Unofficial English Translation

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-026327-163
(500-17-078217-133)

DATE: June 20, 2019

CORAM: THE HONOURABLE JACQUES CHAMBERLAND, J.A.
ALLAN R. HILTON, J.A.
PATRICK HEALY, J.A.

CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED
APPELLANT – Defendant
v.

HYDRO-QUÉBEC
RESPONDENT – Plaintiff

JUDGMENT

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[1] The appellant Churchill Falls (Labrador) Corporation Limited ("CFLCo") appeals a judgment of the Superior Court, District of Montreal (the Honourable Mr. Justice Martin Castonguay) rendered on August 8, 2016 and corrected on November 8, 2016 which granted the respondent Hydro-Québec's motion for a declaratory judgment and dismissed its contestation of that motion, with legal costs in favour of Hydro-Québec.

[2] For the reasons of Chamberland, J.A., with which Hilton and Healy, JJ.A. concur,
THE COURT:

[3] **ALLOWS** CFLCo's appeal in part;

[4] **REVERSES** the trial judgment by substituting the following conclusions for those found at paragraphs 1149-1157:

> [1149] **GRANTS** Hydro-Québec's motion for a declaratory judgment and Churchill Falls (Labrador) Corporation's contestation in part;
>
> [1150] **DECLARES** that, under Schedule III of the May 12, 1969 contract, the terms and conditions of which apply since September 1, 2016:
>
> > (1) Hydro-Québec does not have the exclusive right to purchase, and receive, all of the energy produced by the Upper Churchill power plant, as defined in section 1.1 (in the definition of "*Plant*") and as maintained in accordance with section 4.1.4, but, rather, the right to purchase, and to receive, annually, a specific quantity of energy equivalent to the value of the *Annual Energy Base* (which value is then allocated monthly pursuant to the concept of *Continuous Energy*, according to a mathematical formula that provides for the calculation of the monthly payments owed by Hydro-Québec); and
> >
> > (2) Hydro-Québec has the right, at all times, to the power defined by the expression *Firm Capacity* (section 1.1/*Definitions*), as well as, upon request, all additional power which, in CF(L)Co's opinion, is available (section 5.2) and, lastly, from November to March, all additional power whose availability Hydro-Québec ensured under the Guaranteed Winter Availability Contract ("GWAC");
>
> [1151] **DECLARES** that the rights conferred on Hydro-Québec under sections 4.1.1 (*Operational Flexibility*) and 5.3 (*Firm Capacity Schedules*) of Schedule III to the May 12, 1969 contract provide it with an operational flexibility very similar to the operational flexibility it enjoyed since the commissioning of the Upper Churchill plant, including its right to schedule and plan its energy and power requirements and to postpone (or accelerate) the delivery of energy from one month to another, the whole without being limited to a quantitative cap established pursuant to the concept of *Continuous Energy* on a monthly basis; and last,
>
> [1152] **DECLARES** that, until August 31, 2041, CF(L)Co cannot sell to a third party, or use for the benefit of a third party, including Newfoundland and Labrador Hydro ("NLH"), any quantity of power whatsoever, with the exception of the power associated with the "*Recapture*" (300 MW) and "Twinco" (225 MW) blocks, and, since September 1, 2016, the power associated with the energy produced by the Upper Churchill plant over and above the value of the *Annual Energy Base*, regardless of whether such sales, or use, are made on a firm or interruptible basis;

[5] **THE WHOLE** with the legal costs on appeal in favour of CFLCo, each party paying its own costs at trial, including expert fees, given the divided outcome of the motion for a declaratory judgment and its contestation.

JACQUES CHAMBERLAND, J.A.

ALLAN R. HILTON, J.A.

PATRICK HEALY, J.A.

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For the respondent

Date of hearing: December 4, 2018

REASONS OF CHAMBERLAND, J.A.

[6] On November 2, 2018, the Supreme Court of Canada rendered judgment in the case in which Churchill Falls (Labrador) Corporation Limited ("CFLCo") sought a court order compelling Hydro-Québec ("HQ") to renegotiate the contract signed on May 12, 1969.[1]

[7] Confirming the decisions of this Court[2] and the Superior Court,[3] the highest court in the land concluded that HQ had no obligation to renegotiate the 1969 contract.

[8] That case was but one of many that had arisen between the same parties since the mid-1970s. In his reasons, with which all the members of the panel concurred (save one) concurred, Gascon, J. thus described this long judicial saga:

> [19] […] In 1976, it [the Government of Newfoundland and Labrador] tried to force CFLCo to "recapture" more electricity than CFLCo was entitled to under the Contract. CFLCo responded that the inevitable result of doing so would be a failure to perform the prestations it owed Hydro-Québec, and it declined to comply, which led to the dispute being brought before the courts of both provinces. This Court heard and summarily dismissed appeals from the two series of decisions that had followed, in which the lower courts had agreed with Hydro-Québec on all points: *Newfoundland (Attorney General) v. Churchill Falls (Labrador) Corp.*, [1988] 1 S.C.R. 1085; *Hydro-Québec v. Churchill Falls (Labrador) Corp.*, [1988] 1 S.C.R. 1087.
>
> [20] Second, in 1980, the province's legislature enacted a statute that provided for reversion to the government of the rights that had been assigned to CFLCo in 1961. Another court challenge ensued. The Newfoundland and Labrador Court of Appeal declared the legislation to be valid, but this Court unanimously held that it was *ultra vires* the province, because its pith and substance was to interfere with rights that, under the Contract, were situate in Quebec, that is, the place where a party could bring an action for the enjoyment of those rights: *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297.

[9] The present case involves a different approach to the 1969 contract between CFLCo and HQ. The issue is no longer whether the contract should be renegotiated, but rather how it should be interpreted in order to assess the following two propositions: (1) since September 1, 2016 (the date on which the additional period of 25 years began, following the expiry of the initial term of 40 years), HQ would be limited to specific capped quantities of electrical energy (monthly and yearly) and, therefore, would not have the exclusive right to all the energy and power from the Churchill Falls power plant; and (2)

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1 *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46 [*Churchill Falls 2018*].
2 *Churchill Falls (Labrador) Corporation Ltd. c. Hydro-Québec*, 2016 QCCA 1229.
3 *Churchill Falls (Labrador) Corporation Ltd. v. Hydro-Québec*, 2014 QCCS 3590 (Silcoff, J.).

CFLCo would be entitled to sell power to third parties on an interruptible basis both before and after September 1, 2016.[4]

[10] After a lengthy trial, the judge rejected both these propositions.[5]

THE BACKGROUND

[11] In order to shorten these reasons, I will refer to the background described by the Supreme Court in *Churchill Falls 2018*, subject to later elaborating on certain points when dealing with the various issues this appeal raises:

> [8] In 1961, the Government of Newfoundland and Labrador signed a lease with the Hamilton Falls Power Corporation Limited (which later changed its name and became CFLCo), a subsidiary of the British Newfoundland Corporation Limited ("Brinco"). Brinco was a consortium of industrial, banking and mining companies whose directors were, according to the trial judge, elite titans of industry at the time. The lease conferred on CFLCo the right to make use of the watershed of the Churchill Falls site to produce hydroelectric power. The lease, which was for a fixed rent, had a term of 99 years, renewable for a further 99 years. It provided that royalties were to be paid to the Government of Newfoundland and Labrador, but prohibited the province from raising taxes or increasing the amount of the royalties.
>
> [9] At the time, Brinco wanted to exploit the watershed and build a hydroelectric plant there, but it was apparently unwilling either to finance the plant by issuing shares in CFLCo or to commit its own funds. Instead, it tried to secure debt financing for the construction of the Plant. For that purpose, CFLCo, its subsidiary that was to develop the project, sought customers that could guarantee that they would purchase large quantities of electricity on a long-term basis, in part to assure its future creditors that the project was financially viable. The customers it sought would also need to have the technology required to transmit the electricity produced by the Plant to consumers. In the trial judge's opinion, there was nothing to suggest that, at the time, CFLCo was in any way dealing with an urgent situation that forced it to undertake the project in such circumstances.
>
> [10] Hydro-Québec, a state-owned enterprise created in 1944 that has had a monopoly on electricity in Quebec since 1963, met these criteria. Furthermore, it was at that time facing an increase in the demand for electricity in Quebec. This did not make it the perfect partner, however, as it was capable of developing its own hydroelectric projects. Hydro-Québec therefore had to be convinced that it

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4 In the present case, this refers to sales of power whose delivery can be interrupted at any time to allow CFLCo to satisfy HQ's requests.

5 *Churchill Falls (Labrador) Corporation Ltd. c. Hydro-Québec*, 2016 QCCS 3746 [Trial Judgment].

would be worth its while to participate in the construction of plants owned by third parties and to purchase their electricity rather than producing its own.

[…]

[11] CFLCo approached Hydro-Québec immediately after the 1961 lease was signed, but Hydro-Québec rejected its initial offers. It was not until 1966 that the parties agreed on a development project. At that time, they signed a Letter of Intent setting out the terms of the project, although those terms required the approval of the governments of Quebec and Newfoundland and Labrador. Article 2.0 of the Letter of Intent stipulated that a final contract remained to be signed. The Letter of Intent stated that CFLCo would be responsible for building the Plant, and Hydro-Québec for building the transmission lines to Quebec. The parties expected Hydro-Québec to purchase a fixed quantity of electricity from the Plant for 40 years at fixed prices that would decrease every 5 or 10 years and would be based on the cost of building the Plant. That purchase guarantee took the form of a "take-or-pay" undertaking that would require Hydro-Québec to buy and pay for a fixed quantity of electricity whether it needed it or not. The Letter of Intent also provided that CFLCo would have the right to receive 300 megawatts of electricity on request: this was the right of "recapture". The parties also agreed that Hydro-Québec would guarantee up to $100 or $109 million in construction cost overruns.

[12] Construction of the Plant began immediately, but both CFLCo and Hydro-Québec quickly realized that the work was proving to be more costly than had been anticipated. In addition, potential creditors were hesitant and were asking for additional security. This required the parties to make changes to their respective prestations, with the result that a new contractual equilibrium was established following further negotiations. The 1969 Power Contract, which superseded and replaced the Letter of Intent, therefore differed fundamentally from the latter on certain key points. For example, Hydro-Québec now guaranteed any cost overruns for the Plant. As well, the parties retained the initial 40-year term, but agreed to add a clause providing for automatic renewal of the Contract for an additional 25 years.

[13] In his rigorous analysis of the evidence, the trial judge reviewed the negotiations on this last point in detail. He noted that, because the electricity prices were based directly on the Plant's construction costs, cost overruns had increased those prices and made the project less attractive for Hydro-Québec. He observed that, at the time, Hydro-Québec had therefore requested — in what the executive committees of the boards of directors of Brinco and CFLCo perceived as a "very firm" position — an option to renew the Contract for 25 years at a single fixed price slightly lower than the rate it was to pay at the end of the initial term of the Contract. It was clear, however, that Hydro-Québec would still be required to buy and pay for a fixed quantity of electricity.

[14] The minutes of a joint meeting of those two committees indicate that they were of the view that such a commitment would produce significant annual revenue, that there would be no debt outstanding for CFLCo at the time of the renewal and that, although hydroelectricity was an attractive source of power at the time of the negotiations, it was conceivable that it would be less economical than nuclear power 40 years later. Ultimately, CFLCo acceded to Hydro-Québec's request, although it thought that it would be better off with an automatic renewal clause, a point on which Hydro-Québec conceded in the end. The Government of Newfoundland and Labrador was consulted before the final agreement was signed: *Newfoundland (Attorney General) v. Churchill Falls (Labrador) Corp.* (1985), 56 Nfld. & P.E.I.R. 91 (C.A.), at paras. 16 and 26.

[15] When the Power Contract was signed, it reflected the parties' legitimate expectations and seemed to them to be mutually beneficial. The paradigm of the Contract, its organizing principle, can be easily summarized. On the one hand, Hydro-Québec assumed the risks associated both with the Churchill River development project and with the uncertainty of market prices for electricity. On the other, because CFLCo was receiving a Plant that it would not be paying for itself and was acquiring the certainty and stability that resulted from having a long-term customer, it agreed in exchange to sell the electricity produced by the Plant to Hydro-Québec at low prices, and over a very long period.

