500-09-026327-163

COURT OF APPEAL OF QUÉBEC

(Montréal)

On appeal from a judgment of the Superior Court, District of Montréal, rendered on August 8, 2016 and rectified on November 8, 2016 by the Honourable Justice Martin Castonguay.

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No. 500-17-078217-133 S.C.M.

CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED

APPELLANT
(Defendant)

v.

HYDRO-QUÉBEC

RESPONDENT
(Plaintiff)

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APPELLANT'S ARGUMENT

PART I – FACTS

A. Summary of the Appeal

1. This is an appeal about contract interpretation gone awry.

2. On May 12, 1969, after years of negotiations, the Appellant Churchill Falls (Labrador) Corporation ("**CF(L)Co**") and the Respondent Hydro-Québec ("**HQ**") signed a Power Contract which was in effect until August 31st 2016 and concurrently executed a distinct contract, the Renewal Contract,[1] with effect from September 1st, 2016 to August 31st, 2041.

3. The first issue in this appeal arises exclusively under the Renewal Contract and concerns the amount of energy that HQ is entitled to purchase from CF(L)Co each month, over the 25 year term of the Renewal Contract.

4. Despite the obvious and material differences between the Power Contract and the Renewal Contract, which are fundamentally distinct contracts, the trial judge concluded, without any supporting language to that effect in the Renewal Contract, that HQ had the exclusive right to purchase all the available power and all the energy produced at the Churchill Falls power plant (the "**Plant**"), with the exception of the Twinco Block and the Recapture Block, as if the original Power Contract was still in effect.

5. To start with, the trial judge held that the Power Contract and the Renewal Contract constituted "*an inseparable contractual group*":

> *[859] L'ensemble de ces éléments permet au Tribunal de conclure que le Contrat principal ainsi que le Contrat renouvelé constituent un ensemble contractuel indivisible.*

6. It is significant to note that nowhere in his analysis of this first question at issue, at pages 159 to 194 of his Judgment, does the trial judge quote or take into consideration the renewal clause negotiated by the parties and incorporated at section 3.2 of the original Power Contract, which makes it clear that far from being "inseparable", the Power Contract and the Renewal Contract are to the contrary distinct and separate contracts, with different temporal effect:

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[1] Schedule III of the Power Contract, **Exhibit P-1,** Joint Schedules, hereinafter "**J.S.**", **vol. 3**, **pp. 596 to 654**.

> *"3.2 Renewal of Contract*
>
> *This Power Contract shall be renewed on the basis stated in this Section, for a further term of 25 years from the expiry date hereof.*
>
> *The renewed Power Contract shall be that set forth **in Schedule III hereof**, which shall come into force automatically without further signature being required.*
>
> ***Any or all Articles or Sections of this Power Contract, other than this Section 3.2, as well as any or all undertakings or promises not specifically contained in Schedule III shall have no force and effect beyond the expiry date hereof and shall not thereafter be binding upon the parties to the renewed Power Contract**."*[2]

7. The Power Contract and the Renewal Contract are not only distinct and separate contracts, but more importantly, they have significantly different terms and conditions, including the very object of each contract.

8. The object of the Power Contract was for the sale and purchase of Energy Payable, a term defined by the Parties in the said contract.[3] On the other hand, the object of the Renewal Contract is for the purchase and sale, each month, of **Continuous Energy**, a term also defined by the Parties in the Renewal Contract:

> *"2.1 Object*
>
> *During the entire term hereof, Hydro-Quebec agrees to purchase from CFLCo and CFLCo agrees to sell to Hydro-Quebec **each month** the **Continuous Energy** and the Firm Capacity, at the price, on the terms and conditions, and in accordance with the provisions, set forth herein."*
>
> *"1.1(Definitions)*
>
> *II – Concerning Delivery, Energy and Capacity*
>
> *"**Continuous Energy**" means, in respect of **any month**, the number of kilowatthours obtainable, calculated to the nearest 1/100 of a billion kilowatthours, when the Annual Energy Base is multiplied by the number which corresponds to the number of days in the month concerned and the result is then divided by the number which corresponds to the number of days in the year concerned."*

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2 Power Contract, **Exhibit P-1**, s. 3.2, p. 7, **J.S.**, **vol. 3**, **p. 607**.
3 Power Contract, **Exhibit P-1**, s. 2.1, p. 7, **J.S.**, **vol. 3**, **p. 607** and definition of Energy Payable, p. 3, **J.S.**, **vol. 3**, **p. 603**.

9. As we can appreciate from the very definition stipulated by the parties, Continuous Energy represents a predetermined and finite amount of energy[4] which HQ is entitled to purchase on a monthly basis during the term of the Renewal Contract.

10. Nonetheless, the trial judge held that the mere presence of the same operational flexibility clause in both the Power Contract and the Renewal Contract created an ambiguity that *allowed* him to interpret the notion of Continuous Energy:

> *[873] Dans le présent cas, l'ambiguïté se révèle de la présence de la clause de flexibilité opérationnelle tant dans le Contrat principal que dans le Contrat renouvelé.*
>
> *[874] Plus particulièrement, la présence de cette clause dans le Contrat renouvelé couplée à la définition de Continuous Energy qui elle ne se retrouvait pas au Contrat principal créé une réelle ambiguïté, **permettant** dès lors au Tribunal de procéder à l'interprétation des clauses en litige.*

11. This is a manifest error. The operational flexibility clause has nothing to do with the *amount* of energy which HQ is entitled to purchase, but rather deals with *scheduling* and the modalities under which HQ may request and receive its predetermined monthly amount of Continuous Energy under the Renewal Contract.

12. But even more importantly, this error was compounded by another manifest and overriding error made by the trial judge in his interpretation of the notion of Continuous Energy, which vitiates his whole reasoning and requires the intervention of this Court.

13. Indeed, despite the language used by the parties to define Continuous Energy, the trial judge concluded that the term "Continuous Energy" meant *all* the energy produced at the Plant, as explained in the short *ratio* of his Judgment:

> *[944] Bref, le terme « Continuous Energy » lorsque conjugué avec l'ensemble des clauses des projets de lettre d'intention signifiait **toute l'énergie produite à la Centrale**.*
>
> *[1000] Bref, le Tribunal conclut que l'ensemble de la preuve ne démontre pas que les négociateurs aient voulu donner le sens que suggère CF(L)Co à la notion de «Continuous Energy» puisqu'à la seule occasion où cette expression fût utilisée, outre la période de construction, elle signifiait **toute la production de la Centrale**.*

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4 A corporeal movable (art. 906 CCQ).

14. He even went so far as to state that:

> *[988] (…) L'utilisation du terme « Continuous Energy » peut dès lors se comprendre surtout que la dernière définition utilisée par les parties est la suivante « **shall mean all energy available at the agreed point of delivery** ».*

15. This is remarkably wrong for a number of reasons. First, as we will demonstrate herein, the trial judge misquoted the previous definitions of Continuous Energy used by the parties in the context of their Letter of Intent,[5] which actually defined Continuous Energy as a predetermined and finite amount of energy and not as "all energy made available", any amount of energy over and above Continuous Energy being defined by the parties as Excess Energy.

16. Moreover, the trial judge ignored one of the fundamental differences between the Power Contract and the Renewal Contract, which is the omission of section 6.2 of the Power Contract in the Renewal Contract, meaning that the following clause ceased to have any force and effect after August 31st, 2016:

> *6.2 Sale and Purchase of Power and Energy*
>
> ***CFLCo shall deliver to Hydro-Quebec at the Delivery Point such power and energy as Hydro-Quebec may request**, subject to the provisions of Sections 4.2 and 4.3.*

17. In other words, under the guise of interpretation, the trial judge rewrote the Renewal Contract, the whole in clear breach of the principles outlined at Articles 1425 to 1432 of the *Civil Code of Québec* ("**CCQ**").

18. For those reasons, CF(L)Co submits that the Judgment of the trial court on the issue of the meaning of Continuous Energy is fundamentally flawed and should be reversed by this Court.

19. To put it simply, the object of the Renewal Contract is for the sale and purchase of Continuous Energy by HQ, which is a predetermined and finite monthly amount of energy. Any energy produced by the Plant over and above that amount of energy, which the

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5 Letter of Intent between CF(L)Co and the Quebec Hydro-Electric Commission executed on October 13, 1966, **Exhibit D-12**, **J.S.**, **vol. 38**, **pp. 14020 to 14040**.

parties have referred to in their previous dealings as Excess Energy, belongs to CF(L)Co as holder of the water rights and owner and operator of the Plant.

20. While the value of this Excess Energy may be viewed as "scraps"[6] in the eyes of HQ, the potential Excess Energy which is as stake in this case is very important to CF(L)Co, not only for its monetary value, but also from a more fundamental perspective regarding the respective rights of the parties, which ties into the second question at issue in this appeal.

21. CF(L)Co exclusively holds the water rights to the Upper Churchill River and owns and operates the Plant, whereas HQ is one of CF(L)Co's customers, albeit its largest customer, deriving its rights solely from within the confines and the terms and conditions of the Renewal Contract, nothing more, nothing less.

22. Therefore, CF(L)Co enjoys the universality of rights which have not already been contracted to its customers and is free to dispose of all the electricity products generated by the Plant (Art. 947-948 CCQ) as it sees fit, provided it respects the terms and provisions of the contracts it has entered into with its customers, including HQ.

23. With respect to the first question at issue, those principles are illustrated by the fact that HQ is entitled to receive a predetermined amount of Continuous Energy under the Renewal Contract, whereas any amount of energy over and above that amount, that is Excess Energy which may be available from time to time, belongs to CF(L)Co which may dispose of same as it sees fit.

24. Those principles are also illustrated by the second question at issue in this appeal, that is the "Interruptible Power" issue which arose under both the Power Contract and the Renewal Contract and raises the fundamental question of whether CF(L)Co has any right to develop, market and sell any new electricity products, services and enhancements not specifically allocated to HQ under the contracts, or whether HQ can prevent CF(L)Co from developing such products for sale to third parties, even if HQ has no need nor desire for those products.

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6 Expert report of Carlos Lapuerta, **Exhibit P-79**, § 20, 118 and 140, **J.S.**, **vol. 10**, **pp. 3183, 3217 and 3223**.

25. In practical terms, this second issue arose with the initiation of a program for the sale by CF(L)Co of a product called Interruptible Power to Newfoundland and Labrador Hydro ("**NLH**"), which began in 2012. Interruptible Power is essentially the sale of unused capacity of the Plant when it is not requested by HQ. HQ's position is that even if it has no need for the unused capacity, it can prevent CF(L)Co from monetizing this available capacity.

26. It is inconceivable that a party who owned the water rights to the river, and no matter how important the sale of certain rights to HQ was, nonetheless only transferred certain rights to HQ, would be foreclosed for a 65 year period from taking advantage of the opportunity to develop, market and sell new electricity products, including those not known or foreseen in 1969, when the sale of these products and services in no way affects CF(L)Co's ability to fully fulfil its obligations to deliver power and energy to HQ as requested under the contracts.

27. Yet that is the position of HQ and is the position that was ultimately accepted by the trial judge in the conclusions of the Judgment under appeal. CF(L)Co submits that this is fundamentally wrong and should also be reversed by this Court.

B. The Facts

28. CF(L)Co refers this Court to the Churchill Falls Time Line prepared jointly by the Parties and reproduced as Schedule II of the Judgment under appeal, at pages 225 to 243 thereof.

