUA in respect of the supply of firm power to cryptocurrency customers, unless one of the two exceptions applies.

[74] The first exception, related to temporary firm service, is not applicable in this case because the Board found that there was no firm power available. Blockchain does not allege that the Board erred in interpreting the first exception of OC 2022-266, but rather that it erred in finding that there was no firm power. As already stated, this is a factual finding and not subject to appeal. Therefore, Blockchain can only succeed in its argument if the Board erred in interpreting the second exception.

[75] The second exception is for cryptocurrency mining applicants who were approved for and receiving service as a cryptocurrency mining customer at the time OC 2022-266 was issued. There is no doubt that Blockchain met this requirement when OC 2022-266 was issued on November 10, 2022 because the temporary service agreement was in place at that time.

[76] However, in accordance with the clear and ordinary language of OC 2022-266, the exception only applied to Blockchain for as long as it continued to receive that service, without any changes. If at any point Blockchain's service changed, then the exception no longer applied and NL Hydro was exempt from its statutory obligations to supply it firm power.

[77] That is what OC 2022-266 says and that is how the Board interpreted it. The Board found that the amended temporary service agreement expired upon the Board deciding the Application, and that the expiry was a change in Blockchain's service that would result in the second exception of OC 2022-266 no longer applying to Blockchain. In coming to this conclusion, the Board interpreted the termination

clause of the amended temporary service agreement, which stated that the agreement “shall be deemed to end” at the earliest of several dates, one of which was the effective date of the Board’s Order determining the Application.

[78] The Board’s interpretation of the temporary service agreement involves questions of mixed fact and law that are not subject to appeal (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 50). However, to the extent that the Board’s conclusion rested on an interpretation of OC 2022-266, the Board made no error. The Board interpreted OC 2022-266 by reading it in context, in its grammatical and ordinary sense, and in accordance with the government’s policy choice. I would thus dismiss this ground of appeal.

DISPOSITION AND COSTS

[79] For the foregoing reasons, I would grant leave to appeal in part but would dismiss the appeal.

[80] I would order that Blockchain pay party and party costs to NL Hydro, based on column 3.

[81] I would not order costs in favour of the Board. As the administrative tribunal whose decision was under appeal, the Board’s participation in the appeal was not necessary. The Board chose to participate and was permitted to by the Court (*Court of Appeal Rules*, NLR 38/16, r. 10(2)). While there were some minor differences in approach, NL Hydro and the Board were generally aligned in their responses to Blockchain’s grounds of appeal. The one notable exception was the Board’s request to this Court to interpret “questions of jurisdiction” in subsection 99(1) of the PUA broadly so as to cover all potential grounds of judicial review of its orders. The Board was not successful in its submission on this point. In these circumstances, I would have the Board pay its own costs of participation.

K.J. O’Brien J.A.

I concur : _____
F.P. O'Brien J.A.

I concur : _____
G.L.C. Noel J.A.