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Water-management rights need to be worked out

The CF(L)Co-Nalcor water management agreement ostensibly permits, as Nalcor's Ed Martin colourfully puts it, Nalcor to "store electricity" (i.e. "store water") in the Churchill Falls reservoir.

Can Nalcor do so without HydroQuébec's consent?

Sections 3.1 and 3.2 of the CF(L)Co-Nalcor water management agreement explicitly acknowledge that the agreement is subservient to Hydro-Québec's contractual rights under the HQ Power Contract (including its 2016 to 2041 renewal) and the Churchill Falls Guaranteed Winter Availability Contract (which expires in 2041).

The HQ Power Contract (subsection 6.4) and Renewed Power Contract (subsection 5.2) state:

"The firm capacity shall be available at all times when HydroQuébec has requested it. In addition, whenever additional capacity can, in the opinion of CF(L)Co, be made available, such capacity shall also be available to Hydro-Québec on request."

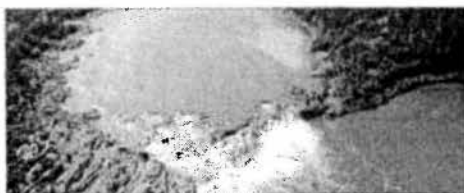
Therefore, HQ can, until 2041, require CF(L)Co to provide HQ with any and all capacity in excess of firm capacity that can be made available from the Churchill Falls plant, presumably using whatever water happens to be present in the Churchill Falls reservoir.

Those two sentences apparently allow HQ to take any and all electricity produced at Churchill Falls over and above the 225 megawatt Twincor Power and the 300 MW recall amounts. A recital in the Nov. 1, 1998 Churchill Falls Guaranteed Winter Availability Contract reiterates: "And whereas the Power Contract also provides that whenever additional capacity can, in the opinion of CF(L)Co, be made available from the plant, such capacity shall also be made available to HQ on request."

Because the CF(L)Co-Nalcor water management agreement explicitly acknowledges the priority of HQ's contractual rights, the "right-to-use" status of any water Nalcor was to "store" in the Churchill Falls reservoir is unclear. What is clear is that, without HQ's consent, Nalcor has no right to "store water" in the Churchill Falls reservoir if such storage would "adversely affect" HQ's contractual rights.

Another concern related to water-management rights is HQ's contractual right to determine the timing and capacity of electrical output at Churchill Falls. HQ's decisions in that regard largely determine the water flow downstream at Muskrat Falls and, consequently, the electrical output achievable there, as the Muskrat Falls project is a run-of-river development with limited reservoir storage capacity of its own.

In late 2009, HQ "decided not to intervene" in Nalcor's application for approval of the CF(L)Co-Nalcor water-management agreement, and in doing so noted that Nalcor "acknowledge(s) that the CF(L) Co/Hydro-Québec Power Contracts are protected by Section 5.7 of the (Electrical Power Control Act) ..."



Before consideration is given to sanctioning the spending of billions of dollars on the Muskrat Falls project, prudence and common sense require that Nalcor either reach an agreement with HQ on water-management rights or have the courts definitively determine the respective water-management rights of Hydro-Québec and Nalcor.

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