[…]

[21] At that same time, Hydro-Québec and CFLCo began negotiations to settle their differences. The negotiations continued sporadically for several years, but the parties never reached an agreement to reopen the 1969 Contract. Instead, they chose to enter into other contracts parallel to it.

[22] Thus, in 1991, Hydro-Québec undertook to purchase the balance of the Plant's production capacity for a limited time. In 1998, the parties changed the conditions for the exercise of CFLCo's "recapture" right by agreeing that, for a period of time, CFLCo would sell the electricity in question to NLH, which would resell it at a profit to Hydro-Québec under terms that were kept confidential. Since 2009, the electricity to which the conditions respecting the recapture right apply has been resold in other markets and exported through Hydro-Québec's transmission lines. Finally, in 1999, the parties signed the Guaranteed Winter Availability Contract, under which Hydro-Québec received the assurance that the Plant's production capacity would be available during the winter months in exchange for substantial additional revenue for CFLCo. Significantly, these last two contracts will expire at the same time as the Power Contract, in 2041.

[12] To simplify matters, the May 12, 1969 power contract provides for the purchase by HQ of the energy produced by the Churchill Falls power plant, save for one block of a maximum of 300 MW and 2.362 billion kilowatthours,[6] called the "*Recapture*" block, which is reserved for sale by CFLCo to a third party for consumption outside Quebec, and another block of 225 MW and 1.980 billion kilowatthours[7] which relates to CFLCo's existing contractual obligations towards Twin Falls Corporation Limited ("Twinco")) for a period of 65 years beginning on August 31, 1976 (the date on which the plant was in service at full capacity), under certain conditions applicable to the first period ending on August 31, 2016 and different conditions applicable to the second period (automatic renewal) beginning on September 1, 2016 and ending on August 31, 2041.

THE PROCEEDINGS

[13] Over the years, especially as the initial 40-year term was coming to a close, the two parties disagreed on several points regarding the interpretation of the contract, particularly with respect to the second 25-year period, such that, in 2013, HQ asked the Superior Court of Quebec to clarify certain aspects of its contractual relationship with CFLCo.

[14] The motion for a declaratory judgment focused on two main issues, articulated as follows in the amended conclusions HQ sought:

First issue**:**

> [TRANSLATION]
>
> DECLARE that under the terms of Schedule III (Renewed Contract) of the contract entered into on May 12, 1969 (Contract) between Churchill Falls (Labrador) Corporation (CF(L)Co) and Hydro-Québec, Hydro-Québec has the exclusive right to purchase all of the available power and all the energy produced at the Upper Churchill power plant, as such plant is defined in section 1.1 of the Initial Contract and of the Renewed Contract (under the definition of "Plant") and maintained in accordance with section 4.2.4 of the Initial Contract and section 4.1.4 of the Renewed Contract (Plant), with the exception of the power and energy associated with:
>
> > (i) the block of 225 MW which was reserved for CF(L)Co to meet its obligations towards Twin Falls Power Corporation Limited until December 31, 2014[8] and which, subject to the conditions set forth in the Shareholders' Agreement entered into between Newfoundland &

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6 Section 6.6 of the Contract.

7 Section 4.2.2 of the Contract and note 1 of Schedule II.

8 On December 5, 2014, the period that was to end on December 31, 2014 was extended until August 31, 2041.

Labrador Hydro (NHL), Hydro-Québec and CF(L)Co on June 18, 1999, may be sold by CFLCo for distribution and consumption in Labrador West as of January 1, 2015 (Twinco Block); and;

(ii) the block of 300 MW reserved for CF(L)Co for sale to a third party for energy consumption outside Quebec (300 MW Block).

DECLARE that the rights conferred on Hydro-Québec under section 4.1.1 of the Renewed Contract, including its right to schedule and plan power and energy, are not limited, restrained or restricted in any manner whatsoever, on a monthly basis, to the purchase of blocks capped on the basis of the concept of "Continuous Energy" set out in the Renewed Contract, and that they may be exercised with respect to all the available power and all the energy produced at the Plant, excluding the power and energy associated with the 300 MW Block and the Twinco Block.

DECLARE that under the Renewed Contract, Hydro-Québec is not bound to limit its requests for the delivery of energy to blocks subject to a monthly cap determined on the basis of the concept of "Continuous Energy" set out in the Renewed Contract.

DECLARE that under the Renewed Contract, CF(L)Co is obliged to deliver to Hydro-Québec, at the latter's request, all the available power and all the energy produced at the Plant, excluding the power and energy associated with the Twinco Block and the 300 MW Block.

Second issue:

DECLARE that, as long as the Contract is in force, that is, until August 31, 2041, CF(L)Co shall not have any right to any quantity of power or energy produced at the Plant, except for the power and energy associated with the 300 MW Block and the Twinco Block.

DECLARE that, as long as the Contract is in force, that is, until August 31, 2041, CF(L)Co shall not have the right to sell to a third party, including NLH, any quantity of power or energy whatsoever exceeding the quantities associated with the 300 MW Block, whether such sales occur on a firm or so-called "interruptible" basis.

[Emphasis added]

[15] CFLCo contests HQ's position as follows:

First issue:

> DECLARE that under the terms of the Renewal Contract, the right of Hydro-Quebec to request and receive energy each month during the term of that contract is limited to the amount of Continuous Energy as defined under the said Renewal Contract, subject to the Minimum and Firm Capacity limits.

Second issue:

> DECLARE that in addition to the 300 MW of Recapture and in addition to the Twinco block, CF(L)Co is entitled under the Power Contract and the Renewal Contract to use the Churchill Falls power plant's available capacity to increase the rate of delivery of energy to third parties, provided that by so doing it continues to make available to Hydro-Quebec its requested power and energy scheduled in accordance with the terms and conditions of the contracts.
>
> DECLARE that, as owner and operator of the Churchill Falls power plant and holder of the hydraulic rights, CF(L)Co is entitled to operate the Churchill Falls plant as it deems appropriate and is entitled to derive revenues where possible from selling all electricity products that have not been specifically sold to Hydro-Quebec or third parties under the terms of a contract, provided that CF(L)Co fulfills its contractual obligations to Hydro-Quebec and third parties.
>
> [Emphasis added]

THE TRIAL JUDGMENT

[16] After a 31-day trial that ended on December 18, 2015, judgment was rendered on August 8, 2016 and subsequently corrected as to form on November 8, 2016. The judgment is extremely detailed, consisting of 1157 paragraphs, as well as a complete glossary of the terms used (Schedule I), a lengthy time line (Schedule II) and, last, a list of the issues in dispute prepared by the parties at the request of the trial judge (Schedule III).

[17] The judge spent over 600 paragraphs describing the events that preceded and followed the signing of the May 12, 1969 contract, and explaining certain exhibits in the court record. His summary of the facts, from the very first contact between the Government of Newfoundland and Labrador and the Government of Quebec in 1953 until the signing of a letter of intent in 1966, and from the 1969 contract, and even subsequent thereto, until HQ brought the present dispute before the courts of Quebec in 2013, is meticulous, comprehensive and remarkable. I will return to it, when necessary, in the course of my analysis of the issues this appeal raises.

[18] The judge then devoted over 150 paragraphs to discussing the reports and opinions of the experts each party retained as well as their qualifications. I will return to this as well, if necessary, in the course of my analysis of the issues the appeal raises.

[19] After distilling the dispute to the following two points:[9]

> [TRANSLATION]
>
> - Under the renewed contract, does H.Q. have the right to all the power and energy produced by the Churchill Falls Plant, while enjoying the same flexibility it had throughout the term of the Principal Contract?
>
> - Does CF(L)Co have the right to sell to third parties, on an "interruptible" basis and at a rate exceeding the 300 MW recapture, the energy and power not requested by H.Q.?
>
> [Reference omitted]

the judge divided his analysis into five chapters: the characterization of the contract; whether or not there is any ambiguity; HQ's rights to the energy produced by the plant; CFLCo's rights to the available power and the impact of the absence of any sales of power, when the trial took place, on the possibility of rendering a declaratory judgment on this subject.

[20] With respect to the first question, the judge found that the Principal Contract and the Renewed Contract (i.e., Schedule III of the Principal Contract) were an inseparable contractual whole. He was of the view, however, that the Guaranteed Winter Availability Contract ("GWAC") signed by the parties on June 18, 1999 (retroactive to November 1, 1998), which sought to guarantee HQ access to a certain quantity of additional power during the peak winter period, was not part of that contractual whole, because it dealt with a matter which, although raised during discussions leading to the May 12, 1969 contract, had never been agreed upon.

[21] With respect to the second question, the judge concluded that the contractual whole is ambiguous and that he was therefore required to interpret it. This conclusion allowed him to apply the rules of contractual interpretation set out in the *Civil Code of Lower Canada* (the situation being an existing contractual situation within the meaning of the transitional law), which, as the judge pointed out, are the same as those under the current *Civil Code of Québec* (art. 1425-1432). In interpreting the contract, he therefore had to take into account the nature of the contract, the circumstances in which it was formed, the interpretation that had already been given to it by the parties over time and, lastly, usage.

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9 Trial Judgment, para. 9.

[22] In dealing with the third question, the judge considered the meaning to be given to the terms and conditions of the contract applicable to the 25-year period that began on September 1, 2016.

[23] With respect to the nature of the contract (or the contractual group), the trial judge found it to be a mixed contract containing a joint venture component and a sales component.[10] The existence of the joint venture component led him to conclude that he had to take into account the reasonable expectations of each of the shareholders of CFLCo at the time of the negotiations (HQ holding 34.2% of the shares and Brinco[11] holding 65.8%).[12]

[24] With respect to the circumstances in which the 1969 contract was formed (including the documents peripheral to the contract and the parties' objective in entering into the contract), the judge noted that the case was particular in that [TRANSLATION] "none of the participants in the negotiations testified".[13] The evidence, therefore, was strictly documentary.[14] The search for the common intention of the parties, he further stated, was thus dependent on [TRANSLATION] "the identity of the individuals involved in the negotiations, the socio-economic and political context as well as the peripheral documents".[15]

[25] The trial judge concluded that CFLCo's interpretation of the expression *Continuous Energy*[16] in Schedule III did not match what the parties had in mind during their negotiations. As a result, he found that HQ is entitled to all the energy produced by the plant, not just the quantities of energy associated with the definition of *Continuous Energy*.[17] According to him, CFLCo's assertion would be a drastic change compared with the situation that existed during the first 40 years of the contract, and there was nothing in the evidence pointing to such a contemplated change;[18] the evidence, instead, indicating [TRANSLATION] "an intention of continuity"[19] throughout the 65 years of the contract.

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10 In addressing the same matter in *Churchill Falls 2018*, *supra*, note 1, the Supreme Court concluded that the contract is neither a joint venture contract nor a contract of undeclared partnership nor a *sui generis* contract of joint venture (para. 41-42 and 60-65). It further found that the contract is not a relational contract (para. 66-71).

11 British Newfoundland Corporation Limited.

12 Trial Judgment, para. 891.

13 *Ibid*, para. 898.

14 *Ibid*, para. 145.

15 *Ibid,* para. 898.

16 The parties translated this expression as "*Énergie continue*" in the letter of intent signed in French and in English on October 13, 1966.

17 Trial Judgment, para. 974-981.

18 *Ibid,* para. 989.

19 *Ibid,* para. 1045.

[26] With respect to the parties' interpretation of the contract, the judge concluded that the position CFLCo was now asserting had been communicated to HQ only in June 2012, at the time the parties were discussing the five-year plan that included the year 2016-2017. He was of the view that, until CFLCo came up with this [TRANSLATION] "new theory", it had always acted as if nothing was to change on September 1, 2016, particularly with respect to the operational flexibility HQ enjoyed on both a seasonal and multi-year basis (and not merely on a monthly basis, as CFLCo now argues).

[27] With respect to usage, the judge found that the evidence did not support the conclusion that the expression *Continuous Energy* was known and used in the electricity industry at the time the 1969 contract was signed, nor did it establish that the sale of blocks of power and energy was commonplace.

