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500-09-026327-163

QUÉBEC COURT OF APPEAL

(Montréal)

On appeal from a judgment of the Superior Court, District of Montreal, rendered on August 8, 2016 and corrected on November 8, 2016 by the Honorable Mr. Justice Martin Castonguay.

N° 500-17-078217-133 C.S.M.

CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED

APPELANT
(Defendant)

v.

HYDRO-QUÉBEC

RESPONDENT
(Plaintiff)

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OVERVIEW

1. On May 12, 1969, Churchill Falls (Labrador) Corporation Limited (**CF(L)Co**) and Hydro-Québec entered into a 65-year power and energy supply contract entitled "*Power Contract*" (**Contract**). It consists of a first part which expires on August 31, 2016 (**Original Contract**[1]), and of an extension thereof which takes effect automatically on September 1st, 2016 pursuant to "*Schedule III*" of the Contract, which forms an integral part of the Original Contract (**Renewed Contract**).

2. For decades, CF(L)Co described the Contract in its annual reports or financial statements as a 65-year contract for the sale to Hydro-Québec of substantially all of the production of the Plant until 2041[2].

3. The Original Contract and the Renewed Contract contain an identical provision relating to the operational flexibility of the Churchill Falls hydroelectric complex (**Plant**), entitled "*Operational flexibility*"[3], allowing Hydro-Québec to operate the Plant according to the seasonal pattern of Quebec's demand for consumption (which is higher in winter than in summer) and in coordination with its own generation fleet, as well as a practically identical provision[4], limiting to 300 MW the right of CF(L)Co to recall, from the power available for sale to Hydro-Québec, power for the consumption needs of the province of Newfoundland and Labrador (**Newfoundland**).

4. In flagrant contradiction with the language of the Contract and with its own earlier assertions, CF(L)Co is attempting in this instance to defend unprecedented positions according to which the parties would have signed, in 1969, not one but two contracts[5], giving to Hydro-Québec the right to purchase, not substantially all of the production of the Plant, but rather specifically defined "products", and subjecting Hydro-Québec, as of September 1, 2016, to an operating regime entirely different from that which has been in use since the Plant was put into service and which would sterilize the operational flexibility conferred on Hydro-Québec under the Contract.

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1 The parties used the expression "*original Power Contract*" to designate the first part thereof: see, for example, Renewed Contract, Joint Schedules, Exhibit P-1, s. 1.5 and 5.4, **v. 3, p. 646 and p. 650.** Unless otherwise indicated, all references to volumes are to the volumes of the Joint Schedules.

2 Exhibit P-35: for example, from 1987 to 2005: "A power contract with Hydro-Québec, dated May 12, 1969 provides for the sale of substantially all the energy from the Project until 2041.", **v. 5, p. 1518 (electronic version)**; See para. 30 of the Hydro-Québec's Response for the various formulations used by CF(L)Co throughout the period.

3 Original Contract, Exhibit P-1, s. 4.2.1, **v. 3, p. 608**; Renewed Contract, Exhibit P-1, s. 4.1.1, **v. 3, p. 647**. The trial judge made a literal translation of the expression "Operational Flexibility", to which he refers as the "flexibilité opérationnelle": Judgment, para. 109.

4 Original Contract, Exhibit P-1, s. 6.6, **v. 3, p. 615**; Renewed Contract, Exhibit P-1, s. 5.4, **v. 3, p. 650.**

5 Appellant's Brief, para. 2 and 56.

5. The evidence revealed that the positions advocated by CF(L)Co in these proceedings originate from the theories[6] developed between 2008 and 2011 by Nalcor Energy (**Nalcor**), a Newfoundland Crown corporation created in 2007[7] that indirectly controls CF(L)Co[8].

6. The first theory, conceived by Nalcor in 2008-2009, would limit Hydro-Québec's supplies from the effective date of the Renewed Contract, to monthly blocks of energy equivalent to a specified number of kWh determined by the definition of "Continuous Energy" found in the Renewed Contract[9]. This theory would remove Hydro-Québec's ability to operate the Plant on the basis of the seasonal pattern of Quebec's demand for consumption and, as the trial judge concluded, would constitute a "drastic shift"[10], and an abrupt break with the historical operating pattern of the Plant.

7. The second theory, conceived by Nalcor in 2011, would allow CF(L)Co to exceed the limit of 300 MW provided in the Contract regarding the power that can be recaptured by CF(L)Co and to use power already sold by CF(L)Co to Hydro-Québec when this power is not scheduled by Hydro-Québec, provided that such use is made on an allegedly "interruptible" basis. Never before had CF(L)Co claimed to be entitled to exceed the 300 MW limit provided for in the Contract.

8. Given the total absence of documents dating back to the time of negotiation of the Contract that would support either of these theories[11], CF(L)Co sought to remedy this deficiency by attempting to administer experts' evidence on the presumed intent of the parties and on certain industry practices (usage). The first judge rightly refused to recognize the expert status of one of the two CF(L)Co experts, Mr. Robert Kendall, and partially rejected one of the two reports prepared by the other, Ms. Tanya Bodell[12].

9. The trial judge was correct in rejecting the two unprecedented theories developed by Nalcor and endorsed by CF(L)Co, finding that these were totally divorced from the common intention of the parties. In a judgment strongly grounded in the evidence, the trial judge instead confirmed that Hydro-Québec purchased almost all of the production of the Plant and was granted full operational flexibility of the latter during the 65 years of the Contract, as CF(L)Co had always well understood and affirmed several times itself, until its controlling shareholder interfered with its contractual relationship with Hydro-Québec.

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6 The word "theory" was used during the trial by CF(L)Co's then President and CEO to describe the new and unprecedented interpretation of the Contract proposed by Nalcor with respect to the second issue of this litigation: E. Martin testimony, Nov. 18, 2015, **v. 68, p. 25396, l. 24**.

7 Exhibit P-290 (2008), **v. 22, p. 8070.**

8 Judgment, para. 49-51.

9 Renewed Contract, Exhibit P-1, s. 1.1 (II) - definition of "Continuous Energy", **v. 3, p. 644.**

10 Judgment, para. 1001.

11 See Judgment, para. 989-991.

12 Judgment, para. 655-680. As for the report prepared by Ms. Bodell on the meaning of "*Continuous Energy*", the trial judge correctly found that CF(L)Co was attempting to make the demonstration of a usage "by extrapolation": Judgment, para. 1041-1043.

PART I – THE FACTS

10. Hydro-Québec accepts the statement of facts relevant to this dispute outlined by the trial judge. It also refers to the factual context set out by this Court in paragraphs 7 to 31 of the judgement *Churchill Falls (Labrador) Corporation Limited v. Hydro-Québec*[13], which relies essentially on the same evidence as that adduced in these proceedings and retains all its relevance for the purposes of this appeal.

11. Considering the technical nature of the issues raised by this appeal, Hydro-Québec considers it useful to supplement the statement of facts with certain contextual elements essential to the proper understanding of these issues.

A. Negotiation and conclusion of the Contract

1. Hydro-Québec's decision to proceed with the Churchill Falls project and the signing of the Letter of Intent

12. CF(L)Co was incorporated in 1958[14] by a consortium of private investors shareholders of British Newfoundland Corporation Limited (**Brinco**), to build the Plant on the Upper Churchill River (**Upper Churchill**) and to exploit it in order to produce hydroelectric energy.

13. In the early 1960s, Quebec's hydroelectric potential was enormous and still largely untapped[15]. To meet Quebec's future consumption demand, Hydro-Québec therefore had the opportunity to construct its own hydroelectric facilities, which it would own and which it could exploit at will throughout their useful life[16]. Consequently, and as this Court recently recognized, in order to interest Hydro-Québec in purchasing the Plant's production instead of building its own facilities, Brinco and CF(L)Co had to offer Hydro-Québec the same advantages as those that Hydro-Québec could draw from its own projects, but at a lower price[17].

14. Further to Hydro-Québec's refusal, in 1961, to take an interest in the Churchill Falls project, preferring to develop its own projects[18], CF(L)Co came back in 1963 with a proposal to

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13 2016 QCCA 1229 (***Churchill Falls* Case**). This judgment is the subject of an application for leave to appeal to the Supreme Court of Canada, still pending at the date of this factum.

14 At the time of its incorporation and until October 1, 1965, CF(L)Co was named "*Hamilton Falls Power Corporation*" or "*HFPCo*".

15 Testimony of C. Dubé, Oct. 28, 2015, **v. 62, p. 23083, l. 15 to p. 23086, l. 8 and p. 23091, l. 9 to p. 23094, l. 3**. See also Churchill Falls Judgment, para. 82, as well as the Judgment, para. 58 to 70, regarding the broad lines of Hydro-Québec's development in the 1960s.

16 The life of a hydroelectric plant is more than 100 years: testimony of C. Dubé, Oct. 28, 2015, **v. 62, p. 23130, 4 at p. 23133, l. 1**; Testimony of T. Vandal, Oct. 19, 2015, **v. 59, p. 21763, 25 to p. 21765, l. 10**.

17 *Churchill Falls* Case, Para. 82 and 98.

18 Exhibit D-10, **v. 38, p. 14016**; Judgment, para. 152 and 919-920; *Churchill Falls* Case, Para. 12 and 97.

sell to Hydro-Québec the entire production of the Plant in excess of Newfoundland's consumption needs and to provide it with the necessary flexibility to exploit it as if it were one of its plants[19]:

> 3. Concept of Sale
>
> - HQ will undertake to buy the entire installed capacity of the Hamilton plant together with all the energy which it can generate net after Newfoundland's present requirements have been deducted. [...]
>
> - Some implications of our approach: [...]
>
> c) inherent flexibility both during period of unit installation and subsequently from operations point of view – there would be little difference between Hamilton and one of HQ's own plants. [...]

15. After three years of negotiations, Hydro-Québec finally let itself be convinced to support the Churchill Falls project, and it interrupted some of its own construction sites and temporarily postponed some of its projects[20].

16. On October 13, 1966, Hydro-Québec and CF(L)Co signed a Letter of Intent[21]. As noted by the trial judge, the Letter of Intent set out in Articles 1.0 and 3.0 the fundamental principle, adopted by the parties at the outset of the negotiations[22] and never subsequently called into question, according to which the Upper Churchill would be developed at its full energy potential[23] and CF(L)Co would sell all[24] of the Plant's production to Hydro-Québec with the exception of two blocks[25] each having a specific purpose, the first being intended to meet the commitments of Twin Falls Power Corporation Limited (**Twinco Block**)[26] and the other to meet Newfoundland's future consumption needs (**Recapture Block**)[27].

17. At the request of Hydro-Québec, Article 10.0 of the Letter of Intent explicitly limited to 300 MW the amount of power that CF(L)Co could recall under the Recapture Block. This power ceiling

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19 Exhibit P-39, **v. 5, p. 1686 and s.** Unless otherwise indicated, all underlinings in this factum come from the undersigned attorneys.
20 Testimony of T. Vandal, Oct. 19, 2015, **v. 59, p. 21797, 14 to p. 21803, l. 17**; Exhibits P-52 (1966), **v. 6, p. 2063 (electronic version)** and P-52 (1974), **v. 6, p. 2063 (electronic version)**. See also R. Boyd's testimony in the 800 MW Case (defined in para 9 of the Response), Exhibit P-241, **v. 19, p. 6533.**
21 Exhibit P-4, **v. 3, p. 714 and s.**
22 Internal drafts of CF(L)Co of August 1963: Exhibits D-54 to D-56, **v. 40, p. 14980 and s.**, D-58 to D-60, **v. 40, p. 15001 and s.**, D-63 and D-64, **v. 40, p. 15022 and s.**; draft transmitted by CF(L)Co to Hydro-Québec on September 3, 1963: Exhibit P-60, **v. 7, p. 2285 and s.**. See also Exhibits P-39, **v. 5, p. 1686 and s.**., P-91, **v. 11, p. 3438 and s.**, P-102, **v. 11, p. 3504 and s.** and P-146, **v. 12, p. 4013 and s.**
23 Judgment, para. 905.
24 Judgment, para. 203, 229, 231 and 268. See also *Churchill Falls* Case, para. 14.
25 Judgment, para. 268.
26 Exhibit P-4, s. 3.3 and 14.0 - Note 2, **v. 3, p. 715 and p. 724**; Judgment, para. 132-135.
27 Exhibit P-4, s. 10.0, **v. 3, p. 721**; Judgment, para. 136.

was intended to protect Hydro-Québec from the risk of CF(L)Co taking back a substantial portion of the Plant's output after Hydro-Québec invested considerable amounts in the project[28].

2. The conclusion of the Contract and its modalities relevant to the issues at stake in this dispute

18. Beginning in 1967, the parties engaged in intensive negotiations, during which they generated a voluminous documentary evidence attesting to their common intention. The Contract negotiations culminated in the summer of 1968 with the approval of the Contract. However, it was not signed until May 12, 1969, once the project financing had been completed[29].

