

IN THE MATTER OF An Investigation And Hearing
Into Supply Issues And Power Outages On The
Island Interconnected System.

**REPLY TO HYDRO'S RESPONSE TO GRK'S MOTION DATED NOVEMBER 26, 2015 TO ORDER COMPLETE
RESPONSES TO RFIS**

**Board of Commissioners of Public Utilities
Prince Charles Building
120 Torbay Road, P.O. Box 21040
St. John's, NL
A1A 562**

**ATTENTION: Ms. Cheryl Blundon
Director of Corporate Services & Board Secretary**

January 30, 2016

This letter constitutes GRK's reply to Hydro's response to GRK's motion dated Nov. 26, 2015 requesting an order requiring Hydro to make full and complete replies to several RFIs.

Hydro's response essentially contains three arguments:

- 1) That GRK's RFIs request information concerning hypothetical scenarios, to which it should not be obliged to respond;
- 2) That GRK's RFIs request information regarding Muskrat Falls, and more specifically the North Spur, that the Board has already indicated are outside the scope of this proceeding; and
- 3) That Hydro's assertions regarding the negligible risk of failure of the North Spur do not render relevant or admissible evidence to contradict these assertions or that question their validity (page 5).

We reply to each of these arguments in turn.

1. Hypothetical scenarios

In its responses regarding GRK-NLH-93, GRK-NLH-104, GRK-NLH-105 and GRK-NLH-107, Hydro argues that it cannot or should not be obliged to respond, because the RFIs depend on hypothetical scenarios.

Regarding GRK-NLH-93, Hydro states (at page 3) that:

Hydro is unable to comment on hypothetical potential scenarios arising from the outcome of the litigation.

The second paragraph of GRK-NLH-093 requests information with respect to hypothetical scenarios which are not Hydro's position with respect to the Hydro Quebec litigation¹. ... Hydro respectfully submits that it is inappropriate for the GRK to request information with respect to potential future hypothetical interpretations.

Regarding GRK-NLH-104, Hydro wrote (at page 4):

Hydro still submits that it would be completely inappropriate to have Hydro attempt to elaborate on the implications of hypothetical eventualities which pre-judge the litigation and which Hydro does not support. In fact, Hydro would have to undertake analysis to determine what these implications may be in any event, based on the hypothetical eventualities posed by the GRK. The requests are clearly premised on hypothetical outcomes.

With respect to the issue of the response being able to address consequences regarding the availability of a reliable and adequate supply of power to the Island Interconnected System associated with the risks outlined, Hydro notes its specific response to GRK-NLH-021(Revision 1, January 14-15) noted above. Hydro is unable, nor is it appropriate for it, to reply to hypothetical scenarios.

Regarding GRK-NLH-105 and GRK-NLH-107, Hydro added (at page 4):

Hydro's response above is equally applicable to these two hypothetical scenarios, and clearly illustrates why it is inappropriate for Hydro to be asked to evaluate the outcome of hypothetical situations. This would seriously unduly complicate and protract the inquiry, and to do so on the basis of hypotheticals is, in Hydro's respectful submission, inappropriate for the reasons the Board has itself previously ordered.

First, the correct and appropriate question is one of relevance, and the matter is clearly relevant to these proceedings, as indicated by the Board in its decision to allow GRK to intervene in these proceedings:

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 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.

¹ Hydro is not a party to the Quebec litigation, and so it is not clear in what sense it has a "position" with respect thereto.

Second, the analysis requested here is not strictly speaking a “hypothetical” at all, since it is simply one of two possible outcomes. At the end of the day, the Courts will either endorse Nalcor’s interpretation of the renewal contract, or not. Hydro’s analysis is in fact based on the “hypothetical” that the Courts adopt Nalcor’s interpretation of the renewal contract. This premise is neither more nor less hypothetical than the opposite one.

In all likelihood, the definitive resolution of this question will not occur before the end of this inquiry. Therefore, the Board will have to issue its report in the face of **uncertainty** regarding the outcome of those proceedings. Clearly, the Board cannot simply presume that Nalcor will prevail, so it must, in assessing future reliability, take into account both possibilities. To do so, it need not take any position as to the likelihood of one outcome or another. Indeed, GRK respectfully submits that it would be inappropriate for the Board to presume what the Courts will decide. It must neither presume that Hydro-Quebec will prevail, nor that Nalcor will.