29. In addition, CF(L)Co states that it is in general agreement with the summary of the facts outlined by the trial judge in his Judgment, except for certain immaterial errors and a number of manifest and overriding errors and omissions, which will be more fully discussed in our arguments below.

C. Glossary of Terms

30. For the benefit of the Court, the parties have also agreed on a Glossary of the basic technical terms relevant to this case, which is at Schedule I of the Judgment under appeal, at pages 206 to 224. As this is central to an understanding of both questions at issue in these proceedings, we include hereafter a brief discussion of the notions of energy, power and capacity.

31. Power and energy are two distinct notions (and electricity products) that must be carefully distinguished before delineating the rights conferred to HQ under the Power Contract and the Renewal Contract.

32. According to the definitions in the Power Contract and HQ's glossary of electrical terms published on its website, these two notions can be defined as follows:

> ***"Energy"*** *means electrical energy* ***measured in kilowatthours****.*
>
> *"**Power**" means the rate at which energy is transferred at any point measured in kilowatts or multiples thereof."*[7]
>
> *"**Énergie/energy***
>
> *Grandeur caractérisant l'aptitude d'un système physique (hydraulique, thermique, etc.) à fournir un travail. Plus spécifiquement,* ***puissance consommée pendant un temps donné et mesurée en kilowattheures*** *(kWh).*
>
> ***Puissance/power wattage***
>
> *Capacité d'accomplir un travail, qui s'exprime généralement en watts (W), kilowatts (kW) et mégawatts (MW)."*[8]

33. In short, while power is a rate of delivery of energy at a point in time, energy is the result of the application of such power over time, so that, for a constant level of power, energy is equal to power multiplied by time (E=P*t).

34. From a commercial point of view, this distinction is important as power and energy are considered distinct electricity products that can and often are sold separately in the industry. An electricity distributor must not only be able to provide the electrical energy requested by its clients in a given month, but it must also be able to meet their power requirement at each instant in time, including during peak demand.[9]

35. Therefore, from a physical and commercial standpoint, it is very different to receive 1,000 kWh of energy with a power limit of 1,000 kW rather than a power limit of 100 W.

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7 Power Contract, **Exhibit P-1**, p. 1, **J.S.**, **vol. 3**, **p. 601**.
8 Glossaire de terminologie liée à l'électricité d'HQ, **Exhibit D-16**, **J.S.**, **vol. 38**, **pp. 14200 to 14203**.
9 *MacMillan Bloedel Limited* v. *Her Majesty the Queen in the Right of the Province of BC*, 2003 BCSC 705, paras. 15-16 (reasons of Hood J.); Illustration of power and energy concepts, **Exhibit D-17**, **J.S.**, **vol. 38**, **pp. 14204 to 14206**.

a) In the first case, one can exhaust the entire 1,000 kWh of energy in a single hour providing 1,000 kW of power to light, for example 10,000 (100W) light bulbs for one hour.

b) In the second case, the same 1,000 kWh of energy could be used to light only a single 100 W light bulb, but for a duration of 10,000 hours.[10]

36. The term "capacity" is also used in the Power Contract and the Renewal Contract. While the term "capacity" is often used in the industry interchangeably with the term "power", it is more properly understood, as the name implies, as the "capacity" or capability to generate power and the associated energy, available to be called upon. In the context of commercial arrangements, capacity is a contractual commitment that a certain amount of power will be made available when requested, rather than a measure of the power actually made available. It is noteworthy that capacity and power are both expressed in kilowatts or megawatts while energy is expressed in kilowatthours or megawatthours.

PART II – QUESTIONS IN DISPUTE AND GROUNDS FOR APPEAL

37. CF(L)Co submits that the questions that this Honourable Court must address are as follows:

1) Did the trial judge err by concluding that HQ has the exclusive right under the Renewal Contract to all of the power and all of the energy available from the Churchill Falls Power Plant (with the exception of the Recapture Block and the Twinco Block)?

2) Did the trial judge err by concluding that the Renewal Contract prevents CF(L)Co from selling Interruptible Power to NLH or other third parties?

3) Are the Conclusions of the Judgment, in any event, overbroad?

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[10] These distinctions between power and energy are further illustrated in **Exhibit D-17, J.S.**, **vol. 38**, **pp. 14204 to 14206**.

PART III – ARGUMENTS

A. DID THE TRIAL JUDGE ERR BY CONCLUDING THAT HQ HAS THE EXCLUSIVE RIGHT UNDER THE RENEWAL CONTRACT TO ALL OF THE POWER AND ALL OF THE ENERGY AVAILABLE FROM THE PLANT (WITH THE EXCEPTION OF THE RECAPTURE BLOCK AND THE TWINCO BLOCK)?

1) The Judgment erroneously failed to give effect and meaning to the terms of the Renewal Contract and modified it under the guise of interpretation.

38. The Renewal Contract is a detailed contract that stands on its own at the expiry of the Power Contract, and which contains provisions that are quite distinct from the Power Contract.

39. Many of the provisions contained in the Power Contract have been removed under the Renewal Contract. This includes **s. 6.2** (which required CF(L)Co to deliver to HQ all the power and energy that HQ requested), **s. 4.2.6** (right to spinning reserve), **s. 4.6** (calculation of spillage for the purpose of payment), definition of **Energy Payable** (including energy taken and spillage, which were both subject to payment under the Power Contract), definitions of **Basic Contract Demand**, **Applicable Rate** and **Base Rate**, **s. 8.5.2** (a four-year settlement mechanism, which effectively ensured that HQ paid only for energy taken (up to 32.2 TWh at the agreed rate, and amounts in excess of 32.2 TWh at a third of the agreed rate)).

40. Moreover, several new provisions have been added, notably in regards to the notion of Continuous Energy, such as the definition of **Continuous Energy**, a change of the **Object of the contract** at **s. 2.1** and **s. 7.1** (Price and Price Adjustments).

41. With respect to the quantity of energy in particular, a review of the plain language of the Renewal Contract confirms that CF(L)Co only agreed to sell to HQ each month an amount of energy defined as Continuous Energy (s. 2.1 RC), which is to be determined according to a definition (s. 1.1 RC), which stipulates that Continuous Energy is a fixed and limited amount of energy, based on the number of days in the month:

> *"2.1 Object*
>
> *During the entire term hereof, Hydro-Quebec agrees to purchase from CFLCo and CFLCo agrees to sell to Hydro-Quebec each month the **Continuous Energy** and the Firm Capacity, at the price, on the terms and*

conditions, and in accordance with the provisions, set forth herein."

"1.1(Definitions)

II – Concerning Delivery, Energy and Capacity

"Continuous Energy" means, in respect of any month, the number of kilowatthours obtainable, calculated to the nearest 1/100 of a billion kilowatthours, when the Annual Energy Base is multiplied by the number which corresponds to the number of days in the month concerned and the result is then divided by the number which corresponds to the number of days in the year concerned."

42. Therefore the very Object of the Renewal Contract has been modified to specify that the actual product being sold is Continuous Energy, the quantity of which is expressly defined as a fixed and limited quantity of energy per month for the duration of the Renewal Contract. Continuous Energy is in the range of 2.4 to 2.5 TWh per month.

43. A comparative review of the language of the Power Contract and the Renewal Contract should have been entirely sufficient to dispose of HQ's Motion for Declaratory Judgment, as the interpretation proposed by HQ and accepted by the trial judge is in direct contradiction with several provisions of the Renewal Contract and presumes an exclusive right to unlimited energy that is simply nowhere to be found in this contract:

Power Contract **(Express right to Energy in excess of the Annual Energy Base at 1/3 the price, with price adjustment mechanism)**	**Renewal Contract** **(Right only to fixed monthly amount of Continuous Energy)**
2.1 Object *During the existence of the present Power Contract Hydro-Quebec agrees to purchase from CFLCo and CFLCo agrees to sell to Hydro-Quebec each month […] (ii) from and after the Effective Date, the **Energy Payable** and the Firm Capacity; all at the prices, on the terms and conditions, and in accordance with the provisions, set forth herein.*	*2.1 Object* *During the entire term hereof, Hydro-Quebec agrees to purchase from CFLCo and CFLCo agrees to sell to Hydro-Quebec each month the **Continuous Energy** and the Firm Capacity, at the price, on the terms and conditions, and in accordance with the provisions, set forth herein.*
"Energy Payable" means *(b) in respect of any month commencing on or after the Effective Date, (i) the amount of energy which is taken by Hydro-Quebec during such month plus (ii) the amount of energy equivalent to water spilled during such month, […]*	*II – Concerning Delivery, Energy and Capacity:* […] *"Continuous Energy" means, in respect of any month, the number of kilowatthours obtainable, calculated to the nearest 1/100 of a billion kilowatthours, when the Annual*

	Energy Base is multiplied by the number which corresponds to the number of days in the month concerned and the result is then divided by the number which corresponds to the number of days in the year concerned.
8.4 Price After the Effective Date *After the Effective Date the monthly price for power and energy shall be:* *(i) the product of the Basic Contract Demand multiplied by 66.67% of the Applicable Rate (earned whether or not taken or made available), plus* *(ii) the product of Energy Payable as calculated for the month then ended multiplied by 33.33% of the Applicable Rate."* *8.5 [Adjustment each 4 year period if Energy Payable is below or above Annual Energy Base, but up to a limit of 32.2 TWh]*	*7.1 For all Continuous Energy, Hydro-Quebec shall pay CFLCo 2.0 mills per kilowatthour.* *In the event that in any month CFLCo is unable due to Plant deficiencies to make available at least 90% of the Continuous Energy, the price payable by Hydro-Quebec for such month shall be 2.0 mills per kilowatthour for that part only of the Continuous Energy which is made available.*
6.2 Sale and Purchase of Power and Energy *CFLCo shall deliver to Hydro-Quebec at the Delivery Point such power and energy as Hydro-Quebec may request, subject to the provisions of Sections 4.2 and 4.3.[…]*	Ø This provision was not incorporated in the Renewal contract. [No other provision concerning any right that HQ would have to energy other than Continuous Energy is present in the Renewal Contract]

44. The plain language of the Renewal Contract, which is in no way ambiguous in regards to Continuous Energy, should thus have led the trial judge to conclude that Continuous Energy, as per its definition, and as per the object of the Renewal Contract, is the quantity of energy to which HQ will be entitled each month once the Power Contract terminates and the Renewal Contract comes into effect. While this quantity represents the vast portion of the estimated energy available, it is not all of the energy that can be generated by the Plant. Any Excess Energy that can be produced from time to time clearly was not sold to HQ and thus belongs to CF(L)Co.

45. It is striking that in a 200-page Judgment, the trial judge failed to address the above table which showed the clear differences between the contracts, failed to even quote the definition of Continuous Energy found in the Renewal Contract and did not even mention any of the main provisions relied upon by CF(L)Co in its analysis of the questions at issue.

