NLH 2017 General Rate Application
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COURT OF APPEAL OF QUÉBEC

(Montréal)

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

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

CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED

APPELLANT
(Defendant)

v.

HYDRO-QUÉBEC

RESPONDENT
(Plaintiff)

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TABLE OF CONTENTS

Appellant's Brief **Page**

APPELLANT'S ARGUMENT

PART I – FACTS 1

A. Summary of the Appeal 1

B. The Facts 6

C. Glossary of Terms 6

PART II – QUESTIONS IN DISPUTE AND GROUNDS FOR APPEAL 8

PART III – ARGUMENTS 9

A. DID THE TRIAL JUDGE ERR BY CONCLUDING THAT HQ HAS THE EXCLUSIVE RIGHT UNDER THE RENEWAL CONTRACT TO ALL OF THE POWER AND ALL OF THE ENERGY AVAILABLE FROM THE PLANT (WITH THE EXCEPTION OF THE RECAPTURE BLOCK AND THE TWINCO BLOCK)? 9

1) The Judgment erroneously failed to give effect and meaning to the terms of the Renewal Contract and modified it under the guise of interpretation. 9

2) The Judgment erroneously reversed the meaning of earlier draft contractual documents to modify a defined term in the Renewal Contract and concluded that Continuous Energy means all of the energy that can be produced at the Plant. 16

3) The Judgment is internally inconsistent and contradictory in its analysis of the meaning of the notion of "Continuous Energy". 21

TABLE OF CONTENTS

Appellant's Brief **Page**

4) The grounds relied upon by the trial judge to disregard entire sections of the Renewal Contract are entirely insufficient to trump the language of the contract and were in any event fully compatible with a defined monthly limit of Continuous Energy. 25

i. Operational Flexibility 26

ii. The GWAC 28

B. THE POWER CONTRACT AND THE RENEWAL CONTRACT DO NOT PREVENT CF(L)CO FROM SELLING INTERRUPTIBLE POWER TO NLH OR OTHER THIRD PARTIES 31

1) Recapture is not a Limit on CF(L)Co's Rights but rather on HQ's Rights 35

2) CF(L)Co's Sales of Interruptible Power to NLH do not Affect the Contractual Rights of HQ 36

3) Operational issues 37

C. THE CONCLUSIONS OF THE JUDGMENT ARE OVERBROAD 38

PART IV – CONCLUSIONS SOUGHT 40

PART V – AUTHORITIES 41

Attestation 43

APPELLANT'S ARGUMENT

PART I – FACTS

A. Summary of the Appeal

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

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

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

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

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

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

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

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

"3.2 Renewal of Contract

This Power Contract shall be renewed on the basis stated in this Section, for a further term of 25 years from the expiry date hereof.

*The renewed Power Contract shall be that set forth **in Schedule III hereof**, which shall come into force automatically without further signature being required.*

***Any or all Articles or Sections of this Power Contract, other than this Section 3.2, as well as any or all undertakings or promises not specifically contained in Schedule III shall have no force and effect beyond the expiry date hereof and shall not thereafter be binding upon the parties to the renewed Power Contract**."*[2]

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

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

"2.1 Object

*During the entire term hereof, Hydro-Quebec agrees to purchase from CFLCo and CFLCo agrees to sell to Hydro-Quebec **each month** the **Continuous Energy** and the Firm Capacity, at the price, on the terms and conditions, and in accordance with the provisions, set forth herein."*

"1.1(Definitions)

II – Concerning Delivery, Energy and Capacity

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

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2 Power Contract, **Exhibit P-1**, s. 3.2, p. 7, **J.S.**, **vol. 3**, **p. 607**.

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

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

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

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

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

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

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

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

[4] A corporeal movable (art. 906 CCQ).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Facts

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

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

C. Glossary of Terms

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

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

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

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

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

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

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

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[7] Power Contract, **Exhibit P-1**, p. 1, **J.S.**, **vol. 3**, **p. 601**.

[8] Glossaire de terminologie liée à l'électricité d'HQ, **Exhibit D-16**, **J.S.**, **vol. 38**, **pp. 14200 to 14203**.

[9] *MacMillan Bloedel Limited* v. *Her Majesty the Queen in the Right of the Province of BC*, 2003 BCSC 705, paras. 15-16 (reasons of Hood J.); Illustration of power and energy concepts, **Exhibit D-17**, **J.S.**, **vol. 38**, **pp. 14204 to 14206**.

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

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

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

PART II – QUESTIONS IN DISPUTE AND GROUNDS FOR APPEAL

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

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

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

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

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

PART III – ARGUMENTS

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

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

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

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

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

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

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

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

"1.1(Definitions)

II – Concerning Delivery, Energy and Capacity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 See also § 143.

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

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

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

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

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

conceptually represent a true average.[24]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

31 Art. 1425 CCQ.

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

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

i. Operational Flexibility

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

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

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

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

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

of the Renewal Contract.

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

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

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

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

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

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

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

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

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

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

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

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

ii. The GWAC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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46 See *Anglo Pacific Group Plc* c. *Ernst & Young*, 2013 QCCA 1323, par. 84.

47 *Kitimat (District)* v. *British Columbia (Minister of Energy and Mines)*, 2008 BCCA 81, par. 26-27, 31 and 38 (reasons of Lowry J.).

48 *District of Kitimat and Wozney* v. *Minister of Energy and Mines et al*, 2007 BCSC 429 (CanLII), par. 58 (reasons of Brenner J.), aff'd 2008 BCCA 81; M. Cantin Cumyn, *De l'existence et du régime juridique des droits réels de jouissance innommés : essai sur l'énumération limitative des droits réels*, (1986) 46 R. du B. 1, par. 50.

49 "*Amendement apporté par Hydro-Québec aux conclusions de sa Requête en jugement déclaratoire*", December 14, 2015, **J.S.**, **vol. 2**, **pp. 563-564**.

50 Definition of Deficiency, **Exhibit P-1**/8 and **P-1**/49, **J.S.**, **vol. 3**, **pp. 608 and 644**.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3) Operational issues

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

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

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

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

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

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

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

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

C. THE CONCLUSIONS OF THE JUDGMENT ARE OVERBROAD

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

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

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

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

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

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

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

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

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

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

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

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

PART IV – CONCLUSIONS SOUGHT

ALLOW the appeal;

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

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

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

The whole with costs, including expert fees.

Montréal, December 16, 2016

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Stikeman Elliott LLP
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Montréal, December 16, 2016

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PART V – AUTHORITIES

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ATTESTATION

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

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

Montréal, December 16, 2016

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500-09-026327-163

QUÉBEC COURT OF APPEAL

(Montréal)

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

N° 500-17-078217-133 C.S.M.

CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED

APPELANT
(Defendant)

v.

HYDRO-QUÉBEC

RESPONDENT
(Plaintiff)

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TABLE OF CONTENTS

Respondent's Factum **Page**

RESPONDENT'S ARGUMENTATION

OVERVIEW **1**

PART I – THE FACTS **3**

A. Negotiation and conclusion of the Contract 3

1. Hydro-Québec's decision to proceed with the Churchill Falls project and the signing of the Letter of Intent 3

2. The conclusion of the Contract and its modalities relevant to the issues at stake in this dispute 5

a. The extension of the Contract for an additional period of 25 years by way of the Renewed Contract 5

b. The granting of full operational flexibility to Hydro-Québec allowing it to manage the Plant's reservoirs 7

c. The adoption of a modality of payment designed to reflect the energy potential of the Plant available to Hydro-Québec 9

B. The conduct of the parties between 1969 and 2009 11

1. The confirmation of a single 65-year contract 11

2. The use by Hydro-Québec of the full operational flexibility 11

3. The conclusion of agreements confirming the rights of Hydro-Québec 12

a. The agreements relating to the Recapture Block 12

b. The GWAC 13

C. The genesis of the present dispute: the re-reading of the Contract by Nalcor 14

1. Nalcor's theory regarding the interpretation of the Renewed Contract 14

2. Nalcor's theory regarding sales in excess of 300 MW 15

PART II – THE QUESTIONS AT ISSUE **15**

PART III – THE ARGUMENTS **16**

A. The concept of "Continuous Energy" is a concept used for the purposes of the modality of payment contained in the Renewed Contract 17

1. The incompatibility of CF(L)Co's theory with the vocation of the AEB 18

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

#11581488

the Original Contract 19

a. The object clause defines the object of the Contract, being the sale of almost all of the production of the Plant.................... 19

b. The object of CF(L)Co's obligation is defined elsewhere in the Contract 21

c. The absence in the Renewed Contract of a provision similar to article 6.2 of the Original Contract does not affect Hydro-Québec's supply rights.................... 22

B. The mirage of "Excess Energy" and its alleged gratuity 22

1. Under the Renewed Contract, Hydro-Québec pays, through "Continuous Energy", all energy contemplated by the Letter of Intent....................22

2. The allegedly gratuity of "Excess Energy" 24

3. The AEB adjustment ceiling: an attempt at diversion....................24

C. The absurdities arising from the interpretation of the Renewed Contract proposed by CF(L)Co 25

1. Hydro-Québec would lose the seasonal flexibility which allows it to meet the demand in Québec and to integrate the Plant into its fleet....................25

2. Hydro-Québec would assume 100% of the hydraulic risk while losing the management of the reservoirs enabling it to manage this risk 27

3. The GWAC would lose its reason to exist and an important part of its value 28

4. Hydro-Québec would pay a rate exceeding 2 mills/kWh under the Renewed Contract....................28

5. The operation of the Plant would be inefficient, sub-optimal and unprecedented 29

A. The status of CF(L)Co as owner of the Plant and holder of water rights: a false debate... 30

B. The so-called "availability" of power not scheduled by Hydro-Québec: a false premise.... 30

C. The lure of the "interruptible" label to describe the sales by CF(L)Co to NLH above 300 MW 31

D. CF(L)Co's criticisms of the judgment's findings *a quo* 32

PART IV – THE CONCLUSIONS 32

PART V — THE SOURCES 32

ATTESTATION 36

#11581488

OVERVIEW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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6 The word "theory" was used during the trial by CF(L)Co's then President and CEO to describe the new and unprecedented interpretation of the Contract proposed by Nalcor with respect to the second issue of this litigation: E. Martin testimony, Nov. 18, 2015, **v. 68, p. 25396, 1. 24.**

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

8 Judgment, para. 49-51.

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

10 Judgment, para. 1001.

11 See Judgment, para. 989-991.

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

PART I – THE FACTS

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

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

A. Negotiation and conclusion of the Contract

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[28] This is precisely what the Government of Newfoundland will attempt to do in the 800 MW Case, which has been denied to it by the Supreme Court of Canada; Exhibits P-26 and P-26A, **v. 4, p. 1312 and s.**
[29] Judgment, para. 269, 270 and 327.
[30] Judgment, para. 271; See also *Churchill Falls* Case, para. 15.
[31] Judgment, para. 954.
[32] Exhibit P-4, s. 11.0, **v. 3, p. 722.**
[33] Exhibit P-8, **v. 3, p. 831**; Judgment, para. 320.
[34] *Churchill Falls* Case, Para. 16. See also Churchill Falls (Labrador) Corporation Ltd. v. Hydro-Québec, 2014 QCCS 3590, para. 460, where the Honorable Joel Silcoff, j.c.s., qualifies these minutes as "self-explanatory, uncontradicted and determinative of the intentions of the parties."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

68 Judgment, para. 499.

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

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

71 Judgment, para. 280-283.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The conduct of the parties between 1969 and 2009

1. The confirmation of a single 65-year contract

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

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

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

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

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

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

[83] Judgment, para. 1015.

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

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

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

[87] *Churchill Falls* Case, Para. 2.

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

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

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

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

a. The agreements relating to the Recapture Block

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

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

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

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

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

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

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

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

94 Judgment, para. 441.

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

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

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

b. The GWAC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[106] Judgment, para. 1028-1029.

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

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

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

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

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

PART II – THE QUESTIONS AT ISSUE

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

[107] Before this turnaround, CF(L)Co has always acted as if the Renewed Contract was merely an extension of the Original Contract, including with respect to operational flexibility, to the point where the first judge considered that the conduct of CF(L)Co before 2009 constituted "the confession of the party": Judgment, para. 1030-1031.
[108] Testimony of E. Martin, Nov. 18, 2015, **v. 68, p. 25396, l. 24 to p. 25397, l. 17**. The term "theory" is that of E. Martin: *supra* note 6.
[109] Testimony of E. Martin, Nov. 18, 2015, **v. 68, p. 25395, l. 11 to p. 25400, l. 13.**
[110] Exhibit D-40, **v. 40, p. 14875 and s.**
[111] Exhibit D-40, s. 10.03, **v. 40, p. 14893.**

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

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

PART III – THE ARGUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[122] Judgment, para. 873-874.

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

[124] Judgment, para. 121-123.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Contrat original	Contrat renouvelé
Energy Payable means (a) In respect of any month after the first Delivery Date and prior to the Effective Date, the amount of energy taken by Hydro-Quebec or made available to it up to the amount indicated in Column 6 of Schedule II hereof as available during the stage of construction applying to such month as shown in Column 1 of Schedule II hereof, plus any excess energy taken by Hydro-Quebec; (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 recaptures is deducted from 35.4 billion kilowatthours.	
Basic Contract Demand means in respect of any month, the number of kilowatthours obtainable, calculated to the nearest 1/100 of a billion kilowatthours, when the Annual Energy Base is multiplied by the number which corresponds to the number of days in the month concerned and the result is then divided by the number which corresponds to the number of days in the year concerned	Continuous Energy means, in respect of any month, the number of kilowatthours obtainable, calculated to the nearest [illegible]00 of a billion kilowatthours, when the Annual Energy Base is [illegible] by the number which corresponds to the number of days in the month concerned and the result is [illegible] by the number which corresponds to the number of days in the year concerned
2.1 Object During the existence of the present Power Contract Hydro-Quebec agrees to purchase from CFLCo and CFLCo agrees to sell to Hydro-Quebec each month (i) prior to the Effective Date at least the amount of energy indicated in Column 7 of Schedule II hereof as available during the stage of construction applying to such month and the Firm Capacity and (ii) from and after the Effective Date, the Energy Payable and the Firm Capacity; all at the prices, on the terms and conditions, and in accordance with the provisions, set forth herein.	**2.1 Object** During the entire term hereof, Hydro-Quebec agrees to purchase from CFLCo and CFLCo agrees to sell to Hydro-Quebec each month the Continuous Energy and the Firm Capacity, at the price, on the terms and conditions, and in accordance with the provisions, set forth herein.

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

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

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

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

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

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

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

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

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

[146] *Supra,* para. 38.
[147] The object clause at section 2.1 does not mention the additional capacity to which Hydro-Québec is entitled under sections 6.4 of the Original Contract, **v. 3, p. 615** and 5.2 of the Renewed Contract, **v. 3, p. 649**. This is another demonstration that the object clause is not intended to identify the object of CF(L)Co's prestation.
[148] Testimony of T. Vandal, Oct. 19, 2015, **v. 59, p. 21745, l. 3 to p. 21746, l. 13.**
[149] Articles 6.5 (a) of the Original Contract, **v. 3, p. 615** and 5.3 (a) of the Renewed Contract, **v. 3, p. 650.**

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

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

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

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

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

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

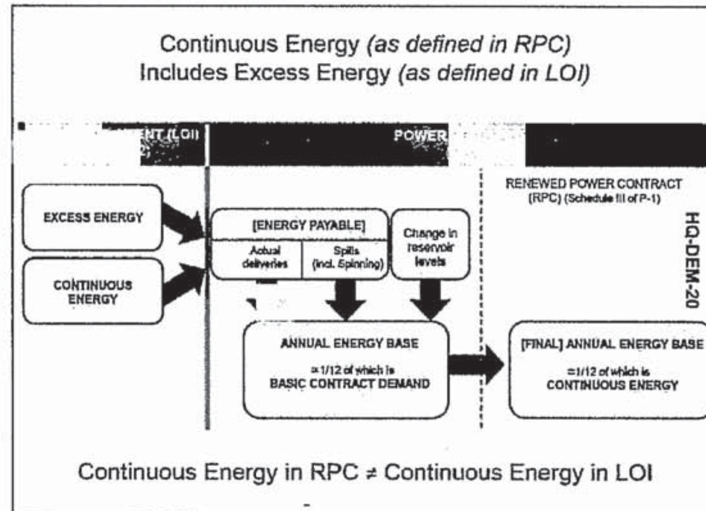
85. The main argument invoked by CF(L)Co in both the first instance[153] and before this Court[154] is based on the fact that the Letter of Intent contained the concepts of "Continuous Energy" and "Excess Energy", while only the notion of "Continuous Energy" can be found in the Renewed Contract. According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

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

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

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

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



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

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

[156] *Appellant's Brief*, para. 13-15, 59 and 64
[157] On the other hand, the trial judge correctly described the concept of "*Continuous Energy*" as used in the Letter of Intent in para. 202, 235 and 241 of the Judgment.
[158] Exhibit HQ-DEM-20, **v. 58, p. 21574.**
[159] Judgment, para. 986: "... the application of the "*Split Tariff*" and "*Annual Energy Base*" clauses led to the abandonment of the expression "*Continuous Energy*". See also Exhibit P-160, **v. 13, p. 4226-4227** and Judgment, para. 286: "*[...] Continuous and excess energy definitions and related provisions will cease to be applicable*"; Exhibit P-161, **v. 13, p. 4233** and Judgment, para. 291 and 959.
[160] See Exhibit P-172, **v. 13, p. 4352**, of which Exhibit P-6, **v. 3, p. 770** confirms that it was prepared by CF(L)Co.
[161] Original Contract, Exhibit P-1, s. 9.2, **v. 3, p. 619.**

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

2. The allegedly gratuity of "Excess Energy"

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

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

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

3. The AEB adjustment ceiling: an attempt at diversion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[171] Judgment, para. 996.