The Board already has before it considerable evidence based on the assumption that Nalcor’s interpretation is correct. But there can be no certainty, at this time, that this will in fact be the outcome. For the Board to draw conclusions about the implications of the other possible outcome on the reliability of the Island system, it will undeniably require the production of evidence regarding Hydro’s perspective on those implications. For these reasons, Hydro’s arguments regarding hypotheticals are misleading, and it should be ordered to respond fully to these RFIs.

It is clear in law that an expert either in his or her testimony in chief, or in cross-examination by an opposing party is entitled or can be obliged to consider hypothetical scenarios, insofar as they are relevant to the matter at issue. As such, the true issue is relevance, not hypotheticality:

A [combination](#) of assumed or proved facts and [circumstances](#), stated in such form as to constitute a coherent and specific situation or [state of facts](#), upon which the opinion of an expert is asked, by way of evidence on a trial. Howard v. People, 185 N. E. 552, 57 N. E. 441; People v. Durrant, 116 Cal. 216, 48 Pac. 85; Cowley v. People, 83 N. Y. 464, 38 Am. Rep. 464; Stearns v. Field, 90 N. Y. [\(Black's Law Dictionary\)](#)

A mixture of assumed or established facts and circumstances, developed in the form of a coherent and specific situation, which is presented to an expert witness at a trial to elicit his or her opinion.

When a hypothetical question is posed, it includes all the facts in evidence needed to form an opinion and, based on the assumption that the facts are true, the witness is asked whether he or she can arrive at an opinion, and if so, to state it.

West's Encyclopedia of American Law, edition 2. Copyright 2008 The Gale Group, Inc.

The leading case on this issue in Canada is Fortili, which has been adopted in Newfoundland and Labrador. In Fortili, Justice Garson attempted a codification of the general rules pertaining to an examination for discovery, adopting these words:

"The scope of an *examination for discovery* extends to any matter relating to a matter in question in the action and is in the nature of a cross-examination. The question need not be focused directly on a matter in question in the action but need only relate to such a matter. Rigid limitations rigidly applied can destroy the right to a proper examination for discovery.

"On an *examination for discovery*, questions are limited to relevant issues ... between the party conducting the discovery and the party being examined. In other words, questions may not be put which are relevant only to issues between the party conducting the discovery and another party (not being examined).

"A [witness](#) need not answer questions soliciting an opinion on an *examination for discovery*. There is an exception to this rule where the party examined is asked questions regarding his or her professional conduct or competence where that conduct and/or competence is in issue in the action. Questions soliciting an opinion must pertain to the area of expertise of the individual being examined. The party being examined need not answer questions pertaining to the conduct of another defendant.

"Hypothetical questions may properly be put to a witness where the witness has expertise and when the hypothetical question is relevant to some issue in the case, provided the question is not overly broad or vague.

"Counsel for the party being examined may object to the form of a question on the grounds that it is vague, confusing, unclear, overly broad or misleading. An example of a misleading question is the misstatement of earlier [testimony](#). The proper conduct of counsel in this instance is to state the objection to the form of the question and the reasons for objection. It is not appropriate for counsel to make comments, suggestions, or criticisms. The court will not order a question to be answered if the meaning of the question to be answered is not clear, or if it appears to involve questions of law.... The questions should be set out in concrete form and should not depend for their meaning on previous questions or answers...." (emphasis added)

As, for all intents and purposes, RFIs are the equivalent of a discovery in these proceedings, it is respectfully submitted that the same rule applies in the present circumstances.

Finally, it should be noted that the 2nd paragraph of GRK-NLH-093 does not require any examination of hypotheticals, but simply asks whether or not NLH has carried out or received copy of a specific type of analysis:

In your response, please indicate whether or not NLH has carried out or received copy of any specific analysis of to the extent to which the Hydro-Quebec's interpretation of the Churchill Falls Power Contract, as set out in its filings before the Quebec Superior Court, would limit the Independent Coordinator's ability to respect NLH's Delivery Requirements with respect to s. 6.3(a) of the WMA (Citation 2).

Hydro should not be allowed to hide behind dubious arguments regarding hypotheticals to avoid responding to this simple yes-or-no question, or to avoid producing the relevant document, should it exist.

