



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

Citation: *Newfoundland and Labrador Hydro v. Board of
Commissioners of Public Utilities*, 2026 NLCA 36

Date: October 19, 2026

Docket Number: 202501H0033

BETWEEN:

NEWFOUNDLAND AND LABRADOR HYDRO

APPELLANT

AND:

BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

RESPONDENT

AND:

NEWFOUNDLAND POWER INC.

INTERVENOR

AND:

NUNATUKAVUT COMMUNITY COUNCIL INC.

INTERVENOR

AND:

LABRADOR INTERCONNECTED GROUP

INTERVENOR

Coram: D.M. Boone C.J.N.L., F.J. Knickle and G.L.C. Noel JJ.A.

Tribunal Appealed From: Newfoundland and Labrador Board of
Commissioners of Public Utilities
Order No. P.U. 12(2025)

Appeal Heard: June 16, 2026
Judgment Rendered: October 19, 2026

Reasons for Judgment by: D.M. Boone C.J.N.L.
Concurred in by: F.J. Knickle and G.L.C. Noel JJ.A.

Counsel for the Appellant: Daniel W. Simmons K.C. and Catherine J.
Hutchens
Counsel for the Respondent: J. Michael Collins
Counsel for Intervenor: Liam P. O'Brien
Counsel for Intervenor: Jason Cooke K.C. and Sarah MacLeod
Counsel for Intervenor: No appearance

Authorities Cited:

CASES CITED: *Blockchain Labrador Corporation v. Board of Commissioners of Public Utilities*, 2025 NLCA 35; *Buckle v. Newfoundland and Labrador Board of Commissioners of Public Utilities*, 2022 NLCA 28; *Consumer Advocate v. Board of Commissioners of Public Utilities*, 2022 NLCA 39; *Consumer Advocate v. Board of Commissioners of Public Utilities*, 2021 NLCA 50; *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43; *Section 101 of the Public Utilities Act (Newfoundland) (Re)*, 1998 CanLII 18064 (NLSCAD); *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147; *Castonguay Blasting Ltd. v. Ontario (Environment)*, 2013 SCC 52, [2013] 3 S.C.R. 323.

STATUTES CONSIDERED: *Public Utilities Act*, RSNL1990, c. P-47, sections 16, 41, 99, 20, 118(1), 118(2); *Electrical Power Control Act*, 1994, SNL 1994, c. E-5.1, sections 3(b)(i), (ii), (iii), 4.

REGULATIONS CONSIDERED: *Board of Commissioners of Public Utilities Regulations*, 1996, CNLR 39/96, sections 3,4,5, 9, 13,14, 22, 28.

TEXTS CONSIDERED: Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022).

OTHER: Newfoundland and Labrador Board of Commissioners of Public Utilities, *Capital Budget Application Guidelines (Provisional)* (January 2022).

D.M. Boone C.J.N.L.:

OVERVIEW

[1] The *Public Utilities Act*, RSNL 1990 c. P-47 (the “*Act*”), gives the Board of Commissioners of Public Utilities (the “Board”) the general power to supervise public utilities (section 16) and the specific power to supervise the undertaking of capital projects proposed by utilities (section 41). A utility must submit an annual capital budget to the Board. The budget and specific construction or purchase of any improvements or additions to the utility’s property, valued more than a specified amount (prescribed by regulation), must be approved by the Board before the utility can carry out that construction or make that purchase.

[2] Newfoundland and Labrador Hydro (“Hydro”) applied to the Board for approval to build a generating station and regional transmission grid to supply electricity to six communities in Southern Labrador. The Board rejected Hydro’s application and later rejected Hydro’s request for reconsideration (collectively referred to as “the Decision”) (Appeal Book, Tab 5, at p. 25, lines 4 to 7, at p. 52, lines 31 to 35).

[3] Hydro seeks leave to appeal and, if leave is granted, appeals the Decision on the grounds that the Board: (i) failed to properly interpret and apply the prescribed test for approval of the construction of improvements and additions to the property of a utility; (ii) failed to apply the proper standard of proof to the evidence before it; and (iii) failed to afford Hydro with procedural fairness in considering the application as filed.

[4] The Board agrees that Hydro ought to be given leave to appeal but says that the appeal should be dismissed. NunatuKavut Community Council Inc. (“NCC”) and Newfoundland Power Inc. (“NL Power”) oppose granting leave but say that if leave is granted then the appeal should be dismissed.

[5] For the reasons that follow, I would grant leave but dismiss the appeal on the first ground and refuse leave to appeal on the second and third grounds.