19. The fundamental principle of the sale to Hydro-Québec of all the production of the Plant with the exception of the Twinco Block and the Recapture Block remained intact in the Contract. However, changes occurred between the signing of the Letter of Intent and the conclusion of the Contract, which led, as the trial judge found, to the emergence of new concepts that radically changed the Contract with respect to the Letter of Intent[30]. This is for that reason that Article 1.7 of the Contract provides that the Letter of Intent is "fully superseded and replaced" by the Contract[31].

a. The extension of the Contract for an additional period of 25 years by way of the Renewed Contract

20. While until the spring of 1968 the drafts of the Contract exchanged between the parties provided, as did the Letter of Intent[32], that the contract would have a term of approximately 44 years, with the possibility of renewal under conditions to be defined, CF(L)Co and Hydro-Québec agreed in April 1968 to automatically extend the Contract for an additional term of 25 years.

21. The circumstances in which the automatic extension of the Contract was agreed are described in the minutes of a joint meeting of the Executive Committees of the Boards of Directors of Brinco and CF(L)Co held on April 10, 1968[33], a crucial document that has been recognized as such on three occasions by our courts, including this Court[34].

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28 This is precisely what the Government of Newfoundland will attempt to do in the 800 MW Case, which has been denied to it by the Supreme Court of Canada; Exhibits P-26 and P-26A, **v. 4, p. 1312 and s.**

29 Judgment, para. 269, 270 and 327.

30 Judgment, para. 271; See also *Churchill Falls* Case, para. 15.

31 Judgment, para. 954.

32 Exhibit P-4, s. 11.0, **v. 3, p. 722**.

33 Exhibit P-8, **v. 3, p. 831**; Judgment, para. 320.

34 *Churchill Falls* Case, Para. 16. See also Churchill Falls (Labrador) Corporation Ltd. v. Hydro-Québec, 2014 QCCS 3590, para. 460, where the Honorable Joel Silcoff, j.c.s., qualifies these minutes as "self-explanatory, uncontradicted and determinative of the intentions of the parties."

22. These minutes show that in the spring of 1968 the parties were in a fundamentally different situation from that in which they were when the Letter of Intent was signed[35]. Indeed, as the cost of the project had increased considerably[36] and CF(L)Co had difficulty in obtaining the necessary financing for the project, Hydro-Québec had agreed, at the request of the Lenders, to assume much heavier guarantees than those granted in the Letter of Intent[37].

23. In this context, Hydro-Québec had strongly insisted on obtaining an "extension"[38] of the contract for 25 years in order to reduce the average tariff payable under the Contract[39]. CF(L)Co's negotiating team was authorized to agree to such an extension with Hydro-Québec[40]. The minutes of the next joint meeting, held on May 14, 1968, confirm that the parties had effectively agreed on an automatic 25-year renewal of the Contract at a fixed rate of 2 mills/kWh, without qualifications[41].

24. The parties chose to incorporate the terms of the Renewed Contract into "*Schedule III*" of the Original Contract which, contrary to CF(L)Co's assertion[42], was not the subject of a distinct signature by the parties at the time of the conclusion of the Contract[43]. "*Schedule III*", which automatically comes into force on September 1st, 2016, only renews the terms of the Original Contract which remain relevant, the parties having discarded those which would no longer be useful after 40 years, when the construction of the Plant, the financing of the project and the

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35 Exhibit P-8, **v. 3, p. 830**.

36 Judgment, para. 313; see also *Churchill Falls* Case, para. 16.

37 See Judgment, para. 23; See also the document transmitted by the President of Hydro-Québec to the Premier of Québec on June 6, 1968 entitled « Comparaison entre la Lettre d'intention du 13 octobre 1966 entre Hydro-Québec et Churchill Falls (Labrador) Corporation et le projet de contrat et documents ancillaires soumis », Exhibit P-208, **v. 15, p. 5233-5240, p. 5249-p. 5257;** *Churchill Falls* Case, Para. 15, 16 and 22-23.

38 The trial judge noted the repeated use by the directors of CF(L)Co and Brinco of the term "*extension*" to describe the renewal of the Contract: Judgment, para. 322. See also Exhibit P-185, p. 1: *"How can the term of the Power Contract be extended either directly or by option to HQ by an additional 10 to 25 years at a fixed mill rate? "*, **v. 14, p. 4716**; Exhibit D-113: *"Extension of term / Mr. Boyd pointed out that an extension of the term to Hydro-Quebec would have the same significance to them as the completion guarantee had to CFLCo, and he thought that Hydro should be given an option to renew flat at 2.2 mills per kilowatthour for 25 years or that an extension of the term for 25 years at this rate should be built-in to the contract. [...] We indicated sympathy with Hydro's request"*, **v. 41, p. 15443.** See also Judgment, para. 316.

39 Exhibit P-8: « Hydro-Quebec wished to be able to project a lower mill rate than the present draft of the contract permitted. Due to increased costs and escalation the effect of the present term of 44 years from first delivery or 40 years from completion indicated an average mill rate considerably in excess of that contemplated in 1966. Accordingly, they had requested a 25 year extension of the contract on a flat mill rate basis suggested at two mills per kilowatthour. They wished this to be in the form of an option. », **v. 3, p. 831**. The trial judge correctly recognized that the term of the renewal period, set at 25 years, was a direct consequence of the increase in project costs: see Judgment, para. 823 and 856.

40 Exhibit P-8, **v. 3, p. 831**; Handwritten notes taken by one of the participants at the joint meeting of the Executive Committees of the Boards of Directors of Brinco and CF(L)Co of April 10, 1968, Exhibit P-194: "*Agreed that management authorized to extend contract 25 years at 2 mills*", **v. 14, p. 4831**.

41 Exhibit P-204, **v. 15, p. 5033;** See also Exhibit P-212, the notes of D. Gordon of CF(L)Co, on his telephone conversation of July 12, 1968 with the Premier of Newfoundland, J. Smallwood: "*I said there was one special point mentioned in the Hydro Quebec announcement, namely the extension of the Power Contract for 25 years at a fixed price of two mills. [...] all things considered we felt it to be a good deal to have the terms settled now. [...] Hydro-Quebec had asked for an option to renew at the price mentioned but we had negotiated for a firm commitment as being in our best interests*", **v. 15, p. 5305 and s.**

42 Appellant's Brief, para. 2 and 56.

43 Erroneous in facts, CF(L)Co's claim that the Original Contract and the Renewed Contract would be two distinct contracts is also erroneous in law. Due notably to the technique used to extend the Contract - an automatic renewal - the Original Contract and the Renewed Contract constitute one and the same legal act. See D. LLUELLES and B. MOORE, *Droit des obligations*, 2nd ed. (Montreal: Themis, 2012) (**Lluelles & Moore**), p. 1261-1262; *Services Matrec inc.* v. *CFH Security Inc.*, 2014 QCCA 221, para. 38.

repayment of the debt of CF(L)Co would have been completed[44], and when the energy potential of the Plant would be known.

25. As set out in the following two sections, "[the] intention of continuity between the Original Contract and the Renewed Contract", as noted by the trial judge[45], is reflected both in the full operational flexibility conferred to Hydro-Québec and the "*Annual Energy Base*" (**AEB**) concept intended to reflect the average annual energy potential of the Plant available to Hydro-Québec, which can be found in the price formulas of the Original Contract and of the Renewed Contract.

b. The granting of full operational flexibility to Hydro-Québec allowing it to manage the Plant's reservoirs

26. As was recognized by the trial judge, Hydro-Québec had always pursued the objective, which in 1966 had become "at the top [of its] priorities"[46], to operate the Plant in a manner integrated with its own generation fleet, that is to say to plan its production and to manage its reservoirs, on a seasonal as well as a multi-annual basis, in a coordinated way with the plants which it would own. To do this, Hydro-Québec had to be able to vary, through its energy delivery requests, the level of water in the reservoirs (notably from one season to the next, depending on Québec's electricity demand)[47].

27. Such full operational flexibility would be comparable to that enjoyed by Hydro-Québec if, instead of opting for the Churchill Falls project, it had built its own facilities. The documentary evidence is explicit as to this overarching objective pursued by Hydro-Québec during the negotiation of the Contract[48].

28. In early 1968, Hydro-Québec insisted with CF(L)Co to obtain full control of the Plant's reservoirs so that it could be operated in coordination with its own power stations to meet Québec's seasonal demand[49].

29. It was CF(L)Co who found the solution to the deadlock that the parties were in. On April 17, 1968, just one week after CF(L)Co had accepted Hydro-Québec's request to extend the term of the Contract, an "important change of direction"[50], "fundamental"[51], intervened regarding

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44 Judgment, para. 857 and testimony of T. Vandal, 19 Oct. 2015, **v. 59, p. 21881, l. 13 to p. 21884, l. 10.**
45 Judgment, para. 1045.
46 Judgment, para. 161, 261, 279, 948-949 and 953.
47 Judgment, para. 499 where the first judge recognizes that water is the "raw material" that allows the Plant to produce energy; Testimony of H. Sansoucy, Oct. 21, 2015, **v. 60, p. 22249-22250.**
48 Exhibit P-184, **v. 14, p. 4710 to 4712.** The first draft Contracts (Exhibits P-5 and P-53, **v. 3, pp. 736 and s., and v. 7, pp. 2123 and s.**) granted to Hydro-Québec a flexibility limited to one quarter: see Judgment, para. 298. In November 1967, CF(L)Co had agreed to introduce a six-month limited energy bank in the draft Original Contracts: Exhibit P-55, **v. 7, p. 2164** and Judgment, para. 303 and 304. Despite the introduction of this energy bank, Hydro-Québec still considered that the flexibility offered was insufficient to enable it to integrate the power station into its own fleet: Judgment, para. 305 and 960-961.
49 Exhibit P-184, **v. 14, p. 4711**; Exhibit P-58, c. 7, p. 2279-2281; Exhibits D-30 and P-59, **v. 40, p. 14774 and s.** and **v. 7, p. 2282.**
50 Judgment, para. 305 and 963.

the extent of Hydro-Québec's operating rights under the Contract, when CF(L)Co agreed to grant Hydro-Québec full operational flexibility and to transfer to Hydro-Québec the management of the Plant's reservoirs[52].

30. A CF(L)Co document dated April 17, 1968, entitled "*Notes on Changes in Energy Forecasting*" (**Notes**)[53], which is of such importance that it is quoted in its entirety by the trial judge[54], confirms that the appearance of the "Operational Flexibility"[55] clause in the Original Contract marked the culmination of Hydro-Québec's repeated requests to benefit from a flexibility which would allow it to operate the plant and its reservoirs in a manner similar to the way it operates its other hydroelectric plants[56], integrate it into its own fleet[57] and coordinate the whole efficiently to meet Quebec's seasonal demand[58].

31. Clause 4.2.1, entitled "*Operational Flexibility*", coupled with Article 6.5 of the Original Contract, gives Hydro-Québec full operational flexibility of the Plant by allowing it, through its delivery programs[59], to control the production[60] and to manage the level of the reservoirs[61] of the Plant. As the first Judge put it, "during the first 40 years [...] HQ, controls the level of the reservoirs in interaction with its own generation fleet"[62].

32. The parties, having agreed to extend the Contract, have deliberately elected to renew, in the Renewed Contract, exactly the same operational flexibility and the same management of the reservoirs granted to Hydro-Québec under the Original Contract. Indeed, the Renewed Contract contains, in Article 4.1.1, a clause entitled "Operational Flexibility" which is in all respects identical to that of the Original Contract,[63] as well as an Article 5.3 which is almost identical to Article 6.5 of the Original Contract.

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51 Judgment, para. 297.
52 Judgment, para. 305 and 962.
53 Exhibit P-7, **v. 3, p. 774 and s.** Although the Judgment indicates, at para. 305, that this document is "undated", in fact it bears the inscription "17.4.68" on the last page.
54 Judgment, para. 305.
55 A first rider of this clause was prepared on April 17, 1968 (Exhibit P-195, **v. 14, pp. 4841**). It was subsequently included in the draft of April 19, 1968 titled "*Operation*" (Exhibit D-22, **v. 39, pp. 14317**), and then reproduced in the Original Contract: Judgment, para. 308.
56 Exhibit D-24, **v. 39, p. 14448**; Exhibit P-220, **v. 15, p. 5386, 5394, 5405 and 5416**, the English text of which was approved by CF(L)Co, which read: "*Hydro-Quebec shall have a right to call for such operation of the power plant and the reservoir as Hydro-Quebec wishes, almost as if those assets were its property*"; Testimony of N. Magrath of Acres Canadian Bechtel of Churchill Falls (**Acres**), called as a witness by CF(L)Co as part of the 800 MW Case: Exhibit P-239, **v. 18, p. 6272-6274.**
57 The first paragraph of s. 4.2.1 of the Original Contract, Exhibit P-1, explicitly states that "*it is desirable for Hydro-Quebec to have the benefit of operational flexibility of CFLCo's facilities in relation to the Hydro-Quebec system*", **v. 3, p. 608.** See also Exhibit D-29: "The Project reservoir, the management of which will be fully integrated into the overall Hydro-Quebec operating pattern [...]", **v. 40, p. 14696** and Exhibit P-79, **v. 10, p. 3200, para. 61.**
58 Judgment, para. 718-726 and Exhibit P-79, **v. 10, p. 3200.** See also Exhibit P-208, **v. 15, p. 5240;** Exhibit P-213, **v. 15, p. 5307.**
59 In English: "*Schedule of power requirements*": Original Contract, Exhibit P-1, ss. 4.2.1 (i), **v. 3, p. 608.**
60 Hydro-Québec may cause the production of the Plant tovary between the "*Minimum Capacity*" and the "*Firm Capacity*", and it is also entitled to schedule the additional capacity, when it is available: Exhibit P-1, s. 4.2.1 (i), and 6.4, **v. 3, p. 608 and p. 615.**
61 Original contract, Exhibit P-1, s. 4.2.1 (ii), **v. 3, p. 608;** Testimony of H. Sansoucy, Oct. 21, 2015, **v. 60, p. 22280, l 13 to p. 22281, l. 4.**
62 Judgment, para. 888.
63 Judgment, para. 858