[28] The trial judge concluded his analysis of the third question by stating that CFLCo's interpretation of the expression *Continuous Energy* (as representing all the energy to which HQ is entitled) did not match what the parties had in mind. In his opinion, the expression refers to all the energy produced by the plant, thus including the so-called excess energy. As a result, with the exception of the power and energy associated with the block reserved for Twinco and the block recaptured by CFLCo, HQ's right to plan for and schedule power and energy according to its needs (the operational flexibility) is not limited, on a monthly basis, to the purchase of blocks of energy capped in accordance with the concept of *Continuous Energy*. According to the judge, this concept, a new one, was intended only to ensure a stable flow of revenue for CFLCo, not to limit HQ's rights in terms of the quantity of energy or power and of operational flexibility.[20]

[29] The fourth and fifth questions dealt with the issue of sales of power on an interruptible basis.

[30] The trial judge first questioned whether the fact that, at the time of the trial, there were no more sales of interruptible power[21] was an obstacle to a declaratory judgment. He found that no such obstacle existed, given the forthcoming availability of a new transmission line[22] which CFLCo would be able to use to access the Northeastern American market without having to go through HQ's transmission lines.

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20 *Ibid,* para. 1066-1077.

21 These sales began in 2009, but stopped in May 2015, following an initiative by HQ to prevent the transmission of power for these sales through its 735 KV lines, which, in fact, led to CFLCo filing a complaint with Quebec's Régie de l'énergie.

22 At the time, there was talk of a new transmission line which was to be completed in 2017, from Churchill Falls to Muskrat Falls, with a land and underwater transmission line from the latter plant that could reach the Northeastern American market without the use of HQ's transmission lines (Trial Judgment, para. 1084).

[31] With respect to the fifth question, the judge concluded that the concept of sales of interruptible power existed at the time of the negotiations leading to the signing of the May 12, 1969 contract. The mechanism for these sales, however, was vastly different from what it is now,[23] such that "interruptible power" as a product at the beginning of the 21st century is different from what it was forty years ago. He therefore concluded that the parties had never contemplated this subject in their negotiations leading to the signing of the contract.

[32] The trial judge finished this part of his analysis by linking his conclusion on the meaning of the expression *Continuous Energy* (namely, all the energy produced by the plant, including the excess energy (but excluding the Twinco and Recapture blocks), as established through 40 years of experience and reflected in the *Annual Energy Base* at the end of this 40-year period) to the answer to be given to this last question. He pointed out that HQ must pay for this energy, whether or not it takes delivery thereof (the *take-or-pay* concept). It therefore follows, he found, that CFLCo [TRANSLATION] "cannot sell what it has already sold to H.Q."[24] CFLCo thus has [TRANSLATION] "no right to the power and energy not used by H.Q., but which H.Q. is entitled to use because it has paid for it".[25]

[33] At the end of his reasons, the trial judge stated that, under Schedule III to the May 12, 1969 contract, HQ has the exclusive right to purchase, and to receive, all the available power and all the energy produced at the Upper Churchill plant, except for the power and energy associated with the Twinco and *Recapture* blocks.[26]

[34] The trial judge further declared that under Schedule III to the May 12, 1969 contract, the rights conferred on HQ in terms of operational flexibility (including the scheduling and planning of power and energy) are not limited in any manner whatsoever, on a monthly basis, to the purchase of blocks capped on the basis of the concept of *Continuous Energy*, and that they may be exercised with respect to all the available power and all the energy produced at the plant, excluding the power and energy associated with the Twinco and *Recapture* blocks.[27]

[35] Lastly, the trial judge declared that, until August 31, 2041, CFLCo will not have the right to sell to anyone whomsoever any quantity whatsoever of power and energy exceeding the quantities associated with the *Recapture* block, whether such sales are made on a firm or interruptible basis.[28]

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23 A regulatory structure referred to as "Open Access" has now been put into place, under the lead of the Federal Energy Regulatory Commission (FERC). The judge described these changes in detail in para. 415-425 and 512-593.

24 Trial Judgment, para. 1139.

25 *Ibid,* para. 1141.

26 *Ibid*, para. 1150, 1153 and 1154.

27 *Ibid*, para. 1151-1152.

28 *Ibid*, para. 1155.

[36] Finally, the trial judge condemned CFLCo to pay the legal costs in favour of HQ, including the costs pertaining to the expert report and presence in court of Carlos Lapuerta.[29]

THE ISSUES ON APPEAL AND ANALYSIS

[37] In essence, the appeal raises three questions:

37.1. Did the trial judge err by concluding that, under the terms and conditions of Schedule III of the May 12, 1969 contract, HQ still has the exclusive right to purchase, and to receive, all the available power and all the energy produced at the Churchill Falls plant, with the exception of the power and energy associated with the Twinco and *Recapture* blocks, without being limited, on a monthly basis, to a quantitative cap established on the basis of the concept of *Continuous Energy*?

37.2. Did the trial judge err by concluding that, under the terms and conditions of said Schedule III, CFLCo cannot, until August 31, 2041, sell to anyone whomsoever (including Newfoundland and Labrador Hydro ("NLH"))[30] any quantity whatsoever of power or energy over and above the quantities associated with the Twinco and *Recapture* blocks, whether such sales are made on a firm or interruptible basis?

37.3. Do the conclusions of the judgment go beyond what the trial judge was entitled to decide?

[38] Before analyzing these questions, it would be useful to quickly address certain preliminary matters.

The concepts of power and energy

[39] First, the concepts of power and energy. "*Power*", as defined in the May 12, 1969 contract, is the rate at which electrical energy is delivered at any point, measured in kilowatts (KW, 1000 watts) or multiples thereof.[31] Similarly, "*Energy*" is the result of power

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29 *Ibid*, para. 1157.

30 NLH, which was created in 1975, was, until recently, the energy arm of the province; it holds 65.8% of the shares of CFLCo. Since 2007, NLH has been a subsidiary of Nalcor Energy, a Newfoundland and Labrador Crown corporation and the province's consolidated energy arm.

31 For example, megawatt (MW, one million watts), gigawatt (GW, one billion watts) and terawatt (TW, one trillion watts). Thus, in the letter of intent dated October 13, 1966, in section 3.1 entitled "Installed Capacity", the parties had written that "[t]he power plant will have an installed rated capacity of 4,500,000 kw in ten generating units each of 450,000 kw. […] [T]his installation will be adequate for the generation of all of the energy to be available from the Upper Churchill River with the allowance of the equivalent of one unit as spare capacity" [Emphasis added]. In fact, at the time the plant was fully commissioned on September 1, 1976, there were 11 turbine-generator units generating total capacity of 5,428 MW, therefore even more than the 5,170 MW estimated in Schedule II (column 3) of the 1969 contract (judgment *a quo*, para. 483).

multiplied by the time during which the power is used, measured, in the case of electrical energy, in kilowatthours (KWh)[32] or multiples thereof. Energy and power (or capacity) are therefore two different, albeit interconnected, concepts; the trial judge rightly explained that it is [TRANSLATION] "useful to point out, once again, that power is used to deliver energy".[33]

The standard of review

[40] Second, the standard of review. The case at bar deals essentially, if not exclusively, with the interpretation of the contract the parties signed on May 12, 1969. The standard of review, as the Supreme Court noted in *Churchill Falls 2018,* is that of a palpable and overriding error:[34]

> [49] That being said, it should be borne in mind that, in this case, both the interpretation and the characterization of the Contract are questions of mixed fact and law: *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59, at paras. 41-42; see also *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 50. Because the trial judge's interpretation and characterization of the Contract are based on a particular set of circumstances that are unlikely to have any precedential value, they may not be overturned absent a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 28 and 36.

The characterization of the contract

[41] Third, the characterization of the contract. The trial judge concluded that the contract dated May 12, 1969 and its Schedule III constitute an inseparable contractual whole. He found it to be a mixed contract containing a joint venture component and a sales component.

[42] In *Churchill Falls 2018*, however, the Supreme Court concluded that the contract is neither a joint venture contract[35] nor a relational contract.[36] It is, rather, a very long-term (65-year) innominate contract[37] whose "various prestations owed for the whole of that term have been defined with precision since day one".[38] The Supreme Court found

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32 Therefore, 1 KWh = 1 KW of power over a period of one hour.
33 Trial Judgment, para. 1092.
34 *Churchill Falls 2018*, *supra*, note 1, para. 49.
35 *Ibid*, para. 60-65.
36 *Ibid*, para. 66-71.
37 *Ibid*, para. 55.
38 *Ibid*, para. 69.

that the contract is a synallagmatic contract[39] governing "the financing of the Plant and the sale of electricity produced there".[40]

[43] The Supreme Court did not refer to an inseparable contractual whole, but rather to a single contract "[providing] for its automatic renewal 40 years after the Plant has been installed and is in service at full capacity",[41] under the terms and conditions set out in Schedule III.

[44] The May 12, 1969 contract has a very long term: 65 years from the plant's commissioning. The terms and conditions for implementing the agreement between the parties vary depending on whether the parties are in the first 40-year period (the "Initial Contract") or the second 25-year period ("Schedule III").[42]

[45] With all due respect for the trial judge, his error regarding the characterization of the contract is not without its consequences. Viewing the document as an inseparable contractual whole created the risk of commingling the terms and conditions applicable to one period with those applicable to the other, together with all aspects of their negotiation, contrary to the clear wording of the third paragraph of section 3.2 of the Contract:

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

[46] It is clearly wrong to say that the agreement relating to the first 40 years and the agreement relating to the following 25 years form an indivisible whole, when section 3.2

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39 *Ibid*.
40 *Ibid*, para. 75.
41 *Ibid*, para. 44.
42 For ease of reference, in these reasons I will use the expression "Contract" or "Initial Contract" when referring to the terms and conditions applicable to the initial 40-year period (ending on August 31, 2016) and "Schedule III" when referring to the terms and conditions applicable to the additional 25-year period (ending on August 31, 2041).

states the opposite in no uncertain terms. Both are contained in the same legal document, but each has a separate existence.

[47] Schedule III describes a set of terms and conditions that are independent of the agreement that ended on August 31, 2016 and differ from it in many respects. Entire sections have completely disappeared,[43] while others have been added or entirely rewritten.[44]

[48] Similarly, the fact that the trial judge saw a joint venture where there was none led him to write that he had to [TRANSLATION] "take into account the reasonable expectations of each shareholder",[45] to the detriment of the wording of the terms and conditions which the parties determined in 1969 would apply as of the start of second 25-year period. This problem is all the more serious here given that, for obvious reasons resulting from the passage of time, the persons involved directly in the negotiations from 1961 until the contract was signed on May 12, 1969 did not testify at the trial held in 2015, such that the evidence on this matter is strictly documentary.

The ambiguity of the contract

[49] Fourth, the ambiguity of the contract. The trial judge concluded that Schedule III is ambiguous and that he therefore had to interpret it, as regards both HQ's right to the plant's power and energy and CFLCo's right to sell power to third parties on an interruptible basis:[46]

> ***CONTINUOUS ENERGY***
>
> [TRANSLATION]
>
> [873] In the case at bar, the ambiguity results from the presence of the operational flexibility clause both in the Principal Contract and in the Renewed Contract.

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43 To reflect the fact that 40 years after the commissioning of the Churchill Falls hydroelectric complex, the construction of the plant, the project financing and the repayment of CFLCo's debt would be completed, and the plant's energy potential would be better known. For example, sections 4.1 (*Construction*), 4.2.6 (*Spinning Reserve*), 4.6 (*Method of Calculating Spillage and Inventory*), 5.1 (*Provision for Additional Funds Required*), 5.2 (*General Provisions Applicable to Debentures*), 5.3 (*Dividend Restrictions*), 5.4 (*Right of Hydro-Quebec to cure events of default under certain Debts Obligations of CFLCo*), 6.2 (*Sale and Purchases of Power and Energy*) and 8.5.2 (*Resulting from Variations between Annual Energy Base and the Annual Average Energy Payable*), as well as the definitions (section 1.1) of "*Basic Contract Demand*", "*Applicable Rate*" and "*Base Rate*".

44 For example, sections 2.1 (Object) and 7.1 (Price and Price Adjustment), as well as the definition of "*Continuous Energy*".

45 Trial Judgment, para. 891.

46 *Ibid*, para. 873-876.

> [874] In particular, the presence of this clause in the Renewed Contract, coupled with the definition of Continuous Energy, which does not appear in the Principal Contract, creates a real ambiguity, thereby allowing the Court to interpret the disputed clauses.
>
> **SALES OF INTERRUPTIBLE POWER**
>
> [875] The situation regarding sales of interruptible power is different. While the concept existed at the time of the negotiations, it was only with the easing of the rules for the transmission of electricity products that this market developed.
>
> [876] Therefore, the ambiguity can be phrased as the following questions: Based on section 6.6. of the Principal Contract and section 5.4 of the Renewed Contract, can CF(L)Co sell energy and power to third parties not required by H.Q., and thereby exceed the 300 MW Recapture limit? In other words, does H.Q. have the right to all the power and energy that the Plant can produce?