BACKGROUND

[6] Hydro has been working for some time on a long-term plan to supply electricity to six communities in Southern Labrador in place of non-connected, diesel-powered generating stations located in Charlottetown, Port Hope Simpson, St. Lewis, and Mary's Harbour, that each supply electricity to those respective communities as well as to Lodge Bay and Pinsent's Arm.

[7] The proceedings at issue commenced in July 2021 when Hydro asked the Board to approve \$49.9 million in capital spending to build a regional diesel generating station in Port Hope Simpson and a 50 kilometer transmission line to connect the Port Hope Simpson and Charlottetown systems. This project was proposed as the first phase of a long-term plan that would interconnect all four electrical systems, with future phases timed to align with the planned retirement of the existing community diesel generating stations ("Phased Inter-connection"). Hydro anticipated connecting Mary's Harbour in 2030 for about \$15.2 million (Phase 2) and St. Lewis in 2045 for about \$7.5 million (Phase 3).

[8] In its initial application, Hydro stated that it had considered and screened out alternatives. These alternatives included a 400 kilometer transmission line from Happy Valley-Goose Bay ("LIS Interconnection") that carried a preliminary cost estimate of over \$400 million and building small hydro plants instead of a regional diesel station at a preliminary cost estimate of \$160-200 million.

[9] On March 31, 2025, following a protracted process that included two revisions of the initial application (the last of which increased the projected costs of the proposed project to \$110.9 million), the Board denied Hydro's application. On October 24, 2025, the Board denied Hydro's request for reconsideration.

LEAVE TO APPEAL

[10] Under section 99 of the *Act*, an appeal of a Board decision lies to this Court but only on a question of law or jurisdiction and only with leave of the Court.

[11] The requirement for leave to appeal is a "substantive hurdle". The party seeking leave "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” (*Blockchain Labrador Corporation v. Board of Commissioners of Public Utilities*, 2025 NLCA 35 (*Blockchain*), at para. 11, citing *Buckle v. Newfoundland and Labrador Board of Commissioners of Public Utilities*, 2022 NLCA 28 (*Buckle*), at paras. 37-39).

(i) *Failure to properly interpret and apply the prescribed legal test*

[12] Hydro’s first ground of intended appeal concerns the interpretation of the *Electrical Power Control Act, 1994*, SNL 1994, c. E-5.1 (*EPCA*), section 3(b)(iii), which requires that electrical services and facilities power be managed and operated in a manner that delivers power to consumers at the lowest possible cost, in an environmentally responsible manner, consistent with reliable service. This provision is a component of the power policy of the Province that the Board is required, by s. 4 of the *EPCA*, to implement.

[13] Hydro argues that the Board failed, first, to articulate, and second, to apply, the correct test from section 3(b)(iii).

[14] Deciding whether a legal standard was met is a question of mixed fact and law unless the decision maker made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error in law.

[15] Hydro says that the Board misinterpreted the *EPCA*. The interpretation of a statute is a question of law.

[16] Therefore, Hydro’s first ground of appeal raises a question of law alone.

[17] The next question is whether Hydro has presented an arguable case for success on the merits of its position regarding interpretation of the *EPCA*.

[18] The Board’s role in approving a utility’s capital expenditure is set out in section 41 of the *Act*. That provision does not specify the criteria to be applied to assess a utility’s request for approval or the evidentiary burden a utility must meet.

[19] Hydro argues that, correctly interpreted, section 3(b)(iii) of the *EPCA*, requires the Board to:

- (1) apply the stated criteria sequentially, asking first whether, compared to alternatives, the project would accomplish its goal with the least possible cost and, if so, then whether the proposed project is environmentally responsible and would provide reliable service; and
- (2) assess costs on a comparative basis but consider environmental responsibility and reliability in absolute measure.

[20] Hydro says, therefore, that once the utility demonstrates that the proposed project is the least expensive means to accomplish its goal and will provide reliable power in an environmentally responsible manner, the Board must approve it even if alternative approaches will provide more reliable service or could be considered more environmentally responsible.

[21] Hydro says that the Board rejected its proposal because it did not maximize the integration of renewable power sources notwithstanding that its proposal was environmentally responsible in absolute measure.

[22] Although this Court has considered section 3 of the *EPCA* on several occasions, it has not directly addressed the question posed by Hydro's intended appeal. Section 3 was amended effective May 25, 2023 to add "an environmentally responsible manner". This Court has not considered section 3 of the *EPCA* since that amendment. There is no direct authority bearing on the statutory interpretation question posed by Hydro's intended appeal.