2. The relevance of Muskrat Falls

Hydro claims in its introduction that GRK "continues to attempt to extend the ambit of the Phase 2

inquiry”, making specific reference to the Muskrat Falls project. It justifies its refusal to provide complete responses to GRK-NLH-100 and GRK-NLH-115 through -121 on this basis.

In a number of past orders, the Board has addressed the relevance of the Muskrat Falls project for the present proceeding. Hydro’s response quotes the first and third paragraphs of page 4 of P.U. 15(2014), including the statement that “the issues in this matter should not be extended to the construction, legal, contractual and physical risks of the Muskrat Falls development”. However, it omits to quote the second paragraph, which states:

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 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.

Thus, the Board found that the “various risks associated with the unavailability of some or all of the planned energy and capacity from Muskrat Falls... may fall within the issues to be addressed in this investigation and hearing ...”

GRK had made clear in its submissions that these risks included those related to the North Spur, as in the following passage, quoted by the Board on page 2 of its Order:

We are concerned about many aspects of the construction of the Project, as well as the impacts after construction is complete, impacts that would include but are not limited to, risks, which we believe Nalcor has not thus far acknowledged, that include legal and contractual risks, and risks to the physical integrity of the dams and the North Spur natural dam.

These risks could entail the unavailability for the Island of some or all the planned energy and capacity from Muskrat Falls, over the short, medium or long term. GRK believes that these risks are material in evaluating the adequacy and reliability of the Island Interconnected system after the interconnection with the Muskrat Falls generating facility, and it intends, through its participation in this hearing, to present evidence with respect to these risks.

Thus, the Board’s reference to the “various risks associated with the unavailability of some or all of the planned energy and capacity from Muskrat Falls,” which it “is satisfied ... may fall within the issues to be addressed in this investigation and hearing ...” clearly includes risks related to the North Spur.

In granting GRK’s request for intervenor status, the Board indicated its openness to hearing evidence regarding the implications of these risks with respect to IIS reliability.

This is not the first time that NLH has failed to properly characterize the Board’s order granted intervenor status to GRK. In its submission regarding GRK’s application for interim costs, Hydro attacked GRK’s interest in the present proceeding. As GRK noted at page 4 of its Reply re Interim Cost Award, filed on July 9, 2015:

“GRK respectfully submits that this is in fact a tardy and disguised appeal of the Board’s decision to grant intervenor status to GRK in the present proceeding, and should be disregarded.”

The irony, of course, is that while Hydro again wrongfully accuses GRK of ignoring the Board’s previous decisions, it is Hydro that is again attempting to do so. These RFIs clearly fall within the subject matter recognized by the Board when granting GRK intervenor status. NLH opted not to appeal that decision. They are now barred by “issue estoppel ” and “laches” from doing so.² One cannot do indirectly what one has opted not to do directly, and a party must act in a timely manner.

The Board stated its understanding of the question most clearly in its letter of February 26, 2015 concerning the request by Messrs. Penney and Vardy, where the Board wrote:

The Muskrat Falls project is relevant in this matter to the extent that it has the potential to impact the reliable and adequate supply of power by NLH on the IIS.

This clear and unambiguous statement demonstrates that the Muskrat Falls project is relevant to this inquiry **insofar as it affects reliability on the IIS**. There can be little doubt that, were the dam to collapse due to the structural weakness of the North Spur, the effects on IIS reliability would be dramatic. Therefore, RFIs that will help the Board assess the extent of this risk are unequivocally relevant to the present inquiry.

3. The Board’s prior decisions regarding GRK’s RFIs

In its response to GRK-NLH-118, Hydro referred to P.U. 41(2014). In its submission leading to that order, Hydro had argued:

Hydro states in its submission that these requests pertain to alleged construction and physical risks of the Muskrat Falls Project which the Board ruled in Order No. P.U. 15(2014) are not relevant to the review of system reliability and are therefore outside of the scope of the present inquiry. (page 26)

However, the Board was only partially persuaded by this argument. It went on to quote GRK’s perspective:

Grand Riverkeeper Labrador, Inc. argues that the Board has not excluded these issues from the inquiry and states at page 7:

² Issue estoppel is explained by Lord Diplock of the House of Lords in *Hunter v Chief Constable of the West Midlands Police* (1982):

This case] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.

See also [Henderson v Henderson](#) (1843) 3 Hare 100, 67 ER 313.

More specifically, it is stated that taking into account the various risks associated with the unavailability of some or all of the planned energy and capacity from Muskrat Falls- which certainly include any identified risks to the physical integrity of the plant - falls within the issues to be addressed in this investigation and hearing.