[50] CFLCo argues that the trial judge erred in concluding as to the existence of ambiguity. According to CFLCo, the presence of an *Operational Flexibility clause*, whose wording is identical in the Contract and in Schedule III, does not create any ambiguity, because the clause deals with the manner in which HQ can plan deliveries of energy, not with the quantity of energy to which it is entitled. Thus, it argues, the clause does not in any way contradict the concept of *Continuous Energy*, which provides for the limited and fixed quantity of energy to which HQ is entitled each month. Moreover, CFLCo submits that the definition of *Continuous Energy* is not ambiguous, because its literal interpretation properly conveys its meaning.

[51] Lluelles and Moore have thoroughly summarized the process a judge must follow to determine whether a contract, or a portion thereof, is ambiguous:[47]

> [TRANSLATION]
>
> 1571. The mere fact that parties disagree on the meaning of a clause does not make that clause ambiguous or vague. It is up to the judge to determine vagueness, through a preliminary analysis of the contract. If, after this pre-interpretation phase, the court determines that the intention of the parties is doubtful, there is room for interpretation. Strangely enough, during this preliminary phase, the judge must, in a way, interpret the contract, but only superficially, in a process that has been referred to as *interpretative screening*. In principle, in this phase, the judge should not rely on articles 1425 and ff., because the purpose of this phase is precisely to determine whether or not these articles apply.

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47 Didier Lluelles and Benoît Moore, *Droits des obligations*, 3rd ed. (Montreal: Thémis, 2018) p. 876 and ff., para. 1570-1575.

> 1572. The pre-interpretation phase, however, sometimes calls upon the same tools as the interpretation phase. For example, the entirety of the contract, a major rule of interpretation, may also be useful for determining ambiguity. Indeed, a clause that appears clear when considered separately from the rest of the contract, may become ambiguous when read with other elements of the text. Conversely, an apparently ambiguous clause may become clear when combined with other contractual clauses. In this regard, it is understandable that some may doubt the relevance of the two-phase approach (pre-interpretation/interpretation), calling into question, *de lege ferenda*, the need for an ambiguous text.
>
> 1573. Sometimes, doubt arises from the use of an inadequate term or from a contradiction between two clauses. Most often, however, ambiguity results from a lack of precision, although lack of precision in not necessarily the same as ambiguity. Lack of precision may be avoided through the use of definitions, although this technique can, in and of itself, also result in ambiguity or, at the very least, be difficult to apply to the facts of the case!
>
> 1574. One should be wary of apparent clarity. A text may be clear in isolation, but vague within the context of the rest of the document, or it may be entirely unambiguous on its face, but contradict the parties' manifest objective. In such cases, the judge can conclude that a doubt exists and apply the rules of interpretation. Indeed, the rule that a clear text "accurately reflects the intention of the parties" is only a relative presumption. When the wording of the contractual document (the *instrumentum*) misrepresents the common intention of the parties (the *negotium*), the court may even go so far as to correct the text of the contract, as well as the official administrative forms (particularly in taxation matters) filled out following the signing of the contract. However, such "reconciliation between the will of the parties and the document evidencing it", which may be effected by the court simply replacing the exhibits originally filed, must be based on a legitimate need and must not adversely affect third parties.
>
> 1575. Before concluding that a doubt exists, the judge must be convinced that the difficulty in understanding the document is serious enough that an ordinarily intelligent person would be confounded. Clumsy drafting is insufficient to conclude that a doubt exists.
>
> [References omitted]

[52] This is a [TRANSLATION] "discretionary process that gives the judge called upon to interpret the text a certain degree of latitude to decide on the matter"[48] and [TRANSLATION]

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[48] *Immeubles Régime XV inc. c. Indigo Books & Music Inc.*, 2012 QCCA 239, para. 9. Cited by the Supreme Court in: *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59, para. 41.

"a question of fact requiring restraint and deference, such that an appeal court must not intervene unless a palpable and overriding error has been proven".[49]

[53] With all due respect for the contrary opinion, I am not convinced that the trial judge committed a palpable and overriding error by concluding that the contractual texts are ambiguous with respect to the meaning of the concept of Continuous Energy and that of sales of interruptible power.

[54] Nonetheless, I would like to stress the prudence with which one must proceed in seeking out the intention of the parties in a case such as this one where, first, none of the persons involved in the negotiations from 1961 (when CFLCo first approached HQ) to 1969 (when the Contract and its schedules was signed) testified and, second, the parties to the Contract stipulated, in a clause which is unambiguous (section 3.2), "Any or all Articles or Sections of this Power Contract, […], as well as any or all undertakings or promises not specifically contained in Schedule III shall have no force and effect beyond the expiry date hereof and shall not thereafter be binding upon the parties […]".[50] In short, the words the parties used in Schedule III to describe their rights and obligations as of the first day of the second 25-year period are vitally important.

[55] I now turn to my analysis of the issues this appeal raises.

A. HQ's right to all the power and energy

[56] The trial judge concluded that HQ has the exclusive right to purchase [TRANSLATION] "all the available power and all the energy produced at the Upper Churchill plant", except for the power and energy associated with the two blocks reserved for CFLCo (225 MW for Twinco and 300 MW for *Recapture*).[51]

[57] The right to the energy produced and the right to the available power can be split up (as appears from the table attached as Schedule II to the May 12, 1969 contract), although power and energy are intimately related, since the second (kWh) is generated through the first (kW) being used over a certain period of time (h). The water that accumulates in the reservoirs serves to produce this energy.

[58] I will deal with energy fist and then power.

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49 *Éolectric inc. c. Kruger, groupe Énergie, une division de Kruger inc.*, 2015 QCCA 365, para. 16. Cited by the Supreme Court in: *Uniprix inc. c. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59, para. 41.

50 Exhibit P-1, "Power Contract" between Hydro-Québec and Churchill Falls (Labrador) Corporation Limited (CF(L)Co) dated May 12, 1969, p. P-1/12.

51 Trial Judgment, para. 1150, as well as, on this subject, para. 1153-1154.

Energy

[59] The trial judge concluded that HQ has the right to all the energy produced by the plant, as was the case during the 40-year period that ended on August 31, 2016.

[60] To reach this conclusion, the trial judge considered that he was justified to go beyond the wording of Schedule III because of its ambiguity. Given that, according to him, the agreement has a joint venture component, he was of the view that he had to take into account the reasonable expectations of each of the shareholders of CFLCo at the time of the negotiations, including HQ. He also examined the circumstances surrounding the signing of the May 12, 1969 agreement in order to find the parties' intention, particularly with respect to the meaning of the expression *Continuous Energy* (Schedule III), which is included, word for word, in the Initial Contract under the definition of *Basic Contract Demand*. The judge then considered the manner in which the parties interpreted their contract after it was signed, as well as usage in the electrical energy industry.

[61] With all due respect for the trial judge, I am of the opinion that, in concluding that nothing had changed on September 1, 2016, he committed a manifest error in his interpretation of the terms and conditions of Schedule III.

[62] Upon reflection, I see two flaws in his logic. First, it seems to me that, under the pretext that the texts were ambiguous, he was so focused on seeking out what the parties had wanted to say that he minimized the importance of what they had written. While interpretation requires going beyond the wording of the text, nevertheless, the text should not be treated as if it did not exist.

[63] Second, it appears that the trial judge's examination focused on a single paradigm, namely, that operational flexibility[52] is meaningless unless HQ has access to all the energy produced by the plant, as it did before September 1, 2016. In doing so, the judge distorted the meaning and scope of the concepts of *Annual Energy Base* and *Continuous Energy*, while also obscuring, without an explanation, certain significant differences between the terms and conditions applicable to the first 40-year period and those applicable to the subsequent 25-year period.

[64] He could have done otherwise, however, by recognizing that, contrary to the situation that existed during the first 40 years of the agreement, HQ's right to the energy produced by the Churchill Falls plant is now limited, while at the same time recognizing that, contrary to CFLCo's position, HQ still has an operational flexibility very similar to the operational flexibility both parties acknowledged it had prior to September 1, 2016.

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[52] Arising from sections 4.2.1 (*Operational Flexibility*) and 6.5 (*Firm Capacity Schedules*) of the Initial Contract and sections 4.1.1 (*Operational Flexibility*) and 5.3 (*Firm Capacity Schedules*) of Schedule III.

[65] For a better understanding of the reasons that follow, I have chosen to reproduce certain portions of the Initial Contract and Schedule III.

[66] They are presented as a table, side by side, to highlight the differences between the two periods, one running until August 31, 2016 and the other, a subsequent period, running until August 31, 2041:

Agreement up to August 31, 2016 (May 12, 1969 contract, excluding Schedule III)	**Agreement as of September 1, 2016 (Schedule III)**
2.1 Object	2.1 Object
[…] Hydro-Quebec agrees to purchase from CFLCo and CFLCo agrees to sell to Hydro-Quebec each month (i) […] (ii) from and after the Effective Date, the **Energy Payable** and the **Firm Capacity**; all at the prices, on the terms and conditions, and in accordance with the provisions, set forth herein.	[…] Hydro-Quebec agrees to purchase from CFLCo and CFLCo agrees to sell to Hydro-Quebec each month the **Continuous Energy** and the **Firm Capacity**, at the price, on the terms and conditions, and in accordance with the provisions, set forth herein.
1.1 Definitions	1.1 Definitions
"***Energy Payable***" means […] (b) in respect of any month commencing on or after the **Effective Date**, (i) the amount of energy which is taken by Hydro-Quebec during such month plus (ii) the amount of energy equivalent to water spilled during such month, as determined pursuant to Sections 4.2.6 and 4.6 and after excluding spillages attributable to the fact that CFLCo has, during the 12 months preceding the spillage, either incurred any penalty under Article X or avoided such penalty only by virtue of Sections 10.3.4 or 10.3.6. Such spillage shall not cause the total Energy Payable for the 12 month period which terminates with the cessation of spilling to exceed the amount obtained when the total amount of all prior	"***Continuous Energy***" means, in respect of any month, the number of kilowatthours obtainable, […], when the **Annual Energy Base** is multiplied by the number which corresponds to the number of days in the month concerned and the result is then divided by the number of days in the year concerned. […]

recaptures is deducted from 35.4 billion kilowatthours.

"***Annual Energy Base***" means 31.50 billion kilowatthours per year or, in the event of an adjustment […], the number of kilowatthours per year established as a result of such adjustment, […]

8.4 Price after the **Effective Date**[54]

[…] the monthly price for power and energy shall be:

(i) the product of the **Basic Contract Demand** multiplied by 66.67% of the Applicable Rate (earned whether or not taken or made available), plus
(ii) the product of **Energy Payable** as calculated for the month then ended multiplied by 33.33% of the Applicable Rate.

Such price shall be subject to adjustment as provided in Section 8.5.

1.1 Definitions

"***Basic Contract Demand***" means, in respect of any month, the number of kilowatthours obtainable, […], when the **Annual Energy Base** is multiplied by the number which corresponds to the number of days in the month concerned and the result is then divided by the number which corresponds to the number of days in the year concerned.

"***Annual Energy Base***" means the number of kilowatthours per year represented by the Annual Energy Base in effect at the time of expiry of the Power Contract which is hereby renewed.[53]

7.1 (Article VII – Price and Price Adjustment) For all **Continuous Energy**, Hydro-Quebec shall pay CFLCo 2.0 mills per kilowatthour.

In the event that in any month CFLCo is unable due to Plant deficiencies to make available at least 90% of the **Continuous Energy**, the price payable by Hydro-Quebec for such month shall be 2.0 mills per kilowatthour for that part only of the **Continuous Energy** which is made available.

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[53] At the hearing, the parties told the Court that they were in disagreement regarding the value of the *Annual Energy Base* as of September 1, 2016, although they had agreed, in May 1969, to set it at 31.5 billion kilowatthours (31.5 TWh) at the start of the first 40-year period. This is a dispute we are not required to rule on within the scope of the case presently before us and which we hope the parties will be able to settle amicably.