[23] It cannot be said at this preliminary stage that Hydro does not have an arguable case for its suggested interpretation of section 3 of the *EPCA*.

[24] I would grant leave on this issue.

(ii) *Failure to afford Hydro procedural fairness in considering the application as filed*

[25] Hydro's second ground of intended appeal says that the Board breached its duty of procedural fairness because it based its Decision on considerations that had not been made known to Hydro and which Hydro had not been given an opportunity to respond with evidence and argument.

[26] Questions of procedural fairness 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 (*Consumer Advocate v. PUB (2021)*), at para. 6; *Buckle*, at para. 43; and *Blockchain*, at para. 24).

[27] However, Hydro has failed to present a reasonably arguable case that it was denied procedural fairness.

[28] Section 20 of the *Act* empowers the Board to make its own rules of practice and procedure. Considerable weight and deference must be given to the Board’s procedural choices (*Blockchain*, at para. 51; *Consumer Advocate v. PUB (2021)*, at paras. 24-25).

[29] The Board has made its own procedural rules that were promulgated in the *Board of Commissioners of Public Utilities Regulations, 1996*, CNLR 39/96 (the “*Regulations*”). The *Regulations*:

- require that an application must include the information or particulars on which the applicant relies and the reasons why the applicant believes the Board should grant the application (s. 4);
- give the Board the discretion to issue directions as it considers necessary for the proper consideration and disposition of an issue (s. 3);
- provide for intervention (s. 9) or comment (s. 13) by interested parties;
- allow requests for information (RFIs) to be directed to the applicant by the Board and the intervenors (s. 14);
- allow the Board to dispose of applications without a hearing based on written submissions and supporting documentation, including submissions from intervenors and comments by interested parties (s. 22); and
- allow for rehearing following the Board’s decision (s. 28).

[30] As stated earlier, the Board's process in this case took considerable time. Hydro's initial application was filed with the Board in July 2021 and then the following procedural steps occurred:

- NL Power, the Consumer Advocate, the Industrial Consumer Group (Corner Brook Pulp and Paper Ltd., Braya Renewable Fuels (Newfoundland) GP Inc. and Vale Newfoundland and Labrador Limited), the Labrador Interconnected Group (Sheshatshiu, Happy Valley-Goose Bay, Wabush and Labrador City) and the NCC were allowed to intervene. In addition, the Board received comments from several communities and individuals in Southern Labrador;
- the Board and intervenors submitted 126 requests for information (RFIs) to Hydro in two rounds;
- Hydro responded to those RFIs in the fall of 2021;
- The Board received comments from stakeholders in the fall of 2021;
- The Board set a schedule for submissions which it suspended after a request from Hydro for time to engage with stakeholders;
- Hydro reported on stakeholder consultations and on January 31, 2022 asked the Board to resume the application review schedule;
- On April 7, 2022, the Board identified aspects of the application for which it believed there had not been sufficient analysis and paused the application process until Hydro submitted further information with involvement from an independent expert to be engaged by Hydro;
- Hydro replied to the Board stating that it had provided sufficient support for the Board to make a decision but, on May 16, 2022, the Board rejected Hydro's position;
- Hydro then advised the Board that it was engaging an expert, Midgard Consulting Inc. (Midgard), as requested and Hydro and Board staff met to discuss the areas that the Board wanted addressed and the proposed scope of work for the expert;

- On March 31, 2023, Hydro received a report from Midgard;
- On May 31, 2023, Hydro filed a revised application for approval of the capital expenditures necessary to implement the option recommended by Midgard. The revised capital cost budget was \$86.4 million;
- The Board set a schedule for additional RFIs and, on July 5, 2023, Hydro responded to a total of 76 RFIs submitted to it by the Board, Newfoundland Power, and NCC;
- On August 1, 2023, the Board then wrote Hydro with a series of requests for Hydro to develop and provide additional information and analysis;
- Hydro replied on August 4, 2023 that it had retained Midgard to assist with preparation of a response, but also expressed concern that the Board already had evidence demonstrating that the proposed option was the least cost alternative for reliable service and requested a timely decision from the Board;
- The Board replied on August 10, 2023, challenging many of the assertions raised by Hydro in its correspondence;
- On October 5, 2023, Hydro submitted its response to the Board's requests for additional analysis, with a report from Midgard;
- On November 6, 2023, Hydro responded to a fourth round of RFIs, including 10 requests from the Board;
- The Board then requested submissions from the parties;
- On December 6, 2024, Hydro wrote to the Board and the Parties to report that it had performed some early-stage work but that other work was on hold pending a decision on its application and that, due to the passage of time, project costs had increased to \$110.9 million and the schedule for completion moved back to 2029. Hydro stated that its proposed project remained the lowest cost alternative for reliable service. It asked the Board to approve the application without conditions;

- The Board invited comments on the revised cost estimate and schedule;
- On January 13, 2025, the Board distributed comments it received; and
- Hydro responded to those comments and submissions on January 16, 2025.