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

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

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

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

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

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

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

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

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

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

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

[179] Judgment, para. 993.

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

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

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

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

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

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

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

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

Contract: see Judgment, para. 741 and 997.

182 Judgment, para. 506-509.

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

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

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

186 Judgment, para. 957.

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

188 Judgment, para. 716.

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

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

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

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

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

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

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

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

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

[192] Judgment, para. 1018.

[193] Judgment, para. 1019.

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

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

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

[197] Judgment, para. 509.

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

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

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

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

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

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

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

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

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

112. CF(L)Co criticizes the trial judge for failing to determine what it considers to be the true relevant issue with respect to sales above 300 MW: "*can CF(L)Co use capacity that is otherwise idle to produce energy other than HQ's entitlement, when that capacity is not needed to meet HQ's energy schedules?*"[209]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[221] Judgment, para. 1130.

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

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

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

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

PART IV – THE CONCLUSIONS

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

Montréal, March 2, 2017

Norton Rose Fulbright Canada,
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(Me Pierre Bienvenu, Ad. E.)
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Montréal, March 2, 2017

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PART V — THE SOURCES

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224 *Appellants' Brief,* para. 154-160.
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Compagnie de chemin de fer du littoral nord de Québec et du Labrador inc. v. Sodexho Québec ltée, 2010 QCCA 2408 61

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ATTESTATION

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

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

Montréal, March 2, 2017

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

Hydro-Québec,
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(Me Lucie Lalonde)

Attorneys for the Respondent

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SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

NO: 500-17-078217-133

DATE: August 8, 2016

BEFORE: THE HONOURABLE MARTIN CASTONGUAY, J.C.S.

HYDRO-QUÉBEC
Plaintiff

v.

CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED
Defendant

JUDGMENT

I. INTRODUCTION 5

II. THE PROTAGONISTS 8

A) HYDRO-QUÉBEC 8

B) BRINCO 10

C) CF(L)Co 11

D) NEWFOUNDLAND AND LABRADOR HYDRO (NLH) 11

E) NALCOR ENERGY (Nalcor) 12

III. SITUATION OF THE PARTIES AT THE TIME OF NEGOTIATIONS 13

A) THE PROVINCE OF QUÉBEC AND HYDRO-QUÉBEC 13

B. NEWFOUNDLAND 15

IV. THE CHURCHILL FALLS PROJECT 16

V. BRIEF SUMMARY OF THE POSITION OF THE PARTIES 19

A) HQ 19

B) CF(L)Co 20

VI. CIRCUMSTANCES SURROUNDING THE SIGNING OF THE MAY 12, 1969 CONTRACT 21

A) PREAMBLE 21

B) HISTORY OF THE NEGOTIATIONS 22

1) THE FIRST ROUND 23

2) THE SECOND ROUND 24

3) THE FINAL ROUND 33

C) NEGOTIATIONS LEADING TO THE SIGNING OF THE MAY 12, 1969 CONTRACT 38

1) SPLIT TARIFF 40

2) ANNUAL ENERGY BASE 43

3) OPERATIONAL FLEXIBILITY CLAUSE 44

4) RENEWAL CLAUSE 48

VII. RELATIONSHIP BETWEEN THE PARTIES BETWEEN MAY 12, 1969 AND 1998 51

A) PRÉAMBLE 51

B) NEWFOUNDLAND’S DEMANDS AND THE JUDGMENTS 51

C) NEW ROUNDS OF NEGOTIATIONS 60

1) 1989 to 1992 61

2) 1995 to 1996 64

3) 1998 67

i) TWINCO BLOCK 68

ii) 300 MW RECALL 69

ili) GWAC 70

iv) SHAREHOLDERS’ AGREEMENT 74

VIII. OPERATIONS OF THE POWER PLANT AND TRANSMISSION OF ENERGY 75

A) INTERACTION BETWEEN H.Q. AND CF(L)CO 75

B) NEW REALITY IN THE TRANSMISSION OF ENERGY 80

C) EVENTS SURROUNDING HQ’s DISCOVERY OF THE EXISTENCE OF INTERRUPTIBLE SALES, AND CF(L)Co’s POSITION ON THE INTERPRETATION OF THE RENEWED CONTRACT 90

IX. EXPERTS 101

A) PREAMBLE 101

B) QUALIFICATION OF THE EXPERTS 102

- BODELL REPORT: Continuous Energy: an overview of Contemporaneous Industry context 110
- LAPUERTA REPORT: An Economic and Financial Analysis of the Renewed Power Contract between Hydro-Québec and Churchill Falls (Labrador) Corporation Limited. 115
- PFEIFENBERGER REPORT: CF(L)Co's Sales of “Interruptible” Power.123
- BODELL REPORT: Interruptible Power and overview of Industry context and CF(L)Co's ability to sell. 128

X. PARTIES’ POSITION 131

A) H.Q. 131

B) CF(L)Co 132

XI. ISSUES IN DISPUTE 134

XII. ANALYSIS 135

SCHEDULE I 175

SCHEDULE II **194**

SCHEDULE III **213**

I. INTRODUCTION

[1] Since May 12, 1969, Hydro-Québec (hereinafter referred to as "HQ") and Churchill Falls (Labrador) Corporation Limited (hereinafter referred to as "CF(L)Co") have been bound by a contract known as a "Power Contract". That contract expires September 1, 2016 and a new set of provisions contained in Schedule III of the May 12, 1969 Contract are to take effect on the same date and govern the parties for a further 25 years.

[2] The parties disagree on the scope of certain provisions of the aforementioned Schedule III, to the extent that they each characterized it differently. Thus, according to CF(L)Co, it is a "Renewal Contract" whereas according to HQ, it is a "Renewed Contract". The difference is significant.

[3] Accordingly, one of the issues in dispute is whether there are two distinct contracts or are whether we are dealing with what HQ describes as a contractual whole.

[4] That said, as this decision is drafted in French, the Court will designate Schedule III as the "Contrat renouvelé" ["Renewed Contract"] and the May 12, 1969 Contract as the "Contrat principal" ["Main Contract"].

[5] Apart from the interpretation of the Renewed Contract, HQ raises a number of divergences of opinion regarding the scope of the Main Contract and that of the Renewed Contract with respect to new commercial practices implemented by CF(L)Co, practices which, while barely possible in 1969, currently prevail in the energy market owing to the technological advances, regulatory changes and increased regulatory flexibility that has occurred in North America.

[6] Thus, HQ has applied to the Court for a declaratory judgment aimed at clarifying its contractual relations with CF(L)Co.

[7] This application focuses on two major themes. It is appropriate at this juncture to reproduce the amended conclusions sought by HQ:

> [Translation:]
>
> "**ALLOW** Hydro-Québec's application to introduce proceedings for a declaratory judgment.
>
> **DECLARE** that pursuant to Schedule III **(**the **Renewed Contract)** of the contract entered into on May 12, 1969 **(**the **Contract)** between Churchill Falls (Labrador) Corporation **(CF(L)Co)** and Hydro-Québec, Hydro-Québec has an exclusive right to purchase all the available power and all the energy generated at the Upper Churchill Generating Station, as defined in article 1.1 of the original Contract and in the Renewed Contract (at the definition of "Plant") and as maintained in accordance with article 4.2.4 of the original Contract and article 4.1.4 of the Renewed Contract (Generating Station), with the exception of the power and the energy associated with:
>
> i the 225 MW block that was reserved to CF(L)Co to satisfy its obligations to Twin Falls Power Corporation Limited until December 31, 2014 and which, subject to the conditions set forth in the "Shareholders' Agreement" entered into on June 18, 1999 between

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

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

DECLARE that the rights conferred on Hydro-Québec under article 4.1.1 of the Renewed Contract, including power and energy scheduling and planning rights, are not in any manner limited, circumscribed or restricted, on a monthly basis, to the purchase of blocks subject to a quantity cap that would be established on the basis of the notion of "Continuous Energy" stipulated in the Renewed Contract, and that such rights are exercisable with respect to all available power and all energy generated at the Generating Station, to the exclusion of power and energy associated with the 300 MW Block and the Twinco Block.

DECLARE that pursuant to the Renewed Contract, Hydro-Québec is not obliged to limit its energy delivery requests to blocks subject to a monthly cap to be established according to the notion of "Continuous Energy" stipulated in the Renewed Contract.

DECLARE that pursuant to the Renewed Contract, CF(L)Co has an obligation to deliver to Hydro-Québec, on demand, all the available power and all the energy generated at the Generating Station, with the exception of the power and energy associated with the Twinco Block and the 300 MW Block.

DECLARE that as long as the Contract is in effect, namely until August 31, 2041, CF(L)Co is not entitled to any quantity of power and energy generated at the Generating Station, with the exception of the power and energy associated with the 300 MW Block and the Twinco Block.

DECLARE that as long as the Contract is in effect, namely until August 31, 2041, CF(L)Co may not sell to a third party, including NLH, any quantity of power and energy in excess of the quantities associated with the 300 MW Block, irrespective of the fact that said sales are on a firm or allegedly "interruptible" basis.

[8] Obviously, CF(L)Co, contests HQ's claims. The three (3) main conclusions of its contestation are reproduced below:

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

DECLARE that in addition to the 300 MW of Recapture and in addition to the Twinco block, CF(L)Co is entitled under the Power Contract and the Renewal Contract to use the Churchill Falls power plant's available capacity to increase the rate of delivery of energy to third parties, provided that by so doing it continues to make available to Hydro-Quebec its requested power and energy scheduled in accordance with the terms and conditions of the contracts.

DECLARE that, as owner and operator of the Churchill Falls power plant and holder of the hydraulic rights, CF(L)Co is entitled to operate the Churchill Falls

plant as it deems appropriate and is entitled to derive revenues where possible from selling all electricity products that have not been specifically sold to Hydro-Quebec or third parties under the terms of a contract, provided that CF(L)Co fulfils its contractual obligations to Hydro-Quebec and third parties."

[9] Thus, briefly summarized, the issues in dispute are as follows:

- Under the Renewed Contract, is HQ entitled to all the power and energy generated by the Churchill Falls Generating Station while retaining the same flexibility that it had during the period of the Main Contract.
- Is CF(L)Co entitled to make "interruptible" sales to third parties from energy and power not required by HQ and for power in excess of the 300 MW recapture[1].

[10] Relations between HQ and CF(L)Co span some five decades and have been punctuated by numerous court proceedings described very briefly below.

- Action before the courts of Newfoundland and those of Québec concerning the recapture by the Province of Newfoundland-and-Labrador[2] of some 800 MW from the Churchill Falls Generating Station output.
- Reference to the Newfoundland Court of Appeal regarding the application of the *Upper Churchill Water Reversion Act* enacted by the Province of Newfoundland, which reference was ultimately decided by the Supreme Court.
- Action by CF(L)Co seeking an order modifying the pricing terms of the contract. The judgment of the Québec Superior Court dismissing CF(L)Co's claims was upheld by the Québec Court of Appeal on August 1, 2016.

[11] Thus, although some of the above judgments rendered over the years can enlighten this Court, the analysis that it must conduct concerns an aspect barely touched on in previous court actions, except in the last case, and even then, only up to a certain point.

[12] To answer the questions raised in this matter, the Court will have to consider the historical context of the negotiation and signing of the Main Contract and of the Renewed Contract. The Court will also discuss the relationship between the parties from after the contracts were signed up to the present, including the various legal actions instituted by each party. Given that this relationship spans some fifty years, it must be analyzed through the prism of technological, regulatory and market developments.

[13] The Court proposes to deal with this matter as follows. After introducing the parties and providing the background, for a proper understanding of the evidence adduced before the Court, the position of the parties will be outlined before the matter before the Court is addressed. This decision will therefore be delivered using the following headings:

- THE PROTAGONISTS.
- THE SITUATION OF THE PARTIES AT THE TIME OF THE NEGOTIATIONS.
- THE CHURCHILL FALLS PROJECT.
- BRIEF SUMMARY OF THE POSITION OF THE PARTIES.
- THE CIRCUMSTANCES SURROUNDING THE SIGNING OF THE MAY 12, 1969 CONTRACT.
  - A) Preamble

---

[1] The reader is henceforth referred to the glossary reproduced in Appendix I of the terms used to designate units of power or of electric energy.

[2] This is the exact name of the province, however for reasons of brevity, it will be referred to as Newfoundland.

B) History of the negotiations

i) Negotiations leading to the Letter of Intent
- First round
- Second round
- Final round

ii) Negotiations after the Letter of Intent of May 12, 1969 (including its schedules) (Renewed Contract)

- RELATIONS BETWEEN THE PARTIES BETWEEN MAY 12, 1969 AND 1998.
- OPERATION OF THE GENERATING STATION AND ENERGY TRANSMISSION.
- EXPERT REPORTS.
- POSITION OF THE PARTIES.
- ISSUES IN DISPUTE.
- ANALYSIS.

[14] Although certain sections of this judgment may seem redundant in light of previous decisions, they are nevertheless essential for an understanding of this decision because they form the basis for the reasoning leading to its conclusions.

II. THE PROTAGONISTS

A) HYDRO-QUÉBEC

[15] The forerunner of Hydro-Québec, the Québec Hydro-Electric Commission, a Crown agent, was created by provincial statute in April 1944[3]. That name would be used until 1978 until it was designated under its current name, Hydro-Québec.[4]

[16] When it was created, HQ's primary market was limited to the Montréal area since it took over the "Montreal Light and Power Company" which at the time produced 4,000 MW mainly through the Les Cèdres Generating Station, a "run-of-river"[5] generating station".

[17] In 1963, during Quebec's "Quiet Revolution", electricity was nationalized through the purchase of almost all the private power producers in Québec.

[18] Under nationalization, HQ's output increased to 6,000 MW.

[19] One of the power producers purchased by the Commission during the nationalization period was the Shawinigan Light and Power Company, whose subsidiary Shawinigan Engineering Limited held 20% of the shares of the company now known as CF(L)Co.

[20] As an illustration, the Churchill Falls Generating Station project contemplated in the early 1960s planned for some 5,423 MW of power, which alone was almost equal to the entire electricity production distributed in Québec.

[21] Over the years, HQ was the architect of many other projects, the best known of which are Manicouagan and La Grande.

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[3] *Act to Establish the Québec Hydro-Electric Commission,* S.Q., 1944, c. 22.
[4] The Québec *Hydro-Electric* Commission will be referred to under its present name, Hydro-Québec, unless the historical context requires that it be identified under its original name
[5] Known in French as "au fil de l'eau".

[22] Most of those projects, including Churchill Falls, are generating stations with reservoirs, unlike run-of-river generating stations whose water supply depends on river current strength. The characteristics of these kinds of generating stations with reservoirs are central to the argument.

[23] In 1997, the US electricity market underwent a profound structural change: our neighbours to the south adopted regulations aimed at opening up all electricity transmission networks to promote electricity transmission. Thus, the transmission systems that until then were owned by independent entities, had to be made available to other users.[6]

[24] The Court deliberately employs the term "users" because, as will be seen later, despite the fact that at the inception of this mini revolution access was intended for producers, with the advent of technological innovations, a number of other industry players joined the original users.

[25] The business revolution south of the border led HQ to make major changes in its business model. In 2001 it created the following divisions:

1. HQ Production (hereinafter referred to as "HQP."), the division that manages the Generating Fleet and acts as a wholesaler for sales outside Québec.
2. HQ Trans-énergie (hereinafter referred to as "HQT."), the division that manages the transmission of energy generated until its final destination, irrespective of whether the energy is for export or for local consumption.
3. HQ Distribution (hereinafter referred to as "HQD"), the division that distributes electricity locally to industrial, commercial and residential consumers.
4. HQ Équipement (hereinafter referred to as "HQE"), the division that carries out the various work required by HQ to build or maintain generating or transmission structures.

[26] HQ engages in 10 or 20-year planning periods for its Generating Fleet and Transmission Network based on demand growth.

[27] Since 1963, the Hydro-Québec Fleet has expanded. Thus, according to HQ's 2014 Annual Report[7] its Fleet is constituted as follows:

62 Hydro-electric generating stations for total power of	=	36,100MW
25 thermal generating station for total power of	=	543 MW
		36,643 MW
Other sources:		
Churchill Falls Generating Station for power of		5,428 MW

[28] HQ's Generating Fleet, including those equipped with reservoirs, is not uniform either as regards reservoir capacity or as regards water supply. With enormous variations in weather from one region of Québec to another, it is a matter of common sense that snow and rain precipitation levels will not be the same for a generating station like La Grande, in north-western Québec, as for a generating station like Manic in the north-eastern part of the province, .

---

[6] To describe this concept, Americans use the term "Open Access".

[7] Exhibit P-52 A.6, (2014) /118.

[29] Thus, although the Churchill Falls Generating Station when completed represented almost half of HQ production in the early 1970s, by 2014 its contribution had declined to about 15% of HQ production

B) BRINCO

[30] As well as HQ's acquisition of shares in CF(L)Co through Shawinigan Engineering Limited in the early 1960s, particular attention should be focused on the other controlling shareholder, namely Brinco, several of whose directors played a key role in the Churchill Falls Project.