33. In addition, the Notes of April 17, 1968, show that in exchange for the transfer by CF(L)Co to Hydro-Québec of the management of the Plant's reservoirs, CF(L)Co requested and obtained protections against the consequences which may result from such management by Hydro-Québec.[64] This has resulted in the emergence of new terms in the Original Contract,[65] all of which have been incorporated in one form or another in the Renewed Contract.[66] The presence of these protections in the Renewed Contract confirms the parties' intention that Hydro-Québec continue to ensure the management of the reservoirs under such Contract.

c. The adoption of a modality of payment designed to reflect the energy potential of the Plant available to Hydro-Québec

34. Under the Letter of Intent, CF(L)Co was exposed to substantial fluctuations in its revenues as Hydro-Québec's monthly payments were essentially a function of the amount of energy made available monthly by CF(L)Co,[67] which was dependent on hydrological conditions at the Plant, which inevitably vary with the seasons and years.[68] CF(L)Co had repeatedly, during the Letter of Intent negotiations, expressed its concern regarding this risk of fluctuation of its revenues.[69]

35. During the negotiation of the Contract, CF(L)Co persuaded Hydro-Québec to adopt a different payment formula, referred to as the "Split Tariff", under which 2/3 of CF(L)Co's revenues would be protected from fluctuations, and only 1/3 would remain reliant on the actual monthly energy quantity taken by Hydro-Québec (and spilled water).[70] As the trial judge found, the adoption of this formula in the Original Contract constituted a major and structural change compared to the price formula set out in the Letter of Intent.[71]

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64 The first judge refers to these protections as constituting "compensations" (Judgment, para 306), or "assurances" (Judgment, para 962).

65 A comparison between the last draft of the Original Contract prior to April 17, 1968, being that of April 12, 1968 (exhibit P-57, **v. 7, pp. 2208 and s.**) and the first draft of the Original Contract arising immediately after April 17, 1968, being the one dated April 19, 1968 (exhibit D-22, **v. 39, pp. 14306 and s.**), allows the identification of the main changes made to the terms of the Original Contract following the change in direction which occurred on April 17, 1968.

66 Hydro-Québec assumes financial responsibility for water spills: Judgment, para. 209-210, 307 and 500. Under the Renewed Contract, Hydro-Québec continues to assume this responsibility by paying for all the energy potential of the Plant available to Hydro-Québec, and this, regardless of the fact that the water is spilled rather than turbined: testimony of T. Vandal, Oct. 19, 2015, **v. 59, p. 21945-21947**. Secondly, CF(L)Co is exempt from any penalty in the event that the management of reservoirs by Hydro-Québec results in water insufficiencies preventing CF(L)Co from making Firm Capacity available: Judgment, para. 307. See Articles 10.3.7 of the Original Contract, **v. 3, p. 621** and 8.3.6 of the Renewed Contract, **v. 3, p. 652**. Third, CF(L)Co enjoys protection against the risk that the management of reservoirs by Hydro-Québec jeopardizes its rights with respect to the Twinco Bloc and the Recapture Block. See Articles 4.2.2 and 4.2.3 of the Original Contract, **v. 3, p. 608** and 4.1.2 and 4.1.3 of the Renewed Contract, v. 3, p. 647. Fourth, CF(L)Co is protected from an operation by Hydro-Québec which would endanger the equipment or facilities of the Plant. See Articles 4.2.7 of the Original Contract, **v. 3, p. 609** and 4.1.6 of the Renewed Contract, **v. 3, p. 648.**

67 Exhibit P-4, s. 15.0, **v. 3, p. 725.** See, however, s. 24.0, **v. 3, p. 731**, which provided for a Hydro-Québec obligation, limited to 25 years, to make minimum monthly payments to CF(L)Co.

68 Judgment, para. 499.

69 Exhibit P-46, **v. 6, p. 1995**; Exhibit P-120, v. 12, p. 3717 and s .; Exhibit P-123, **v. 12, p. 3760**.

70 Exhibits P-49, **v. 6, p. 2040**; P-158, v. 13, **p. 4192 and s.**; P-50, **v. 6, p. 2046**; P-161, **v. 13, p. 4237** and Judgment, para. 291; Exhibit P-170, **v. 13, p. 4310**; P-8, **v. 3, p. 831**; P-220, **v. 15, p. 5386, 5394, 5406, 5417 and 5422**, the English text of which, as approved by CF(L)Co, stated: "*The method of payment for energy received or made available is fairly complicated because CFLCo wished to be assured of a certain regularity in its revenues, in order to protect it from too great fluctuations in annual hydraulic conditions or in the production of its plants whose operating schedule will be established by Hydro-Quebec*". See also Judgment, para. 280-286.

71 Judgment, para. 280-283.

36. In order to protect 2/3 of CF(L)Co's revenues from fluctuations resulting from hydrological variations, the parties devised a payment methodology incorporating the AEB concept,[72] which reflects the fundamental principle of the sale to Hydro-Québec of all the production of the Plant in excess of the Twinco Block and the Recapture Block. The AEB is therefore a representation of the average annual energy potential of the Plant available to Hydro-Québec. To translate this energy potential, the AEB includes, on an annual basis, the energy delivered to Hydro-Québec, the energy equivalent of the water spilled[73] (including water used for the spinning reserve, if applicable[74]), as well as the water stored in the reservoirs compared to their initial level.[75]

37. The "Split Tariff" pricing formula contained in Article 8.4 of the Original Contract therefore provides for the payment by Hydro-Québec of 2/3 of the tariff on the basis of the AEB, transposed on a monthly basis designated as "Basic Contract Demand", and this, regardless of the amount of energy taken by Hydro-Québec (the "Take or Pay" modality) or the quantity made available by CF(L)Co. Hydro-Québec pays the remaining 1/3 of the tariff on the basis of a second concept created by the parties, called "Energy Payable", which measures the energy value associated with Hydro-Québec's actual use of water stored In the reservoirs of the Plant.[76]

38. The initial value of the AEB[77] represented an estimate of the Plant's average annual energy potential.[78] Over the 40 years that would elapse after the commissioning of the Plant, this value would be subject to periodic adjustments in order to reflect the energy potential of the Plant effectively available to Hydro-Québec.[79] These periodic adjustments were intended to ensure that, at the expiry of the Original Contract in 2016, the current AEB would no longer be an estimate but a reflection of the Plant's proven energy potential, as recognized by the trial judge,[80] it "represents [...] the average of all the first forty years of operation of the Plant, and this, in all imaginable conditions".

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72 The trial judge recognized that the appearance of the AEB was a direct consequence of the "Split Tariff" formula: Judgment, para. 293.

73 Original Contract, Exhibit P-1, s. 9.2 (iii), **v. 3, p. 619**; Judgment, para. 503 and 1072.

74 The water used for the spinning reserve is counted as spilled water: Exhibit P-1, s. 4.2.6, **v. 3, p. 609**; Judgment, para. 480, 503, 1071 and 1057. The evidence revealed that since the "Effective Date" Hydro-Québec has never used the spinning reserve: Judgment, para. 504 and 1058.

75 Original Contract, Exhibit P-1, s. 9.2, **v. 3, p. 619**; Exhibit HQ-DEM-13, **v. 58, p. 21520 and s.**

76 Original Contract, Exhibit P-1, s. 1.1 (IV), definition of "Energy Payable", **v. 3, p. 603-604.**

77 The AEB was originally estimated by the parties on the basis of the estimate of "the long-term average annual energy output" of the Plant performed by Acres, which was retained by CF(L)Co, in its Engineering Report of Spring 1968 (cited In the Original Contract, Exhibit P-1, s.1.1 (II) - definition of "Plant", **v. 3, pp. 602-603**), Exhibit P-198, **v. 14, p. 5015** (Plate 32): Judgment, para. 746-749. See also testimony of C. Lapuerta, Nov. 9, 2015, **v. 66, p. 24485-24486.**

78 A bulletin published by Hydro-Québec on May 13, 1969, the day after the conclusion of the Contract, the English text of which had been previously approved by CF(L)Co, indicated that the initial value of the AEB of 31.5 TWh Represented the "long-term average": Exhibit P-220, **v. 15, p. 5388, 5399, 5406, 5410 and 5420.**

79 Original contract, Exhibit P-1, s. 9.1, v. 3, p. 618. Exhibits P-160, **v. 13, p. 4226-4227**; P-164, **v. 13, p. 4252 and s.**; P-5, **v. 3, p. 738**; P-55, **v. 7, p. 2164-2165.**

80 Judgment, para. 1073; See also Judgment, para. 971 and 1050-1051.

39. During the term of the Renewed Contract, the parties elected to protect CF(L)Co from fluctuations in its revenues by basing the monthly payments to be made by Hydro-Québec on the proven energy potential of the Plant represented by the AEB at the end of the Original Contract.[81]

40. Pursuant to article 7.1 of the Renewed Contract, Hydro-Québec therefore pays, at a rate of 2 mills/kWh, the AEB transposed on a monthly basis, referred to in the Renewed Contract as "Continuous Energy", and this, regardless of the amount of energy actually taken by Hydro-Québec (the "Take or Pay" modality) or the amount actually made available by CF(L)Co.[82]

B. The conduct of the parties between 1969 and 2009

1. The confirmation of a single 65-year contract

41. During the 40 years following the conclusion of the Contract, the parties confirmed by their conduct that they considered that the Original Contract and the Renewed Contract constituted a single 65-year contract[83] under which CF(L)Co undertook to sell almost all of the Plant's production to Hydro-Québec. This is how CF(L)Co has described the Contract in its annual reports or financial statements up to 2009,[84] and this is also how its attorneys described it as recently as March 13, 2013, in the Joint statement of complete file filed before the Superior Court of Quebec in the parallel case regarding the price stipulated in the Contract.[85]

42. This description of the Contract has been repeatedly confirmed by the courts, including the Supreme Court of Canada in the *Reversion Act* Case,[86] and more recently by this Court in the *Churchill Falls* Case.[87]

2. The use by Hydro-Québec of the full operational flexibility

43. Since Plant entered into service, Hydro-Québec has made full use of its operating rights under the "*Operational Flexibility*" clause of the Contract. Hydro-Québec has modulated its operation in response to Quebec's seasonal demand, reducing its supply in summer to accumulate water in the Plant's reservoirs, and consequently increasing its supplies in winter, when Quebec's consumption demand is the strongest.[88] Hydro-Québec also modulated its

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81 Judgment, para. 988. For the purposes of the Renewed Contract, the AEB is defined as the AEB in force at the expiration of the Original Contract: Exhibit P-1, Art. 1.1 (IV) - definition of "Annual Energy Base", **v. 3, p. 603-604.**

82 An exception to this dissociation between the payment due by Hydro-Québec and the energy made available by CF(L)Co is provided for in the second paragraph of s. 7.1, in the case of "*Plant Deficiencies*": see, *infra*, para. A.109.

83 Judgment, para. 1015.

84 See *supra*, para. A.2.

85 Exhibit P-324: "*This action relates to the pricing terms of a contract (the Power Contract – Exhibit P-1) signed by Plaintiff and Defendant in 1969 under which virtually all the electric power produced at the Churchill Falls complex in Labrador – one of the world's largest – was sold to Hydro-Québec for a sixty-five year period terminating in 2041*, **v. 28, p. 10100.**

86 Exhibit P-9, **v. 3, p. 836 and s.**

87 *Churchill Falls* Case, Para. 2.

88 Exhibit HQ-DEM-15, **v. 58, p. 21543-21545**; Testimony of H. Sansoucy, Oct. 22, 2015, **v. 61, p. 22556, l. 19 at p. 22576, l. 21.**

operation on a multi-year basis by planning deliveries higher than AEB in years of high hydraulicity and deliveries below AEB in years of low hydraulicity.[89]

3. The conclusion of agreements confirming the rights of Hydro-Québec

44. In 1998, Hydro-Québec and CF(L)Co entered into agreements reflecting their mutual understanding of the Contract, thereby confirming Hydro-Québec's contractual rights.

a. The agreements relating to the Recapture Block

45. On March 9, 1998, Hydro-Québec and CF(L)Co entered into an agreement entitled "*Notice of Recapture and Waiver*"[90] under which Hydro-Québec permitted CF(L)Co to immediately recapture[91] the balance of 130.7 MW of the 300 MW of the Recapture Block which it had not yet recalled.

46. The preamble to this agreement confirms the parties' understanding that CF(L)Co's rights to the power associated with the Recapture Block are limited to 300 MW.[92] Never in the negotiations leading up to the signing of the Notice of Recapture and Waiver did CF(L)Co indicate to Hydro-Québec that the quantity of 300 MW could be anything other than a maximum Power limit and that it considered itself entitled to exceed this limit in any circumstances whatsoever.