[31] The Board denied the application on March 31, 2025 and denied Hydro's request for reconsideration on October 24, 2025. The Board concluded that Hydro had not demonstrated that the project should be approved and, in particular:

- i) The revised Project costs of \$110.9 million were not supported;
- ii) The assumed replacements of the community diesel generating stations were not justified;
- iii) Hydro did not demonstrate that it sufficiently prioritized the development of renewable generation;
- iv) There was inadequate study of the potential interconnection with the Labrador Interconnected System; and
- v) Hydro should take immediate steps to reevaluate solutions to ensure access to safe and reliable power for Charlottetown and Pinsent's Arm.

[32] The Decision identified gaps in Hydro's evidence regarding the reliability of its capital cost estimate and its assumptions modeling the life of existing generating stations.

[33] Hydro argues that it had an expectation that the Board would either expressly tell Hydro what it needed to do in order to satisfy the Board that its application should be approved, or that the Board would not deny the application because of gaps in Hydro's evidence without first telling Hydro what those gaps were (and allowing it an opportunity to fill those gaps). Hydro says that it could have provided better support for its capital cost estimates if it had been aware that the Board considered the evidence insufficient and that if the Board suspected that extending the replacement dates of the existing plants beyond 50 years could change the

modeling outcomes (or if it considered it reasonable to explore that possibility) then it should have asked Hydro for more information regarding projected service life.

[34] Hydro does not explicitly rely on the doctrine of legitimate expectations, but that is the essence of its argument. A party who relies on the doctrine of legitimate expectations in support of an argument of procedural unfairness must show that its legitimate expectation arose from the “clear, unambiguous and unqualified” conduct of the decision maker (*Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, paras. 95-96; *Blockchain*, at para. 62).

[35] Hydro’s position is inconsistent with the record in this case.

[36] Section 4 of the *Regulations* puts the onus on an applicant to support its application with necessary information and particulars. The Board may ask for further information, but the *Regulations* do not require that it do so. The record shows that Hydro raised the issues of capital cost estimates and modeling assumptions regarding the life of existing generating stations. These questions were live issues throughout the process and addressed by intervenors and various RFIs.

[37] Hydro frequently appears before the Board as an applicant and as a participant in proceedings initiated by others. Hydro did not suggest that the Board’s approach to the evidence in this case was different than the approach taken by the Board in other applications.

[38] This application process was extremely protracted. There were significant pauses for the purposes of information gathering and Hydro was afforded the opportunity to revise its application. Hydro could not have had a legitimate expectation that the matter would continue indefinitely.

[39] Hydro’s argument that it had a legitimate expectation that the Board would ask it for additional information before deciding is inconsistent with Hydro’s own actions. Hydro asked the Board in December of 2024 to decide the application based on the record to that point because it wanted to begin construction.

[40] Finally, nothing precludes Hydro from returning to the Board with an updated or revised application. The Decision is not akin to a final judicial determination. The Decision expressly invites Hydro to reapply with additional evidence and analysis addressing the Board’s concerns.

[41] I would deny Hydro's application for leave to appeal on the grounds that the Board denied it procedural fairness.

(iii) Failure to apply the proper standard of proof to the evidence

[42] Hydro asserts in its Notice of Appeal that the Board did not "articulate, specify or apply" the correct standard of proof (Appeal Book, Tab 3, at p. 12).

[43] The parties agree that the correct standard of proof that the Board had to apply was the balance of probabilities standard. The parties also agree that whether the Board used a different standard is a question of law.

[44] However, Hydro has not presented an arguable case for success on the merits on this ground of appeal.

[45] Hydro says that the Board did not articulate the standard of proof and simply found that Hydro did not show that its proposed project was the least cost. Hydro argues that the Board should have decided whether Hydro had demonstrated that the project was more likely than not the least cost.