The Board first acknowledged Hydro's point, with respect to GRK-NLH-42, and 47 to 50, which requested detailed technical information:

The Board believes that the detailed technical information in relation to the North Spur of the Muskrat Falls Project sought in GRK-NLH-42, and 47 to 50 is not relevant to the issues in this proceeding. This proceeding will not involve an analysis of engineering and construction issues associated with the Muskrat Falls Project, but rather will address whether Hydro has secured a reliable and adequate supply of power for the Island Interconnected system and has fully addressed any risks to this supply.

The Board then goes on to conclude that, while requests for specific technical information are beyond the scope of this proceeding, **“to the extent that the information sought may relate to issues associated with the risks to the adequate and reliable supply on the Island Interconnected system and how these risks have been addressed, this information may be relevant.”**

It therefore **rejected** Hydro's motion with respect to GRK-NLH-43 to 46, and ordered it to respond to these RFIs, “direct[ing] its response to the risks and consequences to the Island Interconnected system of the scenarios and issues raised.”

Similarly, on page 27, the Board rejected Hydro's motion with respect to GRK NLH-55 and 57, because they may be **“relevant to the issue of assessment of risk,”** and that Hydro must respond to these RFIs “to the extent that the responses can address the consequences regarding the availability of a reliable and adequate supply of power to the Island Interconnected system”.

Subsequent to P.U. 41(2014), GRK filed an additional motion requesting complete responses to several of its RFIs. In P.U. 5(2015), the Board found in favor of GRK with respect to GRK-NLH-045, 046 and 057, writing as follows (at page 4):

In Order No. P.U. 41(2014) the Board found that GRK-NLH-45 and 46 seek very specific information in relation to the technical issues associated with the North Spur which is beyond the scope of the investigation but, to the extent that the information sought may relate to issues associated with the risks to the adequate and reliable supply on the Island Interconnected system and how these risks have been addressed, this information may be relevant. The Board clarified that it was not necessary for Hydro to provide detailed technical information or reports related to engineering and construction issues but rather should direct its responses to the risks and consequences to the Island Interconnected system of the scenarios and issues raised. In relation to GRK-NLH-57 the Board found that the requested information may be relevant to the issue of assessment of risk and that the response should address the consequences regarding the availability of a reliable and adequate supply of power to the Island Interconnected system. The Board agrees with Grand Riverkeeper Labrador, Inc. and the Consumer Advocate that Hydro should provide further information in

relation to these requests. The Board accepts the motion of Grand Riverkeeper Labrador, Inc. in relation to GRK-NLH- 45, 46 and 57.

Read as a whole, these passages provide clear indication of the Board’s judgement with regard to the relevance of issues related to the North Spur in the present proceeding. The Board considers the issue to be relevant, insofar as it speaks to the “assessment of risk” with regard to “the availability of a reliable and adequate supply of power to the Island Interconnected system”. At the same time, it has declined to order the production of technical engineering data.

In July 2014, Hydro filed a motion regarding certain RFIs filed by GRK, in which it stated:

Hydro respectfully submits that the Requests for Information noted above are beyond the parameters and scope of the issues which have been established by the Board and the requirement to provided [sic] responses to those Requests for Information will act to complicate the hearing and would not be relevant or helpful to the Board in making its final determination.³

In its Order, the Board wrote, at page 4:

The use of requests for information is accepted practice for the Board and, with few exceptions, the Board's procedures provide for direct filing of requests for information to a party. Issues of relevance, usefulness or information availability related to specific requests are dealt with on objection or motion from the responding party. The Board expects that intervenors will only ask questions that are relevant and that the responding party will strive to answer all questions fully and adequately. However, efficient regulatory process sometimes requires the Board to rule on whether certain information requests should be struck on the basis that they may be considered to be outside the scope of the proceeding or that the costs and time associated with the production of the information are not in line with the potential usefulness of the information to be produced. Often the value or usefulness of certain information to the Board in a matter is difficult to assess in the absence of the production of the information.