[54] It is accepted that this date is September 1, 1976, the date on which the Churchill Falls plant was fully commissioned, i.e. 11 turbine-generator units, the eleventh to be used as a spare during maintenance.

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

[Emphasis added]

[67] What can one learn from this comparative table?

[68] First, the wording of the object of the contract for the 40-year period is very different from the wording of that object for the subsequent 25-year period. The expression *Energy Payable* does not appear in Schedule III, while the term *Continuous Energy*, which does appear, was not included in the terms and conditions applicable from September 1, 1976 to August 31, 2016. As for the definition of *Continuous Energy*, it is identical to the definition of *Basic Contract Demand*, which appears in the Contract, but not in Schedule III.

[69] The manner in which the power and energy purchased by HQ are billed differs from one period to the other. I will return to this later, but, for now, suffice it to note that monthly billing based on two components,[55] one fixed (a predetermined quantity of energy billed at 66.67% of the applicable rate) and the other, variable (another quantity of energy billed at 33.33% of the applicable rate), during the first 40 years of the agreement, was abandoned in favour of a more straightforward and linear formula of 2.0 mills per kilowatt-hour until the end of the agreement.

[70] Last, it should be noted that section 6.2 (*Sale and Purchase of Power and Energy*), which was in effect until August 31, 2016, does not appear in Schedule III.

[71] In my view, the table itself illustrates the difference between the two periods (40 years, 25 years) as regards the quantity of energy to which HQ is entitled.

[72] During the first 40 years, the agreement between the parties clearly recognized HQ's right to <u>all</u> the energy it required: first, in its *Object* ("Hydro-Quebec agrees to purchase and CFLCo agrees to sell […]"), then in the definition of *Energy Payable* ("in respect of any month […] the amount of energy which is taken by Hydro-Quebec during such month")[56] and, last, in section 6.2—*Sale and Purchase of Power and Energy*

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55 Referred to by the parties as the "Split Tariff".

56 It should be noted that, given the billing structure in place during the initial 40-year term, the energy HQ received over and above the *Basic Contract Demand*/*Annual Energy Base* (i.e., excess energy) was billed, in accordance with section 8.4(ii) of the Contract, at "33.33% of the Applicable Rate".

("CFLCo shall deliver to Hydro-Quebec […] such power and energy as Hydro-Quebec may request […]").

[73] The situation is different for the 25 years beginning on September 1, 2016. HQ's exclusive right is limited to the quantities of energy contemplated by the inseparable concepts of *Annual Energy Base* (annual limit) and *Continuous Energy* (monthly limit) found in Schedule III. What is particularly telling, in my opinion, is that CFLCo's undertaking set out in s. 6.2 of the Initial Contract was not included in Schedule III.

[74] It is not contested that HQ is required to purchase and pay for, and CFLCo is required to sell to HQ, a fixed and predetermined quantity of energy. And, in my opinion, nothing less, but nothing more either. Section 2.1 (*Object*) of Schedule III and the concepts of *Annual Energy Base*/*Continuous Energy* are too clear to allow for another conclusion.

[75] Unlike the Initial Contract, Schedule III does not contain anything that would lead to the conclusion that HQ is entitled to all the energy produced by the Churchill Falls plant, over and above the quantities defined by the concepts of *Annual Energy Base*/*Continuous Energy*. The first establishes the annual quantity of energy to which HQ is entitled, while the second, as the trial judge rightly noted, allocates this quantity from month to month, on a purely mathematical basis, essentially to ensure CFLCo has a regular and stable flow of revenue throughout the year.

[76] The problem that such a mathematical allocation of energy would inevitably create (given the seasonal demand for electrical energy in Quebec) is resolved, in my opinion, just as it was prior to September 1, 2016, by the operational flexibility granted to HQ with respect to the scheduling of its requests for the delivery of energy (section 4.1.1) and its power requirements (section 5.3).

*

[77] In my opinion, and with all due respect for the work done by trial judge, the reasons that led him to conclude that HQ continues, even after August 31, 2016, to have the exclusive right to purchase all the energy produced at the Churchill Falls plant, contrary to the text of Schedule III, are undermined by certain palpable and overriding weaknesses.

[78] To convince himself that the concept of *Continuous Energy* refers to all the available energy,[57] notwithstanding the parties' definition of that concept in Schedule III by reference to the concept of *Annual Energy Base*, the trial judge cites excerpts from two drafts of a letter of intent from HQ to CFLCo, the first dated June 15, 1965 (exhibit D-78), "The term 'Continuous Energy', for the purposes hereof, shall mean all energy made available on a monthly basis at the agreed point of delivery, […]", and the second dated

[57] Or [TRANSLATION] "all of the plant's production", Trial Judgment, para. 977.

July 12, 1965 (exhibit D-81), “The term ‘Continuous Energy’ for the purposes hereof shall mean all energy made available at the agreed point of delivery, […]”.[58]

[79] These excerpts, however, are incomplete, such that the parties seem to be saying the very opposite of what they were actually saying at the time within the context of their negotiations with a view to abandoning the Split Tariff billing formula in favour of another formula as of the forty-first year of their agreement.

[80] The full text of the relevant passage concerning the concept of *Continuous Energy* in the draft dated July 12, 1965 states the following:[59]

> The term “continuous energy” for the purposes hereof shall mean all energy made available at the agreed point of delivery, from all generating units commissioned less one unit, up to but not exceeding 105% of the corresponding amounts of energy shown in column 5 of the Table Article 9, and subject to the provisions of Article 8.1(a) below.
>
> **9.0 CAPACITY AND ENERGY SURPLUS TO PRESENT REQUIREMENTS OF NEWFOUNDLAND**
>
> **Estimated Amounts at Agreed Point of Delivery**

Column 1	Column 2	Column 3	Column 4	Column 5
Date	Units Installed	Firm Capacity (KW)	Spare Capacity (KW)	Continuous Energy (Millions of KMH Per Month)
March 1, 1971	2	435,500	444,500	320.1
June 1, 1971	3	881,000	444,500	644.57

[81] The words “all energy […], from all generating units commissioned less one unit, up to but not exceeding 105% of the corresponding amounts of energy shown in column 5” clearly do not refer to all the energy, but rather to a specific and limited quantity of energy, which is necessarily less than the plant’s total energy production. First, the quantity is limited: a maximum of 105%, and nothing more. Second, the same draft letter contains a clause entitled *Excess Energy* (section 8.2), which describes the energy produced over and above what is covered by the concept of *Continuous Energy* due, for example, to increased water availability in the reservoirs or to the improved efficiency of the facilities. Lastly, the calculations are based on one turbine-generator unit being taken

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58 *Ibid,* para. 942-944 and 988. See also paragraphs 234-235 and 239-241, in the section of the Trial Judgment in which the judge describes the circumstances that led to the signing of the May 12, 1969 contract.

59 Exhibit D-81.

out of service every month. It goes without saying that a more rapid return to service of that unit, if only for a few days, could result in additional energy production.

[82] In short, the definition of *Continuous Energy* in the drafts of the letter of intent does not contradict the definition in Schedule III which, together with the *Annual Energy Base*, refers to a defined and limited quantity of energy.

[83] In its brief, HQ acknowledges that the judge truncated the definition of *Continuous Energy*, but it concludes that this is of no consequence because the concept of *Annual Energy Base*, to which the concept of *Continuous Energy* refers, includes all of the plant's proven energy potential, and therefore includes the excess energy.

[84] Indeed, HQ argues that on September 1, 2016, the value of the *Annual Energy Base* was identical to the value of that in effect the previous day, August 31, 2016.[60] It points out that the adjustments to this value throughout the period from September 1, 1976 to August 31, 2016[61] took into account all energy deliveries to HQ, the equivalent kilowatthours of any spilled water and the equivalent number of kilowatthours represented by the change (up or down) in the reservoir level as compared with the reservoir level on the date the plant was commissioned (section 9.2—*Basis for Adjustment*). In short, it reflected the entire proven energy potential of the hydroelectric complex.

[85] As brilliant as the argument may seem at first, it loses much of its luster when one considers the limits the parties contractually agreed on with respect to the adjusted value of the *Annual Energy Base* (section 9.3—*Limitations on Adjustment of Annual Energy Base*). The upward adjustment could not exceed 3⅓% and the adjusted value itself could never exceed "the amount obtained when the amount of all recaptures of energy is deducted from 32.2 billion kilowatthours per annum". In fact, the amount of 32.2 TWh was reduced to 29.84 TWh as a result of CFLCo taking all of the "recaptures of energy" on March 9, 1998.[62]

[86] It is therefore highly doubtful that the value of the *Annual Energy Base* represents the plant's entire proven energy potential.[63]

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60 See the definition of "*Annual Energy Base*", section 1.1 (II) of Schedule III.

61 The first adjustment was made 8 years after the plant's commissioning, and the others every 4 years thereafter (section 9.1—*Adjustment Intervals*, Initial Contract). Schedule III does not provide for other adjustments as of September 1, 2016.

62 Document entitled "Notice of Recapture and Waiver", pursuant to which CFLCo immediately recaptured the remaining 130.7 MW of the *Recapture* block and HQ waived the requirement for CFLCo to give a prior notice of three years as provided for in section 6.6 of the Initial Contract.

63 For the same reasons, I believe the trial judge is wrong to conclude that, on August 31, 2016, the *Annual Energy Base* represented [TRANSLATION] "the average of the entire first forty years of the plant's operation under every imaginable [climatic and hydrological] condition" (Trial Judgment, para. 1073). This is a mathematical impossibility given that, as I just pointed out, the parties imposed limits on the calculation of the value of the *Annual Energy Base* from September 1, 1976 to August 31, 2016.

[87] Another fact must also be taken into account. Since September 1, 2016, the value of the *Annual Energy Base* is no longer subject to periodic adjustments. It is frozen in time, until the end of the 25-year period. During this period, knowledge of hydroelectricity will undoubtedly continue to grow, to increase the efficiency of the facilities and, inevitably, to drive the energy potential of the hydroelectric complex upwards, but without being reflected in the *Annual Energy Base*.

[88] It is therefore clear to me that, contrary to the trial judge's conclusion, the value of the *Annual Energy Base* (and its monthly counterpart, *Continuous Energy*) does not include all the energy produced by the Churchill Falls hydroelectric complex.

[89] All things being equal, there is, and will continue to be, a certain quantity of energy over and above the value of the *Annual Energy Base*. As a matter of fact, why would this dispute have arisen if both parties did not believe in the existence of a certain quantity of energy over and above the value of the *Annual Energy Base*?

[90] Regardless, one can only question the probative value of an argument based on prior versions of a document whose wording the parties refined over the course of their discussions, before arriving at a final version set out in the letter of intent dated October 13, 1966 and in Schedule III of the May 12, 1969 contract. The exercise is all the more perilous given that the parties were careful to state that "all undertakings or promises not specifically contained in Schedule III shall have no force and effect beyond the [31st of August 2016] and shall not thereafter be binding upon the parties to the renewed Power Contract" (section 3.2, third paragraph). The wording of this section also highlights the fact that the Initial Contract and Schedule III constitute two separate agreements. This is not a mere renewal where, as sometimes occurs, the parties simply extend the initial term by a few years without amending the terms and conditions of their agreement.

[91] In any event, the entire set of documents that led to the signing of the October 13, 1966 letter of intent and the May 12, 1969 contract confirm that the expression *Annual Energy Base* (and its monthly counterpart, *Continuous Energy*) refers to a specific and limited quantity of energy, and not to the plant's entire production, from the very first time it is defined in the draft letter of intent dated March 9, 1964[64] until the letter of intent signed by the parties on October 13, 1966,[65] and in all versions in-between.

[92] With all due respect, the trial judge is therefore mistaken when he states that [TRANSLATION] "the only time this expression (Continuous Energy) was used, other than during the construction phase, it referred to the Plant's entire production".[66] This is a palpable error, and because it involves a fundamental element of his logic, it is potentially an overriding one.

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64 Exhibit P-117.
65 Exhibit P-4 (or D-12).
66 Judgment *a quo*, para. 1000.