[31] Thus, Brinco was incorporated on April 17, 1953, with the following principal shareholders:

- N.M. Rotschild & Sons
- Anglo-American Corporation of South Africa
- Anglo-Newfoundland Development Company Limited
- The Bowater Paper Corporation Limited
- The English Electric Company Limited
- Frobisher Limited (its interest was ultimately transferred to the Compagnie Financière de Suez)
- Rio Tinto Company Limited[8]

Brinco's shareholders varied over the years. The following are some key events.

1963 Purchase by Rio Algom Mines Limited of 185,000 Brinco shares.

1968 Thornwood Investments Limited, whose majority shareholder is Rio Tinto-Zinc Corporation Limited and minority shareholder is Bethlehem Steel Corporation, was created and purchased all the shares that until then had been held by Rio Algom Mines Limited, thereby becoming Brinco's controlling shareholder.

[32] An excerpt from a "Quick Reference Summary" dated June 9, 1964 published by "The Financial Post Corporation Service" succinctly summarizes the importance of Brinco's role in the development of the Churchill Falls Generating Station.

> "In 1958, the Company transferred its rights to develop the Upper Hamilton River[9], including Hamilton Falls, to a new company, Hamilton Falls corporation limited, in which it had an 80% interest. The remaining 20% was owned by Shawinigan Water and Power, which was acquired by the Province of Quebec (Hydro-Québec)[10].

[8] Exhibit P-81.

[9] In 1965, the name of the Hamilton River was changed to Churchill River, posthumous homage to Britain's former Prime Minister, Winston Churchill. Thus, the original name of CF(L)Co, which was Hamilton Falls Power Corporation, was also changed. Except in very specific instances and for historical considerations, the Hamilton River and the Hamilton Falls Power Corporation will be referred to under their new names.

[10] Exhibit P-125***12,*** penultimate paragraph, left column.

[33] In 1974, Brinco's 65.8% equity interest in CF(L)Co was purchased by Newfoundland Industrial Development Corporation[11] for $160 million, which interest was ultimately transferred to Newfoundland Labrador Hydro in the fall of 1975.

C) CF(L)Co

[34] CF(L)Co was created by Brinco on January 31, 1958, which at the time held the entirety of CF(L)Co's share capital[12].

[35] CF(L)Co's corporate stated purpose is hydro-electric development of the Churchill River in Labrador.

[36] On October 8, 1958, Shawinigan Engineering Company Limited purchased 20% of CF(L)Co's shares[13].

[37] As noted earlier, in March 1963 the Québec Hydro-Electric Commission acquired the parent company of Shawinigan Engineering Company Limited and thus became a CF(L)Co shareholder for the same 20% equity interest formerly held by the parent company.

[38] From 1963 to 1975 a number of share issues or share sales took place. The transactions most relevant to this matter are as follows:

- November 1968: One million CF(L)Co shares issued to HydroQuébec bringing its equity interest to 34.2%[14].
- June 1974: Acquisition by Newfoundland Industrial Development Corporation of the shares until then held by Brinco in CF(L)Co and its hydro-electric development rights in the Churchill River[15].
- 1975: Transfer by Newfoundland Industrial Development Corporation of its shares in CF(L)Co to Newfoundland Labrador Hydro[16].

[39] Lastly, and as a result of other transactions, since November 1975 the shareholders of CF(L)Co and their respective equity interests are as follows.

NLH:	65.8%
HQ:	34.2%

[40] Currently, CF(L)Co's board of directors has eight (8) positions filled as follows: six (6) NLH representatives and two (2) HQ representatives.

D) NEWFOUNDLAND AND LABRADOR HYDRO (NLH)

[41] NLH is a creature of the Province of Newfoundland and was constituted in 1975. Until very recently it was the province's energy arm.

[11] Exhibit P-227.
[12] Exhibit D-29, p. 6.
[13] Exhibit P-82.
[14] Exhibit P-219.
[15] Exhibit P-305*17.*
[16] *Id.*

[42] Upon its creation, Newfoundland Industrial Development Corporation transferred its shares in CF(L)Co to NLH, giving it 68.5% of CF(L)Co's common shares.

[43] On the Island of Newfoundland, NLH is an electricity producer that operates several generating stations with a total output of 950 megawatts[17].

[44] NLH directly serves industrial customers and consumers in the outlying areas of the Island. As for major centres, the electricity generated by NLH is sold to an independent distributer, Newfoundland Power[18], which ensures the distribution of that electricity.

[45] NLH also has transmission lines in the Labrador part of the province including two 230-KV lines supplying western Labrador, and one 138-KV line supplying Goose Bay[19].

[46] As at the date hereof, there is no transmission line between Labrador and the Island of Newfoundland. However, that situation will change as of 2017 when a 900-MW submarine line linking Labrador and the Island of Newfoundland is completed.

[47] The 900-MW line that will link Churchill Falls to the Muskrat Falls Generating Station will be used not only to supply power to part of the Island but also to export energy to Nova Scotia and New England[20].

[48] NLH is under the authority of the Public Utilities Board of Newfoundland.

E) NALCOR ENERGY (Nalcor)

[49] Nalcor Energy is a Crown corporation of the Province of Newfoundland created in 2007[21,22]

[50] This entity was created further to the efforts of a working group whose mission was to provide the Province of Newfoundland with a consolidated energy arm[23].

[51] As of its creation, Nalcor became NLH's parent company. It would also head the Oil and Gas Corporation of Newfoundland and Labrador in addition to ensuring development of the electric potential of the Lower Churchill[24].

[52] Pursuant to its incorporating statute, NLH's directors automatically became Nalcor directors.

[53] Currently, Nalcor has 6 business lines. They are as follows[25]:

- NLH
- Churchill Falls
- Oil and Gas
- Lower Churchill Project
- Bull Arm Fabrication

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17 Exhibit P-350.
18 Id
19 Chad Wiseman, transcript, November 23, 2015, p. 96-97 and 112-113.
20 Exhibit D-221.
21 *ENERGI Corporation Act S.N.L,* 2007, c. E-11.01.
22 Examination out of court of Edmund Martin, February 4, 2015, Exhibit P-381 /57.
23 *Id.* /34.
24 Exhibit P-289.
25 Exhibit P-290, (2014) /382-385.

- Energy Marketing

[54] Nalcor incorporated the last of the above business lines, Energy Marketing, under the name Nalcor Energy Marketing Corporation (NEMC). The following is how Edmund Martin describes its activities[26]:

> "And our sixth line of business is Energy Marketing which has also recently become a separate company. And this Energy Marketing arm currently sells the recall energy from Churchill Falls, which is sold to Newfoundland & Labrador Hydro, this Energy Marketing company actually handles the direct sales of that electricity currently through Québec with an open access transmission arrangement that we have, Energy Marketing has, and they sell it directly into the markets.
>
> The vision for this company obviously Your Honour, is as Muskrat Falls comes online, there's significant excess energy that is not needed for the province. Gull Island would be another addition obviously. And the longer-term plan is to have this group also handle the marketing of the oil and gas from the Oil and Gas division over time."

[55] In 2015, NEMC became NLH's agent on the US electricity market as a "purchasing-selling entity" specifically on the New York, New England markets and the Pennsylvania, New Jersey, Maryland market[27], the latter known as PJM.

[56] This concludes a very brief presentation of the main protagonists involved in this case.

III. SITUATION OF THE PARTIES AT THE TIME OF NEGOTIATIONS

[57] It is important for what follows, to describe the respective situations of the parties at the time of negotiations.

A) THE PROVINCE OF QUÉBEC AND HYDRO-QUÉBEC

[58] In the early 60s, the population of Québec was approximately 5,250,000[28] 25% of which lived in rural areas versus 75% in the cities[29]. Québec's gross domestic product represented 26%[30] of Canada's gross national product.

[59] In 1962, the Québec Hydro-Electric Commission operated nine 9) generating stations that produced approximately 3,675 MW[31].

[60] Virtually all of that production was from "run-of-river" generating stations.

[61] In 1962, Manic Generating Stations 5 and 2 were under construction. Upon completion, they would ultimately generate an additional 2,296 MW. Those generating stations have reservoirs[32].

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[26] Transcript, Edmund Martin, November 18, 2015, p. 71, lines 3 to 23.
[27] Transcript, Robert Henderson, November 5, 2015, p. 132, lines 20 to 25, p. 133, lines1 to 9.
[28] Statistics Canada, Canadian Census (1851 to 1971) and Population Estimates (1971 to 2015: September 2015), adapted by the Institut de la statistique du Québec.
[29] Association canadienne-française pour l'avancement des sciences, Politique et Économie, 1986, p. 51.
[30] Association canadienne-française pour l'avancement des sciences, Politique et Économie, 1986, p. 70.
[31] Exhibit P-52 A.1, (1962) *H* 3.
[32] *Id.*

[62] In 1962, HQ also had three (3) projects underway, namely Manic 3, Outardes 58 and Outardes 45[33]. Upon completions, they would ultimately produce an additional 2,250 MW of power. Those generating stations also have reservoirs[34].

[63] Electricity was transmitted from the Manic-Outardes hydro-electric complex through 735-KV lines using technology developed in-house at HQ[35]

[64] In 1963, during Quebec's "Quiet Revolution", as part of the electricity nationalization process, HQ purchased outright 90% of the shares in the following independent power producers:

- Shawinigan Water and Power.
- Southern Canada Power Company Limited.
- Québec Power Company.
- Gatineau Power Company.
- Lower St. Lawrence Power Company.
- Saguenay Power Company.
- Northern Québec Power Company Limited[36].

[65] The additional power from these various producers brought HQ's total capacity to 6,382 MW[37].

[66] In 1965, the first Manic 2 generating sets and the first 735-K transmission lines were commissioned. By the end of 1965, while the Manic 5 and Outardes were still under construction[38], HQ's total power was 7,349 MW.

[67] By 1967, HQ's total output was 8,178 MW[39].

[68] At that time, HQ predicted exponential growth in its requirements, establishing them at 16,125 MW by 1978[40].

[69] However, HQ's 1967 annual report reported an annual increase in the following terms:

[Translation:]

"Consumption by Québec customers increased by 8.8%, a rate, which if sustained would double requirements in eight to ten years." [41]

[70] To summarize, at the end of 1967, while negotiations regarding Churchill Falls Project were underway, HQ saw a substantial increase in requirements at a time when a large part of its power was derived from run-of-river generating stations and those with reservoirs (Manic, Outardes...) were in the process of being completed, although a few units were functional. Furthermore, an initial 735-KV transmission line was already in service from the Manicouagan complex.

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[33] The name of Outardes 38 was changed to Outarde 3, and Outardes 45 was changed to Outarde 4, transcript of the testimony f C. Dubé, October 28, 2015, p. 42, lines 2, 3 and 4.
[34] Exhibit P-52 A.1, (1962)/20.
[35] Exhibit P-52 A.1, (1962)/21.
[36] Exhibit P-52 A.2, (1963) /13.
[37] /d./51.
[38] P-52 A.3, (1965) /10/55.
[39] D-29, p. 15. That figure was rounded up to 8,179 MW.
[40] *Id.,* p. 16.
[41] P-52 A.4, (1967) *17.*

B. NEWFOUNDLAND

[71] The Dominion of Newfoundland joined the Canadian Confederation as a province on April 1, 1949. In the early 60s, its economy was driven by the fishing industry and it had a population of 457,000 distributed equally between urban and rural settings[42].

[72] Newfoundland's gross domestic product represents 1.26%[43] of the overall Canadian gross national product. However, it ranks the highest in Canada for jobs related to the fishing industry[44].

[73] In the two decades after Newfoundland joined the Canadian Confédération, there was been a profound transformation of that industry from family-run or artisanal to mass production using processing plants.

[74] The Province of Newfoundland's then Liberal Premier, Joseph R. Smallwood, was convinced that the Churchill River had immense energy potential.

[75] As a result of J.R. Smallwood's persuasive efforts in 1952 with Winston Churchill, a group of investors founded the British Newfoundland Corporation Limited (Brinco) on April 17, 1953.

[76] In the weeks following its incorporation under *The Government-British Newfoundland Corporation - N.M. Rothschild and Sons (confirmation of agreement) Act*, Brinco was granted the option of obtaining exclusive rights "to harness and make use of all or any of the rivers, streams, waterways and watersheds in Newfoundland and Labrador including the Hamilton river..."[45]

[77] Enactment of that statute resulted in an agreement on May 21, 1953 pursuant to which Brinco, in exchange for investing $1,250,000,00 every five (5) years over a period of 20 years to explore and develop natural resources, was granted an option regarding hydro-electric rights for a renewable period of 99 years.[46].

[78] On June 30, 1958, Brinco incorporated CF(L)Co and transferred to the new entity its rights under the aforementioned Act and the May 21, 1953 agreement. The transfer indicates that Brinco had already incurred exploration expenses of $5,477,371.48,[47] the equivalent of $45,000,000.00 in 2015 dollars[48].

[79] On May 26, 1960, CF(L)Co exercised its hydro-electric rights option under the May 21, 1953 agreement[49].

[80] On the same date, namely May 26, 1960, CF(L)Co, informed the Premier of Newfoundland that it would shortly be commencing construction of a generating station through a subsidiary, namely Twin Falls Corporation Limited, 2/3 of whose shares were controlled by CF(L)Co. The function of that generating station was to satisfy the energy needs of various mines operating in the western part of Labrador.

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[42] Government of Newfoundland and Labrador, Historical Statistics of Newfoundland and Labrador, October 1970, Table A-11.
[43] Government of Newfoundland and Labrador, Historical Statistics of Newfoundland and Labrador, October 1970, Table F-1.
[44] Statistics Canada, Historical Statistics of Canada, 2nd ed., 1983, N38-48.
[45] Exhibit D-4, s. 9.
[46] Exhibit D-5, ss. 1 and 9.
[47] Exhibit D-6.
[48] Bank of Canada inflation calculator.
[49] Para 160 of the CF(L)Co defence, admitted by H.Q.

[81] On March 13, 1961, Newfoundland enacted the *Hamilton Falls Power Corporation Limited (lease) Act* for the purpose of entering into a lease. Pursuant to that Act, a 99-year lease was signed between CF(L)Co and the Province of Newfoundland, which lease is renewable for a further 99 years[50].

[82] The lease between CF(L)Co and the Province of Newfoundland provided for the payment by CF(L)Co of royalties on the sale of electricity generated by the Hamilton River[51].

[83] Thus, in 1961 (CF(L)Co held the water rights in the Hamilton River and between 1953 and 1958 incurred some $5.5 million dollars in exploration and development expenses, and had commenced construction of the Twin Falls Generating Station.

[84] At that time, there was no electric transmission link between Labrador and the Island of Newfoundland.

IV. THE CHURCHILL FALLS PROJECT

[85] When it was designed and developed, the Churchill Falls Generating Station was unique of its kind in America in terms of size, capabilities and *situs* and even in its manner of financing. It is therefore worthwhile to list its main features.

[86] At the outset, the Court states that this section is based primarily on the "Churchill Falls (Labrador) Corporation Limited - First Mortgage Bonds Series A - Offering Memorandum (referred to herein as the "O.M.")[52]and the "Technical Abstract and Engineers' evaluation" prepared by the firm ACRES and dated April 23, 1968[53]. However, as will be seen later, most of that information would be somewhat different by the time the project was completed.

[87] However, it must be stated that the lifespan of such structures is considerable. Thus, according to Claude Dubé, a retired HQ engineer, that lifespan is as follows[54].

Dam and dykes	=	120 years
By-pass canals	=	100 years
Turbines / Generating units	=	50 to 60 years

[88] The residual value of those same structures is also considerable. Thus, using the cost method, Thierry Vandal, valued the Churchill Falls Generating Station at some $20 billion in 2015[55].

[89] In view of the above, this description of the project as it was envisaged is fundamental for an understanding of the negotiations as certain changes to the final result led to modifications of the negotiation process that culminated in the contract between the parties.

[90] The generating station is in the western part of Labrador approximately 200 km east of Labrador City and Wabush which mark the western border between Labrador and Québec[56].

[50] Exhibit D-8, the lease that was produced is unsigned, but it has been acknowledged by H.Q.
[51] *Id.,* p. 16 of the lease.
[52] Exhibit D-29.
[53] Exhibit P-198, it should be noted that according to the parties, this Exhibit should be Appendix F of the 'O.M.; an appendix that was not included with Exhibit D-29.
[54] Transcript, Claude Dubé', October 28, 2015, p. 82, lines 2 to 17.
[55] Transcript, Thierry Vandal, October 19, 2015, p. 120, lines 15 to 25, p. 121, lines 1 to 3.
[56] Exhibit D-231.

[91] Churchill Falls has two large reservoirs and two diversion bays covering an area of some 600 square kilometres with a capacity of some 26 billion kilowatthours.

[92] The more westerly reservoir is known as Ossokmanuan and the other one as Smallwood.

[93] The water supply to the Generating Station from the reservoirs is controlled by a structure known as the "Lobstick Control Structure".

[94] A fact that should be noted that affects the operation of the Generating Station is that once water from the reservoirs crosses the Lobstick Control Structure, it will take three (3) days to reach the Generating Station to be channeled through the turbines.