The Board then wrote:

The investigation and hearing into supply issues and power outages will address adequacy and reliability of the Island Interconnected system and involves Newfoundland and Labrador Hydro and Newfoundland Power, as the two utilities which operate this system. This proceeding raises issues which are of great public interest and import in relation to the planning and operation to the long term power supply in the province. The Board notes that there is a particular interest in information surrounding the Muskrat Falls Project. While certain concerns in relation to the reliability and adequacy of the Island Interconnected system may involve aspects of the Muskrat Falls Project this proceeding does not involve an evaluation of the Muskrat Falls Project. The Board was specifically exempted from review of this project and from the regulation of Nalcor which is responsible for this project.

Although an evaluation of the Muskrat Falls Project is not part of this proceeding, the Board believes that information which goes to the risks of timely delivery of reliable and adequate power to the Island Interconnected system is relevant to the issues in this proceeding and

³ Order P.U. 41(2014), at page 1.

should be produced. However, detailed technical information in relation to Nalcor's planning and construction of the Muskrat Falls Project, alternative approaches which may have been taken, and issues associated with the economic or physical viability of the project are not required or relevant in this proceeding. The Board acknowledges that it is sometimes difficult to make this distinction and further that some parties may be interested in the most detailed information available. Each request for information must be considered in all of the circumstances, balancing the interests of full disclosure and participation with an efficient process and the potential for undue burden on the parties.

GRK respectfully requests that the Board review the individual RFIs in its motion in light of this statement, and makes its decisions accordingly.

4. In asserting that the probability of failure of the North Spur is negligible, Hydro has created a right to reply

In its responses to GRK-NLH-098, -099 and -100, Hydro affirmed that the risk of failure of the Muskrat Falls dam is negligible, and hence there is no need to mitigate against such a risk. It has further indicated (GRK-NLH-066, Rev. 1) that it has no worst-case planning estimate for an outage from the MF-LITL of more than two weeks.

In P.U. 13(2015), at page 7, the Board wrote:

The Board's primary concern is with the identification of the risks and consequences to Hydro's supply of reliable and adequate power to the Island Interconnected system after the Muskrat Falls project comes online, and how Hydro plans to mitigate against those risks.

GRK understands that, given the Muskrat Falls Exemption Order, the Board's jurisdiction in this regard is highly constrained. However, these questions go to the heart of the subject matter of the present inquiry, "the identification of the risks and consequences to Hydro's supply of reliable and adequate power to the Island Interconnected system after the Muskrat Falls project comes online." The Board thus cannot avoid deciding whether to accept or reject Hydro's affirmation that the probability of failure of the North Spur is negligible.

In GRK-NLH-099, Hydro was asked:

On what basis was it determined that "a potential dam breach at Muskrat Falls [is] very unlikely"? Please provide all supporting documentation leading to this conclusion.

And in GRK-NLH-100, Hydro was asked:

On what basis was it determined that "the probability of risk of failure is negligible"? Please provide all supporting documentation leading to this conclusion.

Hydro provided a single response to the two RFIs, which reads:

The determination is based on Hydro's understanding of the principles associated with the engineering design of large-scale dams. See also Hydro's response to GRK-NLH-098. ... (emphasis added)

The response to GRK-NLH-098 states:

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.

In effect, Hydro is saying that, because the dam was designed according to the same principles and methods as all other dams, it cannot fail. However, some dams have in fact failed upon impoundment – the Grand Teton Dam in the United States being the most famous example – with substantial loss of money and life.⁴ Another important dam failure, the 2015 failure of the tailings dam at the Mt. Polley Mine in British Columbia, was found by a Review Panel to be due to design flaws related to the foundation.⁵

In Hydro's response concerning GRK-NLH-100, it quotes the Board's letter to Messrs. Penney and Vardy, in which it reiterated that "this proceeding will not involve a study of the engineering or construction of the Muskrat Falls project." However, it did not cite the rest of that same paragraph, which reads:

... Nalcor and the Muskrat Falls Project have been exempted from the oversight of the Board. The Muskrat Falls Project is relevant in this matter to the extent that it has the potential to impact the reliable and adequate supply of power by NLH on the Island Interconnected system. Whether the North Spur is a risk to the supply of power and, if so, how Hydro has addressed this risk may be an issue but the Board does not believe that it is necessary for purposes of this proceeding to engage its experts to undertake an independent review of the North Spur.

At the end of the day, the Board will have to decide whether or not the Island Interconnected System must maintain readiness for a scenario involving failure of the Muskrat Falls dam. If it concludes that Hydro's zero-probability assessment is correct, it may well decide to authorize the eventual decommissioning of Holyrood. If not, and is no other back-up plan can be designed, such decommissioning may be impossible. This is without doubt one of the key questions before the Board in this proceeding.