46. The notion of contractual group[11] which he relies on at par. 838ff, and which was not even raised by HQ, does not authorize the trial judge to replace the terms of the Renewal Contract with those of the original Power Contract. This is especially true considering the renewal provision itself, which specifically overrides all previous provisions contained in the original Power Contract, and which the trial judge entirely failed to quote and give effect to in his legal analysis:

> *"3.2 Renewal of Contract*
>
> *This Power Contract shall be renewed on the basis stated in this Section, for a further term of 25 years from the expiry date hereof.*
>
> *The renewed Power Contract shall be that set forth in Schedule III hereof, which shall come into force automatically without further signature being required.*
>
> *Any or all Articles or Sections of this Power Contract, other than this Section 3.2, as well as any or all undertakings or promises not specifically contained in Schedule III shall have no force and effect beyond the expiry date hereof* ***and shall not thereafter be binding upon the parties to the renewed Power Contract****."*

47. It is a well-established principle of Quebec civil law that courts should not interpret a contract unless there is an ambiguity as to the true intent of the contracting parties. In fact, as recently as 2014, this Court reiterated that to do otherwise would constitute a reversible error of law:

> *"[10]* ***Nous sommes d'avis que le juge a commis une erreur déterminante en voulant interpréter une clause contractuelle claire*** *à la lumière d'une lettre (P-3, le 12 avril 2006) qui ne faisait que confirmer l'entente du 6 avril (P-1) : le revenu total annuel de l'appelant serait au minimum de 65 000 $ incluant un salaire de base, des commissions et des bonis.*
>
> *[11] Tel que l'a souligné la Cour à plus d'une reprise, « pour que l'interprétation d'un contrat soit nécessaire, il faut d'abord qu'il y ait ambiguïté ». Il s'agit donc d'une erreur déterminante qui justifie l'intervention de la Cour."*[12]

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11 *Billards Dooly's inc.* c. *Entreprise Prébour ltée*, 2014 QCCA 842.

12 *Bisignano* c. *Système électronique Rayco ltée*, 2014 QCCA 292, par. 10-11; See also *Samen Investments Inc.* c. *Monit Management Ltd,* 2014 QCCA 826, par. 46; *Pépin* c. *Pépin*, 2012 QCCA 1661, par. 86-87, 91 (reasons of Fournier J.); P.-G. Jobin with the collaboration of N. Vézina,

48. Obviously, the mere fact that the parties hold different views is not in itself sufficient to conclude that the contract is ambiguous.[13] If the meaning of a contract, reading its words in their ordinary sense, is plain and unambiguous on its face, it must be relied upon and given effect by the courts. The Court cannot, under the pretense of finding the common intention of the parties, alter the clear language of the contract:

> *"[125] Il faut qu'il y ait une ambigüité ou un doute raisonnable sur le sens à donner aux termes d'un contrat pour l'interpréter.* ***En l'absence d'une telle ambigüité, le Tribunal ne pourrait, sous prétexte de rechercher l'intention des parties, dénaturer un texte clair*** *:[…]*
>
> > *« Il devra s'en tenir à une application de ce qui est littéralement exprimé, tenant pour acquis que le texte reflète fidèlement l'intention des parties. L'exigence préalable d'une ambigüité, selon l'heureuse formule de deux auteurs, « joue le rôle de rempart » contre le risque d'une interprétation qui écarterait la volonté réelle des parties et bouleverserait l'économie de leur convention ».*[14]

49. Here, the only so-called ambiguity on which the trial judge based his entire judgement (par. 873) is the presence of identical operational flexibility provisions in both contracts. But, as we will examine in detail below (see par. 99) the operational flexibility provision does not in any way contradict the Continuous Energy definition found in the Renewal Contract, nor its Object. In fact, it does not even deal with the quantity of energy available under the contract. It is purely a scheduling provision, which must be exercised in accordance with all of the constraints found in the rest of the contract (for example Maintenance (s. 4.1.4), prior contractual obligations such as Twinco (s. 4.1.2) and the safety of the reservoir (s. 4.1.6)) and is easily reconcilable with the existence of a monthly limit for the energy.

50. Even if there was some degree of ambiguity created by the presence of the operational flexibility provision, and even if there was a "contractual group" as determined by the trial judge, this does not mean that the trial judge is allowed to disregard the language of the Renewal Contract to assert its true meaning. It still remains the first and foremost guide of the intent of the parties especially considering that in light of the

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Baudouin et Jobin: *Les obligations*, 7th ed. (Cowansville, Que: Yvon Blais, 2013), par. 413 ; *Eli Lilly & Co.* v. *Novopharm Ltd.*, [1998] 2 SCR 129, pp. 166-167 (reasons of Iacobucci J.).

13 *Godin* c. *Compagnies du Canada sur la Vie*, 2006 QCCA 851, par. 30 (reasons of Tessier J.).

14 *Canada (Procureur Général)* c. *Compagnie des chemins de fer nationaux du Canada*, 2014 QCCS 5007, par. 125, 128 et 139 (reasons of Lacoursière J.).

passage of time, no witness could be heard to contradict or explain the language of the contracts (§ 145).[15] The trial judge should therefore have at least attempted to reconcile his interpretation with the terms of the contract, which he entirely failed to do.

51. As stated at Art. 1427 CCQ, each clause of a contract must be interpreted in light of the others so that each is given the meaning derived from the contract as a whole. For example, the trial judge does not even attempt to explain:

a) The meaning of the difference in the objects of the Power Contract and the Renewal Contract;

b) How Continuous Energy could be a mere payment term given that s. 2.1 stipulates that "CFLCo agrees to sell to Hydro-Quebec each month the Continuous Energy and the Firm Capacity, at the price, on the terms and conditions, and in accordance with the provisions, set forth herein";

c) Why Continuous Energy would be defined as a monthly quantity varying with the numbers of days in the month if it is not the physical monthly quantity of energy available to HQ but rather a mere payment term;

d) Why it should disregard the fact that the definition of Continuous Energy is part of a section entitled "Concerning Delivery, Energy and Capacity", making clear again that it is a physical quantity and not a payment term;

e) What provision of the Renewal Contract would provide for the quantity of energy available for HQ if it is not for the clearly defined notion of Continuous Energy, let alone what provision of the Renewal Contract would allow HQ to receive exclusively all of the energy;

f) What is the effect of the removal of s. 6.2 of the Power Contract dealing with sales of power and energy, which stated that CF(L)Co would deliver to HQ "such power and energy as Hydro-Quebec may request".[16]

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15 D. Lluelles & B. Moore, *Les obligations*, 2nd ed (Montréal: Les Éditions Thémis, 2012), par. 1593; See also: *Gagnon* c. *Suncor Énergie Inc.*, 2014 QCCS 3669, par. 36 (reasons of Bolduc J.).

16 It is important to note that HQ itself relied on Section 6.2 of the Power Contract in the context of the 1982 Québec Declaratory Judgment Case to support the proposition that it was entitled, under the terms of that contract, to request the delivery of all of the power and energy that can be generated by the Plant: Amended Motion for Declaratory Judgment filed by HQ dated November 18, 1982, **Exhibit D-18**, pp. 22-23, **J.S.**, **vol. 38**, **pp. 14219 to 14243**.

52. In other words, the trial judge did not interpret the Renewal Contract, but modified it under the guise of interpretation, which is the hallmark of an error of law which calls for the intervention of the Court of Appeal.[17]

53. As mentioned by this Court in regards to an *Amiable Compositeur* to which the court affords even more interpretative freedom (liberté interprétative) than a judge:

> *[98] Je doute tout de même que cette licence interprétative aille jusqu'au point d'autoriser un arbitre-amiable compositeur à pratiquer, au nom de la primauté de l'intention des parties et donc de l'esprit de leur contrat, un remodelage qui, en l'absence d'une habilitation conventionnelle claire, consiste à radier purement et simplement certaines dispositions essentielles du contrat.*[18]

54. It is simply untenable in law and in logic to conclude that despite all of the changes described above, nothing changes for HQ and it gets to enjoy all of the same benefits and rights it had under the original contract, even if these rights are nowhere to be found in the language of the Renewal Contract. The trial judge even went so far as to conclude that HQ gets to keep the benefit of a specific electricity product called spinning reserve despite the fact that this product was originally conferred to HQ by a specific provision under the Power Contract (s. 4.2.6), which provision entirely disappeared from the Renewal Contract (see § 1056 ff).

55. This result not only flies in the face of the clear language of the contract and all known principles of legal interpretation, but it is particularly troubling considering that the price paid by HQ for these electricity products has decreased by more than 21% under the Renewal Contract. If the parties had wanted things to remain entirely the same, they would not have drafted a separate contract with markedly distinct provisions, but would have enacted a simple renewal clause extending the original contract for 25 years.

56. The parties were extremely sophisticated, were assisted by experienced counsel and the contracts were negotiated over a long period of time. It was in this context that the parties chose not to simply renew the Power Contract for another 25 years, with

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17 Vincent Karim, *Les Obligations*, Vol. 1, 3rd ed. (Montréal : Wilson & Lafleur, 2009), pp. 559; 694; *Lemarier* c. *Corporation de Ste Angèle,* (1920) 26 R.J. 317, 328; *Investissements René St-Pierre inc.* c. *Zurich, compagnie d'assurances,* 2007 QCCA 1269, par. 35.

18 *Coderre* c. *Coderre,* 2008 QCCA 888, par. 98; See also *Eli Lilly & Co.* c. *Novopharm Ltd.,* [1998] 2 S.C.R. 129, par. 54.

certain clauses removed. They also chose not to simply extend the term and modify the price. They chose to sign a distinct agreement, with a distinct object and numerous different clauses. They also chose to make the distinction between the two contracts even more explicit through the inclusion of section 3.2. The duty of the courts in matters of contractual interpretation is to give effect to the choices of the parties. The trial judge failed to give effect to those clear choices.

57. Finally, it is important to note that when faced, such as here, with a claim that a contract would provide for the existence of an exclusive right to a resource, courts have always refused to infer such a right as being implicitly conferred by an agreement and have always required a clear and express provision to that effect.[19] In particular the Supreme Court of Canada has concluded in *Fort Frances v. Boise Cascade Canada Ltd*., [1983] 1 SCR 171, that the contractual requirement to provide electrical energy "*to such an extent as the said Town… may require"* was entirely insufficient to confer to the town an exclusive right to the electrical production of the plant.

58. *A fortiori* this precedent should thus be sufficient to reverse the Judgment under appeal, given that, with the express removal of s. 6.2 of the Power Contract, there is absolutely no provision in the Renewal Contract which even mentions exclusivity or a right to unlimited energy, let alone a requirement that CF(L)Co would have to provide HQ with power or electrical energy "*to such an extent as Hydro-Québec may require*".

2) The Judgment erroneously reversed the meaning of earlier draft contractual documents to modify a defined term in the Renewal Contract and concluded that Continuous Energy means all of the energy that can be produced at the Plant.

59. In order to reach the conclusion that the term "Continuous Energy" in the Renewal Contract refers to all energy available at the Plant, despite the clear contrary definition contained in the contract itself, the trial judge relied on previous draft contractual documents which, according to him, would all define Continuous Energy as "all of the energy available at the agreed point of delivery" (§ 977, 988).

60. More specifically, the trial judge refers to negotiations concerning the removal of the

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19 *Société immobilière Trans-Québec inc.* c. *2981092 Canada inc.*, J.E. 98-389 (C.A.), pp. 7-9 (reasons of Rothman J.). See also: *Gameroff* c. *Voelkner*, (1965) B.R. 827, p. 828.

"Split Tariff" structure and affirms that in that context the parties had understood Continuous Energy to mean all of the production of the Plant, as evidenced by the following excerpt of a previous version of the Letter of Intent, quoted by the trial judge: *"[Continuous Energy] shall mean all energy made available at the agreed point of delivery"* (§ 988; see also § 977 and § 236-242).