[93] On the same subject, it is worthwhile noting that, as of 1966, the parties had already provided for the fact that there would be a certain quantity of energy available over and above the *Continuous Energy*. Section 7.3 of the letter of intent dated October 13, 1966, entitled *Excess Energy* ("*énergie excédentaire*" in the signed French version of the same letter), refers to this expression as "all energy other than continuous energy" ("*toute l'énergie autre que l'énergie continue*").[67]

[94] With all due respect for the trial judge, the texts to which he refers state the opposite of what he concluded. The concept of Annual Energy Base (and its monthly counterpart, Continuous Energy) refers to a limited quantity of energy, any additional quantity of energy being excess energy. Therefore, it does not refer to <u>all</u> the energy produced by the plant.

[95] This conclusion is also consistent with the evolution of the renewal clause contained in the May 12, 1969 contract (section 3.2). In an internal memo dated March 7, 1968,[68] CFLCo stated, under the heading "3.2 Renewal ", that the sale of energy "shall be on a continuous energy basis, whereby, up to the limit of the number of kilowatthours per year which shall constitute […] the Annual Energy Base, Hydro-Quebec shall pay for all energy made available to it by CFLCo, whether or not taken". The quantity of energy covered by this purchase guarantee [69] was clearly defined in relation to the Annual Energy Base, and was limited. It did not refer to all the energy produced by the plant.

[96] The same terms are found in subsequent versions of the renewal clause (such as those dated April 19, 1968[70] and April 25, 1968[71]), until the final version dated May 12,

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67 Moreover, while the price of continuous energy was to change over the years and range from 2.29 – 2.67 mills per kilowatthour, the price of excess energy was set at 1.0 mill per kilowatthour (section 16.0 of the letter of intent dated October 13, 1966), i.e., approximately 1/3 of the price of continuous energy, such that it was in HQ's interest at the time to establish the initial value of the *Annual Energy Base* as low as possible. The same idea appears in a document entitled "*Notes descriptives des documents accompagnant la demande d'Hydro-Québec en date du 6 juin 1968, relativement au contrat d'énergie projeté entre Hydro-Québec et Churchill Falls (Labrador) Corporation (CF(L)Co)*" (Notes describing the documents sent with Hydro-Québec's request dated June 6, 1968 with respect to the proposed energy contract between Hydro-Québec and Churchill Falls (Labrador) Corporation Limited (CF(L)Co)): [TRANSLATION] "Although the actual annual production may reach 35.4 billion kilowatthours, the average used for the adjustments has been limited to 32.2 billion kilowatthours in order to ensure excess energy for Hydro-Québec at the low price equal to 1/3 of the rate" (exhibit P-208/16, J.S., vol. 15, p. 5240). In the Initial Contract, the value of the *Annual Energy Base* was established at 31.5 billion kilowatthours (definition of *Annual Energy Base*, section 1.1), while the amount of 32.2 billion kilowatthours was used in the section entitled "*Direct Price Adjustments—Resulting from Variations between Annual Energy Base and the Annual Average Energy Payable*" (section 8.5.2 (i)). Moreover, the split tariff billing formula in effect until August 31, 2016 was such that energy delivered to HQ over and above the quantity of energy included in the concept of *Annual Energy Base* would be charged to it at only 1/3 of the applicable rate (section 8.4(ii)).

68 Exhibit P-189, p. 189/5.

69 This is the expression used by the Supreme Court in *Churchill Falls 2018*, para. 11.

70 Exhibit D-22.

71 Exhibit D-23.

1969. The only difference is that in section 2.1 of Schedule III, the parties refer to a monthly limit (*Continuous Energy*), which is calculated in relation to an annual limit, which is itself a specific and limited quantity (*Annual Energy Base*).

[97] Lastly, the terms and conditions of the agreement by which the parties bound themselves for the 40 years following the full commissioning of the plant included section 6.2, which stated, in its first paragraph, that "CFLCo shall deliver to Hydro-Quebec at the Delivery Point such power and energy as Hydro-Quebec may request, subject […]". This clause clearly expressed CFLCo's undertaking to provide HQ with all the energy HQ might request, subject, of course, to the plant's production capacity. This text was not included in Schedule III. CFLCo submits, with good reason in my opinion, that this is a further argument confirming that HQ's right to the energy produced by the plant is now subject to a contractual cap that did not exist during the first 40 years of the agreement. And yet, CFLCo points out, in his judgment, the trial judge completely failed to address the absence of section 6.2.

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[98] One of the arguments the trial judge puts forward, mistakenly, I believe, in order to conclude that *Continuous Energy*[72] is only a payment term, and not the monthly reflection of the maximum quantity of energy to which HQ is entitled each year, is that its definition matches, word for word, that of *Basic Contract Demand*, a concept found in the billing formula applicable until August 31, 2016, in the first of the two elements of the Split Tariff:[73] "(i) the product of the Basic Contract Demand multiplied by 66.67% of the Applicable Rate […]".

[99] This exact match between the two texts, however, is of no consequence if one simply considers the payment structure in effect until August 31, 2016 and the one in effect as of September 1, 2016.

[100] Until August 31, 2016, for reasons that we know,[74] the parties opted for a two-tier monthly billing formula, the first tier being fixed and calculated according to a mathematical formula that refers to the *Basic Contract Demand*/*Annual Energy Base*, whether or not HQ takes delivery of the energy (take or pay)[75] (billed at 2/3 of the applicable rate), and the second tier, being variable and calculated on the basis of the energy actually delivered to HQ, plus the energy equivalent to water spilled during the same month (*Energy Payable*) (billed at 1/3 of the applicable rate).[76]

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72 Schedule III, sections 2.1 and 7.1.

73 Initial Contract, section 8.4—Price after the Effective Date.

74 The parties chose this payment formula to satisfy the requirements of CFLCo and its mortgage lenders. It was intended to provide CFLCo with stable revenue throughout the year.

75 "[…] (earned whether or not taken or made available)", Initial Contract, section 8.4(i).

76 In an HQ document dated June 5, 1968 entitled "*Comparaison entre la lettre d'intention du 13 octobre 1966 entre Hydro-Québec et Churchill Falls (Labrador) Corporation Limited (CFLCo) et le projet de*

[101] As of September 1, 2016, the formula changes. The *Split Tariff* is abandoned, but the willingness to ensure a certain degree of stable revenue for CFLCo remains. In addition, on that date, the parties will have had 40 years of experience calculating the *Annual Energy Base*. From then on, the object of their agreement concerns the purchase by HQ, each year, of a specifically defined and limited quantity of energy, at a firm price of 2.0 mills per KWh for the entire 25-year term. The concept of *Continuous Energy* is used at that time to convert the total quantity of energy that HQ agrees to pay for, regardless of its actual needs, into a monthly quantity.

[102] The basis for the calculation, be it for the *Basic Contract Demand* or *Continuous Energy*, is the same, namely, the *Annual Energy Base* (or, in French, [TRANSLATION] "the assumed annual production of energy"), but the two terms reflect two different realities. The first was used for a purely mathematical calculation, irrespective of HQ's actual needs, with the possibility of an adjustment every four years depending on whether the energy payable was less, or more, than the *Annual Energy Base* (Initial Contract, section 8.5—*Direct Price Adjustments*). The second describes, on a monthly basis, the quantity of energy that HQ will pay for, whether or not it needs it, and that CFLCo will sell to it, with a billing adjustment if CFLCo is unable, due to a failure of its facilities (*Plant*[77] deficiencies), to make available at least 90% of the promised energy (Schedule III, Article VII, section 7.1—*Price and Price Adjustment*).

[103] In the first case, it <u>was only</u> a payment term which, ultimately, had nothing to do with the energy made available to HQ, i.e., all the energy produced by the plant, excluding the Twinco and *Recapture* blocks. In the second case, it <u>is both</u> a payment term intended to ensure regular and steady revenue for CFLCo <u>and</u> a monthly allocation of the energy that HQ binds itself to purchase, and CFLCo binds itself to sell to it, annually.

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[104] The use of the concepts of *Annual Energy Base* and *Continuous Energy* in Schedule III also explains the disappearance of section 6.2, which existed in the Initial Contract ("CFLCo shall deliver to Hydro-Quebec at the Delivery Point such power and

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contrat et document auxiliaires soumis" (Comparison between the letter of intent dated October 13, 1966 between Hydro-Québec and Churchill Falls (Labrador) Corporation Limited (CFLCo) and the draft contract and ancillary documents submitted), exhibit P-208/16, at item 21, the author describes this billing formula as follows:

> [TRANSLATION]
>
> Each monthly payment to be made by Hydro-Québec to CFLCo […] will consist of two parts, one virtually invariable based on an assumed annual production of 31.5 billion kilowatthours, to which 2/3 of the rate will apply, and the other based on the actual number of kilowatthours delivered to Hydro-Québec (or for which Hydro-Québec is responsible), to which 1/3 of the rate will apply.

[77] The definition of "*Plant* " (section 1.1 (II) of Schedule III) is very broad, and includes "all access roads", "airports and runways", "all construction camps", "all transportation and communication facilities", "all water control and water storage works and facilities", "all buildings and structures and their appurtenances", "all machinery and equipment, whether moveable or immoveable", "all spare parts" and "all tools and maintenance material".

energy as Hydro-Quebec may request […]"). Indeed, as of September 1, 2016, the quantity of energy no longer depends solely on HQ's needs; it is predetermined.

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[105] The trial judge also based his conclusion as to HQ's exclusive right to all the energy produced by the plant on the presence of an identical operational flexibility clause in both periods (before and after September 1, 2016)[78] and on an alleged incompatibility between CFLCo's position and the GWAC signed by the parties in 1998.[79]

[106] Was he correct in that regard?

[107] The following is the text of section 4.2.1 (4.1.1 in Schedule III), whose wording is the same,[80] both before and after August 31, 2016:

> 4.2.1 Operational Flexibility
>
> The parties hereto acknowledge 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. Accordingly:
>
> (i) Hydro-Quebec may request CFLCo to operate the Plant so as to supply Hydro-Quebec's schedule of power requirements, provided that no such request shall be less than the Minimum Capacity or, except as provided in Section 6.4 [Section 5.2, in Schedule III], more than the Firm Capacity;
>
> (ii) Hydro-Quebec may require deliveries which have the effect of varying the amount of water to be carried in storage at any time, provided that, in so doing, sufficient water is left in storage so that Minimum Capacity can always be maintained;
>
> (iii) CFLCo agrees to make available to Hydro-Quebec information relating to the hydrology of the drainage basin and the levels of the reservoirs and the measurement and metering of any spillage from the reservoir [reservoirs, in Schedule III]; and to co-operate fully with Hydro-Quebec in the forecasting of energy which can be made available.

[108] It is also worthwhile to reproduce the clause entitled *Firm Capacity Schedules* (section 6.5 of the Initial Contract, section 5.3 of Schedule III), whose text is identical[81] for both periods and which, with respect to power, completes the concept of operational flexibility to which I will refer in this section of my reasons:

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78 Trial Judgment, para. 297-308 and 873.
79 *Ibid*, para. 447-467.
80 Save as indicated in square brackets in paragraphs (i) and (iii).
81 Save as indicated in square brackets in the first paragraph.

> 6.5 Firm capacity Schedules
>
> At least seven days in advance of the first Delivery Date [date upon which this renewed Power Contract shall take effect, in Schedule III] and at weekly intervals thereafter Hydro-Quebec shall furnish to CFLCo:
>
> (a) an hourly schedule of its proposed capacity requirements over the week following, and
>
> (b) an estimate of what Hydro-Quebec is likely to schedule over the three weeks thereafter.
>
> Each such seven-day schedule shall constitute Hydro-Quebec's request for availability of such capacity over the period scheduled to the various extents and at the various times indicated by the schedule, but subject to Hydro-Quebec's right to make further requests for changes in capacity during the period within the limits of Firm Capacity and Minimum Capacity. Any such request shall be considered as revising the schedule to the required extent and for the required time.

[109] As for the GWAC, after some ten years of negotiations, it was signed on June 18, 1999, with an effective date retroactive to November 1, 1998. The GWAC provides HQ with guaranteed additional power (682 MW) for the winter period, without the restriction present in the Initial Contract (section 6.4) as well as in Schedule III (section 5.2): "whenever additional capacity can, in the opinion of CFLCo, be made available" [emphasis added]. This additional capacity, which is over and above the *Firm Capacity* provided for in the contract,[82] increases the power made available to HQ during the winter months (November 1 to March 31) from 4382 MW to 5064 MW.[83] The term of the GWAC coincides with the term of the contract signed on May 12, 1969, i.e., August 31, 2041. According to HQ, the compensation to be paid for this additional power guarantee will total nearly $1.5 billion dollars by the end of the contract,[84] on August 31, 2041.