[95] Another unique feature is the topography of the site: the reservoirs are located on a plateau higher than the Churchill River thus allowing an optimal head. Acres describes the site as follows[57]:

> "The central Labrador plateau on which the drainage basin of the Upper Churchill River lies has an elevation of between 1,300 and 1,900 feet above sea level. The surface of the plateau has only minor relief, with few hills rising to more than 500 feet above the general plateau level. Vegetation is sparse, but some of the land is covered by low spruce forest and there are extensive areas of boulder field and generally shallow muskeg.
>
> The area is characterized by numerous large and small lakes and extensive areas of swamp, and has a random drainage pattern with few well-defined streams. Over 20 per cent of the basin is covered by water and the volume of natural storage is high.
>
> Runoff from the plateau is mainly concentrated in the Churchill, Unknown and Naskaupi Rivers, of which the most important is the Churchill. Flowing from Sandgirt and Lobstick Lakes, it falls in a series of rapids and a great waterfall, the Churchill Falls, to its preglacial channel over 1,000 feet below the plateau, as shown on Plate 3."

[96] This feature is so important that it merited the following passage in the O.M.[58]:

> "An unusual feature of the Churchill Falls development is that power output is independent of reservoir drawdown, since the forebay elevation remains relatively constant (variation is under five feet) under any conditions of reservoir storage upstream of the control structures. Therefore the gross head on the turbines and the resultant power output capability of the plant is relatively constant. Generally, on river development schemes with large dams, any drawdown of the upstream reservoir significantly reduces hydraulic head on the plant and lowers the generating capacity of the installations. Significant operating advantages accrue when a plant may be operated at any storage level without power output being materially affected."
>
> (Emphasis added)

[97] The main conclusions of Acres, as reproduced in the O.M., are as follows

[57] Exhibit P-198/39, Engineering Report, p. 5.
[58] Exhibit D-29, p. 28.

1. The Project can be constructed and will be capable of performing as required and expected. The firm capacity at the delivery point will be 4,431,500 kilowatts after providing for station service, townsite loads, electrical losses and local loads of 225,000 kilowatts.
2. A sufficient long-term average flow of water will be available to provide an average energy output of 34.5 billion kilowatt hours per annum at the generator terminals when the capacity at the delivery point is allowed to vary between firm capacity and 2,500,000 kilowatts. Under these conditions, the Project will be physically capable of providing an average energy output of 31.8 billion kilowatt hours at the delivery point.

   If the plant is operated between the above limits of deliverable capacity in such a manner as to produce an average energy delivery of less than 31.8 billion kilowatt hours per annum, an amount of water will be spilled, equivalent to the reduction in delivered energy.
3. The Construction Cost Estimate as defined of $563,306,000, plus the addition of a provision for escalation at 4.5 per cent compounded annually, is adequate to complete the Project, and provides a sufficient allowance for possible increases in cost of labour, material and services during the scheduled period of construction.
4. The Project can be constructed within the schedule proposed, so as to have initial power available as planned in 1972, and all eleven units completed and operable by 1976.[59]

[98] As noted above, the Generating Station is about 1,200 km from Montréal. The costs related to construction of 735-KV transmission lines were estimated in the O.M. at $72,284,000.00, and only for the portion in Newfoundland, with HQ to assume the costs of the transmission lines over some 1,000 km from the Labrador/Québec border to Montréal.

[99] Other financial features were set forth in the O.M. Thus, the main sources of external financing were as follows:

- First Mortgage Bonds - $590 million
- Bank Loan - $100 million
- General Mortgage Bonds - $100 million[60]

[100] Thus, HQ undertook to purchase all remaining units of the "General Mortgage Bonds" issue, in the event any were unsold after the other shareholders had exercised their options. Therefore, HQ's commitment was for a potential $100 million[61].

[101] Furthermore, as noted in the O.M., HQ had agreed to make the necessary funds available upon completion of the Generating Station in the event that the financing was insufficient. The relevant excerpt is as follows:

> "However, Hydro-Quebec has agreed that, once CF(L)Co has obtained or arranged to obtain a minimum of $700 million (expressed in Canadian dollars) to construct and bring the Project into operation it will provide without limitation as

[59] *Id.,* p. 26-27.
[60] *Id.,* p. 48, see note 1 pertaining to the Bank Loan.
[61] *Id.,* p. 49 and 50.

to total amount any funds additional to the then available funds of CF(L)Co which may be required to complete the project."[62]

[102] Moreover, according to the O.M., HQ had agreed to do the following:

1. Bridge CF(L)Co's liquidity gaps[63].

2. Refurbish or replace the entire project in the event of destruction[64].

3. Assume the risk related to the fluctuation of foreign exchange rates[65].

4. Assume an increase in interest rates on the First Mortgage Bonds (above 51/2% per annum) and on any other CF(L)Co obligation (above 6% per annum)[66].

V. BRIEF SUMMARY OF THE POSITION OF THE PARTIES

[103] One of the Court's imperative tasks in this matter is to interpret the contracts negotiated and signed in 1969.

[104] Clearly, as regards the issues raised in this case, the Court must consider the negotiations and their outcome.

[105] At this juncture, it is important to establish the respective positions of the parties.

[106] As noted earlier, their positions must be stated very broadly for a proper understanding of the evidence adduced before the Court and its treatment of that evidence. After the Court's presentation of all the evidence, it will focus on the position of the parties in greater detail.

A) HQ

[107] First, HQ argues that the Main Contract, the Renewed Contract and the contract entitled "Churchill Falls Guaranteed Winter Availability Contract (GWAC)" in effect November 1, 1998, all form a contractual whole.

[108] According to HQ the Main Contract entitled it to purchase virtually all the power and associated energy of some 5,428 MW generated by the Generating Station.

[109] HQ largely bases its entitlement to the power on the article entitled "Operational flexibility" which is in both the Main Contract and the Renewed Contract.

[110] Thus, according to HQ this multi-year and seasonal flexibility allowed it to require more power from the Generating Station in the winter and less in the summer when demand drops.

[111] HQ complains that CF(L)Co's position is clear; it has interpreted the Renewed Contract so that the only flexibility HQ will retain would be intra-monthly. HQ characterizes CF(L)Co's interpretation as the 'blocks theory" interpretation.

[112] HQ's position in that respect is summarized in its application as follows:

[Translation:]

[62] *Id.,* p. 55, this undertaking is in the May 12, 1969 contract.
[63] *Id.,* p. 57, heading: Debt services requirement.
[64] *Id.,* p. 58, heading: Restauration of plant. [sic]
[65] *Id.,* p. 59, heading: Assumption of risk on foreign exchange.
[66] *Id.,* p. 59, heading: Interest adjustment payments.

"142. Therefore, CF(L)Co is incorrect in claiming that the Hydro-Québec's rights under the Renewed Contract are limited to the purchase of blocks of energy subject to a monthly cap to be established in accordance with the "Continuous Energy" concept.

[113] Furthermore, HQ noted that for several years CF(L)Co had been selling power and energy on an "interruptible" basis, as described in industry jargon, something that it is not entitled to do pursuant to existing contractual agreements or under those to follow .

[114] HQ's views on this particular issue are as follows:

[Translation:]

"158. At no time whatsoever during the term of the Original Contract or of the Renewed Contract, is CF(L)Co entitled to sell to a third party, on a firm or allegedly "interruptible" basis, any amount of power in excess of the 300 MW limit, because any quantity of power in excess of the 300 MW limit vests exclusively in Hydro-Québec under the Original Contract and under the Renewed Contract."

B) CF(L)Co

[115] CF(L)Co maintains that it is correct in stating that as of September 1, 2016 it can apply what HQ calls the "Blocks theory".

[116] According to CF(L)Co, the Renewed Contract must be interpreted separately from the Main Contract because article 3.2 of the Main Contract states *inter alia*:

"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 any or all undertakings or promises not specifically contained in Schedule III shall have no force and effect..."

[117] The Renewed Contract states its purpose as follows:

"Hydro-Quebec agrees to purchase from CF(L)Co and CF(L)Co agrees to sell to Hydro-Quebec each month the continuous energy and the firm capacity ...»[67]

[118] The definition of "Continuous Energy" as stipulated in the Renewed Contract is derived from a mathematical calculation established on a monthly basis, the source of which is the various adjustments made throughout the term of the Main Contract and which allowed for establishment of a final "Annual Energy Base".

[119] According to CF(L)Co, although this interpretation modifies the flexibility that HQ used to have, it does not do away with it entirely.

[120] As regards interruptible sales, CF(L)Co states that pursuant to article 5.2 of the Renewed Contract, its obligation to sell to HQ is limited to HQ's requests and if it does not make any such request, then nothing prevents CF(L)Co from making interruptible sales to third parties because according to the very principle underlying this type of sale, CF(L)Co can interrupt it and redirect the electricity to HQ as soon as it makes a request therefor.

[67] Exhibit P-1/51, clause 2.1.

VI. CIRCUMSTANCES SURROUNDING THE SIGNING OF THE MAY 12, 1969 CONTRACT

A) PREAMBLE

[121] Although CF(L)Co maintains that the Renewed Contract is unambiguous, it is a matter for the Court to first establish whether or not there is an ambiguity.

[122] In order to answer that first question, the Court must examine the circumstances that surrounded the negotiation and signing of the Main Contract and the Renewed Contract given that they were entered into at the same time.

[123] At this juncture it is necessary to examine what that the Court describes as the history of the negotiations.

[124] Discussions between BRINCO and HQ began in the early 60s and were intermittent, with various stops and starts over the years.

[125] What follows is a synopsis of the negotiations that led to the signing of the October 13, 1966 Letter of Intent followed by the May 12, 1969 contract.

[126] The Court will discuss the development of the positions of each party regarding very specific points and clauses. However, the Court intentionally omits certain aspects of the negotiations that were introductory to the issues in dispute and would only weigh down evidence that is already very dense.

[127] The explanation and clarification of a number of points is necessary to ensure that this decision flows smoothly.

[128] Certain terms used by the negotiators to describe or quantify power and energy or describe certain concepts were always in English. The same terms were the subject of expert reports and there again, the authors expressed themselves in English. Although it may affect the flow of the [French] text, the Court will refer to the English terms.

[129] Moreover, a number of the concepts were emphasized in the negotiations and require explanation. Once again to ensure the flow of the text, the Court will now explain the following concepts, so that they are understandable.

- Take or pay
- The Twinco Block
- The "Recall" Bloc
- Split Tariff

TAKE OR PAY

[130] This concept benefits the Generating Station operator, who will be assured of earnings, irrespective of whether or not the purchaser takes delivery of the energy.

[131] As will be seen later, this concept insisted on by CF(L)Co was dictated by financial considerations related to returns and guaranties sought by the project's investors.

THE TWINCO BLOCK

[132] As seen earlier, in describing Newfoundland's situation, Brinco had begun construction of the Twin Falls Generating Station even before negotiations with HQ had commenced.

[133] The output of that Generating Station was intended to fulfil the energy requirements of mining operations underway in Labrador West.

[134] As a result of the diversion of certain bodies of water required by the Churchill Falls Project, the Twin Falls Generating Station could not meet its contractual obligations to its customers in western Labrador.

[135] As a consequence, and this was never the subject of major argument between the parties, it had been agreed that part of the Churchill Falls output would be reserved to satisfy the requirements of Twin Falls Generating Station customers, hence the expression Twinco Block.[68]

THE "RECALL" BLOCK

[136] CF(L)Co wanted to be able to appropriate part of the Generating Station's output to satisfy Newfoundland's requirements.[69]

[137] Although no transmission line linked Labrador to the Island of Newfoundland at that time, it had always been planned. Moreover, the Premier of Newfoundland the Honourable J. Smallwood tried to interfere in that aspect of the negotiations despite the fact that CF(L)Co held hydro-electric development rights to the Churchill River.

[138] The quantity of MW destined for the Recall and the words used to enshrine it as well as the change in vocation of the Recall would acquire capital importance over the years and give rise to at least one court action between the Province of Newfoundland and CF(L)Co.

SPLIT TARIFF

[139] This concept in connection with "Take or Pay" introduced two components regarding payment payments, namely fixed and variable.

Fixed	=	66.67% of the Annual Energy Base for a given month.
Variable	=	3.33% of Energy Actually Delivered to HQ including the spilling.

[140] The special feature of the fixed component is well described in HQ's application, the relevant paragraph of which is reproduced below.

> [Translation:]
>
> "60. The commitment to pay a Fixed Component to CF(L)Co means that pursuant to the Original Contract, Hydro-Québec agreed to assume a significant part of the risks related to run-off fluctuations of the Generating Station's reservoirs, given that it had agreed to pay for energy the delivery of which CF(L)Co could not guarantee."

B) HISTORY OF THE NEGOTIATIONS

[141] That said, several of the goals sought by the parties at one time or another will also be dealt with as they influenced the overall vision of the parties regarding this venture.

[142] Thus, for example, it will be seen that the possibility of exporting electricity to the US had long been a fundamental consideration for HQ. Once HQ realized that this would be impossible in the short or medium term, it had to rethink its vision and perception of the Churchill Falls Project.

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[68] On occasion, the Twinco and Recall Blocks will be referred to collectively as "the reserved Blocks".

[89] *Id.*

[143] The negotiations that led to the signing of the Letter of Intent were conducted in three stages. The first round lasting a few months in 1961, followed by a second round that lasted from March 1963 to July 1964 and the final round, which took place from March 1965 until the signing of the Letter of Intent on October 13, 1966.

[144] Although the first two rounds were unsuccessful, the Court must address several subjects dealt with in those negotiations since they form an integral part of the progression towards the October 13, 1966 agreement.

[145] Obviously, due to the passage of time, evidence surrounding that period is strictly documentary.

1) THE FIRST ROUND

[146] On February 18, 1961 a meeting was held at the Windsor Hotel in Montréal. The participants were the then Premier, the Honourable Jean Lesage, Mr. Marier, Mr. Grenville-Smith and Mr. Southam. Mr. Grenville was a director of Brinco and Mr. Southam was its CEO[70].

[147] It was a very preliminary discussion; the Mr. Southam's notes report the following:

- The discussion revolved around the Churchill Falls Project in relation to Québec's requirements, with the current development of Manicouagan-Outardes as the backdrop.
- It was established that the financing planned for Churchill Falls could be private and that Québec might consider that advantageous.
- That said, at that time, the Manicouagan-Outardes project was already underway and there did not seem to be any question of suspending it.
- The issue of electricity exports to Ontario was raised, however, Premier Lesage did not see any merit to that proposition in the short term.
- Premier Lesage invited Mr. Southam and Mr. Grenville-Smith to meet with Jean Lessard, the President of Hydro-Québec[71].

[148] Thus, a meeting was arranged with Mr. Lessard, who suggested a meeting involving Hydro-Québec's engineers.

[149] That meeting took place on March 6, 1961. The notes of that meeting, drafted by Mr. Morgan-Grenville, indicate that discussions were general. The notes show that although the Hydro-Québec representatives had only a vague idea of the project, they nevertheless laid the foundations for their requirements and the contents of a formal offer from CF(L)Co[72].

[150] At the time of that meeting, it was clear to the participants that the quantity of electricity that could be generated at Churchill Falls would greatly exceed HQ's requirements regarding the supply of power to the town of Sept-îles and its industries and, as a consequence,

> "Power would, therefore be integrated into the Hydro-Quebec system which needs something in excess of 250,000 h.p. of new power each year ..."[73]

[151] That meeting would give rise to a formal offer on March 23, 1961 from CF(L)Co to HQ The offer, again very preliminary, contained the following items, and indicated that there may be further discussions and amendments.

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[70] Exhibit D-43.
[71] *id.*
[72] Exhibit P-84, para 12. At that time, engineers used the concept of horsepower to describe power.
[73] *Id.,* para 21.

- Quantity of energy:
  1,000,000 h.p. "to be continuously available"
- Term:
  25 years as of October 15, 1965
- Price:
  The price considered for the first million horsepower was 23.00 per horsepower or 3.5 mill[74] per kWh.

  The price for the second million horsepower was 2.6 mill per kWh[75].

[152] On May 15, 1961, HQ advised CF(L)Co that it did not intend to act on the March 23, 1961 offer because it wanted to complete the Manicouagan-Outardes development. However, HQ did not close the door to further discussions in the following terms:

> "The Commission has decided that, under present economic conditions, it is preferable to go ahead with the development of its own hydraulic resources on the Manicouagan River. This would, therefore, relegate to a later date the import of energy from Hamilton Falls, if it is still available.
>
> Our Planning Committee is aware of the amount of power that could be made available to Quebec from this source of supply; they are requested to keep that in mind and to signal any economic advantages that could be gained therefrom by Hydro-Quebec at any future date"[76].
>
> (emphasis in the original)

[153] As seen earlier, HQ planned for implementation of the first phase of Manicouagan-Outardes in 1965[77].

2) THE SECOND ROUND

[154] In March 1963, contemporaneous with Québec's nationalization of electricity, discussions resumed between the representatives of HQ, Brinco and H.G. Acres, a firm of engineers retained by CF(L)Co to advise it on the technical aspects of harnessing the Churchill River.

[155] This second round of negotiations is the result of a decision by Canadian federal authorities to allow electricity exports to the US and the interest shown by New York State's Consolidated Edison in purchasing the surplus production of Churchill Falls on an interruptible basis, once Hydro-Québec's requirements had been filled[78].

[156] This last aspect was the backdrop to the second round of negotiations. Thus, most of the documents cited by the Court refer to that possibility and the Court will not spend time on it unless it can shed light on the issues in dispute.