⁴ According to the U.S. Department of the Interior (Bureau of Reclamation), the Teton Dam suddenly failed on first filling of the reservoir in 1976, resulting in the loss of 11 lives and millions of dollars in property damage. <http://www.usbr.gov/pn/about/Teton.html>

⁵ "The design did not take into account the complexity of the sub-glacial and pre-glacial geological environment associated with the perimeter embankment foundation." Mount Polley Review Panel Delivers Final Report, Media Release, Friday, January 30, 2015. <https://www.mountpolleyreviewpanel.ca/mount-polley-review-panel-delivers-final-report>

Hydro has confirmed that it has not examined any scenarios with an outage on the LIL longer than two weeks:

For the reasons discussed in detail in Hydro's response to PUB-NLH-299, Hydro concluded "the two-week repair duration objective was selected as reasonable for the development of restoration plans". Hydro confirms that it does not have a worst-case planning estimate in excess of two weeks for the situation in question. (GRK-NLH-066, Rev. 1)

In GRK-NLH-069, Rev. 1, Hydro provided an analysis demonstrating its ability to withstand a two-week outage. And in GRK-NLH-074, Rev. 1, Hydro stated that it would have sufficient energy resources to meet load throughout the year, through 2025. However, no indication is provided as to what would happen should a long-term or permanent outage occur after 2025, nor is it clear how commitments to Nova Scotia could be met under these circumstances.

GRK respectfully submits that, for all these reasons, the question of the possibility or likelihood of failure of the Muskrat Falls dam is directly relevant to Phase II of this Inquiry.

Jurisprudence concerning the Right of Reply:

In *Moravian Church of Newfoundland and Labrador vs. Newfoundland and Labrador* 2005 NLTD 123, paragraphs 40-43, relying on *Snell v. Farrell* (1990), 72 D.L.R. (4th) 489 SCC Mr. Justice Sopinka relates the burden of proof in civil matters to broad reasons of experience and fairness. Where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it. Nonetheless, *prima facie* evidence from the opposing party is obviously relevant to indicate that the threshold burden has not been met. As noted at para. 42 "it is not unreasonable to require the [Defendant] in such circumstances to disclose his particular basis of knowledge and to bear the burden of proof in so doing."

The right to reply is addressed in the following cases:

Merck-Frosst v. Minister of Health 2009 FC 914 at para. 10:

[10] In considering the motion to file reply evidence, the Prothonotary correctly set out the relevant test as enunciated in *Pfizer Canada v. Canada (Minister of Health)*, [2007 FC 506 \(CanLII\)](#), *Eli Lilly Canada v. Apotex Inc.*, [2006 FC 953 \(CanLII\)](#), and other decisions of this Court. The test has four components as follows:

- (i) whether the further evidence serves the interests of justice;
 - (ii) whether the further evidence assists the Court in making its determination on the merits;
 - (iii) whether granting the motion will cause substantial or serious prejudice to the other side;
- and

- (iv) whether the reply evidence was available and/or could not be anticipated as being relevant at an earlier date.

Dow Chemical co. vs. Nova Chemicals 2012 FC 754 applied this test as concerns expert evidence.⁶

Vernon vs. the Queen BCSC 1688 at para. 12 held that counsel statements constitute evidence.⁷

Other forms of evidence have been held to include statements of counsel: *Fomo Products v. Solkan Enterprises Ltd.* (1986) 4 B..C.L.R. (2ND) 264 (C.A.).

The right to reply (or refute) *prima facie* evidence adduced by the moving party was recognized in *Celtic Business Development Corporation vs. Arsenault* 2010 NLTD 121 at paras. 25: “It is only logical that if a Defendant wishes to refute the Plaintiff’s evidence that the Defendant call evidence which contradicts that of the Plaintiff.... The Defendant’s evidentiary burden does not detract from the Plaintiff’s burden to prove its case.”

Consequently, for all the reasons referred to herein, GRK respectfully requests the Board to order Hydro to respond fully to the RFIs indicated in its Motion.

Respectfully submitted,

Charles O’Brien

⁶ See also *Lockridge vs. Ministry of the Environment* 2013 ONSC 6935.

⁷ This is in particular the case here as GRK *prayed acte* of these assertions.