47. On March 9, 1998, CF(L)Co also entered into an agreement[93] with its majority shareholder Newfoundland & Labrador Hydro (**NLH**), pursuant to which CF(L)Co sold to NLH, until August 31, 2041, all of the power and energy associated with the Recapture Block. NLH and Hydro-Québec simultaneously entered into an agreement whereby NLH resold to Hydro-Québec at a significantly increased price[94] the portion of the Recapture Block that would not be consumed in Labrador[95]. The preamble to this last agreement and its renewals, to which CF(L)Co has intervened, provides that "*300 MW [is] the maximum quantity of power [...] available for recapture by [CF(L)Co]*" pursuant to the Contract.[96]

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89 Judgment, para. 725-726; Exhibit P-79A (Lapuerta Report), Figure 5a, **v. 10, p. 3251;** Testimony of H. Sansoucy, Oct. 22, 2015, **v. 61, p. 22550, l. 15 at p. 22556, l. 18**; Exhibit P-361, **v. 31, p. 11658.**

90 Exhibit D-1, **v. 38, p. 13885 and s.**

91 Hydro-Québec has exempted CF(L)Co from complying with the three-year notice provided at s. 6.6 of the Original Contract: Exhibit D-1, Art. 3, **v. 38, p. 13885.**

92 Testimony of D. Garant, Oct. 28, 2015, **v. 63, p. 23237, l. 4 to p. 23238, l. 22 and p. 23243, l. 19 to p. 23244, l. 3.** One of the paragraphs of the preamble of Exhibit D-1 states that "*pursuant to section 6.6 of the Power Contract dated May 12, 1969 between the parties (the "Contract"), CF(L)Co may recapture capacity and associated energy not to exceed 300 MW and 2.362 TWh per year*".

93 Exhibit P-30 (***Recall PSA***), **v. 4, p. 1340 and s.**, which replaced an earlier agreement between CF(L)Co and NLH (Exhibit P-29, **v. 4, at pp. 1327 and s.**).

94 Judgment, para. 441.

95 Exhibit P-31 C, **v. A - confidential, p. 1361 and s.** Renewed twice, this agreement expired on March 31, 2009: Exhibits P-32C and P-33C, **v. A - confidential, p. 1379 and s. and P. 1399 and s.** A diagram illustrating all the agreements related to the Recapture Block concluded in 1998 can be found in Exhibit HQ-DEM-5, **v. 58, p. 21484.**

96 Exhibits P-31 C, **v. A - confidential, p. 1361**; P-32C, **v. A - confidential, p. 1379-1380**; and P-33C, **v. A - confidential, p. 1399;** testimony of D. Garant, Oct. 28, 2015, **v. 63, p. 23254, l. 14 to p. 23256, l. 9.**

48. By these 1998 agreements, Hydro-Québec and CF(L)Co confirmed that the rights of CF(L)Co to Power, excluding the Twinco Block, are limited to 300 MW. Between 1998 (the year in which the entire Recapture Block is recalled) and summer 2012, CF(L)Co has never knowingly exceeded this 300 MW cap, nor claimed that it was free to do so, its behavior rather indicating that it assumed otherwise.[97]

b. The GWAC

49. On November 1, 1998, Hydro-Québec and CF(L)Co entered into a contract entitled "*Guaranteed Winter Availability Contract*" (**GWAC**). The GWAC guarantees to Hydro-Québec the availability in the winter period of an additional 682 MW of power beyond the "*Firm Capacity*" guaranteed by the Contract,[98] and this until the expiry of the Contract in 2041.[99]

50. By guaranteeing the availability of an additional 682 MW of power, the GWAC intends to allow Hydro-Québec to transfer, to the winter months during which the demand for electricity in Québec is highest, quantities of energy which otherwise would have to be consumed during the summer months.[100]

51. During the GWAC negotiations, CF(L)Co never raised the theory with Hydro-Québec, which Nalcor was going to develop ten years later, according to which Hydro-Québec would lose, as of September 1, 2016, its ability to transfer quantities of energy to the winter months. Neither did CF(L)Co indicate to Hydro-Québec that, in CF(L)Co's view, under the Renewed Contract, Hydro-Québec would lose the benefit of the seasonal operational flexibility and the management of the Plant's reservoirs.

52. During the negotiation of the GWAC, the parties contemplated its execution under the sign of continuity up to 2041. As the trial judge found, "[t]he ordinary witnesses as well as the expert Lapuerta are unanimous to say that HQ would not have consented [to the GWAC] and especially its modalities [if it] had known the interpretation that CF(L)Co wanted to give to the concept of 'Continuous Energy' as of September 1, 2016".[101]

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97 The testimony of R. Henderson, NLH's former vice-president, confirmed that until 2012, CF(L)Co and NLH considered that 300 MW was a limit in power that could not be exceeded: see Exhibit P-382/20, **v. 36, p. 13024, l. 5 to p. 13025, l. 6.** In the 1980s, CF(L)Co had even installed an alarm at the Plant to signal any excess of the Twinco Block or the Recapture Block: see Exhibit P-27, **v. 4, p. 1323 and s.**

98 Original Contract, Exhibit P-1, s. 6.4, **v. 3, p. 615** and Renewed Contract, Exhibit P-1, s. 5.2, **v. 3, p. 649.**

99 Exhibit P-2C, **v. A - confidential, p. 655 and s.**; Judgment, para. 449-451 and 455-457. Under ss. 6.4 of the Original Contract, **v. 3, p. 615** and 5.2 of the Renewed Contract, **v. 3, p. 649,** CF(L)Co's obligation to make available to Hydro-Québec, upon request, additional capacity in addition to the "*Firm Capacity*" *is dependent on CF(L)Co's opinion as to the availability of this additional power. Under the GWAC, CF(L)Co is making a firm commitment regarding the availability of 682 MW of additional capacity in addition to "Firm Capacity".*

100 Judgment, para. 450-451 and 465-466. See Exhibits HQ-DEM-15, **v. 58, p. 21545,** HQ-DEM-16, **v. 58, p. 21554** and HQ-DEM-18, **v. 58, p. 21562.** Testimony of T. Vandal, Oct. 20, 2015, **v. 59, p. 21999, l. 9 to p. 22000, l. 1;** testimony of D. Garant, Oct. 28, 2015, **v. 63, p. 23266, l. 5 to p. 23267, l. 17;** testimony of H. Sansoucy, Oct. 26, 2015, **v. 62, p. 22902, l. 8-14.**

101 Judgment, para. 1023. The trial judge accepted the evidence that the GWAC would yield to CF(L)Co approximately $1.5 billion

C. The genesis of the present dispute: the re-reading of the Contract by Nalcor

53. Since 1976, Hydro-Québec's rights have been the subject of numerous attacks by the Government of Newfoundland and the companies it controls. These attacks resulted in a first wave of litigation between 1976 and 1988, all of which resulted in judgments confirming Hydro-Québec's rights under the Contract.[102]

54. The creation of Nalcor in 2007 marked the start of a new wave of attacks against Hydro-Québec's rights. Nalcor conceived and then communicated to CF(L)Co various theories that constituted so many disruptions to the interpretation that CF(L)Co had previously acknowledged of the parties' rights and obligations under the Contract. These theories, which are at the origin of this dispute, were developed by Nalcor between 2008 and 2011.

1. Nalcor's theory regarding the interpretation of the Renewed Contract

55. In 2008-2009, Nalcor fabricated what the trial judge described as a "new theory"[103] of the interpretation of the Renewed Contract. This theory was articulated for the first time in an application filed by Nalcor[104] before the Newfoundland Board of Commissioners of Public Utilities for the approval of a water management agreement on the Churchill River, in the following terms:[105]

> [...] Schedule III to the HQ Power Contract alters the manner in which the [Annual Energy Base] will be supplied to HQ by CF(L)Co. Upon renewal, HQ will become entitled to receive Continuous Energy [...].
>
> As a result, HQ will be entitled to essentially equal amounts of energy during each month after renewal. However, HQ will remain entitled to schedule the hourly deliveries of its monthly entitlement of Continuous Energy at any time during the month.

56. CF(L)Co has waited until 2012 to announce to Hydro-Québec a new interpretation of the Renewed Contract which corresponds to the one developed by Nalcor.[106] As a complete about-face from the common vision of the parties of Hydro-Québec's rights under the Renewed

between 1998 and 2041: Judgment, para. 462 and 1027.

[102] Exhibits P-9, **v. 3, p. 836 and s.**, P-26, P-26A, **v. 4, p. 1063 and s., P. 1312 and s.**, and P-38, **v. 5, p. 1597 and s.**

[103] Judgment, para. 1009, 1012, 1030 and 1076, which also refers to it as a "new interpretation". See examination for discovery of E. Martin, Exhibit P-381, **v. 34, p. 12590, l. 15 to p. 12591, l. 1.**

[104] At the relevant period, Nalcor, NLH and CF(L)Co shared the President and CEO, E. Martin, as well as several senior management or board members: see HQDD-06, **v. 58, p. 21498.**

[105] Exhibit P-11, **v. 3, p. 918.**

[106] Judgment, para. 1028-1029.

Contract,[107] this position by CF(L)Co gave rise to the dispute between the parties as regards the first issue in this dispute.

2. Nalcor's theory regarding sales in excess of 300 MW

57. In 2011, Nalcor developed another theory that was prejudicial to Hydro-Québec's rights under the Contract. As Mr. Martin testified at the trial, employees of Nalcor's "energy marketing" business unit developed the theory according to which CF(L)Co would be entitled to sell to NLH power quantities beyond the 300 MW of the Recapture Block, even if they have already been sold to Hydro-Québec under the Contract, to the extent that they have not been scheduled by the latter, and provided that this power can be retroceded to Hydro-Québec on demand.[108]

58. After receiving this explanation by Nalcor, CF(L)Co has declared itself in agreement with this rereading of its own rights and obligations under the Contract. Nalcor then proposed to CF(L)Co to conclude an "arrangement",[109] which translated into amendments to the Recall PSA between CF(L)Co and NLH executed on May 1, 2012, in order to provide for the possibility for CF(L)Co to sell to NLH power in excess of 300 MW.[110] Revealing fact, the amendments to the Recall PSA included an indemnity clause by Nalcor in favor of CF(L)Co, in the event that Hydro-Québec complained of the illegality of these sales.[111]

59. From the summer of 2012, following the amendments to the Recall PSA, significant increases in deliveries by CF(L)Co to NLH in excess of 300 MW occurred, thereby allowing NLH to sell larger quantities of energy in certain hours.[112] It was during the summer of 2012 that Hydro-Québec discovered these sales and realized that CF(L)Co was deliberately violating the Contract. This situation gave rise to the dispute between the parties as regards the second issue in the present case.

PART II – THE QUESTIONS AT ISSUE

60. The issues raised by CF(L)Co's appeal require a determination as to whether the trial judge committed an error justifying the intervention of this Court by resorting to the principles of contractual interpretation in deciding the issues raised by this dispute (**Question 1**); by concluding that under the Renewed Contract, Hydro-Québec is not limited by a monthly ceiling in energy (**Question 2**); and by concluding that until the expiry of the Contract on August 31, 2041, except

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[107] Before this turnaround, CF(L)Co has always acted as if the Renewed Contract was merely an extension of the Original Contract, including with respect to operational flexibility, to the point where the first judge considered that the conduct of CF(L)Co before 2009 constituted "the confession of the party": Judgment, para. 1030-1031.

[108] Testimony of E. Martin, Nov. 18, 2015, **v. 68, p. 25396, l. 24 to p. 25397, l. 17**. The term "theory" is that of E. Martin: *supra* note 6.

[109] Testimony of E. Martin, Nov. 18, 2015, **v. 68, p. 25395, l. 11 to p. 25400, l. 13.**

[110] Exhibit D-40, **v. 40, p. 14875 and s.**

[111] Exhibit D-40, s. 10.03, **v. 40, p. 14893.**

for the Twinco Block, CF(L)Co cannot sell to third parties amounts of power that exceed the 300 MW limit of the Recapture Block (**Question 3**).

61. The interpretation of a contract is a question of fact or, at most, a mixed question of fact and law.[113] In these matters, appellate courts must therefore show deference with respect to the interpretation adopted by the trial judge and intervene only in the presence of a manifest and determining (or dominant) error[114]. In the present case, no error which may justify the intervention of this court taints the conclusions of the first judge.

PART III – THE ARGUMENTS

Question 1: The trial judge did not err in using the principles of contractual interpretation in deciding the questions at issue in this litigation

62. CF(L)Co expressly criticizes the trial judge for using the principles of contractual interpretation in deciding the issue regarding the interpretation of the Renewed Contract.[115] Without doing so as openly, CF(L)Co addresses similar criticisms in relation to the issue of sales above 300 MW.[116] Baseless, these reproaches are contradicted by CF(L)Co's own argumentation.[117]

63. The first judge resorted to the principles of contractual interpretation after taking full account of an undeniable reality for anyone who reads all the provisions of the Contract. Obviously, the parties have tailored technical concepts for their Contract, which have no consecrated meaning, either in the technical field or in everyday language. This is the case for such concepts as AEB, Basic Contract Demand, Energy Payable, Continuous Energy, Recapture, Operational Flexibility and Twinco Block.