61. However, this quotation is a truncation of the terms of this document which **completely reverses its meaning**.

62. In reality, and as is apparent from the below complete version of the very sentence quoted by the trial judge in support of his conclusion, this document defined Continuous Energy as a finite limited monthly quantity, consistent with the Renewal Contract and the final version of the Letter of Intent:

> *"The term « continuous energy » for the purposes hereof shall mean all energy made available at the agreed point of delivery,* ***from all generating units commissioned less one unit****,* ***up to but not exceeding 105%*** *of the* ***corresponding amounts of energy shown in column 5 of the Table Article 9****, and subject to the provisions of Article 8.1(a) below."*

9.0 CAPACITY AND ENERGY SURPLUS TO PRESENT REQUIREMENTS OF NEWFOUNDLAND
Estimated Amounts at Agreed Point of Delivery

Column 1 Date	Column 2 Units Installed	Column 3 Firm Capacity (KW)	Column 4 Spare Capacity (KW)	Column 5 Continuous Energy (Millions of KWH Per Month)
March 1, 1971	2	436,500	444,500	320.1
June 1, 1971	3	881,000	444,500	644.57

63. As is apparent from this quote, and the table it refers to, not only is this a finite quantity well below the maximum production of the Plant, it is also a monthly limit, just as it is both in the final version of the Letter of Intent and in the Renewal Contract itself.

64. In other words, "all of the energy up to 105% of 644.57 MW/h per month" is clearly not all the energy, but a finite and limited quantity, i.e. precisely 676.79 MW/h per month. While this may seem obvious, it is worth repeating since it forms the entire basis on which the trial judge authorized himself to deviate from the language of the Renewal Contract.

65. Firstly, it is wrong in law to use an earlier, draft version of the Letter of Intent to contradict and modify a specifically defined term contained both in the final version of the Letter of Intent and in the Renewal Contract.[20] Moreover, a plain reading of said draft Letter of Intent, which again is the sole source of the trial judge's contradiction of the terms of the Renewal Contract, reveals that, far from being in contradiction with said definition, it is in harmony with it and confirms that Continuous Energy was always meant to be a finite and limited quantity below the maximum production of the Plant.

66. In reality all of the historical documents rather define Continuous Energy as a finite quantity of energy, distinct from the total production of the Plant, including the Renewal Contract itself and the final version of the Letter of Intent.

67. Indeed, when a definition of the term Continuous Energy was first introduced, in the draft version of the Letter of Intent dated March 9, 1964 (Exhibit P-117), it already included limits to the quantity of energy by deducting one unit from the Plant capacity and providing for a cap of 105% of the amounts of energy provided in a table, similar to the clause reproduced at paragraph 63 above.

68. Then, the definition of Continuous Energy provided in all subsequent versions of the Letter of Intent included the same limits (Exhibits P-64, D-75, D-78, D-81, P-134, D-83, P-138, P-139, P-143 and D-88), including the final executed version of the Letter of Intent dated October 13, 1966 (Exhibits P-4 and D-12).

> *7.1 After the completion of ten units the term "continuous energy" for the purposes hereof shall mean all energy made available at the agreed point of delivery, from all generating units commissioned less one unit, up to but not exceeding 105% of the corresponding amounts of energy shown in column 6 of the Table Article 14.0 and subject to the provisions of Article 7.2 below.*

69. To make matters even clearer, the final version of the Letter of Intent also anticipated that additional Excess Energy would exist beyond this quantity and specifically defined it as: "…**all energy other than Continuous Energy**…" and priced it at 1/3 the price of Continuous Energy. Obviously if only Continuous Energy, and not Excess Energy, is mentioned in the Renewal Contract, it is because only Continuous Energy is sold to HQ under this contract.

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20 See *Bisignano* c. *Système électronique Rayco ltée*, 2014 QCCA 292.

70. The same limits were also present in the Preliminary outline for a first draft power contract dated November 4, 1966 (Exhibit D-98), and they remained until the definition of Continuous Energy was deleted from the draft Power Contract. When the expression was once more introduced in the Renewal Contract, it was clearly defined as a finite quantity of energy, being the monthly equivalent of the fixed amount of Annual Energy Base in effect at the time of expiry of the Power Contract.

71. In fact, there is not a single draft or final version of the Letter of Intent or of the contracts that supports the position that Continuous Energy means all of the Plant's production (§1000).

72. This is also consistent with the evolution of the Renewal Clause itself, illustrated in the table below, which makes it clear that, while CF(L)Co consented to a 25 year automatic renewal of the Power Contract, which was requested by HQ "*in order to project a lower mill rate than the present draft of the contract permitted*"[21] in light of cost overruns of the project, CF(L)Co expressly stipulated that the terms of this renewal would be changed to reflect the sale of a limited quantity of energy defined as Continuous Energy (without ever including the sale of Excess Energy) on the basis of a simple take-or-pay arrangement (i.e. the purchaser must pay for the energy made available, whether it is taken or not), rather than the more complex "split-tariff" structure of the Power Contract:

- **Rider 34 prepared by CF(L)Co (Exhibit D-21)**

"3.2 Renewal
This Power Contract shall be renewed, on the basis stated in this section, for a further term of 25 years from the expiry date hereof.
Renewal of this Power Contract shall be evidenced by a ***new contract*** *which shall provide as follows and be in form and terms approved by counsel for each of the parties respectively*

a) Sale and purchase of energy under such new contract shall be on a ***continuous energy basis****, whereby,* ***up to the limit of the number of killowatthours*** *per year which shall constitute, at the date of expiry hereof, the Annual Energy Base, Hydro-Quebec shall pay for all energy made available to it by CFLCo,* ***whether or not taken****;*

b) The price payable by Hydro-Quebec shall be payable in lawful money of Canada and the rate per killowatthour applicable shall be the equivalent in Canadian dollars of 2.0 mills in U.S. funds;"

[21] Minutes of a Joint Meeting of the Executive Committee of the Board of Directors of Brinco and CF(L)Co held on April 10, 1968, **Exhibit P-8**, p. 5, **J.S.**, **vol. 3**, **p. 831**; Handwritten notes bearing the mention "26-2-68" prepared by C.T. Manning, **Exhibit P-185**, p. 1, **J.S.**, **vol. 14**, **p. 4716**.

- **April 19, 1968 draft version of the Power Contract (Exhibit D-22)**

"3.2 Renewal of Contract
This power Contract shall be renewed on the basis stated in this Section, for a further term of 25 years from the expiry date hereof.
The renewed Power Contract, on the basis of a ***sale and purchase of continuous energy*** *whereby* ***a number of kilowatthours*** *per year equal to that which shall constitute, at the date of expiry hereof, the Annual Energy Base,* ***shall be made available by CFLCo*** *to Hydro-Quebec and the latter shall pay for it,* ***whether or not taken****, at a price of 2.0 mills per kilowatthour payable monthly […]."*

- **April 25, 1968 draft version of the Power Contract and the Renewal Contract, (Exhibit D-23)**

"3.2 Renewal of Contract
This power Contract shall be renewed on the basis stated in this Section, for a further term of 25 years from the expiry date hereof.
The renewed Power Contract ***shall provide for a sale and purchase of energy****, whereby* ***a number of killowatthours*** *per year equal to that which shall constitute the Annual Energy Base at the date of expiry hereof* ***shall be made available by CFLCo*** *to Hydro-Quebec and the latter shall pay for it,* ***whether or not taken****, at a price of 2.0 mills per kilowatthour payable monthly […]"*
Article II Object (Schedule III)
"2.1 Object
During the entire term hereof, ***Hydro-Quebec agrees to purchase from CFLCo and CFLCo agrees to sell to Hydro-Quebec each month the Continuous Energy*** *and the Firm Capacity, at the price, on the terms and conditions, and in accordance with the provisions, set forth herein."*

- **Final Version of the Power Contract (Exhibit P-1)**

"3.2 Renewal of Contract
This Power Contract ***shall be renewed on the basis stated in this Section****, for a further term of 25 years from the expiry date hereof.*
The Renewed power Contract shall be that set forth in Schedule III hereof, which shall come into force automatically without any further signature being required.
Any or all Articles or Sections of this Power Contract, other than this Section 3.2, as well as any or all undertakings or promises not specifically contained in Schedule III shall have no force and effect beyond the expiry date hereof and shall not thereafter be binding upon the parties to the renewed Power Contract.*"*

Final Version of the Renewal Contract (Schedule III of the Power Contract)
"2.1 Object
During the entire term hereof, ***Hydro-Quebec agrees to purchase from CFLCo and CFLCo agrees to sell to Hydro-Quebec each month the Continuous Energy*** *and the Firm Capacity, at the price, on the terms and conditions, and in accordance with the provisions, set forth herein."*

73. This clearly demonstrates that, just as per the definition of Continuous Energy, it was always intended that HQ would not have access to unlimited energy under the Renewal Contract, but that it would rather be entitled to purchase energy "**up to the limit**" of the Annual Energy Base in effect at the end of the Term of the Power Contract (which is itself a contractually defined quantity). This was initially a yearly limit, but it evolved to a monthly limit under the final version of the Renewal Contract.

74. Contrary to HQ's fundamental premise, there is nothing extraordinary or unusual in selling (on a take-or-pay basis) a fixed monthly block of energy. In fact, the only energy sold between the parties which is not a block is the energy sold to HQ under the Power Contract, while the energy sold to HQ under the Letter of Intent, during the construction phase of the Power Contract, and during the Renewal Contract are all limited monthly blocks, as is also the case for the Twinco and Recapture blocks.[22]

75. Thus, the interpretation of the trial judge is not only inconsistent with the language of the contract, it is also in direct contradiction with all of the earlier definitions of Continuous Energy found in the contractual documents, with the general structure of the contract and with all of the draft versions of the renewal clause which make it clear that the intent of the parties was always to limit HQ's energy purchases to the value of the final Annual Energy Base. While this value represents the vast majority of the available energy, it does not represent the totality of the plant's output as it is expressly capped at 32.2 TWh per year, under s. 9.3 ii of the Power Contract.

3) The Judgment is internally inconsistent and contradictory in its analysis of the meaning of the notion of "Continuous Energy".

76. While the trial judge mentions repeatedly throughout the Judgment and ultimately concludes that the term Continuous Energy means all of the energy produced at the plant (§ 977), he nevertheless confirms at the same time that during the negotiation period, and certainly in the Letter of Intent, the term "Continuous Energy" was always coupled and opposed with "Excess Energy" (§ 983) defined as "…**all energy other than Continuous Energy**…", which should therefore have excluded the possibility that the term Continuous Energy could include this very same excess energy[23].

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22 Letter of Intent, **Exhibit D-12**, column 6, p. 11, **J.S.**, **vol. 38**, **p. 14030**; Power Contract, **Exhibit P-1,** definition of "Energy Payable", ss. 4.2.2., 6.6., pp. 3, 8, 15, **J.S.**, **vol. 3**, **pp. 603, 608 and 615** and Schedule II columns 6 and 7, **J.S.**, **vol. 3**, **p. 643**.

23 See also § 143.

77. However this is exactly what the lower court ultimately concludes with respect to the Renewal Contract, thereby arriving at the contradictory and internally inconsistent result that the same parties would have used the same expression (i.e. "Continuous Energy") in both the Renewal Contract and the Letter of Intent, but that its meaning would somehow have changed to mean the complete opposite and would now incorporate Excess Energy.

78. Moreover, since the price paid by HQ is limited to a fixed monthly amount as per the definition of Continuous Energy (s. 7.1), the conclusion of the lower court that HQ is nevertheless entitled to all of the energy that can be produced at the Plant should lead to the inescapable result that HQ would receive free energy when deliveries to HQ exceed the amount of Continuous Energy.