[157] A memo was drafted by J.R. Hango of HQ concerning a March 4, 1963 meeting, which he describes as exploratory[79].

[158] That memo deals mainly with the transmission of energy across Québec to the US. However, it states that development of Churchill Falls would require borrowing approximately

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[74] Mill was a unit of monetary measurement used in the electricity industry at that time.
[75] Exhibit D-9.
[76] Exhibit D-10.
[77] Exhibit P-52A.1, (1962)/20.
[78] Exhibit D-48, [translation:] "Recitals".
[79] *Id.,* p. 2.

$500 million, 75% of which would come from the US and 25% from Canada. Furthermore, and for the purpose of that financing, a 25-year agreement with Consolidated Edison would be necessary[80].

[159] Although the recitals noted in Mr. Hango's memo were revisited at a second meeting involving HQ, Brinco and Acres held on March 14, 1963, the notes of that meeting indicate that Acres had been instructed to assess the following items:

a) Cost of generation

b) Cost of transmission

c) Amount of power required by Hydro-Quebec and the timing of its requirements[81]

[160] Furthermore, Mr. Clinch of Acres made the following comments concerning future sales to Consolidated Edison. As those comments are relevant to this decision, the following extract is reproduced below:

> "Mr. Clinch said that there may be advantages to all parties concerned in adjusting the load factors so as to take advantage of seasonal differences between the Hydro-Quebec and the Con Edison load patterns and in order to ensure that only the necessary amount of storage is provided at Hamilton Falls."[82]

[161] Thus, CF(L)Co was aware of the need for harmonization between Churchill Falls (the reservoirs) and HQ export requirements.

[162] Another memo, this one by a Brinco representative, dealt substantially with the same subjects namely, available transmission lines for export and HQ's future requirements.

[163] In short, the "exploratory" meeting of March 4, 1963 focused on HQ's requirements, transmission lines for export purposes, and the cost of the project.

[164] A second meeting was held on March 14, 1963 between the respective representatives of Brinco, Acres and HQ. The introduction to the notes taken at that meeting is revealing. It reads as follows:

> "This meeting was apparently called for the purpose of reviewing future procedure."[83]

[165] Once again, transmission lines were discussed. Two observations are of importance:

a) In a few weeks, Acres would provide "the maximum generating capacity from Hamilton Falls".

b) In addition to the planned 700-KV transmission line, three new 700-KV lines would be necessary from Churchill Falls to Manicouagan-Outardes[84].

[166] The Court considers it worthwhile reproducing in its entirety paragraph 6 of the minutes of that meeting because according to CF(L)Co, it indicates the level of knowledge of certain terms used by the parties including the notion of "Firm Energy".

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[80] *Id.,* para 6, p. 3.
[81] Exhibit D-49, p. 3.
[82] *Id.* p.4.
[83] Exhibit D-50.
[84] *Id.,* paras 5 and 7. It should be noted that the 700-KV lines discussed at the time would become the present-day 735-KV lines.

> "Apparently, Acres & Co. will not be able to produce an estimate of the firm annual energy generation of Hamilton Falls Generating Station until the end of May. Until this information is available, it will not be possible to estimate definitely the cost per kwh for transmission from the Newfoundland-Quebec boundary to the Quebec-State of New-York boundary."

[167] In the same vein, a July 31, 1963 letter from Mr. Clinch of Acres sent to CF(L)Co refers to a rate for two levels of energy for a future contract with HQ I.e., a price for "the guaranteed minimum energy output" and a lower price for "secondary energy" or the energy in excess of the guaranteed energy[85].

[168] Starting in August 1963, HQ and CF(L)Co entered the preparatory phase for the purpose of producing a letter of intent. Accordingly, several drafts were prepared by CF(L)Co some of which were sent to HQ, others not[86].

[169] The final result was the draft of August 30, 1963, formally submitted to HQ on September 3, 1963[87].

[170] That said, it should be noted that the parties had a sense of urgency since the draft letter of intent had to be submitted at a meeting of the Hydro-Electric Commission scheduled for September 11.

[171] The following topics of interest are in the draft letters of intent:

- Quantity of energy sold and guarantee of delivery;
- The "Take or Pay" concept;
- The Twinco Block and local requirements; and
- The "Recall Block"[88] for the Province of Newfoundland's requirements.

[172] The question surrounding the quantity of energy and the guarantee of delivery was the most important question as well as the most difficult to answer for the parties because given that the Churchill Falls development was at the project stage, the quantity of energy depended on the number of turbine/generating units installed and the supply of those units with water from the reservoirs. In short, although determinable by calculations and projections, the parties were navigating in unchartered waters regarding final figures. Furthermore, HQ wanted guarantees of supply regarding the energy generated.

[173] Henceforth, the concepts "energy", "capacity" and "power", become important in the history of the negotiations. The glossary included herewith should be consulted for a proper understanding of what follows, noting that in the early 60s, electricity industry professionals used the terms "Capacity" and "Power" to express the rate of energy delivery.

[174] Lastly, on September 5, 1963, HQ submitted its draft letter of intent to CF(L)Co, which letter contained various changes, some minor, some major[89]. In the version drafted by HQ the "Take or Pay" concept was replaced with the expression "According to general conditions outlined hereunder".

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[85] Exhibit D-52, p. 3.
[86] Exhibit D-55, Draft of August 8, 1963; Exhibit D-56, Draft of August 12, 1963; Exhibit D-59, Draft of August 16,1963; Exhibit D-60, Draft of August 21, 1963; Exhibit D-63, Draft of August 29, 1963; Exhibit D-64, Draft of August 30,1963.
[87] Exhibit D-64.
[88] Henceforth identified as the Recall Block.
[89] Exhibit P-061.

[175] The second major change in relation to the draft submitted by CF(L)Co is that HQ replaced the term "Primary Energy"[90] used by CF(L)Co with the expression "The remaining part of firm dependable power and energy to be available..."[91].

[176] In addition to the final texts, it is very useful to consider the various accounts of the meetings held between HQ and CF(L)Co or of those held by each party internally, in August and September 1963.

[177] According to Mr. Morgan-Grenville's notes of the August 22, 1963 meeting, he explained their vision of the "Take or Pay" concept to Mr. De Guise, agreeing that discussion on that point would better be left to their immediate superiors[92].

[178] On August 23, 1963 the definition regarding the guarantee of delivery was summarized by Mr. Morgan-Grenville in the following terms[93].

> "It was evident that further discussion was needed to establish clearly the concepts of firm capacity and firm energy. HQ were inclined to take the view that all energy which was not firm according to their definition should be regarded as secondary."
>
> (Emphasis added)

[179] Furthermore, at the September 3, 1963 meeting held on the occasion of the submission of the draft letter of intent prepared by CF(L)Co, Mr. De Guise suggested that the notion "Take or Pay" be left for negotiation at a higher level[94].

[180] The meeting of September 6, 1963 touched on many more topics that would be the subject of later discussions. They were as follows:

- Changes made by HQ to CF(L)Co's August 30, 1963 draft, reflected in HQ's September 5, 1963 draft letter of intent;
- The possible addition of another unit;
- A penalty in the event of failure to supply;
- Limits on the Recall possibility;
- The term of the contract; and
- Renewal clauses[95].

[181] The parties continued their discussions on September 9, 1963.

[182] On September 30, 1963 Mr. Kirwan-Taylor of Brinco drafted a report providing a rundown of the Churchill Falls development at various levels including the negotiations with HQ Once again, the same concepts were discussed[96]

[183] Lastly, CF(L)Co submitted a new draft letter of intent at a meeting held October 1, 1963[97]. The notes of that meeting were prepared by CF(L)Co external lawyer, Maître Culver[98].

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[90] Exhibit D-64, art. 8.
[91] Exhibit P-61,art. 4.
[92] Exhibit P-91.
[93] Exhibit D-61.
[94] Exhibit D-65, point 3.
[95] Exhibit P-062
[96] Exhibit P-102.
[97] Exhibit P-101.
[98] Exhibit P-63.

[184] The new draft reintroduced the notion of "Take or Pay" and the concept of two tariffs: one price for the quantity of energy agreed upon by parties and another price for additional or surplus energy.

[185] For the first time the draft contained a table establishing the commissioning dates for the units and the associated energy.

[186] This was a turning point in the negotiations; the project seemed much more advanced than when previously considered.

[187] It is worthwhile reproducing some of the comments made by the participants at that meeting:

> "Mr. Morgan-Greenville then discussed the concept of sale, mentioning that the price had not as yet been settled and that this would be worked out between Messrs. Winters and Lessard subject, however, to the obtaining of a check estimate on the cost of the project. Mr. Morgan-Grenville stated that discussions to date had been with a view to a straight kwh charge but that now Brinco was thinking in terms of a split tariff.[99]
>
> (...)
>
> Mr. de Guise referred to his counter proposal given to us after a study of our draft of 3 September 1963, and he stressed that Hydro-Quebec had definite load commitments and he wished to be able to depend on certain amounts of power to meet these commitments.[100]
>
> (...)
>
> Mr. de Guise asked that the Twin Falls set up be explained and clarified and Mr. Clinch did this, pointing out that it would be about 214 times as efficient to use the present Twill Falls water through the HFPCo plant.[101]
>
> (...)
>
> Mr. Farnham stated that he would like to see a further column added to the table entitled "Firm Power" but he was eventually dissuaded from this.[102]
>
> (...)
>
> Mr. de Guise again stated that Hydro needs firm power and that there must be spare capacity to cover outages. He mentioned that the Manic 2 projects was built to provide a capacity of four units but that Hydro had put in five. Mr. Farnham again emphasized that their practice was to consider one unit firm for each two installed.[103]
>
> (...)
>
> Messrs. De Guise. Lemieux and Farnham then objected more or less vehemently to the take or pay concept on the ground that Hydro took the whole risk while it had no control over the design and construction of the plant. Mr. Farnham said

[99] Exhibit P-63/1.
[100] Exhibit P-63/2, 4e paragraph.
[101] *Id.,* 6e paragraph.
[102] *Id.,* para 8
[103] Exhibit P-63/4, para 2

> the situation would be different if Hydro was building a plant of its own and stated that Hydro would want to supervise the whole design and construction program- Mr. de Guise put it another way: Hydro pays for the whole thing but HFPCo spends the money in a manner over which Hydro has no control.[104]
>
> Mr. Mulholland then outlined the take or pay article, explaining that this sort of provision was necessary (in the opinion of counsel) in order that HFPCo's bonds would be "adequately secured" within the meaning of the New York State Life Insurance law requirements for legal investments. Mr. Lemieux had a number of sarcastic comments to make along the lines of Hydro-Quebec having to pay even if the whole plant was blown up. Mr. Lemieux asked what percentage of the plant cost was to be covered by U.S. pay bonds.[105]
>
> [... Mr. Kirwan-Taylor then brought the discussion around to the question of Newfoundland power. (...)
>
> From Hydro's point of view they had to consider the fact that they had built a vast transmission system and did not wish to have too much recaptured and he pointed out that there were various alternatives…**]**"[106]
>
> (Emphasis added)

[188] The notes make it very clear that a that stage the parties were nowhere close to agreement.

[189] Negotiations continued.

[190] It is worthwhile noting that in November 1963, Mr. McParland, who had become one of the CF(L)Co negotiators, was given a glossary dating from 1961 entitled "Glossary of Electric Utility Terms" together with a letter from Mr. Hobson of CF(L)Co insisting on three terms namely[107]:

- Firm Power
- Load Factor
- Capacity Factor

[191] On November 25, Mr. Winters of Brinco wrote to Jean-Claude Lessard of HQ advising him that CF(L)Co was ready to proceed on the basis of the October 7, 1963 draft letter of intent with several changes including the term of the contract and the pricing associated with the energy delivered[108].

[192] The October 7, 1963 draft letter of intent was enclosed with the November 25, 1963 letter and Appendix A explaining CF(L)Co's view of the "Take or Pay" concept. The following extract provides a good summary of the characteristics of this type of contract.

> "The proposed power contract between Hydro-Quebec and HFPCo would contain certain provisions usually described as take-or-pay provisions. These provisions would entail on the part of Hydro-Quebec an obligation, first, to pay for capacity and energy for which it had contracted and which was delivered or

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104 *Id.,* para 3
105 Exhibit P-63/5, para 3
106 Exhibit P-63/6, para 1
107 Exhibit P-83.
108 Exhibit P-108.

> made available by HFPCo, and second, regardless of whether or not HFPCo delivers or makes available the capacity or energy contracted for, to continue to make payments to HFPCo of a certain stipulated [a] minimum amount."[109]

[193] HQ tendered a memo from Mr. De Guise that was contemporaneous with the November 25, 1963 letter[110].

[194] That memo notes that the issue of quantity of energy and available power was still unresolved and had become a thorny subject as regards the negotiations between HQ and Consolidated Edison. Furthermore, the "Take or Pay" principle appears to have been accepted since HQ knew that it was a key item for obtaining financing.

[195] The memo also reiterated that the maximum permissible Recall could not exceed 15% of the Generating Station's capacity because of HQ's considerable investment in the transmission lines between Churchill Falls and Montréal. (The figure given at that time was $500 million).

[196] On December 2, 1963, Mr. De Guise formally stated his concerns to Mr. Lessard, which were as follows:

- The Churchill River's available water flow;
- Operating problems;
- The price of the electricity;
- The risks on both sides;
- Tariffs;
- Various general matters including:
    - a spinning reserve.
    - "Take or Pay" conditions[111]

[197] The general impression given by that letter is that Mr. De Guise's main concern was financial in nature, the cost issue or tariffs being involved in most of the points raised.

[198] A new draft letter of intent prepared by CF(L)Co was sent to H.Q, on January 7, 1964. It clarified a number of points in the earlier drafts including the table introduced for the first time when the October 1, 1963 draft letter of intent was submitted. The new table with six (6) columns provided the following two types of information:

- Firm Capacity and Associated Energy.
- Spare Capacity and Associated Energy.

[199] On January 28, 1964, Mr. Lessard of HQ wrote to Mr. Winters of Brinco stating that HQ was unable to proceed for the following three reasons:

- Pricing.
- HQ had still not received a report from the Committee formed by the Premier concerning the financial aspects of the project.
- Negotiations with Consolidated Edison had stalled[112].

[109] *Id.,* Appendix A to the Letter of Intent /23.
[110] Exhibit P-109, the memo in question is undated.
[111] Exhibit P-110.
[112] Exhibit P-113.

[200] At the same time, Mr. De Guise reported internally that he had major reservations regarding the overall project[113]. The remoteness of the Generating Station and the fact that HQ had to postpone other projects weighed heavily in his reasoning.

[201] On March 10, 1964, further to the reports and studies provide by Acres, Mr. Winters sent a letter to Mr. Lessard stating "We have prepared an energy formula ...", which was incorporated in a new draft letter of intent dated March 9, 1964 enclosed with his letter.

[202] The Court considers it useful to reproduce that formula in full.

> "9. The term "firm capacity" for the purposes hereof shall mean the aggregate capacity of all generating units installed at any given time less one unit, the capacity of which shall for such purposes be termed "spare capacity". The amounts of firm capacity and spare capacity which can be made available at the agreed point of delivery are as given in Columns 3 and 4 respectively of the Table on the following page.
>
> The term "continuous energy" for the purposes hereof shall mean the energy which can be made available continuously at the agreed point x)f delivery, subject only to forced outages at the station in excess of one unit, up to but not exceeding 105 percent of the estimated amounts given in Column 5 of the Table.
>
> The term "excess energy" for the purposes hereof shall mean all energy other than continuous energy as defined above which can be made available at the agreed point of delivery from time to time or continuously whether from operation of the units at dates earlier than those given in Column 1 of the Table, or from increased water availability, or from improved efficiency of plant and equipment.
>
> 10. Subject to the provisions of Clause 13. HFPCo proposes to sell to Hydro-Quebec and Hydro-Quebec proposes to purchase from HFPCo all continuous energy and all excess energy."[114]
>
> (Emphasis added)

[203] In other words, CF(L)Co intended to sell all its output from the Generating Station to HQ.

[204] There was no follow up to that new draft letter of intent, as the parties had failed to agree on a fundamental element, namely the price of energy sold.

[205] While CF(L)Co weighed in again by lowering the asking price, HQ had prepared a new draft letter of intent substantially modifying the "energy formula" developed by CF(L)Co, reducing it to its simplest terms. The relevant passage reads as follows:

> "10. Subject to the provisions of Clause 14, HFPCo proposes to sell to Hydro-Quebec and Hydro-Quebec proposes to purchase from HFPCO all continuous energy and all energy from spare unit when available, according to schedule previously outlined."

[206] Moreover, in that draft, under the heading "Dispatching", the Generating Station and its output were to be controlled by HQ to the point that the draft provided what HQ would be required to pay in the event of spilling.

[207] As this is a new concept, a side note is in order.

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[113] Exhibit P-114.
[114] Exhibit P-117.

[208] Water is the raw material required for the functioning of turbines generating electricity. In that regard, as will be seen later, reservoir capacity is translated into energy for the purpose of contracts covering the generation and sale of electricity.

[209] Thus, when a party manages electricity generation, it necessarily manages the reservoirs. Therefore, if that party mismanages the reservoirs, there can be spilling which is quantifiable in terms of wasted energy and hence in dollars.

[210] In short, as HQ wanted to manage the generation of electricity, it would be normal for it to assume the inherent risks including spilling.