64. The trial judge was therefore right to conclude that a proper understanding of these concepts, and by way of extension, that the determination of the common intention of the parties, was enlightened by the multiple elements of extrinsic evidence relevant to the factors listed in

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112 Exhibit P-75, **v. 9, p. 2631 and s.**

113 *Compagnie de chemin de fer du littoral nord de Québec et du Labrador inc.* v. *Sodexho Québec Ltd.*, 2010 QCCA 2408 (**Sodexho**), para. 81 and 211 (application for leave to appeal to the Supreme Court of Canada dismissed); *Samen Investments Inc.* v. *Monit Management Ltd.*, 2014 QCCA 826 (**Samen**), para. 52; *Dunkin 'Brands Canada Ltd.* v. *Bertico Inc.*, 2015 QCCA 624 (**Dunkin' Brands**), para. 45 to 46 (application for leave to appeal to the Supreme Court of Canada dismissed); *Lamco II, s.e.c.c.* v. *Québec (ville de)*, 2016 QCCA 757 (**Lamco II**), para. 2. For a solution in common law, see: *Sattva Capital Corp.* v. *Creston Moly Corp.*, [2014] 2 R.C. S. 633 (**Sattva**), para. 50-55.

114 *Sattva*, para. 50-55; *Sodexho*, para. 81 and 211; *Samen*, para. 40-43 and 52; *Dunkin' Brands*, para. 45-46; *Lamco II*, para. 2. See also: *Regroupement des CHSLD Christ-Roy (Centre hospitalier, soins longue durée)* v. *Comité provincial des malades*, 2007 QCCA 1068, para. 55; and *P.L.* c. *Benchetrit*, 2010 QCCA 1505, para. 24.

115 *Appellant's Brief*, para. 10-11, 44 and 49.

116 *Appellant's Brief*, para. 127-128 and 133-135.

117 In support of its theory regarding the interpretation of the Renewed Contract, CF(L)Co undertakes a comparative analysis of the provisions of the Letter of Intent, Original Contract and Renewed Contract (Appellant's Brief, para. 38-45), and its factum is full of references to the documentary evidence relating to their negotiation (Appellant's Brief, footnotes 21 and 25-26).

Article 1426 CCQ, such as documentary evidence relating to the negotiation of the Contract, which attests to the origin and purpose of these concepts[118]; the commercial context prevailing at the time of the said negotiations,[119] in order to avoid any unreasonable commercial consequence[120]; and, finally, the evidence relating to the conduct of the parties after the conclusion of the Contract, which spans over more than 40 years.[121]

65. More specifically, the trial judge understood well that, in order to dissipate the ambiguity surrounding the meaning of the concept of "Continuous Energy" in the Renewed Contract,[122] it was necessary to carry out a global interpretation exercise,[123] because this concept flows from the concept of the AEB, which originates in the Original Contract and whose meaning is amply documented in the documentary evidence relating to the negotiation of the Contract.[124]

66. The decision of the first judge to use the principles of contractual interpretation is consistent with its mission, which consists of seeking the common intention of the parties;[125] it is within the purview of his discretion and takes into account the cautiousness that courts must exhibit before concluding that a text is clear and unambiguous, as the apparent clarity of a contractual text may be misleading[126].

Question 2: The trial judge did not err in concluding that under the Renewed Contract, Hydro-Québec is not limited by monthly supply ceilings.

A. The concept of "Continuous Energy" is a concept used for the purposes of the modality of payment contained in the Renewed Contract

67. CF(L)Co criticizes the trial judge for concluding that the concept of "Continuous Energy" under the Renewed Contract is a simple modality of payment which does not constitute an energy

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118 Llluelles & Moore, p. 885-886; F. GENDRON, *L'interprétation des contrats* (Montreal: Wilson & Lafleur, 2002) (**Gendron**), p. 96. See, for example: *Compagnie du centre de divertissement du Forum* v. *Société du groupe d'embouteillage Pepsi (Canada)*, 2008 QCCS 4672, para. 171; Incidental appeal allowed only to alter quantum 2010 QCCA 1652 (**Pepsi (C.A.)**), para. 23-25.

119 P.-G. JOBIN and N. VÉZINA, *Les obligations*, 7th ed. (Cowansville, Que.): Yvon Blais, 2013) (**Jobin & Vézina**), p. 495-496; S. GRAMMOND, "Interprétation des contrats", in *JurisClasseur Québec*, coll. "Droit Civil", *Obligations et responsabilité civile*, fasc. 6 (Montreal: LexisNexis, 2008) (**Grammond**), p. 6/22-6/25; *Exportations Consolidated Bathurst Ltée.* v. *Mutual Boiler and Machinery Insurance Company*, [1980] 1 R.C.S 888, p. 901-903; See, for example, *Richer* v. *La mutuelle du Canada, compagnie d'assurance sur la vie*, [1987] R.J.Q. 1703 (C.A.) (**Richer**), p. 1712 and 1715.

120 Gendron, p. 93; Jobin & Vézina, p. 495-496. See, for example, *Churchill Falls (Labrador) Corporation Limited* v. *Hydro-Québec*, J. E. 85-255 (C.A.), p. 20-21; *Carrefour Langelier* v. *Woolworth Inc.*, [2002] R.D.I. 44 (C.A.), para. 34-35; Richer, p. 1715.

121 Llluelles & Moore, p. 886-887; Jobin & Vézina, p. 502; Gendron, p. 97-99; V. KARIM, *Les Obligations*, v. 1, 4th ed. (Montreal: Wilson & Lafleur, 2015) (**iCarim**), p. 720-721; *Francoeur* v. *441786 Canada Inc.*, 2013 QCCA 191 (**Francoeur**), para. 119; Richer, p. 1714-1713; and *Sobeys Québec inc.* v. *Coopérative des consommateurs de Ste-Foy*, 2005 QCCA 1172 (**Sobeys**), para. 93.

122 Judgment, para. 873-874.

123 Gendron, p. 83-84. Judgment, para. 859; *Billiards Dooly's inc.* v. *Entreprises Prébour ltée*, 2014 QCCA 842, para. 58-63; see also Jobin & Vézina, p. 583 and 586-589. CF(L)Co is wrong to claim, at para. 46 of its factum, that Hydro-Québec had not invoked the notion of "contractual group" in first instance: Application instituting proceedings, **v. 2, p. 274, para. 13.**

124 Judgment, para. 121-123.

125 Article 1425 C.c.Q .; *Union Carbide Canada Inc.* v. *Bombardier Inc.*, [2014] 1 R.C.S. 800, para. 59. See also: *Québec (Agence du revenu)* v. *Services Environnementaux AES Inc.*, [2013] 3 R.C.S. 838, para. 48; Sobeys, para. 51.

126 Jobin & Vézina, p. 492. See also: *Sobeys*, para. 47-50; *Roy* v. *Geométra inc.*, J.E. 90-647 (C.A.), p. 6; Llluelles & Moore, p. 866-867; and Gendron, p. 30; and *Francoeur*, para. 114. See also *Richer*, p. 1705; *Organon Canada Ltée* v. *Trempe*, 2002 CanLII 41261 (C.A.), para. 25; Karim, p. 694-695; J. PINEAU and S. GAUDET, *Théorie des obligations*, 4th ed. (Montreal: Thémis, 2001), para. 223.

ceiling having the effect of limiting the flexibility of operation granted to Hydro-Québec.[127] According to CF(L)Co, "Continuous Energy" would rather refer to the predetermined physical quantity of energy that Hydro-Québec has the right to purchase monthly.[128]

1. The incompatibility of CF(L)Co's theory with the vocation of the AEB

68. CF(L)Co proposes a reading in a vacuum of the definition of "Continuous Energy" under the Renewed Contract and completely ignores the fact such definition (like "Basic Contract Demand" under the Original Contract) is the monthly transposition of the AEB in force at the expiry of the Original Contract.[129]

69. The first judge rightly went back to the origin of the concept of AEB and found that this concept had originally been conceived as a component of the Split Tariff formula, which led him to conclude that "the treatment of the Split Tariff clause is indicative of the intention of the parties"[130] and that "[...] taking into account notably the Split Tariff applicable only during [the Original Contract], the only plausible explanation to the use of the term "Continuous Energy" [under the Renewed Contract] was to confer to CF(L)Co an income and cash inflows stability for the second period of this contractual group [...]".[131]

70. Indeed, as stated above,[132] the uncontradicted evidence revealed that CF(L)Co itself introduced a modality of payment, the "Split Tariff", incorporating the concept of AEB in order to protect itself against the fluctuations associated with the variability of hydrological conditions, by dissociating, up to 2/3 of the applicable tariff, the energy paid by Hydro-Québec from the physical energy actually made available by CF(L)Co.[133] Obviously neither the AEB nor its monthly transpositions, the "Basic Contract Demand" under the Original Contract and the "Continuous Energy" under the Renewed Contract, are intended to represent physical quantities of energy.

71. In an attempt to accredit its theory according to which the concepts of AEB and Continuous Energy under the Renewed Contract would represent annual and monthly ceilings, CF(L)Co tries to rely, by deforming the context, on certain riders and preliminary versions of Article 3.2 of the Original Contract, beginning with Exhibit D-21,[134] which it erroneously identifies

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127 *Appellant's Brief*, para. 51 (b), (c), (d) and 88. Judgment, para. 1049, 1074-1075 and 1077.
128 *Appellant's Brief*, para. 9, 19 and 41.
129 *Supra*, note 81.
130 Judgment, para. 958-959.
131 Judgment, para. 1049 and 1074.
132 *Supra*, para. 35.
133 *Supra*, para. A.36.
134 *Appellant's Brief*, para. 72. Exhibit D-21 consists of a page extirpated by CF(L)Co from an internal memorandum, and originally clearly privileged, from CT Manning, Counsel, Vice-President Legal Affairs and Secretary of CF(L)Co: Exhibit P-189, **v. 14, p. 4734**. Since Hydro-Québec refused to consent to the introduction of Exhibit D-21, it is not part of the record: see Exhibit P-399, **v. 36, p. 13376 and s.**

as "Rider 34".[135] However, these writings have never been the subject of any agreement between the parties.[136]

2. The lack of basis for CF(L)Co's arguments based on the object clause of the Renewed Contract and on the absence of a clause similar to Article 6.2 of the Original Contract

72. CF(L)Co's theory according to which Hydro-Québec would be entitled, under the Renewed Contract, to only a monthly amount of energy is essentially based on what CF(L)Co considers, wrongly, as differences between the text of the object clause of the Original Contract and the Renewed Contract,[137] as well as on the absence, in the Renewed Contract of a clause similar to article 6.2 of the Original Contract.[138]

a. The object clause defines the object of the Contract, being the sale of almost all of the production of the Plant

73. In arguing that the object clause of the Renewed Contract determines the amount of energy to which Hydro-Québec is entitled on a monthly basis,[139] CF(L)Co confers on that clause a role that is clearly not its own, being to define the object of the prestation, that is, the thing that is sold.[140]

74. In the Quebec Law of obligations, the concept of "object" is used in relation to three concepts which are distinct from one another:[141] (a) the object of the contract, that is to say, the main judicial operation contemplated by the parties and that their agreement related to (article 1412 CCQ);[142] (b) the purpose of the obligation, that is to say, the prestation assumed by

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[135] During a negotiating meeting between the parties held on March 11, 1968 (Exhibit P-190, **v. 14, p.4743**), CF(L)Co had filed "*a proposed revision to clause 3.2 which became numbered as rider 34*", but the document so filed remains untraceable and there is no indication that it would be Exhibit D-21, **v. 39, p. 14305**.

[136] In the draft of March 12 1968, Article 3.2 was left blank, as it was "*still under discussion*" (Exhibits P-191, **v. 14, pp. 4746 and 4757 and P-192, 14, pp. 4807**). On March 13, 1968, several riders were "*outstanding, awaiting confirmation by Hydro-Quebec*", among them the "*Rider 34*" (Exhibit D-115, **v. 42, p.15536**). On March 14, 1968, Hydro-Québec "*had not had an opportunity to fully deal with the papers submitted to them by [CF(L)Co] since the last meeting*", including "*Rider 34*" (Exhibit P-193, **v. 14, p. 4808**). In the draft of April 12, 1968, Article 3.2 was still blank and a handwritten note indicated "*Awaiting HQ comment on CFLCo submission due April 16*" (Exhibit P-57, **v. 7, p. 2221**). As for the versions of Article 3.2 which were included in the drafts of April 19 and 25, 1968 (Exhibits D-22 and D-23, **v. 39, pp. 14306 and s.** and **pp. 14356 and s.**), they were criticized by Ebasco, Hydro-Québec's advisors, on April 29, 1968 (Exhibit D-119, **v. 42, p.15572**), and replaced, as of the subsequent draft of May 20, 1968, by the article 3.2 that we find in the Original Contract (Exhibit P-205, **v. 15, pp. 5053**).

[137] *Appellant's Brief*, para. 7 to 9, 40 to 42 and 51.

[138] *Appellant's Brief*, para. 16, 51 and 58.

[139] *Appellant's Brief*, para. 7-9 and 40-42.