79. However, the trial judge dismisses this concern by stating that while HQ would be allowed to take more energy in a given month, this would not change the overall annual limit fixed by the final AEB (§1053). The trial judge thus appears to recognize here that there is at least an annual limit, if not monthly, to the energy that HQ can request under the Renewal Contract. Yet he then seems to forego this annual limit in the latter part of his Judgment since its formal conclusions make no mention of such limits and rather stipulate at §1150 that HQ is entitled to the entire production of the Plant (with the exception of the Twinco and Recapture blocks).

80. But either there is an annual limit or there is not. If there is an annual limit, HQ is not entitled to the entire production of the Plant. If there is not, HQ will necessarily receive energy at no cost if there is sufficient water to deliver more than the numerical value of the final AEB to HQ. At any rate it is impossible to reconcile par. 1053 of the Judgment with the actual declarations granted in the Judgment.

81. In order to further justify that despite its interpretation, HQ would not receive free energy, the trial judge also concluded that the notion of final AEB, which establishes the numerical value of Continuous Energy, is an average of the past production of the Plant that incorporates both years of low and high hydrology. However, this is a mathematical impossibility, since the level of the AEB is capped at a maximum of 32.2 TW/h under the terms of the contract (Section 9.3(ii)), thereby excluding the possibility that the AEB could

conceptually represent a true average.[24]

82. It is worth noting that the trial judge does not even mention this cap in his 200-page Judgment, despite the fact that this notion and its implication for the so-called average, was extensively debated at trial and was fatal to HQ's position.

83. That being said, and while there is uncertainty regarding the amount of Excess Energy that may truly be available during the Renewal Contract period, the existence of Excess Energy above Continuous Energy is the very premise upon which HQ's declaratory judgment is based and its entire *raison d'être*. If such energy does not exist, then the debate is moot. If it exists then it is logically impossible to deny that the result of the trial judge's interpretation of the Renewal Contract is that it flows for free to HQ. The trial judge therefore simply failed to acknowledge the true consequences of his declaration.

84. Be that as it may, what truly matters is that the historical documents show without a doubt that Mr. Clinch (engineer from Acres retained by CF(L)Co at the time) and Mr. McParland, V.P. engineering of CF(L)Co, both estimated in 1964 that Excess Energy above the cap of 32.2 TWh could indeed be produced by the Plant:[25]

> Additional cheap energy beyond the base estimate of 32.2×10^9 kwhrs may be available to Hydro-Quebec, at a lower rate, from the following sources:-
>
> [...]
>
> Flow for secondary energy generation will be available on the average about once in three years, and over the long-term should amount to 2% more energy.

85. It is not only absurd that CF(L)Co would have agreed to give all of this free energy to HQ, it is also inconsistent with the original Power Contract and with the Letter of Intent, which both recognize "Excess Energy" above the AEB as a separate electricity product and specify a price at which such products would be sold to HQ.

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24 It is to be noted that s. 9.4 PC also prohibits any change of the AEB by more than 3.33% per year and allows the party to agree on any AEB "without reference to the said cumulative experience" further demonstrating that the final AEB was never meant to be an average of the production.

25 Notes Concerning Alternative Tariffs for Power and Energy Sales to Hydro-Québec dated February 13, 1964 and prepared by R. L. Clinch, **Exhibit P-46A**/2 and /5, **J.S.**, **vol. 6**, **p. 1999 and p. 2002**. Some Comments on a Possible Energy Formula for the Sale of Power dated March 4, 1964 and prepared by D. McParland, **Exhibit P-47**/7 and /12-13, **J.S.**, **vol. 6**, **pp. 2014 and 2019-2020**.

> *"La production annuelle assumée est corrigée après 8 ans, et tous les 4 ans par la suite, selon la production réelle et des ajustements sont faits pour les montants qui auront été payés en trop ou en trop peu. Bien que la production annuelle réelle puisse atteindre 35.4 billions de kilowattheures, la moyenne servant de base aux ajustements, est limitée à 32.2 billions de kilowattheures pour assurer à Hydro-Québec de l'énergie excédentaire au bas prix de 1/3 du tarif."*[26]

86. The practical effect of such an interpretation is to further reduce the average price per KWh HQ will pay for the energy, thereby rewriting a basic tenet of the contract.

87. In addition to these internal contradiction and inconsistencies, including the above-mentioned failure of the trial judge to give meaning to several key provisions of the Renewal Contract, the Judgment is also impossible to reconcile with other key contractual provisions and leads to commercially absurd results. In particular, the Judgment is incompatible with the Payment mechanism found at 7.1 RC.

88. The fact that Continuous Energy is the physical product (Art. 906 CCQ) that is being purchased by HQ is also evidenced by s. 7.1 of the Renewal Contract, which adjusts the price paid by HQ in accordance with the "part" or quantity of "the Continuous Energy which is actually made available" by CF(L)Co in case of Plant deficiencies. Continuous Energy (or part thereof) is therefore necessarily the physical quantity of electricity that is made available for delivery, and not just a payment term.[27]

89. For example, if CF(L)Co is only able to deliver 80% of Continuous Energy because of Plant deficiencies, it is clear from section 7.1 that HQ pays only 80% of the price, i.e. it pays for the quantity of energy actually made available. This provision is thus perfectly coherent with CF(L)Co's interpretation of Continuous Energy as a limited monthly physical quantity.

90. However, how can this provision be reconciled with the lower court's conclusion that Continuous Energy is not a monthly limit? If HQ is not bound to a fixed monthly amount, and can rather schedule what it wants in any given month, this provision no longer makes any sense whatsoever.

91. To illustrate this with an example, if in a given month CF(L)Co can only make available 80% of Continuous Energy because of a Plant Deficiency, this is what HQ will

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26 "*Notes Descriptives des documents accompagnant la demande d'Hydro-Québec en date du 6 juin 1968, relativement au contrat d'énergie entre Hydro-Québec et Churchill Falls (Labrador) Corporation Limited (CF(L)Co)*", **Exhibit P-208/**16, **J.S.**, **vol. 15**, **p. 5240**; See also: Power Contract, **Exhibit P-1**, ss. 8.4 and 8.5.2, **J.S.**, **vol. 3**, **p. 618**; Letter of Intent, **Exhibit D-12**, s. 10.2, **J.S.**, **vol. 38**, **p. 14027**.

27 Renewal Contract, **Exhibit P-1**, s. 7.1, p. 7, **J.S.**, **vol. 3**, **p. 607**.

actually pay for. However under the interpretation of the trial judge, HQ would then be able to recoup this unavailable energy in the next month by scheduling 120% of Continuous Energy, since it has no monthly limits and since the water unused because of the Plant deficiency is still available in the reservoir. Yet HQ would only have to pay that month for 100% of CE under s. 7.1.

92. Thus instead of paying for what it actually receives, as per CF(L)Co's interpretation, in case of a Plant deficiency, HQ would end-up paying less than what it truly received and getting energy for free (i.e. 20% of CE in our example above, which represents approximately 0.5 TWh with a value, based on the expert testimony, in the range of $25M).[28]

93. Again, despite the fact that these problems were underlined to the trial judge,[29] no mention whatsoever of this is made in the lower court's 200-page Judgment and no attempt to reconcile section 7.1 with the court's conclusion is even attempted.

94. As indicated by the Supreme Court of Canada in *Consolidated-Bathurst* v. *Mutual Boiler,* [1980] 1 S.C.R. 888[30], the Courts must set aside an interpretation of the contract which would lead to absurd, illogical or incongruous results, which rational commercial actors would never have intended.

95. In light of this principle, and all of the above contradictions, it becomes apparent that HQ's interpretation of the Renewal Contract is completely untenable as it leads to several illogical and absurd commercial results which can in no way be taken to reflect the common intention of the parties when they negotiated the Renewal Contract.[31]

4) The grounds relied upon by the trial judge to disregard entire sections of the Renewal Contract are entirely insufficient to trump the language of the contract and were in any event fully compatible with a defined monthly limit of Continuous Energy.

96. In order to justify his direct contradiction of several provisions of the Renewal Contract the trial judge relied almost exclusively on the fact that a single clause dealing

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28 See **Exhibit D-229**, **J.S.**, **vol. 57**, **p. 21148**; Testimony of Chad Wiseman, November 23, 2015, pp. 169-176, **J.S.**, **vol. 70**, **pp. 25950 to 25957**; **Exhibit D-153**, par. 36, **J.S.**, **vol. 43**, **p. 16237**.

29 **Exhibit D-229**, **J.S.**, **vol. 57**, **p. 21148**; Testimony of Chad Wiseman, November 23, 2015, pp. 169-176, **J.S.**, **vol. 70**, **pp. 25950 to 25957**.

30 P. 901; See also *Construction Val-d'Or Ltée* c. *Casiloc inc.*, 2009 QCCS 2719, par. 24-26, (reasons of Guthrie J.), aff'd 2011 QCCA 497.

31 Art. 1425 CCQ.

with operational flexibility remained the same in the Power Contract and the Renewal Contract and on an alleged incompatibility between CF(L)Co's interpretation and another contract signed between the parties in 1998, the Guaranteed Winter Availability Contract (the "**GWAC**").

97. Even if these arguments had any merits, they could not lead to a simple deletion of all of the inconvenient provisions of the Renewal Contract (definition of CE, Object clause, Pricing mechanism at 7.1, removal of 6.2, absence of any other quantity provisions in the RC, etc.) but should rather simply have led the trial judge to reconcile these elements with the rest of the Renewal Contract, which, as we will see, is easily done.[32]

i. Operational Flexibility

98. The trial judge concludes at par. 873 of the Judgment that, since the language of the operational flexibility provision in s. 4.1.1 RC is identical to the operational flexibility provision present in the Power Contract (4.2.1 PC) this creates an ambiguity that somehow would authorize the court to rewrite the contract. Indeed, HQ argued that the inclusion of this provision necessarily implies that it still benefits from unlimited quantities of energy under the Renewal Contract since a fixed monthly quantity of Continuous Energy (as per its definition) would allegedly deprive it of the operational flexibility it enjoys under s. 4.1.1 RC.

99. However this argument is clearly flawed. Firstly, the operational flexibility provisions do not in any way provide for a quantity of energy. As the name implies, they are strictly about the flexibility in the scheduling of the energy.

100. More particularly, s. 4.1.1 RC simply states that within the minimum and maximum capacity limits, "Hydro-Quebec may request CF(L)Co to operate the Plant so as to supply Hydro-Quebec's schedule of power requirements", thereby impacting the level of water in storage.[33]

101. Thus this provision simply indicates that HQ has the benefit of great flexibility in the scheduling of energy and power (under reserve of several other limitations found in the contract, notably at art. 4.1) but tells us nothing about the quantity of energy available to HQ, nor for that matter about the quantity of power, which is itself defined in section 1.1

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32 Art. 1427 CCQ.
33 Renewal Contract, **Exhibit P-1**, **J.S.**, **vol. 3**, **pp. 596 to 654**.

of the Renewal Contract.

102. Secondly, the operational flexibility provision may of course not be interpreted (implicitly to boot) to contradict and erase the actual quantity provisions found in the rest of the contract which are found in s. 2.1 (object) and in the definition of Continuous Energy in s. 1.1, but must rather be reconciled with them, as per CF(L)Co's interpretation.

103. It is fallacious to argue that Operational Flexibility provides HQ with an unlimited amount of energy despite the fact that another provision of the Renewal Contract defines the monthly limited quantity of energy it is entitled to (CE), and despite the fact that HQ will only pay for this limited quantity (CE).