[211] This ends the aside.

[212] According to CF(L)Co, it was never sent the draft prepared by HQ probably because negotiations had broken down.

[213] In any event, despite the Letter from Mr. Lessard of January 28, 1964 and further to new reports prepared by Acres for CF(L)Co, on June 5, 1964 it submitted a document to Hydro-Québec entitled "Submission by Hamilton Falls Corporation". That document was in favour of the project from a financial perspective.

[214] On June 8, 1964, the Committee formed by Premier Lesage submitted its report on the overall project. The following is the context of the report.

> [Translation:]
>
> "We have therefore devoted our efforts to establishing the determining factors of the price at which Hydro-Québec should purchase the entire output of Hamilton Falls, with the exception of a small quantity of energy for consumption in Newfoundland."

[215] That document[115] sheds light on the divergences of opinion and the concerns presented by the Committee to Premier Lesage.

Divergences:

- The Committee estimated project costs at $635 million compared to $697 million estimated by CFL(L)Co.
- The Committee indicated its disagreement regarding the return required by CF(L)Co.

Concerns:

- Remoteness of the project and its inherent risks.
- The burden represented by the "Take or Pay" concept.
- Guarantee of delivery fixed by the Committee at a minimum of 32 billion kWh.

[216] That said, the Committee was also of the view that there were certain advantages related primarily to a potential contract with Consolidated Edison.

[217] In any event, on July 8, 1964, Premier Lesage announced that agreement regarding the development of Churchill Falls was not possible, thereby publicly terminating the second round of negotiations.

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[115] Exhibit P-124 /1.

[218] What the Court retains from the second round is that as the project became more refined, it engendered more sources of divergence. That said, the point must be made that HQ's main motivation in the second round was related to a potential contract for electricity exports to the US. Furthermore, the "Take or Pay" concept, even though accepted in the end, was the subject of intense and serious negotiations.

3) THE FINAL ROUND

[219] The parties resumed negotiations in the spring of 1965.

[220] On May 1, 1965, Mr. Winters, the then Chairman of the Board of CF(L)Co, sent a letter to HQ containing two proposals which although they provided that HQ would be the main customer, suggested that there may be scope for CF(L)Co to export electricity elsewhere in Canada and to the US[116]. Those two general proposals were focused instead on the transmission of that energy.

[221] That letter also referred directly to what had been negotiated in the second round of negotiations, stating that project costs would be greater than had been discussed a year previously and that the term of the contract could be greater than 40 years.

[222] On May 20, 1965, CF(L)Co sent a draft letter of intent dated May 19, 1965 to HQ[117]

[223] The May 19, 1965 Letter of Intent contains many similarities with the March 9, 1964 letter[118]. The most important of which are as follows:

- Quantity of energy substantially the same;
- Exports to Consolidated Edison were still envisaged;
- "Take or Pay" conditions; and
- The definitions of the terms "Firm Capacity", "Continuous Energy" and "Excess Energy" are the same.

However the suggested price for "Continuous Energy" was revised downwards while that for "Excess Energy" was revised upwards. Notably, CF(L)Co also quantifies "Recall" for the Province of Newfoundland's local needs at 300 MW, exercisable upon prior notice of 3 years[119]. Furthermore, the draft assesses the Generating Station's generating capability at approximately 34 billion kWh.

[224] On May 21, 1965, Mr. McParland wrote to Mr. Lessard for the purpose of specifying, *inter alia*, that the annual output available for Hydro-Québec would be approximately 32 billion kWh. It should be noted that this was a response to one of the major concerns raised by Premier Lesage's Committee set forth in its June 8, 1964 report.

[225] On June 8, 1965, Mr. Lessard sent his draft letter of intent dated May 31, 1965 to CF(L)Co[120]. It contained a suspensive condition related to HQ obtaining an export contract that was expected to generate minimum annual earnings of $US 31,000,000.

[116] Exhibit D-74.
[117] Exhibit P-64.
[118] Exhibit P-117.
[119] Exhibit P-64, s. 14.1
[120] Exhibit D-75.

[226] The definitions of "Firm Capacity", "Continuous Energy" and "Excess Energy" are more or less the same. That said, the concept of "Spare Capacity", until than absent in the various drafts, was introduced and was described as follows.

> "spare capacity" The amounts of firm capacity and spare capacity which can be made available in the opinion of HFPCo are as given in Columns 3 and 4 respectively of the Table Article 9.0."[121]

[227] The table referred to in the draft is included in the letter of intent and has the following columns:

Column 1	Column 2	Column 3	Column 4	Column 5
	Units	**Firm Capacity**	**Spare Capacity**	**Continuous Energy**
Date	**Installed**	**(KW)**	**(KW)**	**(Million of KW Per Month)**

[228] Clause 10 of the draft is also of interest, and is worth reproducing here.

> 10.0 Sale and Purchase of Continuous and Excess Energy
>
> Subject to the provisions of Article 14 HFPCo will sell to Hydro-Quebec and Hydro-Quebec will purchase from HFPCo all continuous energy and all excess energy.
>
> 10.1 Hydro-Quebec will purchase such energy from HFPCo on a "take-or-pay" basis, at the respective rates stipulated in Article 11, and will pay for all such energy made available by HFPCo, whether or not taken by Hydro-Quebec, in accordance with the provisions of Articles 15.0 and 15.1.

[229] Once again, it must be concluded that at that time the parties contemplated the sale of the entire output of the Generating Station.

[230] Another point of interest in the HQ draft is that CF(L)Co estimated the generating capability at 34 billion kWh annually, 32.2 billion kWh of which would be available for HQ[122]

[231] At that stage, HQ's intention was clear, it wanted to purchase the entire output of the Generating Station, less the reserved blocks, which it estimated at a minimum of 32.2 billion kWh.

[232] Furthermore, the term of the contract contemplated by HQ was 44 years from the date of the first commercial delivery from the Generating Station.

[233] Although CF(L)Co stated that overall, the draft letter of intent appeared to be acceptable, further negotiations ensued.

[234] HQ submitted a new draft letter of intent, dated June 15, 1965, to CF(L)Co.

[235] That letter contained a modification of the definition of "Continuous Energy", which is useful to reproduce here:

> "The term "continuous energy", for the purposes hereof, shall mean all energy which can be made available on a monthly basis at the agreed point of delivery, from all generating units commissioned less one unit up to, but not exceeding,

[121] *Id.* p. 6.
[122] *Id.,* clause 4.4.

> 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."[123]

[236] On July 12, 1965, Mr. Winters of Brinco wrote to Premier Lesage informing him that in Brinco's opinion, energy exports to the US were not critical for the viability of the project[124]. It must be borne in mind that this was a condition imposed by HQ

[237] Thus, to make up the shortfall, Mr. Winters argued for increased energy prices and greater guarantees from HQ specifically as regards fluctuations in foreign exchange. Thus, as part of the bonds used to finance the project were intended for the US market, servicing the debt would be affected by foreign exchange rates.

[238] This was a major demand and change of course required from HQ by CF(L)Co.

[239] Concurrently, i.e., on July 12, 1965, HQ sent a new draft letter of intent to CF(L)Co[125].

[240] It should be noted that the draft still contained the suspensive condition regarding electricity exports to the US. Furthermore, the "Take or Pay" clause was also subject to conditions directly related to exports.

[241] Moreover, although barely one month had elapsed since the previous draft letter of intent had been sent[126], HQ re-amended the definition of "Continuous Energy" by deleting the words "which can be made available on a monthly basis". The new definition therefore reads as follows.

> "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."

[242] On July 29, 1965, Mr. Winters wrote to Mr. Lessard advising him that they had an agreement in principle regarding the last draft submitted by HQ, subject to agreement regarding the price of electricity and regarding a number of specific points [127].

[243] The aforementioned points to be settled according to CF(L)Co are in the minutes of its board meeting held on same date, namely July 29, 1965[128].

[244] However, as nothing in the documentary evidence reports the content of the discussions regarding the points to be settled, the Court must rely on the new HQ draft. The one dated October 1, 1965 does not contain any significant changes compared to the previous draft of July 12, 1965.

[245] The documentary evidence after that date only reports the negotiations on the price of the electricity, specifically during the construction period of the Generating Station.

[246] In December 1965, Mr. Winters informed his CF(L)Co board colleagues that he was resigning from his position, effective December 17, 1965, and would be replaced by Mr. Henry Borden as Chairman of the Board of Brinco and of CF(L)Co[129].

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[123] Exhibit D-78, p. 7.
[124] Exhibit D-80.
[125] Exhibit D-81.
[126] Exhibit D-75.
[127] Exhibit P-132.
[128] Exhibit P-133.
[129] Exhibit P-136/2 *in fact,* Mr. Winters resigned to join the Pearson government Cabinet.

[247] At that same CF(L)Co board meeting, Mr. Lessard of HQ, who was also on the CF(L)Co board, stated that HQ would shortly be asking the Government of Québec to advance funds in the order of $4,000,000.00 to CF(L)Co so that certain work on the Generating Station site could commence. He stated that the draft letter of intent would be signed shortly, but concurrently with an agreement with potential customers regarding exports to the US.

[248] On that point, HQ tendered a draft letter of intent dated December 9, 1965 that would be binding on HQ, the Consolidated Edison Company of New York and the Niagara Mohawk Power Corporation[130].

[249] The letter detailed the sale by HQ of 10.5 billion of kWh per year for a period of 25 years at a transmission rate of 1,500 MW, the whole corresponding to the "Scheduled delivery energy", the purchasers having indicated an interest in purchasing any available surplus energy.

[250] On December 17, 1965, HQ sent a new draft letter of intent, dated December 13, 1965 to CF(L)Co. It contained a slight change in the definition of "Continuous Energy", specifying in the beginning of the paragraph: "After the completion of ten units, the term "Continuous energy" for the purposes hereof shall mean all energy made available ..."[131].

[251] Clause 10 providing for HQ's purchase of "all continuous energy and all excess energy" in a "Take or Pay" formula remained unchanged except for a re-numbering of reference clauses.

[252] After the beginning of 1966, a number of fundamental changes occurred.

[253] On January 28, 1966, the lawyer for the potential US purchasers informed Mr. De Guise that the purchase project was jeopardized as the result of an unfavourable decision by a US Court of Appeal regarding a pumping station contemplated by the US purchasers, the station for which the electricity purchased from HQ was intended[132]

[254] On February 22, 1966 Mr. Lessard wrote to Premier Lesage seeking his authorization to sign the memorandum of agreement enclosed with the letter[133].

[255] To convince Premier Lesage, Mr. Lessard detailed the favourable price granted to HQ by CF(L)Co and the fact that completion of the Generating Station would not have a major and direct impact on HQ's finances. Furthermore, although Mr. Lessard knew that the export project was compromised, he stated that a final decision regarding the pumping station would take four to eight months. That said, a particular paragraph from that letter marks a major change on the part of HQ. That paragraph is reproduced here[134], and reads as follows:

> [Translation:]
>
> "Should Hydro-Québec be unable to sell in the US part of the energy thus purchased, Hydro-Québec could use all the energy produced and that possibility is actively being studied. In any event, should it be unable to find US customers, the enclosed memorandum of agreement letter is not in any manner binding on Hydro-Québec and lapses after the expiration of twelve months."

[256] The study referred to by Mr. Lessard was submitted by Joseph Bourbeau on March 16, 1966[135].

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[130] Exhibit P-137.
[131] Exhibit P-138/9, clause 8.1.
[132] Exhibit P-137.
[133] Exhibit P-141, the Exhibit only contains the letter and not the draft referred to therein.
[134] Exhibit P-141/2.
[135] Exhibit P-142.

[257] It is a detailed study highlighting four sequential possibilities for the order in which the Manicouagan 3 and 5 Generating Stations, the Churchill Falls Generating Station and various peak-load power facilities would be integrated in the HQ system.

[258] Mr. Bourbeau while supporting the following implementation sequence: July 30, 1965: M5, Churchill Falls, peak-load facilities and M3, concluded his report as follows[136].

> [Translation:]
>
> "The question is how can Hydro-Québec take all this energy for its own system. The report shows that it would be best if Churchill Falls built its own units to meet peak system demand."

[259] On April 17, 1966, CF(L)Co submitted a new draft letter of intent to HQ[137]. Apart from deleting the condition pertaining to exports, the draft contained few if any substantive changes.

[260] Due to political upheavals, specifically the defeat of the Lesage government on June 5, 1966 by Daniel Johnson's Union Nationale, the signing of the memorandum of agreement was postponed, given that the new government required certain political changes to the letter of intent that are irrelevant for the purposes of this decision.

[261] In the letter dated June 21, 1966, HQ was formally advised by the "Power Authority of the State of New York" that it did not intend to enter into a contract for the purchase of electricity, leaving the door open however to the possibility of purchasing "surplus energy" when it became available[138].

[262] In July 1966, as the Johnson government had still not given its consent, Mr. Lessard wrote on two occasions, July 6 and July 22, 1966, to Premier Johnson[139].

[263] While the July 6 letter was very succinct, the July 22 letter went into great detail regarding the advantages of the Churchill Falls Project.

[264] Until September 1966, there was correspondence back and forth between HQ and Premier Johnson in an attempt to convince him go forward with the project.

[265] Finally, the Letter of Intent was signed on October 13, 1966[140].

[266] Several observations regarding the final round of negotiations are in order.

[267] While CF(L)Co actively prepared and submitted several draft letters of intent in the second round of negotiations, HQ was equally active in the final round, having submitted four drafts to CF(L)Co.

[268] At this point, it is worthwhile reiterating the major principles on which the parties had agreed in relation to the Letter of Intent. What follows is the Court's condensed version thereof.

1) CF(L)Co shall sell and HQ shall purchase all the energy generated by the Generating Station (art.1).
2) The capacity of the reservoirs shall be established at 1,115 billion cubic feet (art. 3.2).
3) The Generating Station's capacity or power shall be 4,500 MW with 10 generating units (art. 3.1).

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[136] Exhibit P-142/6, M means Manicouagan.
[137] Exhibit P-143.
[138] Exhibit P-145.
[139] Exhibits D-90 and D-91.
[140] Exhibit D-12.

4) The energy that can be generated is estimated at 34 billion kWh, of which 32.2 billion kWh shall be made available to HQ

5) The terms "Firm Capacity" "Continuous Energy" and "Excess Energy" are defined (article 7).

6) The principle of Blocks reserved for Twinco and Recall is accepted, the latter being limited to 300 MW (articles 3.3 and 10).

7) All the "Continuous and Excess" energy generated, except the Blocks, shall be sold to HQ on a "Take or Pay" basis (articles 15 and 24).

8) The prices of "Continuous Energy" and of "Excess Energy" are fixed for the duration of the term (articles 16 and 17).

9) It is agreed that HQ may request that CF(L)Co operate at a minimum capacity in exchange for certain financial setoffs and it may ask that CF(L)Co operate at maximum capacity (article 8 (c) and (d)).

10) Notwithstanding that the tariff for energy sold is fixed, the parties acknowledge that the final project cost may vary and therefore allows for modification of the tariff (articles 18 and 19).

11) The term of the Contract is 40 years with a possibility of renewing it for an indefinite period, on conditions to be negotiated (article 11). CF(L)Co bases an argument on that article 11, which article should be reproduced and reads as follows:

> "11.1 Renewal of the Contract
>
> Hydro-Quebec shall have the right to renew the definitive power contract for a further term of years from its expiry date, upon such terms and conditions as to quantity and price as may then be mutually agreed. It will also be given right of first refusal prior to any contract that CFLCo may then be willing to sign with a third party for power consumption within Quebec."

12) Abandonment by HQ of the suspensive condition pertaining to electricity exports to the US.

13) HQ undertakes to pay up to $100 million of cost overruns incurred in building the Generating Station.

C) NEGOTIATIONS LEADING TO THE SIGNING OF THE MAY 12, 1969 CONTRACT

[269] This turbulent period of negotiations extended from the beginning of 1967 to July 1968. The parties were driven by a sense of urgency since work on the site had begun a mere 15 days following the signing of the letter of intent.

[270] Significant sums for the time had to be advanced. Thus, the signing of the contract between CF(L)Co and HQ, which was crucial for financing, became a priority.

[271] At the beginning of that period, both parties relied on the letter of intent regarding the form, introduction and development of new concepts. However, the nature of the contract had radically changed in relation to the Letter of Intent.

[272] A few words are in order regarding the negotiating teams.

[273] In February 1967, Robert A. Boyd, CEO of HQ wrote to Mr. McParland designating the HQ negotiating team. It was comprised as follows:

H.B. Abbott-Smith	Director
T.O. Evans	Technical Assistant to the CEO
André Gadbois	Senior in-house Counsel[141]

[274] On March 10, 1967, Mr. McParland, became the president of CF(L)Co, and designated the following persons to represent the company in the negotiations:

C.T. Manning	Vice-President and Corporate Secretary
John Tennant	External Attorney for CF(L)Co
Ron Clinch	Engineer with the firm Acres

[275] Through their respective letters, Mr. Boyd and Mr. McParland agreed that the major points of the contract became and would remain their responsibility.

[276] Another major event occurred on February 12, 1968. HQ mandated EBASCO Services Incorporated, a US firm of engineers (hereinafter referred to as "EBASCO") to assist it with the remainder of the negotiations. The mandate is of interest and it its terms should be reproduced[142].