[110] Operational flexibility was the subject of drawn-out discussions between CFLCo and HQ. This was a crucial point for HQ, whose objective was to operate the Churchill Falls plant (and its reservoirs)—through seasonally adjusted requests for the delivery of energy based on demand—in the same manner as it operates its own plants, to incorporate the Churchill Falls plant within its own network of plants and to coordinate it all efficiently.

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82 The expression *Firm Capacity* is defined in the same way in the Initial Contract and in Schedule III, in section 1.1 (*Definitions*).

83 Which represents almost the entirety of the plant's power, or 5,170 KW according to Schedule II (column 3) of the contract and, in reality, 5,428 KW (judgment *a quo*, para. 483).

84 Trial Judgment, para. 454-462.

[111] On April 17, 1968, CFLCo finally agreed to include this operational flexibility in the agreement that was to bind it to HQ until 2041, during the 65 years following the plant's commissioning.

[112] Sections 4.2.1 and 6.5 of the Initial Contract gave HQ full operational flexibility allowing it, through its requests for the delivery of energy, to control production and manage water levels in the reservoirs. This allowed HQ to adapt its requests for energy and power based on the seasonal demand for energy in Quebec, reducing its requests in the summer (thereby allowing water to accumulate in the reservoirs) and increasing them in the winter, when demand was higher. Given that HQ had access to all the energy produced by the plant, it also adapted its requests for energy on a multi-year basis, by scheduling deliveries above the value of the *Annual Energy Base* during years of high hydraulicity and below that value during years of weaker hydraulicity.

[113] Sections 4.1.1 and 5.3 of Schedule III are identical to sections 4.2.1 and 6.5 of the Initial Contract. The trial judge concluded therefrom that operational flexibility is necessarily inseparable from HQ's access to all the energy produced by the plant and, therefore, that the presence of the same operational flexibility clauses in Schedule III necessarily implies that HQ still has access to all the energy produced by the plant, because limited monthly deliveries of energy would deprive it of the operational flexibility it has always enjoyed.

[114] With all due respect for the trial judge, I believe this logic is flawed. First, the operational flexibility clause does not deal with the quantity of energy or power. Rather, it deals with flexibility in scheduling deliveries. Both before and as of September 1, 2016, even without taking the excess energy into account, the quantities of energy and power that CFLCo is required to deliver to HQ each year are significant. It is reasonable to conclude that HQ still requires scheduling flexibility for deliveries.

[115] Second, it would be surprising if the presence of the operational flexibility clause in Schedule III were to infer that HQ is entitled to all the energy produced by the plant, when section 2.1 (object of the agreement) and the concepts of *Annual Energy Base*/*Continuous Energy* explicitly state otherwise.

[116] In my view, one must try to reconcile the concept of operational flexibility with the notion that HQ has access to a limited, albeit considerable, quantity of energy. On this point, I agree with HQ. It would be surprising if the parties had intended a purely intra-monthly flexibility (i.e., solely within each month), as CFLCo proposes, despite the fact that HQ enjoyed full operational flexibility for 40 years and that, even after August 31, 2016, HQ still needs to efficiently coordinate the considerable energy contributed by the Churchill Falls plant with the energy from its own network of plants.

[117] The wording of the operational flexibility clauses in Schedule III, which is identical to the wording of the clauses that defined the relationship between the parties during the first 40 years of their agreement, does not say this.

[118] I see nothing in the terms and conditions applicable as of September 1, 2016 that would prevent HQ from doing as it has always done since the plant was commissioned, which is to adjust its requests for the delivery of energy (and power) based on the seasonal profile of demand for electrical energy in Québec (higher in winter than in summer) and in perfect harmony with its own network of plants. This, of course, is subject to an additional restriction which did not exist before September 1, 2016, that is, the annual limit on the energy to which HQ is entitled pursuant to Schedule III (*Annual Energy Base*).

[119] Consequently, I see nothing in Schedule III that would prevent HQ from postponing (or accelerating) the delivery of energy it has paid for (or will pay for) pursuant to sections 2.1 and 7.1, but of which it has not yet taken delivery (or which it needs sooner), subject, however, to the annual cap represented by the *Annual Energy Base*.

[120] In my opinion, a comparison between the wording of the payment clauses for each of the two periods, 40 years and 25 years, confirms the need for such operational flexibility.

[121] As a result of the payment formula in the Initial Contract, each month HQ paid for a specific quantity of energy, calculated on the basis of the *Annual Energy Base*, at a rate equal to 2/3 of the applicable rate (*Basic Contract Demand*), the whole “whether or not taken [by HQ] or made available [by CFLCo]” (section 8.4 (i)).

[122] The payment formula in Schedule III is different and does not contain this last feature. HQ still pays for a specific quantity of energy (*Continuous Energy*) each month, calculated, as before, on the basis of the *Annual Energy Base*, at a price of 2 mills/KWh (section 7.1, first paragraph), with the possibility of the monthly invoice being adjusted in the event the facilities are deficient (*Plant* deficiencies) (section 7.1, second paragraph).

[123] The absence of the words “earned whether or not taken or made available” indicates that, as with any other contract of purchase, HQ is entitled to all the energy that it has purchased and that CFLCo has agreed to sell to it. As a result, it needs the operational flexibility that will allow it to postpone, from one month to another, the quantities of energy of which it has not taken delivery, but which it has paid for at the end of the month, or to accelerate the delivery of quantities of energy it requires immediately and which it will inevitably pay for in the following month or months.

[124] As a matter of fact, the possibility of postponing the delivery of energy from one month to another is not new to the parties. It had been agreed upon within the scope of

the letter of intent the parties ratified on October 13, 1966. Article 8.0 (Peaking and Plant Operation) deals with it at paragraph (c):

> (c) Should Hydro-Québec request that the output of the plant be decreased for any period of time, on account of conditions on its system, it will pay for that amount of continuous energy which CFLCo could have otherwise generated during that month had the output of the plant not been so varied. Unless it becomes necessary to spill water Hydro-Québec will be entitled to receive at no cost that amount of energy in excess of the output specified in Article 7.1 which can be generated from the water stored as a result of such decrease in output, subject to paragraph (d) below. It is understood that CFLCo will not be required to hold in storage for a period exceeding six months water corresponding to continuous energy not taken by Hydro-Québec when made available;
>
> [Emphasis added]

[125] In my view, this reading of operational flexibility also seems consistent with the intention of the parties. If not, why did the parties include in Schedule III the same operational flexibility clauses they had included in the Initial Contract?

[126] It also gives full meaning to the first sentence of section 4.1.1 of Schedule III: "The parties hereto acknowledge 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."[85] Indeed, it seems clear from the evidence that HQ would not be able to exercise mere intra-monthly flexibility in any useful way. CFLCo's proposed restrictive interpretation would strip HQ's right to operational flexibility of any effect.

[127] This approach also avoids placing HQ in the quite peculiar position of having access to excessive quantities of energy during the summer months and insufficient quantities during the winter months.

[128] The advantage of this approach is that it also reconciles the meaning of the operational flexibility clause with the contract as a whole, while deflating the basis for the argument, first, that HQ might receive energy at no cost if it receives more energy than the value of the *Annual Energy Base* (a possibility raised by CFLCo in its brief) and, second, that HQ might receive less energy for which it has paid, if CFLCo were unable to make all of the *Continuous Energy* available,[86] without HQ being able to subsequently recoup the undelivered energy on the ground that this would be a type of excess energy belonging to CFLCo (a possibility HQ raised in its brief).

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85 This is identical to the wording in section 4.2.1 of the Initial Contract.

86 HQ states in its brief, at footnote 198, that this is a very real risk, with the number of months during which such a situation could occur potentially amounting to 20 months (out of the 300 months included in the period between September 1, 2016 and August 31, 2041).

[129] Each of these two propositions would quite obviously place both parties in a situation that is just as commercially untenable as it is absurd. In the first case, HQ would receive energy for which it has not paid and, in the second case, CFLCo would retain for itself energy for which HQ has paid. The quantities of energy for which delivery would be postponed (or accelerated) would already have been paid (or would subsequently be paid), as would a certain additional quantity of capacity during the winter months (the GWAC). There is thus absolutely no element of gratuity in the operational flexibility conferred upon HQ as of September 1, 2016.

[130] This approach also retains the full meaning and commercial value of the GWAC and dispels the inconsistency the trial judge saw between the purchase of this additional capacity and HQ's inability to use it due to monthly energy limits that the definition of Continuous Energy imposes on it.

[131] One last point. The payment formula in Schedule III provides for the possibility of a reduced monthly invoice if CFLCo is unable, due to a failure of its facilities (*Plant* deficiencies), to make available at least 90% of the quantity of energy it has committed to sell to HQ for the month in question (Schedule III, section 7.1, second paragraph).

[132] CFLCo sees this as undeniable evidence that the concept of *Continuous Energy* is not merely a modality to be used for calculating the monthly invoice payable by HQ, but rather the expression of a specific, and limited, quantity of energy available to HQ.

[133] On this point, I agree with CFLCo.

[134] But CFLCo adds that this quantity of energy is binding on HQ and deprives it of any operational flexibility that would allow it, for example, to postpone the delivery of certain quantities of energy from one month to another, based on its customers' needs. In other words, HQ would be required to take delivery of this predetermined quantity of energy every month, whether or not it needs it, failing which it would have paid for energy whose delivery it could no longer require.[87] CFLCo adds that if HQ were entitled to exercise its discretion in order to take delivery of the quantities of energy it wants every month rather than being required to take delivery of a fixed and predetermined quantity of energy, the condition set out in the second paragraph of section 7.1 would be meaningless.

[135] On this point, I disagree with CFLCo.

[136] First, this interpretation would require inserting the words "earned whether or not taken or made available" when reading Schedule III, words that the parties used in the description of the first tier of the monthly invoice payable by HQ during the initial 40-year period (section 8.4 (i) of the Initial Contract), but which they clearly chose not to include

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87 Unless, I suppose, it purchased it again from CFLCo at a price agreed upon by the parties.

in the agreement binding them for the second 25-year period. This choice opens the door to the argument that HQ can postpone (or accelerate) the delivery of energy.

[137] Second, this would strip any real effect from the operational flexibility that the parties acknowledge HQ still needs, even beyond the first 40-year period: “The parties hereto acknowledge 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” (Schedule III, section 4.1.1).

[138] Third, I do not believe that the possibility for HQ to postpone certain deliveries from one month to another (or accelerate them) renders the condition set out in the second paragraph of section 7.1 useless or inapplicable. First, the situation contemplated in that paragraph is exceptional—a failure of the facilities that prevents CFLCo from making available at least 90% of the stipulated quantity of energy to HQ. Moreover, it is important to note that the application of the condition would cause a loss of income for CFLCo and, as a result of the delivery of the missing energy being postponed to the following month, it would create savings for HQ. If, however, circumstances were such that CFLCo were to make available a quantity of energy that falls between 90% and 100%, but that, based on CFLCo’s interpretation, HQ would not be entitled to postpone the delivery of the missing energy to another month, HQ would still have to pay the full amount of the monthly invoice without having the possibility of recouping such energy the following month.

[139] On balance, it seems preferable to me that CFLCo (the producer of the electricity) rather than HQ (the customer) should bear the potential losses attributable to *Plant* deficiencies, regardless of the extent of those losses. In this sense, the rule set out in the second paragraph of section 7.1 provides assurance to HQ, if such assurance were necessary, that CFLCo will properly maintain the facilities.

[140] All in all, I agree that the second paragraph of section 7.1 confirms that the concept of *Continuous Energy* is more than a simple modality for calculating the monthly invoice payable by HQ. I do not, however, agree with CFLCo’s argument that the existence of this condition has the effect of depriving HQ of the operational flexibility it has always enjoyed.

[141] In short, for all of these reasons I conclude that, under the terms of Schedule III, the parties limited the quantity of energy purchased by HQ on the basis of the value of the *Annual Energy Base*. Although this quantity represents <u>almost the entirety</u> of the energy produced by the plant, it does not account for <u>all</u> its production, because the value of the *Annual Energy Base*, as the parties have defined this expression, is contractually limited.