104. It is however very easy to reconcile the operational flexibility provision with such a monthly limit. Indeed, although HQ did enjoy multi-seasonal flexibility under the Power Contract, it was not because of the Operational Flexibility provisions, whose language on its face does not provide for any of this, but rather by the combination of s. 6.2 and the definition of Energy Payable (with the payment adjustments at 8.5.2 of the PC).

105. These provisions having disappeared from the Renewal Contract, it simply follows that such multi-seasonal flexibility has not been granted to HQ under the Renewal Contract.

106. Under the Renewal Contract, HQ will enjoy the benefit of the operational flexibility provided for by s. 4.1.1, but it will simply have to exercise this flexibility in accordance with the new monthly energy limit imposed by the other terms and conditions of the Renewal Contract, just as it exercised its previous operational flexibility in accordance with the other contractual (and practical) limits imposed by the contract and the Plant, such as Minimum Capacity and Firm Capacity, scheduling requirements, hydrology and availability of the Plant.

107. Contrary to what HQ suggests, this does not deprive s. 4.1.1 RC of any effect or usefulness. HQ will still enjoy the benefit of operational flexibility, but within a month rather than on a multi-seasonal basis. This hourly, daily and weekly flexibility is meaningful as it allows HQ to schedule power and energy within a given month when it is most required, for example weekday evenings during peak-demand.[34]

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[34] Expert Report of Robert Kendall, **Exhibit D-153**, Figure 1, par. 87-88, pp. 20-21, **J.S.**, **vol. 43**, **pp. 16250-16251**; Six Graphs A to F (supplementing Figure 1 of the Expert Report of Robert Kendall), **Exhibit D-153B**, **J.S.**, **vol. 43**, **pp. 16285 to 16290**; Testimony of Hugo Sansoucy, October 26, 2015, pp. 133-135, **J.S.**, **vol. 61**, **pp. 22615 to 22617**.

108. In short, if the parties had wanted to provide HQ with the ability to shift its energy allotment from month to month, they would have defined Continuous Energy as a yearly or multi-year quantity, not as a monthly limit. Absent such provision HQ cannot claim to have purchased such a valuable right, especially for free.[35]

109. It must finally be stated that despite HQ's allusions to the contrary, multi-seasonal flexibility is a matter of mere convenience for HQ and not a matter of security. Indeed, HQ has all the required flexibility within its own system to operate without any issue, even under an entirely fixed power and energy supply regime. In fact, Mr. Jean Matte, HQ's Director of production planning ("*Directeur planification de la production*") who was examined in discovery by CF(L)Co, has admitted that:

a) HQ will be able to operate within these new parameters without in any way jeopardizing the security of its supply to its customers; and

b) HQ has made no actual study of the impact of this implementation of the Renewal Contract nor designed any specific operational or contingency plan post- August 31, 2016,

thereby indicating HQ's confidence in its ability to operate under a fixed monthly quantity of energy with minimal operational difficulties.[36]

ii. The GWAC

110. The GWAC, or Guaranteed Winter Availability Contract, as its name indicates, is an agreement entered into by the parties in 1999, whereby CF(L)Co agrees to guarantee access and sell to HQ from November to March of each year, additional firm capacity, but not energy, from the Plant above the maximum Firm Capacity described in the Power Contract, up to 682 MW (for a combined total of up to 5064.6 MW less 300 MW for Recapture).

111. Based on the fact that the GWAC will be in force until 2041 and that its terms do not specifically change in 2016, the trial judge concluded (in par. 1005 ff) that the GWAC

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35 Power Contract, **Exhibit P-1**, s. 8.5.2, p. 18, **J.S.**, **vol. 3**, **p. 618**; Letter of Intent, **Exhibit D-12**, s. 8.0(c), p. 6, **J.S.**, **vol. 38**, **p. 14025**; Draft of the Power Contract dated November 13, 1967, **Exhibit P-56/**14, **J.S.**, **vol. 7**, **p. 2184**; Draft Synopsis of Meeting between Hydro-Quebec/CF(L)Co prepared by D.J. McParland, November 7, 1967, **Exhibit P-169/2**, **J.S.**, **vol. 13**, **p. 4304**; Draft of the Power Contract, dated November 13, 1967, **Exhibit P-171/**14, **J.S.**, **vol. 13**, **p. 4326**; Draft of the Power Contract dated December 5, 1967, **Exhibit P-173/**16, **J.S.**, **vol. 13**, **p. 4368**.

36 Examination on Discovery of Jean Matte held on March 31, 2014, **Exhibit D-218**, pp. 186-198, **J.S.**, **vol. 57**, **pp. 21008 to 21011**.

would lose its usefulness if HQ cannot draw upon the additional power continuously during the winter months and must ration its use in accordance with the level of Continuous Energy available to it each month.

112. As CF(L)Co did not "officially" inform HQ of its position on Continuous Energy until June 2012, despite Mr. Burry's testimony confirming that there were at least informal discussions on Continuous Energy as early as 2008,[37] the trial judge went so far as concluding that this would constitute "l'aveu de la partie" against its position [§1031]!

113. This is clearly wrong in law. Indeed how can the behavior (in fact the mere silence) of a party on another contract, that according to the same judge does not form part of the same contractual group (see § 866), constitute relevant behavior relating to the execution of another contract yet to be in force for another 20 years? It is even more troubling considering that the parties specifically entered into these negotiations by stipulating at numerous times, that the GWAC would not in any way alter the respective positions of the parties on the interpretation of the Power Contract:

> *"As was further pointed out at the May 28, 1991 meeting, Hydro-Quebec made it absolutely clear at the start of our negotiations that it was not prepared to consider any changes to the existing Hydro-Quebec CF(L)Co contract, nor the wheeling of power across Quebec. We accepted these pre-conditions. I am sure you will appreciate that we have an equal reticence in these negotiations to do anything which might be construed as confirming or improving for Hydro-Quebec's benefit, the existing arrangements.*
>
> *By mutual consent, therefore, we have striven to attain the objective of keeping CF(L)Co financially whole, within existing shareholdings and without adding to or subtracting from existing arrangements. We have been successful in identifying new commercial arrangements which can achieve both of these objectives."*[38]
>
> *****
>
> *"4. Power Contract*
>
> *None of these arrangements will alter the Upper Churchill Power Contract or the positions of the parties with respect to the Upper Churchill Power Contract."*[39]
>
> *****

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37 Handwritten notes of Oral Burry, **Exhibit D-145**, **J.S.**, **vol. 43**, **p. 16067**; Testimony of Oral Burry, November 26, 2015, pp. 29-30, **J.S.**, **vol. 70**, **pp. 26258-26259**.

38 Letter from Cyril Abery of NLH to Jacques Guèvremont of HQ dated May 31, 1991, **Exhibit D-141**, pp. 3-4, **J.S.**, **vol. 43**, **pp. 16051-16052**.

39 Summary of the discussions between Newfoundland & Labrador and HQ (as of March 6, 1998) attached to the Letter from William E. Wells to Thierry Vandal dated March 9, 1998, **Exhibit P-272**/10, **J.S.**, **vol. 22**, **p. 7881**.

> *"We confirm that such document correctly summarizes our discussions on the major issues which we will be addressing in the Memorandum of Understanding* ***and that any information extracted or derived from the attached document will not affect the substance or interpretation thereof****."*[40]

114. It is therefore inappropriate for the lower court to ignore these clear statements and create out of whole cloth an "aveu" from the mere silence of CF(L)Co on an alleged contradiction, that as we will see below, does not even exist.

115. Firstly, it must be noted again that the so-called contradiction with the GWAC does not at all pertain to the quantity of energy available to HQ under the contract but solely deals with the existence of a monthly rather than yearly limit. Indeed, whether HQ is limited to the final AEB (32.2 TWh minus recapture) or has access to any Excess Energy (potentially in the range of 1 TWh per year), has no bearing on the usefulness or implementation of the GWAC which was always limited by a Plant hydrology that can vary much more than this from year to year.

116. Secondly, it is important to place the GWAC in its proper context. While HQ did purchase a valuable product by way of the GWAC, the principal purpose of that agreement was to find a way to create additional revenues for CF(L)Co, which was facing possible bankruptcy, in order to ensure its long-term financial viability.[41]

117. Consequently, it is not surprising that the parties would not have changed the price structure of the GWAC after 2016. As the common intent of the parties was to generate a stable flow of revenue for CF(L)Co up to August 31, 2041, so as to ensure its long-term survival, a downward adjustment of the price in 2016 would have defeated one of the main purposes of the GWAC.

118. Be that as it may, the terms and structure of the GWAC are perfectly compatible with a monthly limit on the energy available to HQ. Under the GWAC, HQ is simply provided with the guarantee that it will have access to 682 MW of additional capacity, should there be enough energy available to draw upon it. Even under the current agreement, HQ has

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40 Letter from Thierry Vandal to William E. Wells dated March 9, 1998, **Exhibit P-272**/11, **J.S.**, **vol. 22**, **p. 7882**. See also: Testimony of Claude Dubé, October 30, 2015, pp. 96-97, **J.S.**, **vol. 64**, **pp. 23760-23761**.

41 Hydro-Quebec's Proposal Concerning the Financial Integrity of CF(L)Co and Royalties, **Exhibit D-33**, p. 1, **J.S.**, **vol. 40**, **p. 14802**; Minutes of special meeting of CF(L)Co's Board of Directors held on May 18, 1999, **Exhibit D-35**, p. 2, **J.S.**, **vol. 40**, **p. 14810**.

always needed to manage the GWAC in accordance with the limits provided under the Power Contract, such as Minimum Capacity, scheduling requirements and hydrology, so that for example it could not draw on the GWAC continuously in the winter if there was not enough water to satisfy its minimum capacity requirements in the summer.[42] [43]

119. Considering that the price of the GWAC was set on the basis of the avoided cost of building a peaking facility[44] which is normally used only for a few hours each month, the GWAC, which will still be usable for close to 66% of all the hours within the month according to HQ itself, will still be much more valuable to HQ than the price it is paying for.[45]

120. Consequently, the negotiations of the GWAC and its implementation do not in any way support the position of HQ but are rather fully compatible with the interpretation of the Renewal Contract proposed by CF(L)Co.

121. If anything, the GWAC, far from supporting HQ's position, is clear proof that HQ was not entitled to "*all or almost all of the power*" of Churchill Falls under the Power Contract, as otherwise it would not have purchased something it already had. HQ rather agreed to pay to obtain 682 MW of additional guaranteed capacity that it was not entitled to receive under the Power Contract.

B. THE POWER CONTRACT AND THE RENEWAL CONTRACT DO NOT PREVENT CF(L)CO FROM SELLING INTERRUPTIBLE POWER TO NLH OR OTHER THIRD PARTIES

122. This second issue applies to both contracts. It raises the broader question of whether CF(L)Co has any right to develop, market and sell any new products, services and enhancements not specifically allocated to HQ under the contracts, or whether HQ can prevent CF(L)Co from developing such products for sale to third parties even if HQ has no need nor desire for those products, and this for the entire period of the two contracts, i.e. 65 years.