> "1) Compare Letter of intent of October 13, 1966 with latest revision of proposed formal contract. Point out and discuss particular articles of contract act which bind Hydro-Quebec beyond what was agreed upon through Letter of Intent.
>
> 2) What clauses are incorporated in the formal contract which bind Hydro-Quebec beyond what would normally be expected in a contract of this type and magnitude?
>
> 3) What clauses in the contract impose upon Hydro-Quebec obligations which were not provided for in the Letter of Intent and which are not usually necessary to finance a project of this type?
>
> 4) What additional protective clauses should be incorporated in format [sic] contract which would better serve the interests of Hydro-Quebec?
>
> 5) What conditions in the Letter of Intent could profitably be modified at the request of Hydro-Quebec in exchange for concessions which may be required for financing purposes and were not covered in the Letter of Intent?"

[277] The decision to engage the services of Ebasco marks a major change in HQ's vision of its future contractual relations with CF(L)Co. Thus, the very nature of the mandate opens the door to fundamental changes in relation to the Letter of Intent.

[278] It was undoubtedly due to Ebasco's involvement that new concepts or ideas were developed and introduced, either by CF(L)Co, by HQ or collectively. They are as follows:

- Split Tariff.
- Annual Energy Base.
- Operational Flexibility clause.

[141] Exhibit D-99.
[142] Exhibit D-110.

- Renewal clause.

[279] Before discussing the above, a broad picture of the situation and/or motivation of each of the two protagonists must be borne in mind.

CF(L)Co:
- It needed to sign a contract with HQ in order to obtain financing.
- In the short, medium and perhaps long term, HQ would be CF(L)Co's sole customer.

HQ:
- The possibilities of exporting energy generated by and purchased from CF(L)Co in the short and medium term were nil. It therefore had to integrate the Generating Station's output into its system.
- HQ made considerable financial commitments regarding the financing and construction of the Generating Station.

1) SPLIT TARIFF

[280] One of the new features with respect to the Letter of Intent was a significant modification of the tariff. Thus, on June 21, 1967, Mr. McParland wrote as follows:

> “It also appeared desirable to split the tariff so that two-thirds would be payable on a kilowatt per year demand basis and the remaining one-third on an energy basis.” [143]

[281] On July 5, 1967, Mr. McParland formally sent his proposal directly to Mr. Boyd which he qualifies as a Comprehensive Tariff Package[144]. This direct communication between Messrs. McParland and Boyd is explained by the fact that it was a request for major change compared to the letter of intent.

[282] This proposal of some 25 pages constitutes a major departure from the contents of the letter of intent. Without analyzing each and every element, the Court deems it advisable to list the sections thereof in order to show the scope of the structural change sought by CF(L)Co.

[143] Exhibit P-49/6.
[144] Exhibit P-158.

1. Underlying assumptions.
2. Comments on capital cost variations.
3. Base tariff and adjustments.
4. Sample tariff calculations.
5. Tariff comparisons to letter of intent.
6. Peaking arrangements.
7. Method of adjustment for escalation.
8. Notes on split tariff.
9. Comments on the signification of tariff package.
10. Some comments on the alternative for Hydro-Quebec to the Churchill Falls development.
11. Table illustrating changes in overrun guarantee with capital cost changes.

[283] Section 10 of the proposal outlines the importance of the CF(L)Co structural change, taking care to prepare, on its own, a case study for the benefit of H.Q. and to show it, that despite its requests, there is still something in it for H.Q.

[284] Moreover, following is how the Split Tariff is defined:

> "The tariff which applies at any time will be split on a demand-energy basis in the ratio of 2:1. Two-thirds, or the demand charge, will be a fixed amount converted to a KW demand charge (on the 31.2 base) and will be defined as a KW per year charge to be paid on a monthly basis. The second portion of the charge will be a KWHr energy charge, as metered."[145]

[285] As the July 5, 1967 proposal regarding the tariff package was not well received by H.Q., CF(L)Co's board of directors discussed a new proposal on July 26, 1967[146]. As it had the informal approval of Messrs. De Guise and Boyd, it was the subject matter of a formal proposal on August 4, 1967 in a letter addressed to Mr. Boyd[147].

[286] The broad outlines thereof relevant to this matter must be established either by summarizes them or by citing excerpts :

1. Amount of capacity:

   It is set at 4,500 MW on the basis of 10 units one of which will be in reserve (spinning reserve).

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[145] Exhibit P-158/7, art. 17
[146] Exhibit P-50.
[147] Exhibit P-160.

2. Peaking availability:

   Make an additional capacity of 750 MW available to H.Q., by adding an eleventh unit. 500 MW of the 750 MW available at all times for H.Q. and 250 MW on demand for a period of 20 hours per week between November and March[148].

3. Total energy:

   The annual energy base is established at 31.2 billion KWH.

4. Method of payment:

"To eliminate complex corrections to power billings for the cost of peaking, the detail of monthly payment clauses in the power contract will stipulate a split of 2:1 in the tariff; with 66.7% of the applicable mill rate per KWHr calculated as a fixed amount on a KW demand or capacity basis, and 33.3% of the mill rate calculated on an energy consumed or KWHr basis."

5. Excess energy:

"To ensure reasonable and efficient water management, CFLCo will provide three month forecasts in advance of each quarter for the energy which will be made available. Such forecasts would be within ± 10% of one-quarter of the annual energy base of 31.2BKWHr. Under such circumstances, CF(L)Co would waive the right to 105% of energy estimates at prime energy rates, since such an arrangement would be difficult to implement with peaking. Hydro-Quebec would obtain all energy in excess of the annual base at 33.3% of the mill rate in force at the time such excess energy was supplied. Continuous and excess energy definitions and related provisions will cease to be applicable. "

6. Method of operation:

   Water reserves are established at 1,100 BCF and H.Q. could schedule deliveries according to its system.

7. Adjustment in base energy:

   The parties may request an adjustment in the estimate of the annual energy base at regular intervals (between 5 and 10 years).

   "Such an adjusted energy level will then become the base energy for the ensuing period and the fixed demand payment, under the split demand-energy tariff..."

8. Charge for peaking:

   Charges will be billed for the additional 750 MW on a 2 for 1 energy-capacity basis.

---

[148] This is the first time there is a question between the parties of excess energy or capacity during the winter period.

(Emphasis added)

[287] On August 10, 1967, as drafted by Mr. Lessard, H.Q. makes a counter-proposal to CF(L)Co that only deals with the eleventh unit to be added and its cost and the capacity associated therewith and the fact that the terms of the letter of intent must remain unchanged.

[288] On August 21, 1967, CF(L)Co will formally accept H.Q.'s proposal dated August 4, 1967 with respect to the eleventh unit[149].

[289] At the same time as these discussions, on August 14, 1967, Acres will provide CF(L)Co with its engineering report required to prepare a prospectus to finance the project.

[290] On August 17, 1967, a top-level meeting will take place between Messrs. Boyd and De Guise of H.Q. and Messrs. McParland and Lambert of CF(L)Co and on August 22, 1967, Mr. Boyd will record the points that had been resolved.[150]

[291] From these memos,[151], we learn that the principle of the Split Tariff is now accepted subject to certain clarifications. Moreover, the definitions of Firm Capacity, Continuous Energy and Penalty for Continuous Energy Default are dropped owing to the application of the Split Tariff[152].

[292] Thus, the title of column 6 of article 14 of the letter of intent outlining a table is changed from Continuous Energy to Firm Energy.

2) ANNUAL ENERGY BASE

[293] The introduction of the Annual Energy Base concept is a direct consequence of the Split Tariff. Given its importance with regard to each party's contentions and for the course of events, it is necessary to presently reproduce its definition as it now appears in the Principal Contract:

> *"Annual Energy Base"* means 31.50 billion kilowatthours per year or, in the event of an adjustment pursuant to Section 6.7 or to Article IX hereof, the number of kilowatthours per year established as a result of such adjustment, calculated to the nearest 1/100 of a billion kilowatthours."[153]

[294] However, on August 4, 1967[154], the starting Annual Energy Base had been set, for negotiation purposes, at 31.2 billion KWH.

[295] Remember that this estimate evolved during the negotiations regarding the letter of intent. Moreover, the parties established the original value of the Annual Energy Base further to

[149] Exhibit P-40/3
[150] Exhibit P-161.
[151] *Id.*, note that the articles of this memo refer to the numbers of the sections in the letter of intent.
[152] *Id.*, article 7.
[153] Exhibit P-1/8.
[154] Exhibit P-160/2.

the report entitled Churchill Falls Power Project-Engineering Report prepared by Acres Canadian Bechtel with regard to the issue of the prospectus to finance the project[155]. The Court will come back to the evidence having surrounded the setting of the Annual Energy Base for the Principal Contract in the course of its analysis of the expert valuations, more specifically, the one by Mr. Lapuerta.

[296] A meeting of the negotiators held on November 3, 1967 notes the following agreement on the Annual Energy Base.[156]

- Credit extended to H.Q. for energy paid but not delivered, provided there was no spill.
- The original Annual Energy Base after the start-up of the ten units is fixed at 31.5 billion KWH.
- Maximum-minimum in the adjustment of the Annual Energy Base fixed at 3.33 %.
- The first adjustment period is fixed at eight years following the commissioning of the Power Plant and, thereafter, at four year intervals.

3) OPERATIONAL FLEXIBILITY CLAUSE

[297] One other fundamental change will occur, originating no doubt from H.Q.'s desire to obtain some flexibility in terms of deliveries. It stems, first of all, from the section entitled Peaking Availability contained in the August 4, 1967 proposal in which it is proposed to give H.Q. excess power in wintertime.

[298] Note that in the original drafts of the contract, in particular, the one dated September 19, 1967, H.Q. was supposed to take possession of and purchase the energy make available by CF(L)Co, as determined by it using quarterly forecasts. Following is the relevant text:

> "3. Sale and Purchase of Energy.
>
> Subject to the provisions hereof, CF(L)Co shall sell and make available to Hydro- Quebec at the Delivery Point and Hydro-Quebec will purchase, and take delivery of, from CF(L)Co:
>
> (a) prior to the Completion Date, the energy available on and after each Delivery Date from each installed stage of construction (provided that Hydro-Quebec need not purchase energy in any period in excess of that denoted in column ____ of Schedule II hereof, or by any agreed adjustment thereto, as intend to be available for such period): and
>
> (b) in each quarterly period on and after Completion Date, the Forecast

[155] Exhibit P-198/134.
[156] Exhibit P-55/3/4.

Quarterly Supply;

> all at the applicable prices set forth in clause 5 hereof.
>
> At least one month prior to the Completion Date and at least one month prior to the beginning of each third month after the Completion Date CF(L)Co shall furnish to Hydro-Quebec a written forecast of the Forecast Quarterly Supply for the next ensuing three months. The Forecast Quarterly Supply shall not exceed 110% nor be less than 90% of one-fourth of the Annual Energy Base.[157]

[299] Note that the version of this text differs considerably from article 6.2 of the Principal Contract which states:

> "such power and energy as Hydro-Québec may request...[158]

whereas the text of September 1967 provides that it is incumbent upon CF(L)Co to send its available energy forecasts to H.Q.

[300] This draft contains, under the section on rates, a lower price for energy exceeding the forecasts provided by CF(L)Co in these terms:

> "... contemplated by the forecast concerned, the excess shall be billed and paid for...[159]

[301] Mr. Raymond Fournier of H.Q. had written to his superior, Mr. Bourbeau, to inform him about his concern regarding H.Q.'s obligation to take delivery of energy quantities planned by CF(L)Co, the whole in relation to H.Q.'s operation of its entire system. Following is an excerpt that speaks volumes.

> [Translation] "We have seen that the interpretation of clause no.3 of the Hydro-Québec/CF(L)Co preliminary contract can lead to some difficulties in operating Hydro-Québec's system, both in the short- and long-term. The economic operations of the reservoirs will thus be hampered. In addition, future power plant planning must take existing facilities into account and the lack of flexibility in operating the most important Power Plant in the system may lead to the choice of an investment program that would not be optimal."[160]
>
> (Emphasis added)

[302] On October 25, 1967, Mr. Tennant of CF(L)Co prepared a summary of the discussions held on October 24th [161]. The main points dealt with the costs of the project, H.Q.'s desire to obtain credits for the energy it paid for but did not necessarily need. The most important point is that H.Q. seems to distance itself from the principle of the delivery forecasts provided by CF(L)Co.

157 Exhibit P-5/8.
158 Exhibit P-1/19.
159 Exhibit P-5, sec. 5(c)
160 Exhibit P-54/4.
161 Exhibit P-166.

> "It now transpires that Hydro-Québec will be furnishing advance schedules of their proposed take or firm capacity but subject to the right to make emergency demands" [162]

[303] This dissatisfaction will give rise to drafts of compromises including the creation of an energy bank, in particular, in the draft contract sent on November 16, 1967, all in these terms.

> "Should in any such three-month period after the Completion Date, Hydro-Quebec not have received or taken from CFLCo at least the Forecast Quarterly Supply, Hydro-Quebec shall nonetheless pay CFLCo for the entire Forecast Quarterly Supply but :
>
> (a) Hydro-Quebec shall then be entitled to receive free from CFLCo, at any time during the six months following the end of such three month period, such part of the number of kilowatthours of energy which corresponds to that part not delivered of said Forecast Quarterly Supply as Hydro-Quebec may request within the period."[163]

[304] Basically, this clause is tantamount to a future energy credit, with regard to the quantity thereof paid but not received by H.Q.

[305] Despite this compromise, H.Q. wants more. The remainder of the negotiations will culminate in CF(L)Co's acceptance of H.Q.'s control of the reservoirs. With regard to the significant change of course, the Court deems it advisable to reproduce the memo (undated) in its entirety[164] :

> "Hydro-Quebec have expressed their wish to be able to request CFLCo to operate the Churchill Falls installations without the restriction of ±10% on energy forecasting.
>
> In requesting that this be done to improve the integration of this facility into their overall system, Hydro-Quebec have recognized that CFLCo should not suffer any loss of revenue which would have been available to CFLCo under the previous concepts of quarterly energy forecasting when CFLCo had the responsibility for reservoir management.
>
> Since the above principles are consistent with the basic concept of Plant operation and the underlying concepts of the Power Contract, CFLCo would propose to meet Hydro-Quebec's request by the arrangements outlined under (A), subject to Hydro-Quebec agreeing the protections for CFLCo outlined under (B).

Section A - Operating Considerations

1) Hydro-Quebec may request at any time that the Plant be operated anywhere within the limits of minimum capacity and firm capacity.

2) <u>Hydro-Quebec will pay for energy taken during the month and for the equivalent energy</u>

[162] *Id.*, /2(g)
[163] Exhibit P-56/14.
[164] Exhibit P-7.

represented by water spilled In the month, providing such spill did not occur because CFLCo was unable to supply power (e.g.: penalty under Article X).

3) Hydro-Quebec may therefore request CFLCo to operate the Plant in such a manner that the reservoir will be at such level as, in the judgment of Hydro- Quebec. best matches their overall system capacity and system requirements.

Section B - Protections to CFLCo

In operating as outlined above, CFLCo needs the following protections:

(a) A waiver of the penalty clause applying because of a shortage of water, except if such shortage of water results from the failure of any of CFLCo's impounding structures.

(b) Relief from the bonus shares on the debt service and expense advances if CFLCo requires such advances (i) as a result of a shortage of water other than a shortage caused by the failure of any of CFLCo's impounding structures; or (ii) as the result of Hydro-Quebec paying for less than 7.1 billion kilowatthours in any three month period.

(c) In any month where debt service and expense charges are incurred for either of the two reasons outlined in (b) above, such month shall not be counted as one of the thirty-six months of advances referred to in the voting trust.

(d) That the prior obligations to Twinco as defined in the Power Contract shall be respected, and that Hydro-Quebec shall not ask CFLCo to operate the Plant in a manner which prevents this.

(e) That Hydro-Quebec shall not request CFLCo to operate the Plant In such a manner that CFLCo cannot enjoy the rights to power and energy under the recapture clause.

COMMENTS: -

The following simplifications can be achieved:

1) Eliminate all reference to Quarterly Energy Forecasts, and operation thereunder.

2) Eliminate all reference to Deferred Energy Entitlement.

3) Avoid necessity of reference to Advance Energy.

4) Delete reference to pricing excess energy after Effective Date.

5) Treat adjustments of energy base separate from retroactive payment adjustments for experience different from assumed base."

(Emphasis added)

[306] This memo shows that despite CF(L)Co's abandonment of control of its reservoirs, it requested and received compensations that were satisfactory to it.

[307] One of these will consist in H.Q.'s obligation to assume the financial consequences of any spill caused by its operation of the reservoirs. Following is a comment in this respect by Ebasco dated April 23, 1968.

"Article IV - Construction and Operation of the Plant

Page 11 Under 4.2.1 Hydro-Quebec is assigned the responsibility of operating the reservoir and must bear any losses due to reservoir mismanagement i.e. CFL Co suffers no penalty for lack of water and H.Q. pays for water spilled as though it had been converted to energy, to accept this responsibility H.Q. should review the reservoir operation in relation to its other resources to assure its feasibility".[165]

[308] Thus, on April 19, 1968, the operational flexibility clause appeared that was reproduced in its entirety in the original contract, certain sub-sections including one dealing with the operating manual being added in the final version.

4) RENEWAL CLAUSE

[309] Finally, one last major change will be made to the renewal clause.