[140] Lluelles & Moore, p. 538; Jobin & Vézina, p. 30-31

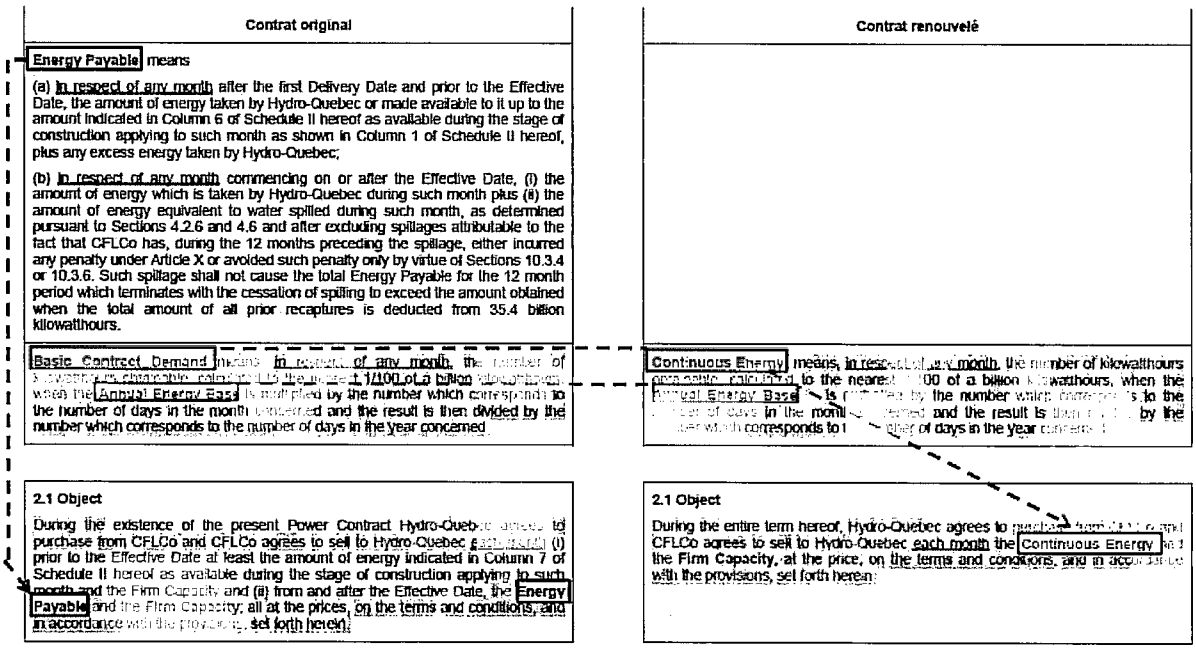
[141] Jobin & Vézina, p. 436; Lluelles & Moore, p. 41 (No. 1) and 537-538; P.-G. JOBIN and M. CUMYN, *La Vente*, 3rd ed. (Cowansville, Que.: Yvon Blais, 2007), p. 29; This distinction was recognized by doctrine under the former code. See: J.-L. BAUDOUIN, *Les obligations*, (Cowansville, QC: Yvon Blais, 1983), p. 174-176.

[142] Jobin & Vézina, p. 436-437; Lluelles & Moore, p. 556.

the debtor (Articles 1371 and 1373 of the CCQ);[143] and (c) the object of the prestation, that is, the "thing" that is the object of the prestation.[144]

75. Properly qualified, the object clause of the Renewed Contract (like the object clause of the Original Contract) plays a similar role to that of a preamble. Its role is to identify the object of the contract, namely the sale to Hydro-Québec of all the production of the Plant, with the exception of the Twinco Block and the Recapture Block. The characteristic prestations of this sale[145] are, on their part, described elsewhere in the Contract, in the provisions following the object clause, as actually announced in the last words of such provision: "[...] *at the price, on the terms and conditions, and in accordance with the provisions, set forth therein*."

76. As shown by the representation below, submitted to the trial judge, once the text of the object clause in the Original Contract has been trimmed by the parties, in order to remove the elements that ceased to have effect after the Plant was put into service (which corresponds to the "Effective Date"), this clause is identical to the object clause of the Renewed Contract (including the terms "each month"), except for the replacement of the term "Energy Payable" by the term "Continuous Energy", whose definition is in all respects identical to that of "Basic Contract Demand":



77. This comparison of the two clauses reveals that, both under the Original Contract and under the Renewed Contract, the parties chose to refer in the object clause, not to the thing sold

[143] Lluelles & Moore, p. 41 and 538.
[144] Lluelles & Moore, p. 538; Jobin & Vézina, p. 30-31.
[145] Obligation to deliver (article 1716-1717 C.c.Q.) the object of the prestation, and obligation to pay the sale price (article 1734 C.c.Q.).

(the object of the prestation), but to the concept that more adequately represents the object of the Contract, i.e. the sale to Hydro-Québec of virtually all of the Plant's production.

78. At the time of the coming into force of the Original Contract, when the Plant had not yet been built, it was the concept of "Energy Payable" that most adequately represented the energy of the Plant available for Hydro-Québec, as it measured the cumulative monthly energy actually delivered by CF(L)Co to Hydro-Québec as well as the energy equivalent of the water spilled monthly. At that time, the AEB and its monthly transposition, the Basic Contract Demand, were only estimates of the average annual energy potential of the Plant available to Hydro-Québec.[146]

79. Upon the coming into force of the Renewed Contract, the parties, by choosing to extend in the Renewed Contract only the modality of the "Split Tariff" based on the AEB, incorporated in the object clause the monthly transposition of the AEB, being the "Continuous Energy", which now reflects the proven energy potential of the Plant based on the 40 years of experience of the Original Contract.

b. The object of CF(L)Co's obligation is defined elsewhere in the Contract

80. The object of the obligation to which CF(L)Co is bound under the Contract is found in articles 6.1, 6.4 and 6.5 of the Original Contract and articles 5.1, 5.2 and 5.3 of the Renewed Contract which, in sum, are identical. It is these articles, and not the object clause, that constitute the source of Hydro-Québec's right to energy and power from the Plant.

81. Articles 6.1 of the Original Contract and 5.1 of the Renewed Contract identify the energy characteristics that CF(L)Co is required to make available to Hydro-Québec, while articles 6.4 and 5.2 require CF(L)Co to make available to Hydro-Québec the "Firm Capacity" at any time and at its request, as well as the additional capacity when, in the opinion of CF(L)Co, it can be made available.[147]

82. Articles 6.5 of the Original Contract and 5.3 of the Renewed Contract describe the power scheduling rights to which Hydro-Québec is entitled under articles 6.4 and 5.2. They provide that Hydro-Québec has the right to schedule its power requirements on an hourly basis. However, as the evidence has shown, the power ("*capacity*") delivered over a given period of time constitutes energy.[148] Hence, Hydro-Québec's right to schedule power from the Plant on an hourly basis[149] requires CF(L)Co to deliver to Hydro-Québec the energy associated with that power in

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146 *Supra,* para. 38.

147 The object clause at section 2.1 does not mention the additional capacity to which Hydro-Québec is entitled under sections 6.4 of the Original Contract, **v. 3, p. 615** and 5.2 of the Renewed Contract, **v. 3, p. 649**. This is another demonstration that the object clause is not intended to identify the object of CF(L)Co's prestation.

148 Testimony of T. Vandal, Oct. 19, 2015, **v. 59, p. 21745, l. 3 to p. 21746, l. 13.**

149 Articles 6.5 (a) of the Original Contract, **v. 3, p. 615** and 5.3 (a) of the Renewed Contract, **v. 3, p. 650**.

accordance with the supply programs submitted by Hydro-Québec. The evidence revealed that this is how the parties have been executing the Contract for 40 years.[150]

c. The absence in the Renewed Contract of a provision similar to article 6.2 of the Original Contract does not affect Hydro-Québec's supply rights

83. CF(L)Co seeks to draw an argument based on the absence of the first paragraph[151] of article 6.2 of the Original Contract in the Renewed Contract, in which it sees the source of Hydro-Québec's right to energy supply.[152]

84. The Renewed Contract contains no provision corresponding to the text of the first paragraph of article 6.2 of the Original Contract. However, CF(L)Co does not deny Hydro-Québec's right to program the power and energy deliveries from the Plant during the term of the Renewed Contract. Clearly, and contrary to CF(L)Co's argument, article 6.2 of the Original Contract was not the source of Hydro-Québec's right to the power and power from the Plant under the Original Contract, as this right would no longer exist under the Renewed Contract. The removal of article 6.2 does not, therefore, alter Hydro-Québec's right to schedule the Plant's power and the corresponding energy deliveries, nor the corresponding obligation of CF(L)Co to deliver that energy to Hydro-Québec.

B. The mirage of "Excess Energy" and its alleged gratuity

1. Under the Renewed Contract, Hydro-Québec pays, through "Continuous Energy", all energy contemplated by the Letter of Intent

85. The main argument invoked by CF(L)Co in both the first instance[153] and before this Court[154] is based on the fact that the Letter of Intent contained the concepts of "Continuous Energy" and "Excess Energy", while only the notion of "Continuous Energy" can be found in the Renewed Contract. According to CF(L)Co, this would attest to the intent of the parties not to sell "Excess Energy" to Hydro-Québec under the Renewed Contract.

86. CF(L)Co acknowledges that the trial judge found that the concept of "Continuous Energy" under the Renewed Contract includes energy that was qualified as "Excess Energy" under the Letter of Intent.[155] CF(L)Co erroneously submits, however, that "*the entire basis*" on which he

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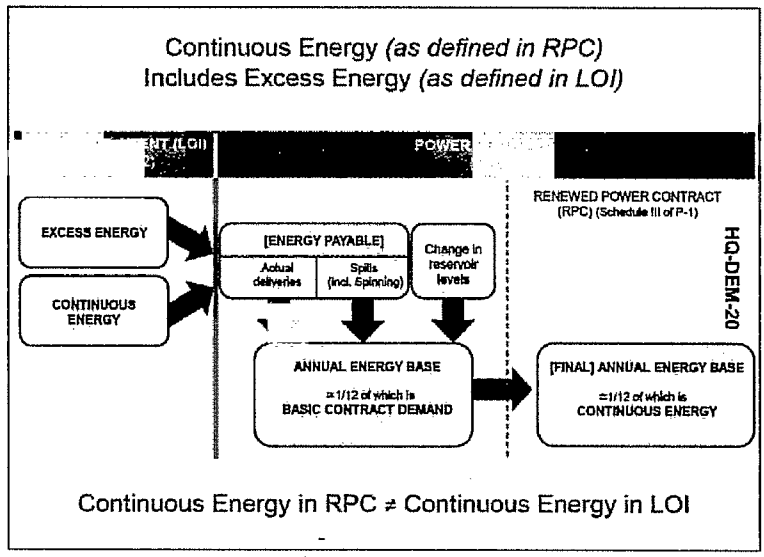
150 See, for example, Exhibit P-311, **v. 27, p. 9794-9796.**
151 The second paragraph of section 6.2 applies only during the construction period of the Plant.
152 *Appellant's Brief*, para. 16, 39, 51 and 58.
153 Judgment, para. 978-979 and 1047-1048.
154 *Appellant's Brief*, para. 69, 76-77 and 83.
155 *Appellant's Brief*, para. 77.

relied in reaching that conclusion would be the fact that he truncated the definition of "Continuous Energy" in the Letter of Intent[156].

87. While it is true that the trial judge, at para. 988, truncated the definition given to Continuous Energy in the Letter of Intent,[157] it is clear that this had no effect on his conclusion as to the meaning of this expression in the Renewed Contract, which is firmly anchored in the documentary evidence as well as in the direct evidence from the expert Lapuerta, who illustrated this reality by the diagram below:[158]



88. This expert evidence demonstrates that by paying for the "Continuous Energy" under the Renewed Contract, Hydro-Québec purchases the Plant's proven energy potential, which includes the totality of the energy described by the concepts of "Continuous Energy" and "Excess Energy" as defined in the Letter of Intent.

89. The evidence has shown that when the "Split Tariff" pricing formula was adopted in the Original Contract, the concepts of "Continuous Energy" and "Excess Energy" within the meaning of the Letter of Intent were explicitly discarded by the parties, as the trial judge found,[159] given that they had been "*[s]uperseded by Annual Energy Base Concept*".[160] The adjustments to the AEB provided under the Original Contract notably take into account all of the energy deliveries to Hydro-Québec since the "Effective Date".[161] The AEB for the purposes of the Renewed Contract,

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156 *Appellant's Brief*, para. 13-15, 59 and 64

157 On the other hand, the trial judge correctly described the concept of "*Continuous Energy*" as used in the Letter of Intent in para. 202, 235 and 241 of the Judgment.

158 Exhibit HQ-DEM-20, **v. 58, p. 21574.**

159 Judgment, para. 986: "... the application of the "*Split Tariff*" and "*Annual Energy Base*" clauses led to the abandonment of the expression "*Continuous Energy*". See also Exhibit P-160, **v. 13, p. 4226-4227** and Judgment, para. 286: "*[...] Continuous and excess energy definitions and related provisions will cease to be applicable*"; Exhibit P-161, **v. 13, p. 4233** and Judgment, para. 291 and 959.

160 See Exhibit P-172, **v. 13, p. 4352**, of which Exhibit P-6, **v. 3, p. 770** confirms that it was prepared by CF(L)Co.

161 Original Contract, Exhibit P-1, s. 9.2, **v. 3, p. 619.**

as well as its monthly transposition, the "Continuous Energy", therefore includes the quantities of energy that would have been qualified as "Continuous Energy" as well as those that would have been qualified as "Excess Energy"[162] under the Letter of Intent.

2. The allegedly gratuity of "Excess Energy"

90. CF(L)Co argues that the inevitable consequence of the interpretation of the Renewed Contract adopted by the trial judge would be that Hydro-Québec would receive on a free basis all monthly energy beyond the "Continuous Energy", which CF(L)Co qualifies as "Excess Energy".[163] This argument is totally specious.