123. In practical terms, the issue arose with the initiation of a program for the sale by CF(L)Co of a product called Interruptible Power to NLH, which began in 2012. Interruptible Power is essentially the sale of unused capacity of the Plant (i.e. water turbines) when it

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42 Expert Report of Robert Kendall, **Exhibit D-153**, par. 103, p. 24, **J.S.**, **vol. 43**, **p. 16254**.
43 Expert Report of Robert Kendall, **Exhibit D-153**, par. 104, p. 25, **J.S.**, **vol. 43**, **p. 16255**.
44 Testimony of Thierry Vandal, October 20, 2015, pp. 191-194, **J.S.**, **vol. 60**, **pp. 22181 to 22184**.
45 Testimony of Hugo Sansoucy, October 22, 2015, p. 178, **J.S.**, **vol. 61**, **p. 22660**.

is not required by HQ. HQ's position is that even if it has no need for the unused capacity, it can prevent CF(L)Co from monetizing this available capacity.

124. HQ's position is not tenable. As holder of the hydraulic rights and owner of the Plant, CF(L)Co enjoys the universality of rights that have not been specifically limited by way of agreements with its customers and is free to dispose of such rights as it sees fit, provided it respects the terms and provisions of the contracts that have been entered into with its customers, including HQ (Art. 947-948 CCQ).[46]

125. It is interesting to note that in *Kitimat (District) v. British Columbia (Minister of Energy and Mines),* the British Columbia Court of Appeal recognized that the holder of the water rights was free to adapt to the changing times and to exploit its resource to their fullest, provided that it was respecting its contractual commitments.[47]

126. HQ is not the holder of the water rights nor the owner or lessor of CF(L)Co's water turbines, it is simply the buyer of some of the electricity they produce.[48] In fact, despite having forcefully argued the reverse in its motion and at trial, HQ finally conceded that it did not, after all, own the entirety of the production from the Plant, since it recognized that if improvements were made to the Plant, the resulting additional capacity and energy would, in fact, belong to CF(L)Co, forcing it to amend its conclusion at the very end of the trial.[49]

127. More specifically, as regards the sale of Interruptible Power, the question can be solved entirely by simply referring to CF(L)Co's obligation, and HQ's correlative rights, under the Contracts, which is to make Firm Capacity available to HQ, when it has requested it and nothing more (as per s. 5.2 RC or 6.4 PC).

128. This is further confirmed by the fact that CF(L)Co is only subject to deficiency penalties when it "fails to make available" a number of "megawatts [of power] out of the total megawatts so requested".[50]

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46 See *Anglo Pacific Group Plc* c. *Ernst & Young*, 2013 QCCA 1323, par. 84.
47 *Kitimat (District)* v. *British Columbia (Minister of Energy and Mines)*, 2008 BCCA 81, par. 26-27, 31 and 38 (reasons of Lowry J.).
48 *District of Kitimat and Wozney* v. *Minister of Energy and Mines et al*, 2007 BCSC 429 (CanLII), par. 58 (reasons of Brenner J.), aff'd 2008 BCCA 81; M. Cantin Cumyn, *De l'existence et du régime juridique des droits réels de jouissance innommés : essai sur l'énumération limitative des droits réels*, (1986) 46 R. du B. 1, par. 50.
49 "*Amendement apporté par Hydro-Québec aux conclusions de sa Requête en jugement déclaratoire*", December 14, 2015, **J.S.**, **vol. 2**, **pp. 563-564**.
50 Definition of Deficiency, **Exhibit P-1**/8 and **P-1**/49, **J.S.**, **vol. 3**, **pp. 608 and 644**.

129. HQ's position is thus entirely inconsistent with the nature of the rights it holds under the contracts.

130. More importantly, it is well recognized that a right to receive electricity (energy or power) does not confer any rights on the production units themselves, especially considering that electricity is not only a commodity, but qualifies as well as a fungible good.[51]

131. Called upon to interpret very similar power contracts, the courts of British Columbia have made it clear that the right to Firm Capacity or power in a power purchase agreement is in reality akin to a mere contractual option. Until this option is exercised, CF(L)Co continues to own the commodity (electricity) and has the full right to use the underlying capacity until HQ requests and accepts delivery of electricity at the Delivery Point:

> *"[24] When asked the question did MacMillan Bloedel take delivery of its contract demand, or did the contract require MacMillan Bloedel to take delivery of its contract demand, assuming that the questions are the same, there is simply no hesitation in responding in the negative.* ***The contract does not require MacMillan Bloedel to take delivery or to pay for the contract demand electricity in the first instance. What MacMillan Bloedel had was nothing more than a right to call upon Hydro to deliver electricity up to its capacity or contract demand. Once that desire was made known, and no matter how, and the electricity was provided (consumption began) it was, in my view, delivered; but not before****.*
>
> *[25] MacMillan Bloedel had to pay for that electricity which it consumed, over and above the charge or fee it paid for the reserved capacity or contract demand from whence it came.* ***Other than the right aforesaid, MacMillan Bloedel did not acquire, own or use any part of the contract demand, until it was received and consumed and MacMillan Bloedel was obligated to pay for it. Delivery of the "capacity" or contract demand****, electrical power as defined by Mr. Mitchell,* ***can only take place once it is accessed by MacMillan Bloedel, and occurs in the form of electricity or electrical energy for which it pays the energy charge****.*[52]

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51 *Churchill Falls (Labrador) Corporation Ltd.* c. *Hydro-Québec*, 2014 QCCS 3590, **Exhibit P-336**, par. 591 (reasons of Silcoff J.), **J.S.**, **see electronic version**; *Community Pork Ventures Inc.* v. *Canadian Imperial Bank of Commerce*, 2005 SKQB 25, par. 6 (reasons of Kyle J.); *District of Kitimat and Wozney* v. *Minister of Energy and Mines et al*, 2007 BCSC 429 (CanLII), par. 51 (reasons of Brenner J.), aff'd 2008 BCCA 81; See also: *Ministre de la Sécurité civile et de la Protection civile (Canada)* c. *Tensaka Marketing Canada*, 2007 CAF 233, par. 11-12 (reasons of Décary J.); *Montreal (City)* v. *Montreal Light, Heat and Power Co.*, [1909] 42 SCR 431.

52 *MacMillan Bloedel Limited* v. *Her Majesty the Queen in the Right of the Province of BC*, 2003 BCSC 705, par. 24-26 (reasons of Hood J.); See also *West Fraser Mills Ltd.* v. *R.*, 2003 BCSC 268, par. 11, 15. (reasons of Catliff J.).

132. This case law is not only determinative of the issue, it is perfectly aligned with the industry context described by Ms. Bodell who has explained that it is very common in the industry to use the same generating units to provide both firm power to a customer and Interruptible Power to another at the same time, when the first customer does not call upon its firm capacity to produce power and energy.[53] Interruptible Power is a common product in the industry, that is in fact sold by HQ itself[54] which defines it on its own website as: "*Puissance régulière susceptible d'être coupée suivant des conditions strictement définies par contrat.*"[55]

133. It is also important to note that the trial judge agreed with CF(L)Co that the 300MW recapture clause does not constitute a limit on the capacity that can be used by CF(L)Co (§ 1135). This should have led the Court to conclude that, as owner of the Plant, CF(L)Co was thus entitled to go above this 300MW capacity allotted in priority for its use, when idle capacity exists at the Plant and is not required to meet HQ's requests.

134. However, the Court then mistakenly linked this question with the question of Continuous Energy and concluded at § 1138 that having decided that no Excess Energy remains for CF(L)Co above Continuous Energy, it necessarily follows that it is not entitled to sell Interruptible Power.

135. By doing so, the trial judge unfortunately erroneously confused the notions of energy and power (see for example § 1123, 1135 and 1141), which are entirely different concepts, and erroneously assumed that CF(L)Co used or would necessarily need to use HQ's energy entitlements when selling Interruptible Power. Yet, it was clear from the declaration requested, as well as the past practice, that CF(L)Co sought to use Interruptible Power solely to sell its own energy entitlements, but not HQ's energy.

136. Even if CF(L)Co does not have access to any Excess Energy according to the trial judge, and even if, despite the foregoing arguments, the judgment on Continuous Energy is upheld by this Court, CF(L)Co is still the owner of the Recapture and Twinco blocks,

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53 Testimony of Tanya Bodell, December 2, 2015, pp. 218-228, **J.S.**, **vol. 72**, **pp. 26964 to 26974**.

54 *Hydro-Quebec/New York Power Authority 1982 Pre-Scheduled Energy Agreement*, **Exhibit D-19**, s. 3.3. *Distribution Tariff of Hydro-Quebec*, Effective April 1st, 2014, **J.S.**, **vol. 39**, **p. 14252**, **Exhibit D-38**, chapter 4, ss. 8-9, pp. 9-16, **J.S.**, **vol. 40**, **pp. 14840 to 14847** and chapter 6, s. 2, pp. 19-25, **J.S.**, **vol. 40**, **pp. 14849 to 14855**.

55 "*Glossaire de terminologie liée à l'électricité d'Hydro-Québec*", **Exhibit D-16**, **J.S.**, **vol. 38**, **pp. 14200 to 14203**; See also *National Energy Board Electricity Regulations*, SOR/97-130, Current to June 17, 2015, **Exhibit D-203**, s. 2, p. 2, **J.S.**, **vol. 55**, **p. 20491**.

and could therefore use idle capacity (i.e. unused turbines) to increase the rate of production and delivery of these blocks of energy.

137. Because of that error, the Judgment failed to address the true question at issue between the parties in regards to Interruptible Power, i.e. can CF(L)Co use capacity that is otherwise idle to produce energy other than HQ's entitlement, when that capacity is not needed to meet HQ's energy schedules? Given the above and the content of the contracts, CF(L)Co submits that the answer is clearly yes.

1) Recapture is not a Limit on CF(L)Co's Rights but rather on HQ's Rights

138. Both parties agree that CF(L)Co is entitled under the Power Contract and the Renewal Contract to recapture a block of power up to 300 MW (at 90% load factor) and a corresponding amount of 2.362 TWh of energy per year (or approximately 196 GWh per month).[56]

139. However, while HQ claims that the rate of delivery of this recaptured energy is capped at 300 MW, in reality nothing in the Power Contract or the Renewal Contract prevents CF(L)Co from drawing upon its Recapture energy at a faster rate, provided that idle capacity is available at the Plant to produce this energy at a higher rate after HQ's requests are honored. The 300 MW is simply the rate of delivery that is guaranteed to CF(L)Co under the contracts, i.e. firm capacity available to generate recapture energy, but certainly not a cap on the capacity of the Plant that CF(L)Co can use to generate said recapture energy or otherwise.

140. This is what CF(L)Co means when it states that it can sell additional available power on an interruptible basis to NLH or to other third parties. CF(L)Co is selling the same 196 GWh of energy each month to NLH that it has always sold, but in addition to selling it at a firm rate of 300 MW it now also offers NLH the possibility of drawing upon that same energy at a higher rate when additional production capability is available, but only on a non-firm or interruptible basis, so that CF(L)Co can reassign this production capacity should it be required to meet any of its contractual obligations to HQ.

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[56] Power Contract, **Exhibit P-1**, s. 6.6., p. 15, **J.S.**, **vol. 3**, **p. 615**; Renewal Contract, **Exhibit P-1**, s. 5.4, p. 7, **J.S.**, **vol. 3**, **p. 607**.

141. The effect of sections 6.6 PC and 5.4 RC is to carve out of HQ's Firm Capacity allotment, a 300 MW block in priority for CF(L)Co, thereby granting CF(L)Co 300 MW of firm capacity. But this of course does not mean that CF(L)Co does not have access to other sources of power under the contract, in particular sources of non-firm power.