[142] Furthermore, I conclude that, as of September 1, 2016, HQ has enjoyed and continues to enjoy the same operational flexibility it enjoyed in the past, subject, however,

to an additional restriction which did not exist before September 1, 2016, that is, the annual limit on the energy to which HQ is entitled under Schedule III.

Power

[143] Schedule III, which applies to the period from September 1, 2016 to August 31, 2041, provides that HQ has a right to the *Firm Capacity* under the same conditions as in the Initial Contract, namely, 4,382,600 KW from October to May and 4,163,500 KW from June to September.[88] This power is available "at all times" when HQ requests it (section 5.2). Pursuant to said section 5.2, it is also possible for HQ to obtain additional power if, "in the opinion of CFLCo", this additional power is available.

[144] In addition to these sections, there is the GWAC, which has been in effect since November 1, 1998 and which I mentioned earlier (682 MW for the period from November 1 to March 31 of each year until 2041, a guarantee that is not subject to "the opinion of CFLCo" regarding the availability of this additional capacity).

[145] In short, HQ is entitled, at all times, to the power defined by the expression *Firm Capacity*, and, upon request, to any additional power which, according to CFLCo ("in the opinion of CFLCo"), is available, as well as the additional power whose availability HQ has ensured under the GWAC, which has been in effect since November 1, 1998.

B. CFLCo and sales of interruptible power

[146] This second issue arose when CFLCo initiated a program in 2012 for the sale of interruptible power to NLH.

[147] HQ opposed it, arguing that CFLCo was prohibited from doing so.

[148] The trial judge began by pointing out that power and energy go hand in hand, the first serving to deliver the second. As a result, his decision on the quantity of energy to which HQ is entitled had a major impact on the issue of sales of interruptible power. Since, in his opinion, CFLCo is not entitled to the energy produced over and above the *Annual Energy Base*, there was no question of it selling the power linked to that energy.

[149] The judge then concluded that the concept of sales of interruptible power existed at the time of the negotiations leading to the signing of the May 12, 1969 contract, but that, at that time, the product was entirely different from what it was at the beginning of the 21st century. He therefore concluded that neither CFLCo nor HQ had contemplated sales of interruptible power in their current form.

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88 Section 2.1—*Object*, and definition of *Firm Capacity* in section 1.1.

[150] The judge dismissed CFLCo's argument that it had always intended to keep some power and energy to sell to third parties, both before and after September 1, 2016.

[151] Ruling on the issue, the judge concluded that, until August 31, 2041, CFLCo has no right to the power and energy produced by the plant, except for the 300 MW (*Recapture*) and 225 MW (Twinco) blocks, and that, accordingly, it will not be entitled to sell to anyone whomsoever (including NLH) any quantity whatsoever of power (and energy) exceeding the quantities associated with those two blocks.[89]

[152] On appeal, CFLCo argues that as holder of the hydraulic rights to the Upper Churchill River and owner of the plant, it has the right to sell to anyone it desires all the power that is available and not requested by HQ. Its obligation would be limited to providing HQ with the *Firm Capacity* scheduled by HQ, and nothing more.[90] CFLCo further submits that the penalties to which it may be liable ("fails to make available") as regards the power apply only in respect of the power requested by HQ ("the total megawatts so requested").[91]

[153] According to CFLCo, HQ's position is incompatible with the nature of the rights it holds. It argues that insofar as HQ does not use the power available to it under the contract, regardless of the period, CFLCo may do with it as it pleases, provided it respects its energy and power commitments to HQ, which is why it is entitled to make sales of power that may be interrupted at any time to satisfy HQ's needs.

[154] HQ replies that the basis for this logic is flawed, because unscheduled power is used to build up operating reserves. These reserves are essential for ensuring the reliable and safe operation of its hydroelectric network. Given that this power belongs to it, it is up to it to determine the quantities it wishes to schedule at any given time.

[155] HQ claims that the parties never intended to give CFLCo rights to any quantity of power and energy other than that associated with the Twinco (225 MW) and *Recapture* (300 MW) blocks. Furthermore, the concept of power as an electricity product separate from the energy it can generate did not exist in the 1960s, when the contract was entered into. Thus, the parties could not have envisaged dissociating CFLCo's power rights from its energy rights.

[156] Furthermore, HQ submits, the sales made by CFLCo since 2012 are not really interruptible, as the trial judge concluded.[92]

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89 Trial Judgment, para. 1154-1155.

90 Section 6.4—*Firm Capacity* of the Initial Contract and section 5.2—*Firm Capacity* of Schedule III.

91 Section 1.1, definition of "*Deficiency*", under III—Concerning Capacity, and section 6.5—*Firm Capacity Schedules*, of the Initial Contract, as well as section 1.1, definition of "*Deficiency*", under II—Concerning Delivery, Energy and Capacity, and section 5.3—*Firm Capacity Schedules*, of Schedule III.

92 Trial Judgment, para. 570 and 1130.

[157] In my view, one cannot address this second issue without distinguishing between the following:

- The power associated with the 300 MW (*Recapture*) and 225 MW (Twinco) blocks;
- The power included in the concept of *Firm Capacity* found both in Schedule III and in the Initial Contract, as well as the additional power reserved by HQ under the GWAC (682 MW during the winter period); and, lastly,
- The power associated with the excess energy (over and above the *Annual Energy Base*) to which CFLCo has been and continues to be entitled since September 1, 2016.

The 300 MW and 225 MW blocks

[158] As of the signing of the May 12, 1969 contract, HQ acknowledged CFLCo's obligations towards Twin Falls Power Corporation Limited, namely, 225 MW "at 100% load factor" and "164.95 million kilowatthours per month for energy".[93]

[159] HQ also acknowledged CFLCo's right to recapture, from the power and energy sold by CFLCo to HQ, quantities of power and energy which, in total, cannot exceed 300 MW "at a specified load factor […] of not less than 60% nor more than 90%" and "2,362 billion kilowatthours per year",[94] under certain conditions.[95]

[160] As regards the power covered by these two blocks, like the trial judge, I see nothing that would prevent CFLCo from disposing thereof as it sees fit.[96]

Firm Capacity

[161] Under the May 12, 1969 contract and its Schedule III, HQ is entitled to 4,382,600 KW at the delivery point "at any time in the months of October, November, December, January, February, March, April and May" and 4,163,500 KW at the delivery

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93 Section 4.2.2 and note 1 of Schedule II to the Contract. The same acknowledgement appears in section 4.1.2 (*Existing Obligations*) of Schedule III.

94 Section 6.6 (*Recapture*) of the Initial Contract; section 5.4 (*Recapture*) of Schedule III.

95 At the beginning, CFLCo recaptured a quantity of power and energy totalling 169.3 MW. On March 9, 1998, CFLCo recaptured (and HQ waived the 3-year notice stipulated in the contract) the maximum quantity of power and energy stipulated, namely, 300 MW or 2,362 TWh per year (see note 62).

96 Trial Judgment, para. 1141 and 1154.

point “at any time in the months of June, July, August and September”,[97] at the monthly price specified “for power and energy”[98] or “[f]or all Continuous Energy”.[99]

[162] Under the GWAC, as of November 1, 1998, HQ is also entitled to 682 MW of additional power during the months of November to March, inclusively, until August 31, 2041, at the price stipulated in the GWAC.

[163] As regards the power contemplated by the expression *Firm Capacity*, both in the May 12, 1969 contract and in Schedule III, as well as in the GWAC, I agree with the trial judge. CFLCo has no right to this power, which HQ has paid for and whose availability it has ensured in case of need.[100]

The power associated with the excess energy

[164] With respect to this power, I see nothing that stands in the way of CFLCo disposing thereof as it sees fit, provided it satisfies its commitments in that regard towards HQ under Schedule III (*Firm Capacity*[101]) as well as under the GWAC (682 MW) or under any other agreement relevant to this matter.

C. The conclusions of the judgment

[165] The appellant argues that even if the trial judge’s reasons are well founded, certain conclusions in his judgment go beyond what the parties argued before him and beyond the evidence presented. It submits that this is so as regards (1) the conclusion that HQ is entitled to all the plant’s power (para. 1150), (2) the conclusion that the energy covered by the Twinco Block can only be sold in Labrador West (para. 1150 i), and (3) the conclusion that [TRANSLATION] “CFLCo shall not benefit from any right to any amount of power and energy generated by the plant” (para. 1154), because HQ has an exclusive right to all such power and energy.

[166] The respondent replies that the conclusions of the judgment are inseparable from the reasons and that, in light of those reasons, it is clear that the judge did not want to reach any conclusions relating to hypothetical scenarios or documents (such as the Shareholder’s Agreement between HQ and NLH) that he was not required to interpret.

[167] Which position is correct?

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97 In the Initial Contract, section 2.1 and section 1.1—*Definitions*, under III—Concerning Capacity, (b) “after the Effective Date”; in Schedule III, section 2.1 and section 1.1—*Definitions*, under II—Concerning Delivery, Energy and Capacity.

98 Section 8.4—*Price after Effective Date* of the Initial Contract.

99 Section 7.1—*Price and Price Adjustment* of Schedule III.

100 Trial Judgment, para. 1141.

101 Section 1.1—*Definitions*, under II—Concerning Delivery, Energy and Capacity and sections 2.1 and 5.2.

[168] Under our rules of civil procedure, it is clear that it is up to the parties to determine the subject matter of their dispute. Courts cannot adjudicate "beyond what is sought by the parties", nor are they required to decide "theoretical questions" (art. 10 *C.C.P.*).

[169] With respect to the conclusion dealing with HQ's right to all the plant's power (para. 1150), the appellant is wrong in stating that HQ did not seek such a conclusion. In the first version (July 22, 2013) of its motion to institute proceedings, as well as in its most recent version (December 14, 2015), HQ asks the Superior Court to declare that it [TRANSLATION] "has the exclusive right to purchase all of the power available […] at the Upper Churchill plant".

[170] Therefore, this conclusion did not go beyond the relief claimed.

[171] In any event, this matter is clearly moot given my conclusions regarding CFLCo's right to the excess energy (over and above the *Annual Energy Base*) the plant produced and to the power associated with the production of that energy.

[172] With respect to the second impugned conclusion, which deals with the energy contemplated by the Twinco Block (para. 1051, subpara. i), the trial judge merely paraphrased the words of an agreement between CFLCo and NLH, translating them into French.[102] In reference to the Twinco Block (225 MW), the trial judge wrote: [TRANSLATION] "and which, subject to the conditions set out in the 'Shareholders' Agreement' […], may be sold by CFLCo <u>for distribution and consumption in Labrador West</u> […]". The agreement between CFLCo and NLH states that "CF(L)Co agreed to make available to NLH, as distributor, […] the Twinco Power, <u>for distribution and consumption in Labrador West</u>" and, further on, "NLH agrees […] to purchase from CF(L)Co […] such portion of the Amount of Power and Energy on Order as NLH may require to meet <u>the demand for electricity in Labrador West</u>". The trial judge did not adjudicate a matter that had not been brought before him; he merely reproduced what the texts stated.

[173] With respect to the conclusion in paragraph 1154 of the trial judgment, CFLCo argues that its wording is so strong that it may potentially affect its rights, as owner of the plant, to other electricity products or ancillary services, whether these are currently available or become available in the future as a result, among other things, of improvements to the plant's equipment.

[174] The appellant is attempting to make this conclusion say something that it does not say when read, as it should be,[103] with the accompanying reasons (in particular, paragraphs 1060-1065). It is clear that the trial judge declined to decide this issue, which he characterized as "hypothetical",[104] and justified why he did so.

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102 Exhibit P-339, "Twinco Power Purchase Agreement".
103 *Air Canada c. Québec (Procureure générale)*, 2015 QCCA 1789, para. 242.
104 Trial Judgment, para. 1062.

CONCLUSION

[175] For all these reasons, I would allow CFLCo's appeal in part and declare, first, that HQ's right to the energy produced by the plant is limited annually to the value of the *Annual Energy Base* (but, under sections 4.1.1/*Operational Flexibility* and 5.3/*Firm Capacity Schedules* of Schedule III, it has the right to an operational flexibility similar to that it enjoyed until August 31, 2016) and, second, that, since September 1, 2016, there is nothing preventing CFLCo from disposing of the power associated not only with the *Recapture* and Twinco blocks, but also with the energy produced over and above the energy contemplated by the concept of *Annual Energy Base*, provided, however, that CFLCo satisfies its commitments to HQ.

JACQUES CHAMBERLAND, J.A.