91. As the trial judge acknowledged, under the Renewed Contract, Hydro-Québec pays the Plant's average annual energy potential available to Hydro-Québec, as reflected by the AEB calculated after 40 years of operation,[164] and is entitled to receive, through the term of the Renewed Contract, all energy available from the Plant (other than the Twinco Block and the Recapture Block), irrespective of whether it proves to be, in any given year, less than or greater than the AEB.

92. Thus, for example, in any given year, all things being otherwise equal, the fact for Hydro-Québec to take each month a number of kWh equal to the "Continuous Energy" or to take less than the "Continuous Energy" during the summer months and to postpone the balance not taken over the winter months amounts to taking exactly the same amount of energy, but distributing it differently during the year, depending on Quebec's seasonal demand. (The same carry-over can occur on a multi-year basis.) The portion of energy taken by Hydro-Québec during the winter months is not "free" since it is the portion not taken during the summer months, but still paid for by Hydro-Québec in full. This is what the trial judge expressed in paragraph 1053 of the Judgment, the meaning of which CF(L)Co seeks to divert.[165]

3. The AEB adjustment ceiling: an attempt at diversion

93. CF(L)Co argues that the existence of the 29.84 TWh cap provided for in the AEB adjustment formula[166] would invalidate the conclusion of the first judge that the AEB represents an

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[162] Judgment, para. 1052.
[163] *Appellant's Brief,* para. 78.
[164] Judgment, para. 987-988.
[165] *Appellant's Brief*, para. 79-80. The use by the trial judge of the word "limit" in relation to the "*final AEB*", which, taken in isolation, may be confusing, must be read in light of his conclusion that Hydro-Québec is entitled, under the Renewed Contract, to all of the power and energy of the Plant, with the exception of those associated with the Twinco Block and the Recapture Block: Judgment, para. 1077.
[166] This cap, initially set at 32.2 TWh, was reduced to 29.84 TWh following CF(L)Co's recall of the totality of the "*recaptures of energy*": Original Contract, Exhibit P-1, art. . 9.3 (ii), **v. 3, p. 619**.

annual average[167] reflecting the proven energy potential of the Plant, as all energy beyond this cap, qualified by CF(L)Co of "Excess Energy", would not be reflected in the AEB.

94. This argument is merely an attempt at diversion, as the evidence has shown that on the basis of nearly 40 years of cumulative experience, Hydro-Québec can expect to receive annually, on average, 29.68 TWh of energy during the Renewed Contract, being a quantity less than the cap of 29.84 TWh.[168] In any event, Mr. Martin admitted that before the expiry of the 25 years of the Renewed Contract, it cannot be known whether the Plant will have been able to deliver to Hydro-Québec annually on average more energy than the AEB.[169]

C. The absurdities arising from the interpretation of the Renewed Contract proposed by CF(L)Co

95. CF(L)Co's theory regarding the interpretation of the Renewed Contract gives rise to many absurdities which are abundantly demonstrated by the evidence.

1. Hydro-Québec would lose the seasonal flexibility which allows it to meet the demand in Québec and to integrate the Plant into its fleet

96. Whether during the negotiation of the Contract or today, it is undeniable that the demand for consumption in Quebec is stronger in winter than in summer.[170]

97. The "Operational Flexibility" clause of the Original Contract, "documented at length",[171] allowed Hydro-Québec to manage the Plant's reservoirs for 40 years in order to match energy supplies from the Plant with Québec's seasonal profile for energy consumption demand (which is higher in winter than in summer), the whole within the framework of an integrated management of its own fleet of power plants[172].

98. The interpretation of the Renewed Contract proposed by CF(L)Co would have the effect of requiring Hydro-Québec to take the entire "Continuous Energy" during each summer month, whilst Quebec's demand is the lowest[173], since otherwise the portion of the "Continuous Energy" paid for

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167 *Appellant's Brief*, para. 81.

168 CF(L)Co relies on estimates dating back to 1964 to claim that the Plant would have the capacity to produce "*Excess Energy*" on an annual basis: *Appellant's Brief*, para. 84-86. However, the evidence revealed that these estimates were based on a preliminary assessment of the flow of the Upper Churchill and that they were rendered obsolete by the *Engineering Report* prepared by Acres in the spring of 1968 (quoted in the Original Contract, Exhibit P-1, Section 1.1 (II) - definition of "*Plant*", **v. 3, pp. 602-603**, exhibit P-198, **v. 14, p. 4967-4968 and p. 5015**: "*Note: Based on simulation of operation with 43 year hydrograph*"; Exhibit P-198, **v. 14, p. 4888**. The trial judge therefore rightly relied on Exhibit P-198, **v. 14, p. 4882 and s.**: see Judgment, para. 86.

169 Testimony of E. Martin, Nov. 19, 2015, **v. 69, p. 25725, l. 6-24.**

170 Exhibit P-79, Figure 2, **v. 10, p. 3194.**

171 Judgment, para. 996.

172 Exhibit P-16, **v. 4, p. 1013**; HQ-DEM-15, **v. 58, p. 21544**; HQ-DEM-10, **v. 58, p. 21514 and s.**; testimony of H. Sansoucy, Oct. 21, 2015, **v. 60, p. 22252, l. 21 to p. 22261, l. 20**. The seasonal flexibility granted to Hydro-Québec is consistent with the definition of "*Firm Capacity*", which is lower during the summer than it is in winter: Exhibit P-1, s. 1.1 (III) of the Original Contract, **v. 3, p. 603** and art. 1.1 (II) of the Renewed Contract, **v. 3, p. 645.**

173 Testimony of C. Lapuerta, Nov. 9, 2015, **v. 66, p. 24536, l. 22 to p. 24538, l. 11.**

by Hydro-Québec pursuant to article 7.1 of the Renewed Contract but not taken would become, according to CF(L)Co, "Excess Energy" and would belong to CF(L)Co. Hydro-Québec would find itself in the absurd position of having access to quantities of energy from the Plant that would be too high during the summer months and insufficient during the winter months.

99. Now, as the trial judge found,[174] and as the expert Lapuerta noted,[175] there is nothing in the evidence to support the proposition that, although the parties had agreed to extend the Contract and, moreover, to confer to Hydro-Québec an operational flexibility through the same "Operational Flexibility" clause as the one contained in the Original Contract, they would at the same time have intended to introduce such a drastic change as to force Hydro-Québec, during the term of the Renewed Contract, to an operational flexibility not only inferior to that enjoyed under the draft contracts prior to the appearance of the "Operational Flexibility" clause, but also inferior to that which it enjoyed under the Letter of Intent.[176]

100. CF(L)Co acknowledges that its interpretation of the Renewed Contract would deprive Hydro-Québec of any operational flexibility of the plant on a seasonal and multi-year basis. [177] In an attempt to reconcile its interpretation with the "Operational Flexibility" clause, it proposes a mitigated interpretation of this clause and claims that it would now confer on Hydro-Québec a "flexibility" said "intra-monthly".[178]

101. The first judge rightly found that the concept of "flexibility" referred to as "intra-monthly", a concept entirely invented by Mr. Kendall, which he refused to qualify as an expert, "does not appear from the negotiations and discussions put into evidence".[179] For good reason: the evidence revealed that Hydro-Québec's right to schedule its energy supplies in order to make the reservoir levels fluctuate under article 4.1.1(ii) of the Renewed Contract cannot be usefully exercised on an intra-monthly basis[180], such that the interpretation proposed by CF(L)Co would deprive of any effect the right of Hydro-Québec, set out in the first paragraph of article 4.1.1, to operate the Plant in an integrated manner with its own fleet ("*in relation to the Hydro-Québec system*").[181]

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174 Judgment, para. 966-967, 989-995 and 1001.

175 Exhibit P-79, **v.10, p. 3218-3219, para. 124**: "*In my experience such a major change would warrant specific mention in negotiating documents, particularly considering the issues that the parties committed t writing elsewhere in the negotiations*".

176 Pursuant to section 8.0(c) of the Letter of Intent (Exhibit P-4, **v. 3, p. 719**), Hydro-Québec was granted the right, while paying for all of the continuous energy that CF(L)Co would be able to make available during a given month, to take less energy during that month than this continuous energy ("*Continuous Energy*") and to defer, without additional payment, the balance over six months. The energy thus deferred from one month to the next did not, due to this, become excess energy ("*Excess Energy*") and continued to belong to Hydro-Québec. CF(L)Co is therefore wrong to argue, as it does in paragraph 62 of its factum, that the concept of "*Continuous Energy*", as used in the Letter of Intent, corresponded to a "finite limited monthly quantity".

177 *Appellant's Brief,* para. 105.

178 *Appellant's Brief,* para. 107.

179 Judgment, para. 993.

180 Testimony of C. Lapuerta, Nov. 9, 2015, **v. 66, p. 24538, l. 14 to p. 24539, l. 12**; Testimony of H. Sansoucy, Oct. 22, 2015, **v. 61, p. 22631, l. 2 to p. 22633, l. 16** and **v. 61, p. 22692, l. 21 to p. 22693, l. 19.**

181 The first judge noted other inconsistencies between the interpretation proposed by CF(L)Co and the provisions of the Renewed

102. Moreover, the very contention that Hydro-Québec would benefit from a certain scheduling flexibility within a given month was contradicted by CF(L)Co's witnesses, who acknowledged that during the summer months, the generation capacity of the Plant is reduced due to the regular maintenance operations of transmission lines and generation equipment[182]. The result is that pursuant to CF(L)Co's interpretation, the Plant would have to operate at full capacity at every hour of the month in order to generate the "Continuous Energy", leaving Hydro-Québec with no flexibility.[183]

2. Hydro-Québec would assume 100% of the hydraulic risk while losing the management of the reservoirs enabling it to manage this risk

103. Both parties[184] accept the economic principle recognized in the industry that the party controlling the reservoirs of a power plant must assume the hydraulic risk.[185] The first judge agreed with the expert Lapuerta on the importance to be given to this risk and the management of the Plant's reservoirs.[186]

104. By accepting, in the Original Contract, the "Split Tariff" formula based on 2/3 of the AEB, Hydro-Québec agreed to assume 2/3 of the hydraulic risk. In return, it obtained the operational flexibility necessary to enable it to control the management of the Plant's reservoirs[187]. This is consistent with the economic principle outlined above.

105. The adoption in the Renewed Contract of a price formula based entirely on the AEB at the expiry of the Original Contract was accompanied, as recognized by the first judge,[188] by the transfer of all the hydraulic risk to Hydro-Québec[189]. This same economic principle, applied to the term of the Renewed Contract, supports and is consistent with the interpretation of the Renewed Contract proposed by Hydro-Québec and accepted by the first judge, according to which Hydro-Québec retains control of the management of the Plant's reservoirs during the term of the Renewed Contract.

106. The interpretation of the Renewed Contract proposed by CF(L)Co, on the contrary, contradicts this economic principle since, as admitted by CF(L)Co, this interpretation would imply that it would resume control of the management of the Plant's reservoirs during the Renewed

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Contract: see Judgment, para. 741 and 997.

182 Judgment, para. 506-509.

183 Testimony of C. Wiseman, Nov. 24, 2015, **v. 70, p. 26077, l. 23 to p. 26078, l. 23.**

184 Judgment, para. 622-623 and 969; Exhibit P-381, **v. 35, p. 12689, l. 11-25.**

185 Judgment, para. 968; Exhibit P-79, **v. 10, p. 3214, para. 110.** Hydraulic risk refers to the risk associated with variations in hydraulic conditions and their impact on the energy generation of a plant.

186 Judgment, para. 957.

187 Judgment, para. 956-957, 968 and 1069-1070.

188 Judgment, para. 716.

189 Testimony of T. Vandal, Oct. 19, 2015, **v. 59, p. 21896, l. 11 to p. 21897, l. 6 and p. 21935, l. 22 to p. 21936, l. 12.**

Contract[190] while Hydro-Québec, which now assumes all of the hydraulic risk, would see its control of the Plant's reservoirs, the essential tool to manage this risk, removed.[191]

3. The GWAC would lose its reason to exist and an important part of its value

107. The first judge granted capital importance to the GWAC, which it considered as having "definitely entrenched the rights of HQ"[192] under the Renewed Contract and as being "indicative of the flexibility [of operation] sought by HQ"[193] until the expiration of the Contract, on August 31, 2041.

108. In its factum, CF(L)Co contends that the GWAC would be "perfectly compatible" with its interpretation of the Renewed Contract.[194] The first judge, however, came to the opposite conclusion, on the basis of clearly preponderant evidence.[195]

4. Hydro-Québec would pay a rate exceeding 2 mills/kWh under the Renewed Contract

109. The parties have agreed, for the duration of the Renewed Contract, to a fixed rate of 2 mills/kWh. CF(L)Co's interpretation of the Renewed Contract would also imply that, in the event that CF(L)Co is unable to make available to Hydro-Québec during each of the 300 months of the Renewed Contract, the entire Continuous Energy, either due to a lack of water[196] or to the maintenance of equipment and transmission lines,[197] which is a very real eventuality,[198] Hydro-Québec would nevertheless be required, under article 7.1, to pay the entire Continuous Energy monthly, without the possibility of recovering the undelivered portion in a subsequent month or year, as it would constitute Excess Energy and would be owned by CF(L)Co.[199] At the end of the Renewed Contract, Hydro-Québec would have received less energy than the AEB it

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190 Judgment, para. 621 and 970; Exhibit P-381, **v. 35, p. 12689, l. 20-25.**

191 Judgment, para. 737; Testimony of T. Vandal, Oct. 19, 2015, **v. 59, p. 21937, l. 14 to p. 21939, l. 13**; testimony of H. Sansoucy, Oct. 26, 2015, **v. 62, p. 22961, l. 1 to p. 22963, l. 9.**

192 Judgment, para. 1018.

193 Judgment, para. 1019.

194 *Appellant's Brief*, para. 118.