[46] Hydro's position is not supported by the record. The Board stated in the Reconsideration Decision at page 15 (Appeal Book, Tab 6) that "it is Hydro's burden to demonstrate on a balance of probabilities that the proposed project should be approved, and the Board is satisfied that Hydro failed to meet this burden." The Board articulated the correct standard of proof.

[47] Hydro also says that the Board decided that Hydro's evidence was not "sufficient" and that this was a different standard than the balance of probabilities.

[48] The reference by the Board to the sufficiency of the evidence refers to the weight of the evidence and not the standard of proof. There is nothing in the use of the word "sufficiency" that would lead to the conclusion that the Board was applying a different standard than the balance of probabilities.

[49] I would refuse Hydro leave to appeal on this issue.

APPEAL

[50] The one issue on which I would grant leave to appeal is the question of statutory interpretation.

[51] Section 4 of the *EPCA* requires the Board, in carrying out its duties and exercising its powers under the *EPCA* or the *Act*, to implement the power policy of the Province declared in the *EPCA*, section 3, and in doing so, to apply tests consistent with generally accepted sound public utility practice. The parties agree that this test governs decisions applied by the Board on applications for approval of the construction of improvements and additions to public utility property.

[52] Section 3(b) of the *EPCA* states the power policy (insofar as is relevant in this case) as follows:

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

(b) all sources and facilities for the production, transmission and distribution of power in the province should be managed and operated in a manner

(i) that would result in the most efficient production, transmission and distribution of power,

(ii) that would result in consumers in the province having equitable access to an adequate supply of power,

(iii) that would result in power being delivered to consumers in the province at the lowest possible cost, in an environmentally responsible manner, consistent with reliable service,

(iv) that would result in, subject to Part III, a person having priority to use, other than for resale, the power it produces, or the power produced by a producer which is its wholly-owned subsidiary,

(iv.1) that would result in open, non-discriminatory and non-preferential access to, interconnection with and service on the integrated electric system,

(v) where the objectives set out in subparagraphs (i) to (iv) can be achieved through alternative sources of power, with the least possible interference with existing contracts,

and, where necessary, all power, sources and facilities of the province are to be assessed and allocated and re-allocated in the manner that is necessary to give effect to this policy.

[53] The dispute in this case concerns the interpretation of the test set out in the *EPCA*, section 3(b)(iii).

[54] Hydro says that section 3(b)(iii) requires that the Board consider whether a proposed project is the least cost alternative and, if it is, whether the project is reliable and environmentally responsible. Hydro says that the consideration of costs is explicitly required to be a comparative exercise because of the reference to “lowest possible cost”. However, Hydro posits that environmental responsibility and reliability must be considered on absolute, and not on comparative, measure because the test does not refer to “most reliable” or “most environmentally responsible.” Hydro relies on the interpretative maxim (known by the Latin expression *noscitur a sociis*) that associated legislative terms, especially those used in a list, should be given parallel reading that can be “relied on to resolve ambiguity or limit the scope of the terms” (Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022, at p. 230).

[55] Hydro submits that environmental responsibility is properly interpreted as imposing a threshold against which the lowest cost alternative is to be assessed. If the proposal crosses that threshold, then it meets the test, regardless of whether other alternatives might be thought to have better or different environmental attributes.

[56] As to reliability, Hydro submits that there are generally accepted measures of reliability. The proposal must be consistent with an appropriate measure of reliability as a threshold for approval. Beyond that, says Hydro, section 3(b)(iii) does not call for comparisons of degrees of reliability among alternatives to the proposal.

[57] The Board in response says that if it is obliged to approach cost, reliability, and environmental responsibility in the particular manner suggested by Hydro, that would unduly narrow the Board’s statutory mandate.

[58] I agree with the Board’s position.

[59] 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. “However, just as the text must be considered in light of the context and object, the object of a statute and that of a provision must be considered with close attention always being paid to the text of the statute, which

remains the anchor of the interpretive exercise. The text specifies, among other things, the means chosen by the legislature to achieve its purposes.” (*Québec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43, at paras. 23 and 24).

[60] Interpretative maxims such as *noscitur a sociis* on which Hydro relies are helpful but not presumptive or conclusive means to discern legislative intent. It is not enough to point out that there is a common feature present or lacking in a list of words to assign meaning or limit the scope of each of the words in the list. It must be demonstrated that the conclusion that is drawn from the maxim is consistent with the statutory scheme and remedial objective of legislation.