142. In fact, when pressed on this issue, HQ's expert Mr. Pfeifenberger had to admit that CF(L)Co did have access to other sources of capacity under the contract, such as Additional Capacity under s. 6.4:

> *"Q219. And I submit to you that, similarly, other blocks of capacity may be available to CF(L)Co under this contract, and the first one obviously is the additional capacity that we find under section 6.4. Assuming that such additional capacity is available in the opinion of CF(L)Co, but that HQ doesn't want it, you will agree with me that this additional capacity is then available to CF(L)Co, is it?*
>
> *A. If there's capacity available and it's not being chosen to be used by Hydro-Québec, then I assume that capacity would be available for other purposes.*
>
> *Q220. And therefore, you would not state, in such a case, that CF(L)Co is limited to the 300 megawatts of firm capacity it has. It can use this other capacity to turbine whatever water is available to it under the rest of the contract, correct?*
>
> *A. That seems to be right."*[57]

143. It is thus clear that the Recapture provision is a limitation of HQ's Firm Capacity allotment, as indicated by the definition of Firm Capacity and section 6.7 of the PC (5.5 RC), and not a limitation on CF(L)Co's ownership rights.

2) CF(L)Co's Sales of Interruptible Power to NLH do not Affect the Contractual Rights of HQ

144. Contrary to what is alluded by HQ, CF(L)Co continued to fulfill its obligations to HQ while selling power on an interruptible basis to NLH and did not affect Hydro Quebec's contractual rights. It was simply making a more efficient use of the Plant to monetize an opportunity that would otherwise go to waste.

145. The fact that CF(L)Co has respected the monthly energy envelope it is entitled to

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[57] Testimony of Johannes Pfeifenberger, November 13, 2015, pp. 130-131, **J.S.**, **vol. 68**, **pp. 25161-25162**.

while selling Interruptible Power has been specifically verified by the Expert Tanya Bodell in her report on Interruptible Power.[58] Similarly, the sale of Interruptible Power does not deprive HQ of any of its rights to Firm Capacity or operational flexibility under the Power Contract, because, as the name implies, this power is only sold by CF(L)Co to NLH on an interruptible basis when capacity not requested by HQ is available.

146. Therefore, despite HQ's claim to the contrary, nothing is "withheld" from HQ by the selling of Interruptible Power and such sales by CF(L)Co to NLH do not impact the rights of HQ under the Power Contract and the Renewal Contract in any way.

3) Operational issues

147. Based on the foregoing, it is clear that nothing in the contracts or the relevant legal principles prevent CF(L)Co from selling Interruptible Power. However, HQ claims that in practice CF(L)Co has been unable to do so without violating its power schedules in light of 37 so-called instances of default identified by HQ out of more than 10 000 hours of deliveries above 300MW performed by CF(L)Co. HQ also claims that CF(L)Co would be unable to do so because of impediments created by applicable market rules.

148. While an enormous amount of time was spent at the hearing dealing with these issues, it is important to note that they are in the end, irrelevant and nothing but a distraction, since what is to be determined by the Court (as per the declarations sought by the parties) is whether the contract allows for such sales, and not whether a particular implementation of these sales, out of many possible ones, was flawless.

149. Be that as it may, and while CF(L)Co disputes that these so-called 37 events are true instances of default under the contracts,[59] [60] more importantly they are *de minimis* and as confirmed by many witnesses, they are well within the normal parameters of scheduling errors which occur naturally in the operations of such a power plant.[61] The associated penalties over two years are worth at best a few thousand dollars under the contracts and are so inconsequential that HQ did not even bother to claim such penalties from CF(L)Co.

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58 Expert report of Tanya Bodell, **Exhibit D-154**, Figure 5, p. 30, **J.S.**, **vol. 44**, **p. 16324**.
59 Interchange Manual, **Exhibit P-17**/31-32, **J.S.**, **vol. 4**, **pp. 1046-1047**.
60 See **Exhibit D-220** pp. 5-27, **J.S.**, **vol. 57**, **pp. 21114 to 21135**
61 Testimony of Johannes Pfeifenberger, November 13, 2015, pp. 201-202, **J.S.**, **vol. 68**, **pp. 25232-25233**.

150. As for the market rules, HQ argues that CF(L)Co's Interruptible Power deliveries to NLH, some of which are intended for export by NLH, cannot be interrupted "*at all times*" because some of these market rules require a "lock-in" period between 30 minutes to two hours before the hour of delivery.[62]

151. Here, HQ is deliberately confusing what is being done by CF(L)Co, i.e. a bilateral sale of Interruptible Power to NLH in Labrador, which is not subject to external market rules and therefore cannot possibly violate them, with potential sales activities by NLH in competitive wholesale electricity markets in the Northeast. Again, this is not determinative of the true question at issue before the court which is whether the contracts allowed for such sales or not. Indeed, these market rules impediment would only apply to the Lab-HQT line and would not prevent sales of Interruptible Power to industrial clients in Labrador such as Iron Ore Canada or to the Island of Newfoundland.[63]

152. In any event, HQ's allegation that, once transactions are "locked-in" a change is impossible, is incorrect. Indeed, as explained by Ms. Bodell in her report, markets have rules and settlement mechanisms to compensate and deal with the discrepancies that can happen between actual and scheduled flows of power and energy.[64] [65]

153. In the end, almost all market participants are subject to the same lock-in periods and yet this has not stopped them, HQ included, from selling Interruptible Power across these markets in the past, and neither should this stop CF(L)Co either.[66]

C. THE CONCLUSIONS OF THE JUDGMENT ARE OVERBROAD

154. Even assuming that the reasons of the trial judgment are entirely correct on both issues, which is expressly denied, the declaratory conclusions granted by the trial judge are clearly overbroad and go far beyond the positions debated between the parties and the evidence presented to the Superior Court.

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62 Response, par. 219, **J.S.**, **vol. 2**, **p. 404**; Expert Report of Johannes Pfeifenberger, **Exhibit P-80**, par. 67-74, pp. 24-27, **J.S.**, **vol. 10**, **pp. 3279 to 3282**.

63 Testimony of Robert Henderson, November 5, 2015, pp. 110-111, **J.S.**, **vol. 65**, **pp. 24256-24257**; Testimony of Edmund Martin, November 18, 2015, pp. 73-77, **J.S.**, **vol. 68**, **pp. 25339 to 25343**.

64 Expert Report of Tanya Bodell, **Exhibit D-154**, par. 147, p. 44, **J.S.**, **vol. 44**, **p. 16338**.

65 Expert Report of Tanya Bodell, **Exhibit D-154**, par. 147, p. 44, **J.S.**, **vol. 44**, **p. 16338**; Testimony of Tanya Bodell, December 3, 2015, pp. 65-66, 72-73, **J.S.**, **vol. 72**, **pp. 27049-27050**, **pp. 27056-27057**; Testimony of Pierre Paquet, November 4, 2015, pp. 72-75, **J.S.**, **vol. 64**, **pp. 23907 to 23910**; Testimony of Sylvain Clermont, October 29, 2015, pp. 137-140, pp. 175-176, **J.S.**, **vol. 63**, **pp. 23486 to 23489**, **pp. 23524-23525**; Testimony of Robert Henderson, November 5, 2015, pp. 188-190, **J.S.**, **vol. 65**, **pp. 24334 to 24336**.

66 Testimony of Tanya Bodell, December 3, 2015, pp. 72-73, **J.S.**, **vol. 72**, **pp. 27056-27057**.

155. For instance, the declarations seem to grant to HQ an unlimited amount of power (not to be confused with energy) under the contracts, while HQ did not even attempt to defend the position that it would be entitled to unlimited power, since its power allotment is plainly limited to 4382.5MW (minus 300MW of Recapture) in the winter (plus 682 MW under the GWAC) and 4163.5MW in the summer (minus 300MW of Recapture) under s. Section 1.1 II (definition of "Firm Capacity") of the contract.

156. The Court also seemingly forgot that CF(L)Co has from time to time access to additional capacity under s. 6.4 of the contract (or 5.2 RC), and that it could at least make use of that capacity to sell Interruptible Power, as explained in par. 143 above.

157. Consequently, HQ is clearly not entitled to any declaration that it has the exclusive right to all of the power that can be generated at the Plant or that CF(L)Co does not have any rights to such power, since such declarations are a clear contradiction of the contracts between the parties.

158. As a further example, conclusion 1150i states that the Twinco block can only be sold in Labrador West, while this remains an unresolved issue that was not and could not be before the lower court since it is entirely dependent on the interpretation of the Shareholders' Agreement between HQ and NLH, a party which was not even before the court, and a contract which is under the exclusive jurisdiction of the Newfoundland and Labrador courts.

159. In general, the trial judge by declaring that "*CF(L)Co shall not benefit from any right to any amount of power and energy generated by the Generating Station*" [our translation] save for two specific blocks, goes much beyond what was at issue between the parties and potentially affects CF(L)Co's rights as owner of the facility to other unspecified electricity products or ancillary services that are available or may become available in the future, such as environmental attributes, carbon credits, energy storage services, voltage control services, frequency control services, spinning reserve services, etc., all without having heard any debates on these issues.

160. Such conclusions essentially transform HQ into the owner of the Plant for 65 years, with all rights to residual electricity products that can be produced at the Plant, rather than what it truly is, i.e. a customer of CF(L)Co, that is entitled solely to the specific rights that have been granted to it under the terms of the contracts.

PART IV – CONCLUSIONS SOUGHT

ALLOW the appeal;

SET ASIDE the judgment in first instance and **PROCEED** to render the decision that ought to have been rendered;

GRANT the conclusions sought by Appellant in first instance, namely:

> ***DISMISS*** *Hydro-Quebec's Introductory Motion for Declaratory Judgment.*
>
> ***DECLARE*** *that under the terms of the Renewal Contract, the right of Hydro-Quebec to request and receive energy each month during the term of that contract is limited to the amount of Continuous Energy as defined under the said Renewal Contract, subject to the Minimum and Firm Capacity limits.*
>
> ***DECLARE*** *that in addition to the 300 MW of Recapture and in addition to the Twinco block, CF(L)Co is entitled under the Power Contract and the Renewal Contract to use the Churchill Falls power plant's available capacity to increase the rate of delivery of energy to third parties, provided that by so doing it continues to make available to Hydro-Quebec its requested power and energy scheduled in accordance with the terms and conditions of the contracts.*
>
> ***DECLARE*** *that, as owner and operator of the Churchill Falls power plant and holder of the hydraulic rights, CF(L)Co is entitled to operate the Churchill Falls plant as it deems appropriate and is entitled to derive revenues where possible from selling all electricity products that have not been specifically sold to Hydro-Quebec or third parties under the terms of a contract, provided that CF(L)Co fulfills its contractual obligations to Hydro-Quebec and third parties.*

The whole with costs, including expert fees.

Montréal, December 16, 2016

Montréal, December 16, 2016

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PART V – AUTHORITIES

Jurisprudence *(cont'd)* **Paragraph(s)**

Doctrine

Attestation

ATTESTATION

We undersigned, Stikeman Elliott LLP and Irving Mitchell Kalichman LLP, do hereby attest that the above Appellant's Brief does comply with the requirements of the *Civil Practice Regulation of the Court of Appeal* and we place at the disposal of the other parties, free of charge, the original or a copy of all the depositions whose recording has been transcribed or whose stenographic notes have been translated at our request.

Length of time requested for the oral presentation of the arguments: 2.5 hours

Montréal, December 16, 2016

Montréal, December 16, 2016

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