195 The evidence revealed that, according to CF(L)Co's interpretation of the Renewed Contract, the number of hours during which Hydro-Québec could fully benefit from the additional capacity the availability of which is guaranteed in winter by the GWAC would be reduced by approximately 33% (testimony of T. Vandal, Oct. 20, 2015, **v. 59, pp. 22061, l. 12, pp. 22062, l. 13**, testimony of D. Garant, Oct. 28, 2015, **v. 63, p. 23290, l. 3 to 20**; Exhibit P-377, **v. 33, p. 12230 and s.**), which would have a significant impact on the value of the GWAC (Judgment, para 463-464). The interpretation of the Renewed Contract proposed by CF(L)Co would also have the absurd consequence of "undoing what the GWAC allowed, that is to say allowing Hydro-Québec, by programming this additional power with a higher level of guarantee, to transfer energy [...] towards the critical period of winter ": testimony of T. Vandal, Oct. 20, 2015, **v. 59, p. 22016, l. 1 to p. 22018, l. 15**. See also testimony of D. Garant, 28 Oct. 2015, **v. 63, p. 23274, l. 17 to p. 23276, l. 20**; testimony of C. Dubé, Oct. 30, 2015, **v. 64, p. 23745, l. 9-21.**

196 See also Judgment, para. 734 and 971-972.

197 Judgment, para. 509.

198 The number of months in which this situation could occur could reach 20 months: HQ-DEM-19, **v. 58, p. 21571**; testimony of H. Sansoucy, Oct. 22, 2015, **v. 61, p. 22715, l. 11 to p. 22716**, Oct. 16 and 26, 2015, **v. 62, p. 22961, l. 1 to p. 22963, l. 9**. See also Exhibit P-397, **v. 36, p. 13371**; testimony of E. Martin, Nov. 19, 2015, **v. 69, p. 25711, l. 7 to p. 35713, l. 5** and testimony of C. Wiseman, Nov. 23, 2015, **v. 70, p. 25943, l. 23 to p. 25945, l. 3.**

199 Testimony of H. Sansoucy, Oct. 22, 2015, **v. 61, p. 22604, l. 3 to p. 22605, l. 10 and p. 22719, l. 2-15.**

would have paid,[200] which, as the first judge noted, it never consented to.[201] Hydro-Québec would therefore pay an effective tariff of more than 2 mills/kWh, an eventuality which the parties specifically considered and rejected in the negotiations for the extension of the Original Contract.[202]

110. In attempting to circumvent this insurmountable obstacle to the position it defends, CF(L)Co argues that the pricing formula in article 7.1 of the Renewed Contract only constitutes "*a simple take-or-pay arrangement*"[203] and that Hydro-Québec would be obligated to pay, whether or not it takes it, only for the portion or quantity of "Continuous Energy" actually made available by CF(L)Co.[204] This claim is doomed to failure, since the exception provided for in the second paragraph of article 7.1, on which it seeks to rely, applies only in the rare cases where the Plant, due to "Plant deficiencies", and not to a lack of water,[205] would prove to be in a physical state not allowing it to generate its generation potential.[206]

5. The operation of the Plant would be inefficient, sub-optimal and unprecedented

111. The evidence showed that the generation of fixed monthly amounts of energy under CF(L)Co's proposed interpretation of the Renewed Contract would result in an inefficient operation of the Plant, would reduce its annual production and would reduce the value of the facility,[207] which parties as sophisticated as Brinco, CF(L)Co and Hydro-Québec would never have agreed to. In the opinion of the expert Lapuerta, "*the arrangements suggested by CF(L)Co are unprecedented in the industry, which makes sense given their inefficiency*".[208]

Question 3: The trial judge did not err in concluding that until the expiry of the Renewed Contract, on August 31, 2041, except for the Twinco Block, CF(L)Co cannot sell to third parties, including NLH, quantities of power exceeding the 300 MW limit of the Recapture Block

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200 Testimony of E. Martin, Nov. 19, 2015, **v. 69, p. 25714, l. 13 to p. 25717, l. 11.**
201 Judgment, para. 973.
202 Exhibit P-79, **v. 10, p. 3212, para. 105**; Exhibit P-8, **v. 3, p. 831.**
203 *Appellant's Brief,* para. 72.
204 *Appellant's Brief,* para. 87-93.
205 Judgment, para. 622-623 and 734-735; Testimony of E. Martin, Nov. 19, 2015, **v. 69, p. 25705, l. 7 to p. 25706, l. 2**; testimony of C. Wiseman, Nov. 24, 2015, **v. 70, p. 26211, l. 18 to p. 26212, l. 5**; testimony of T. Vandal, Oct. 19, 2015, **v. 59, p. 21931, l. 15 to p. 21933, l. 9**; testimony of H. Sansoucy, Oct. 22, 2015, **v. 61, p. 22696, l. 5-17.**
206 Original Contract, Exhibit P-1, s. 4.2.4, **v. 3, p. 608-609** and Renewed Contract, Exhibit P-1, s. 4.1.4, **v. 3, p. 647**; testimony of C. Lapuerta, Nov. 9, 2015, **v. 66, p. 24470, l. 12 to p. 24471, l. 4**; Exhibit P-79, **v. 10, p. 3209, para. 93-94.**
207 Judgment, para. 738-740.
208 Exhibit P-79, **v. 10, p. 3183, para. 20**; testimony of C. Lapuerta, Nov. 9, 2015, **v. 66, p. 24526, l. 2-10 and p. 24535, l. 3-7**. The expert from CF(L)Co recognized that he was unable to cite a single example where a hydroelectric power plant would be operated according to an operating profile such as that proposed by CF(L)Co: Judgment, para. 670.

A. The status of CF(L)Co as owner of the Plant and holder of water rights: a false debate

112. CF(L)Co criticizes the trial judge for failing to determine what it considers to be the true relevant issue with respect to sales above 300 MW: "*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?*"[209]

113. This criticism is unfounded, as the trial judge found, with supporting evidence, that Hydro-Québec had purchased under the Contract all the power and energy of the Plant, with the exception of what he refers to as the "reserved blocks", namely the Twinco Block and the Recapture Block.[210] The first judge therefore fully disposed of the second real difficulty raised by the present dispute, by concluding that "CF(L)Co cannot sell to third parties what it has already sold to H.Q.".[211]

114. The insistence of CF(L)Co on its status as the owner of the Plant and the holder of water rights on Upper Churchill to justify its alleged "right" to proceed with sales beyond 300 MW therefore raises a false debate. The rights of CF(L)Co as the owner or holder of the water rights are not at issue in this case, since the power sold in excess of 300 MW was sold to Hydro-Quebec - and paid to CF(L)Co[212] - under the terms of the Contract. Upon expiration of the Renewed Contract, CF(L)Co will once again possess all power and energy generated by the Plant, including the right to sell it like any owner.[213]

B. The so-called "availability" of power not scheduled by Hydro-Québec: a false premise

115. The "theory" developed by Nalcor in 2011 is based on the premise that the power not "requested" by Hydro-Québec is not "used" and that this power is therefore "available" to be (re)sold to third parties.

116. This premise is false and has been contradicted by the evidence. As recognized by the trial judge, the power not scheduled is actually used by Hydro-Québec, for purposes of operating reserve,[214] the continuous maintenance of which is essential to ensure the safe and reliable

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209 *Appelant's Brief*, para. 137.
210 Judgment, para. 981, 983, 1077 and 1096.
211 Judgment, para. 1139. See art. 1713 C.c.Q.
212 Testimony of C. Lapuerta, Nov. 10, 2015, **v. 66, p. 24627, l. 5 to p. 24630, l. 8.** The testimony of Carlos Lapuerta confirmed that the power quantities sold in excess of 300 MW are paid to CF(L)Co by Hydro-Québec under the Contract through the "*Basic Contract Demand*".
213 As the trial judge reported, the evidence established that the residual value of the Plant, at the expiration of the Contract, would be in the order of $20 billion: Judgment, para. 915.
214 Judgment, para. 533 et 590.

operation of its hydroelectric network.[215] Given that this power belongs to it, Hydro-Québec has the right to determine the quantities that it wishes to schedule at any time. This is one of the essential attributes of the operational flexibility it enjoys under the Contract.[216]

117. CF(L)Co tries to justify the legitimacy of sales above 300 MW by asserting, on the basis of one of the two reports prepared by Ms. Bodell, that "interruptible power" is an electricity product that is "*very common in this industry*".[217]

118. This argument is ill-founded for two reasons. On one hand, the parties never intended to allow CF(L)Co to hold rights to any amount of power and energy other than those associated with the "reserved blocks".[218] On the other hand, power, considered as an electrical product distinct from energy, did not exist at the time when the Contract was concluded.[219] As a result, the parties could not have considered to dissociate CF(L)Co's rights in power from its rights in energy.

C. The lure of the "interruptible" label to describe the sales by CF(L)Co to NLH above 300 MW

119. CF(L)Co is attempting to minimize the operational consequences that sales to NLH above 300 MW have had since 2012 on Hydro-Québec's supply programs from the Plant. It claims that these consequences are *de minimis* and that they are "*well within the normal parameters of scheduling errors which occur naturally in the operations of such a power plant*".[220]

120. This claim seeks to obscure the fact that sales to NLH beyond 300 MW are not interruptible. Now, the trial judge concluded that "the demonstration is made"[221] that CF(L)Co is unable to interrupt at any time its deliveries to NLH, and to satisfy Hydro-Québec's urgent requests for quantities of power that it has nonetheless purchased under the Contract.[222]

121. The trial judge also found that CF(L)Co systematically prioritized deliveries to NLH beyond 300 MW over deliveries to Hydro-Québec in the event of constraints affecting the Plant's generation capacity.[223]

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[215] Testimony of P. Paquet, Nov. 4, 2015, **v. 64, p. 23938, l. 21 to p. 23940, l. 4**. Pierre Paquet's testimony confirmed that Hydro-Québec must at all times dispose of a minimum power reserve of 1,500 MW, which corresponds "*to the minimum for the reliable operation of the network*".

[216] Testimony of H. Pfeifenberger, Nov. 13, 2015, **v. 67, p. 25123, l. 13 to p. 25125, l. 14** and **v. 68, p. 25175, l. 25 to p. 25176, l. 9**; Exhibit P-80, **v. 10, p. 3259-3260, para. 15**.

[217] *Appellant's Brief*, para. 132.

[218] Judgment, para. 981, 983, 1077 and 1096.

[219] Judgment, para. 395-397, 753 and 1118.

[220] *Appellant's Brief*, para. 149.

[221] Judgment, para. 1130.

[222] This disability stems from the rules in force in North American energy markets that impose "*lock-in periods*". Judgment, para. 570.

[223] Judgment, para. 1131. This conclusion confirms that CF(L)Co does not have the operational capability to re-assign NLH's deliveries to Hydro-Québec in the event of urgent changes or constraints in the deliveries requested by Hydro-Québec (Exhibit P-80, **v 10, pp. 3277, para. 59**).

D. CF(L)Co's criticisms of the judgment's findings *a quo*

122. CF(L)Co attacks the alleged excessive scope of the declaratory conclusions pronounced by the trial judge.[224] As this Court has already specified, the conclusions of a judgment "cannot be read without the reasons which accompany, specify and enlighten them".[225] The conclusions of the first judge are solidary from his reasons and, in light of those reasons, it is clear that he did not wish to rule on hypothetical scenarios, and even less on the interpretation of the Shareholders' Agreement, whose text it merely paraphrases.

PART IV – THE CONCLUSIONS

For all these reasons, Hydro-Québec requests that CF(L)Co's appeal be dismissed, together with legal costs, including the expert's costs of Mr. Carlos Lapuerta.

Montréal, March 2, 2017

Norton Rose Fulbright Canada,
S.E.N.C.R.L., s.r.l.
(Me Pierre Bienvenu, Ad. E.)
(Me Sophie Melchers)
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Montréal, March 2, 2017

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PART V — THE SOURCES

Case Law	**Paragraph(s)**
Churchill Falls (Labrador) Corporation Limited v. Hydro-Québec, 2016 QCCA 1229	10, 13, 14, 16, 19, 21, 22, 42

[224] *Appellants' Brief*, para. 154-160.
[225] *Air Canada* v. *Québec (Procureure générale)*, 2015 QCCA 1789, para. 242-243.

Doctrine

ATTESTATION

We, the undersigned, Norton Rose Fulbright Canada, S.E.N.C.R.L., s.r.l. and Hydro-Québec, Cellucci Ganesan Fraser, attest that this factum complies with the *Civil Practice Regulation of the Court of Appeal*.

Time required for the oral presentation of our arguments: 2.5 hours

Montréal, March 2, 2017

Norton Rose Fulbright Canada,
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Montréal, March 2, 2017

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