[61] The *Act* and the *EPCA* together set out a statutory scheme for the regulation of the electrical industry. There is specific direction in section 118(1) of the *Act* that it “shall be interpreted and construed liberally in order to accomplish its purposes”. A “literal and technocratic interpretation and application of the provisions of the Act is to be avoided, in favour of an interpretation which will advance the underlying purpose of the legislation, as well as the power policy of the province and be consistent with generally accepted sound public utility practice” (*Section 101 of the Public Utilities Act (Newfoundland) (Re)*, 1998 CanLII 18064 (NLSCAD) (*Newfoundland (Re)*) at para. 18).

[62] In *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] S.C.R. 147, at paragraph 11, the Supreme Court of Canada relied on express statutory language to describe the general mandate of the Ontario Energy Board regulating electrical services “with an eye to balancing both consumer interests and the efficiency and financial viability of the electricity industry”.

[63] Although there is no equivalent express statutory language in the *Act*, a review of the entire *Act* supports that description as accurately stating the mandate of the Board in respect of the regulation of electrical service in this province. The statutory scheme of the *Act* and *EPCA* is designed to achieve a balance of the interests of the consumer and the utility (*Newfoundland (Re)*, at paras. 22 and 36). The Court stated that the “Board must always be mindful of whether, in so acting, it will be furthering the objectives and policies of the legislation and doing so in a manner that amounts to a reasonable balance between the competing interests involved” (para. 144).

[64] The Board is granted the power to oversee the electrical industry in the province. Aside from the constraint in section 4 of the *EPCA* (that the Board conduct

oversight in accordance with the power policy of the province) the “Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy” (*Newfoundland (Re)* at para. 36).

[65] Prior to 2023, the factors included in the power policy set out in the *EPCA* were: efficiency (section 3(b)(i)), equitable access (section 3(b)(ii)), cost and reliability (section 3(b)(iii)). The factor of environmental responsibility was added to section 3(b)(iii) by amendment in 2023. By adding that factor, the legislature directed the Board to consider the environmental impact of capital projects. However, the legislature did not define the term “environmental responsibility”. The failure to define this term is not surprising: “environmental protection is a complex subject matter — the environment itself and the wide range of activities which might harm it are not easily conducive to precise codification” (*Castonguay Blasting Ltd. v. Ontario (Environment)*, 2013 SCC 52, [2013] 3 S.C.R. 323, at para. 9).

[66] The interpretative directions and objectives in the statutory scheme of the *Act* and the *EPCA* lead to the conclusion that the legislature intended that the term “environmental responsibility” be interpreted liberally. The legislature also intended that the Board have the discretion to adopt tests to interpret the meaning of environmental responsibility, as well as methodologies to achieve balance among all factors expressed in the power policy.

[67] The interpretation for which Hydro argues is not consistent with those conclusions. Hydro’s suggested interpretation of the *EPCA*, section 3(b)(iii) is inconsistent with the requirement to balance interests. A balance cannot be achieved by putting costs measured comparatively on one side of the scale and environmental responsibility and reliability measured absolutely on the other. The only real variable then would be cost. As Newfoundland Power argues, if reliability and environmental responsibility are factors to be measured absolutely, and not comparatively among alternatives, then the legislation would not allow minor adjustments to reliability or environmental responsibility to permit power to be offered at a significantly lower cost, or significant environmental or reliability improvements to be obtained at minimally greater cost.

[68] Although Hydro says that environmental responsibility has only one absolute measure, it does not suggest what that measure could be. It does not make sense that the legislature intended the Board to consider in a binary manner whether a proposed project is environmentally responsible or not. Once the process of electrical

generation and distribution is engaged then there will be an environmental effect. The *Act* requires the Board to assess the degree of that effect balanced against cost and reliability.

[69] In this case, the Board decided that Hydro's failure to include renewable energy sources in its proposal meant that it did not establish that its proposed project provided electricity to the communities of Southern Labrador at the lowest possible cost, in an environmentally responsible manner, consistent with reliable service. On this appeal Hydro failed to show that the Board misinterpreted its statutory mandate.

[70] I would dismiss this ground of appeal alleging based on the Board's failure to properly interpret, articulate and apply the correct statutory test to Hydro's application.

DISPOSITION AND COSTS

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

[72] Neither Hydro, the Board, nor NCC sought costs. Newfoundland Power did seek costs, but I would not award costs as it did not demonstrate any reason to deviate from the general rule against awarding costs against or to intervenors.

D.M. Boone C.J.N.L.

I concur: _____

F.J. Knickle J.A.

I concur: _____

G.L.C. Noel J.A.