[310] Remember that from the outset of the negotiations, the renewal clause was only dealt with on a preliminary basis, it being one of the most concise.

[311] That being said, effective the negotiations on the principal contract, if the format used was somewhat cumbersome, the basis remained substantially the same.

[312] February 26, 1968 also marks the beginning of the concerns about the renewal of the contract, at the very least by CF(L)Co.

[313] Now then, in the spring of 1968, the financial position of the project had changed, in particular, with regard to costs.

[314] In fact, some hand-written memos[166] by Mr. Manning were filed. In them, he considers the possibility of a fixed rate, in terms of various factors such as operating costs and the royalties to be paid to the Province of Newfoundland.

[315] On March 1, 1968, a meeting was held regarding the draft contract and its renewal during which H.Q. will formulate its requests. Minutes of this meeting were filed[167].

[316] From these memos, it is important to remember H.Q.'s request regarding renewal with a view to obtaining a fixed rate for the next 25 years[168].

[317] In his hand-written memos, Mr. Manning indicates that for H.Q. the renewal on

[165] Exhibit D-24, memo dated April 23, 1968, p.2.
[166] Exhibit P-185.
[167] Exhibit D-113.
[168] *Id.*, page 3.

conditions stated by it constituted “A do or die condition”[169].

[318] This is a major change of course. In fact, remember that H.Q. had agreed to the Split Tariff concept on the basis of concern for profitability for CF(L)Co essentially to attract the investors needed to finance the project.

[319] Now then, the parties were aware of the fact that upon expiry of the principal contract, the entire debt owing to the investors would be repaid in full.

[320] The Court takes the liberty of putting forward in the time up to the minutes of a meeting of the directors of CF(L)Co and Brinco held on April 10, 1968 in which H.Q.’s position on the renewal is clearly stated. Following is an excerpt[170] :

> “Hydro-Quebec wished to be able to project a lower mil rate than the present draft of the contract permitted. Due to increased costs and escalation the effect of the present term of 44 years from first delivery or 40 years from completion indicated an average mill rate considerably in excess of that contemplated in 1966. Accordingly, they had requested a 25 year extension of the contract on a flat mill rate basis suggested at two mills per kilowatthour. They wished this to be in the form of an option. This would produce a gross revenue of $60-65 million per annum. There would be no debt outstanding. Should CFLCo attempt to qualify the rate by the addition of escalators or make any provision for its tax position, the purpose of the extension would be defeated. Although the Churchill project was marginally more attractive than nuclear power today, it was conceivable that it would not be in 40 years' time, it was obvious that a commitment on the extension was preferable to an option and it also appeared desirable to endeavour to have the mill rate expressed in either U.S. or Canadian funds at the option of CFLCo in order to afford the greatest protection against serious devaluation of the Canadian dollar. The meeting authorized the negotiating team to conclude an arrangement with Hydro-Quebec for an extension, by way of option to them, of the term of the contract of 25 years at two mills per kilowatthour on the condition that they exercised such option at least ten years before termination of the contract and preferably much sooner. It was also felt desirable to endeavour to secure for CFLCo the option to have the price payable in either Canadian or U.S. dollars if this was achievable.”
>
> (Emphasis added)

[321] It is interesting to note that CF(L)Co was aware of the fact that nuclear energy, then at its very early stages, could prove to be more economic than hydro-electric energy at few decades down the road, hence its inclination to accept a compromise.

[322] Given the difference of opinion among the protagonists to qualify the Renewed Contact either as “Renewed” or “Renewal”, it is interesting to note that the directors of CF(L)Co and Brinco, in connection with this excerpt from the minutes of their board of directors, used the word “Extension” at least four times to describe the renewal.

[323] This proposal by H.Q. will be accepted and adopted at a joint meeting of the board of directors of Brinco and CF(L)Co held on May 14, 1968. Following is the relevant excerpt.

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[169] *Id.*, hand-written memos. This phrase is not reproduced in the minutes.
[170] Exhibit P-8/5.

"(i) Renewal of the Contract - The negotiating team had been authorized to accord an option to renew the contract for an additional twenty-five years at a flat 2 mill rate per kilowatthour but had been requested to try to make this option exercisable at least ten years prior to termination of the contract and to secure, if possible, for CFLCo the option to have the price payable in either Canadian or U.S. dollars.

As reflected in the present draft of the Power Contract, Hydro-Quebec had agreed to make a firm commitment to renew. Hydro-Quebec had insisted, however, that the price be 2 mills payable in Canadian dollars."

[324] On June 3, 1968, H.Q. approved the principal and renewed contract conditional upon its acceptance by Quebec's political bodies. At the same time, CF(L)Co's board of directors ratified the principal and renewed contract which its executive committee had approved.

[325] Furthermore, in the fall of 1968, Morgan Stanley and Co. as well as Wood Gundy Securities Limited issued the prospectus intended to finance the project even though it was already under construction. Following are the contemplated financing amounts:

First Mortgage Bonds - Series A	$500 million (United States)*
- Series B	$50 million (Canadian)
General Mortgage Bonds (fully subordinated to the First Mortgage Bonds)	$100 million (Canadian)

*Equivalent to approximately $549 million Canadian.[171]

[326] It is worth recalling that Brinco and CF(L)Co were then acting as project promoters. Following are the comments contained in Ebasco's final report dated March 28, 1968[172] :

"As we understand the basic interest of the CFL promoters it is to obtain a return upon their investment in the project commensurate with the funds and effort which they put into its development. Each entrepreneur has his own standards as to what would be a fair return and also how to measure it. Presumably the Submission dated June 4, 1964 to HQ represented the earnings level which would be acceptable to the promoters. The equity money to be invested was $60,000,000 and in all subsequent discussions and planning it is believed that this $60,000,000 still represents a commitment which is desirable and necessary.

This submission was predicated upon a price per kwh of 2.75 mills. It was unsatisfactory to HQ and negotiations were suspended. They were renewed when, in 1966, the Province of Newfoundland offered the tax rebate concession for 40 years. The promised rebate enabled CFL and HQ to agree on an average price of 2.45 mills per kwh as the Base Rate for continuous energy which, in turn, was set at 31.5 billion kwh per year."

171 Exhibit D-29, p.4.
172 Exhibit D-24, Appendix B.

[327] In July 1968, the Council of Ministers of Québec approved the principal and renewed contract which will be signed some 10 months later, that is, on May 12, 1969.

[328] July 1968 also marks Ebasco's tabling of its final report on the principal and renewed contract.

VII. RELATIONSHIP BETWEEN THE PARTIES BETWEEN MAY 12, 1969 AND 1998

A) PRÉAMBLE

[329] As we previously saw, the work to develop and construct the Power Plant began on the day after the signing of the letter of intent and will continue until September 1, 1976 even though the eleventh and last unit will be in service

[330] From 1976 to 1998, several events will mark the relations between the parties. They take on a certain importance regarding the problems to be decided by the Court.

[331] These events revolve around the following two main aspects:

- Newfoundland's applications and the judicial recourses related to these applications.
- The various negotiations between the parties to resolve the financial difficulties of CF(L)Co.

B) NEWFOUNDLAND'S DEMANDS AND THE JUDGMENTS

[332] Remember that CF(L)Co's share ownership situation is dependent on a political decision of Newfoundland. Thus, as of 1974, the province indicates its wish to redeem the shares held until then in CF(L)Co by Brinco. The whole to be completed the same year, Newfoundland paying the sum of 160 million to acquire 65.8% of the shares of CF(L)Co held until then by Brinco[173] which are transferred to a Newfoundland entity, that is, Newfoundland Development Corporation, to be ultimately transferred to NLH in 1975.

[333] Thus, as of 1976, the relations between the parties will be marred by the various applications made by Newfoundland regarding, in particular, the Recall.

[334] As for this specific point, a brief look at the past is necessary.

[335] In fact, between the conclusion of the letter of intent and the principal contract, that is, on April 26, 1967, Newfoundland's Premier, the Honourable Joseph P. Smallwood, writes to Mr. McParland to convey his dissatisfaction regarding the content of the letter of intent establishing the limit of the Recall at 300 MW for Newfoundland's needs, asking him at the same time to

[173] Exhibit P-32/15.

obtain a minimum of 500 MW [174].

[336] Following is an excerpt from Mr. McParland negative response to Premier Smallwood dated June 1, 1967:

> "Concerning a possible increase in the amount of recapture, I entirely agree with your view that at the present stage this would throw serious obstacles into our final negotiations, especially because, as a result of rising costs, the transmission economics to Montreal have less latitude than before. "

[337] As of January 6, 1976, NLH asks H.Q. to supply it with 600 MW in excess of what had been contractually provided, and this, as of January 1, 1982[175]. According to the terms of the letter, these 600 MW would be in addition to what had been contractually agreed thus increasing Newfoundland's demands to 900 MW.

[338] H.Q.'s response is negative, owing to Québec's energy needs, arguing that it cannot do without the power required by NLH[176].

[339] The negotiations go to a higher level as indicated in the letter from Newfoundland's Premier, the Honourable Frank Moores, dated May 18, 1976 addressed to Québec's Premier, the Honourable Robert Bourassa[177].

[340] As a result of this letter, we learn several things, they are as follows:

1) Newfoundland was contemplating the development of the Gull Island site for its own energy needs but had to temporarily scrap this project.

2) Mr. Moores takes issue with Minister Cournoyer's proposal to change Labrador's borders so that Churchill Falls becomes Québec territory in exchange for an increase in the price of energy from Churchill Falls.

3) Mr. Moores reiterates his demand for 800 MW for January 1, 1982 and threatens lawsuits against H.Q. in the event of a negative response.

[341] Premier Bourassa's response dated May 25, 1976, even though it is negative, nonetheless invites Newfoundland to the negotiations[178].

[342] On August 6, 1976, Newfoundland enacts an Order-in-Council requiring that CF(L)Co transfer a block of 800 MW from the Generating Station for the Province's energy needs[179].

[343] CF(L)Co refuses to submit to Newfoundland's demand since, in so doing, it would create a technical default pursuant to the bond financing[180].

[344] On September 13, 1976, Newfoundland's Attorney General brings an action against

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[174] Exhibit P-65.
[175] Exhibit P-228/2.
[176] Exhibit P-228/3.
[177] Exhibit P-228/5.
[178] Exhibit P-228/10.
[179] Exhibit P-231.
[180] Exhibit P-70/2.

CF(L)Co and H.Q. before Newfoundland's courts to obtain the 800 MW it is claiming [181]. Following is the key paragraph of his argument appearing in his amended statement of claim as well as the relevant conclusions of his statement:

> "26. Further in the alternative, the Plaintiff says the Second Defendant was at all times aware or should have been aware that, notwithstanding the provisions of the Power Contract, upon the request of the Government, the First Defendant would be obligated under the Lease to give priority to the consumers of electricity in the Province of Newfoundland, and by reason thereof it was or ought to have been the understanding of the First Defendant and the Second Defendant that there is an implied term of the Power Contract that the obligation on the part of the First Defendant as contained in the Power Contract to deliver to the Second Defendant hydro-electric power and energy would be subject at all times to the obligation of the First Defendant, as set forth in paragraph (e) of Clause 2 of Part I of the Lease, to give, upon the request of the Government, priority to the consumers of electricity in the Province of Newfoundland. The Plaintiff repeats the allegations contained in paragraphs 6 and 7 hereof.[182]"
>
> (...)
>
> AND THE PLAINTIFF CLAIMS
>
> (a) a declaration that the Plaintiff is entitled by virtue of paragraph (e)- of Clause 2 of Part I of the Lease to make the request for eight hundred (800) megawatts of electric power as set forth in the Order-in-Council;
>
> (b) a declaration that the Plaintiff, by reason of the Financial Agreement, is not prevented or prohibited from commencing this action;
>
> (c) a declaration that by virtue of Part I of the Lease and Section 3 and 4 of the Act the First Defendant is obliged to comply with the request set forth in the Order-in-Council; [183]

[345] On May 27, 1977, H.Q. brings its own action for a declaratory judgment before the Superior Court of Québec intended to counter Newfoundland's offensive[184]. Following are the relevant conclusions :

> [Translation] "DECLARE that pursuant to contract R-1, only the Courts of the Judicial District of Montreal, subject to the right to appeal to the Supreme Court of Canada, have jurisdiction to rule on any dispute between the parties pursuant to the contract;
>
> DECLARE that pursuant to contract R-1, the petitioner has the obligation to purchase and the respondent has the obligation to sell and deliver all the electrical power and all the electrical energy that might be generated by the current hydroelectric generating station operated by the respondent at Churchill Falls on the Churchill River in accordance with the provisions of paragraphs 2.1, 6.2, 6.4 and 6.6 of the contract, Exhibit R-1;
>
> DECLARE that the respondent's failure to sell and deliver to the petitioner all the electrical power and energy that might be generated by the current hydroelectric

[181] Exhibit P-237/45.
[182] Exhibit P-237/9/10.
[183] Exhibit P-237/11/12 "the Lease" mentioned in the conclusions refer to the rights vested in CF(L)CO regarding the development of the Churchill River by Newfoundland's legislature.
[184] Exhibit D-18, pages 10 and 11.

> generating station operated by the respondent at Churchill Falls on the Churchill River in accordance with the foregoing conclusion would constitute a breach of contract pursuant to contract R-1;"

[346] On December 17, 1980, before the case is heard before Newfoundland's courts regarding the recall of 800 MW, the Province of Newfoundland passed the act entitled The Upper Churchill Water Rights Reversion Act[185].

[347] This act is essentially intended to revert to the province, the rights originally granted to Brinco and assigned to CF(L)Co allowing it to exploit the Churchill River. Following is the wording of section 3 of this act:

> "Purpose of Act
>
> 3. The purpose of this Act is to provide for the reversion to the province of unencumbered ownership and control in relation to certain water within the province. "

[348] On February 10, 1981, Newfoundland referred the validity of this act to the Supreme Court of Newfoundland, appeal division.

[349] From 1982, the rulings in these different cases follow one another.

[350] Thus, on March 5, 1982, the appeal division of the Supreme Court of Newfoundland declared the Reversion Act valid [186].

[351] This decision was appealed before the Supreme Court of Canada which rendered judgment on May 3, 1984, allowing the appeal against the judgment of the appeal division of the Supreme Court of Newfoundland and declaring the Reversion Act *ultra vires* of Newfoundland's legislature.

[352] The Court deems it advisable to dwell on some excerpts from this judgment. In fact, part of H.Q.'s argument reproduced in its motion to institute proceedings rests several times on a sentence taken from this judgment. The Court cites it:

> "Under the contract, CFLCo agreed to supply and Hydro-Québec agreed to purchase virtually all of the power produced at Churchill Falls".[187]

[353] This quote is reproduced in H.Q.'s proceedings several times[188].

[354] It is interesting to note that an error immediately follows this sentence where the Supreme Court continues by stating:

> "Under the contract, CFLCo agreed to supply and Hydro-Québec agreed to purchase virtually all of the power produced at Churchill Falls for a term of forty years; which was renewable, at the option of Hydro-Québec, for a further term of twenty-five years."

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[185] 1980 (Nfld.), c.40
[186] Exhibit P-243.
[187] Exhibit P-9, [1984] 1 S.C.R., p. 305.
[188] Motion to institute proceedings, at pars. 47, 52, 54, 109, 161, 170 and 187.

[355] In defence of the Supreme Court, it did not have to rule on the ins and outs of the renewed contract and it certainly did not have to deal with the veritable mountain of documentary evidence surrounding the negotiations and conclusion of the principal and renewed contract.

[356] That being said, it is the only quotation in this respect of this Supreme Court ruling. Other comments moreover also in *obiter dictum,* are more nuanced even though the Supreme Court makes specific reference in the contract:

> "As soon as the *Reversion Act* came into force, Hydro-Québec's right to receive power according to the terms of the Power Contract would be effectively destroyed. Even if the flow of electricity to Quebec continued at the same rate and for the same price after the coming into force of the Act, it would then be in the form of a privilege rather than an enforceable right. All of this, in my opinion, points to one conclusion: the *Reversion Act* is a colourable attempt to interfere with the Power Contract and thus to derogate from the rights of Hydro-Québec to receive an agreed amount of power at an agreed price." [189]
>
> Little argument was advanced on this issue and the case seemed to proceed on the general assumption that the rights of Hydro-Québec were situate in Quebec. The fact, of course, is that Hydro-Québec has the right under the Power Contract to receive delivery in Quebec of hydro-electric power and thereafter to dispose of it for use in Quebec or elsewhere as it may choose."[190]
>
> (Emphasis added)

[357] Regardless, the Supreme Court allowed the appeal and declared the Reversion Act *ultra vires* since, in its opinion, it affected extra-territorial rights of the Province of Newfoundland.

[358] On June 13, 1983, Judge Goodridge also dismissed the recourse brought before the Supreme Court of Newfoundland regarding the recall of 800 MW [191] primarily for the following reason:

> **"1274** The basic reasons upon which the Government fails may be listed as follows;
>
> **1275** Firstly, the proviso is interpreted to mean that upon the request of the Government the Newfoundland consumer shall be given by CFLCo a right of first refusal to purchase all energy that becomes available for sale and is not then otherwise committed when it is feasible and economic for CFLCo to supply such power and for the Newfoundland consumer to purchase such power. In that connection the power which has been committed for sale to Hydro-Quebec is not available for sale to another customer. The right of first refusal which is extended upon the request of the Government is exercisable only in respect of the power in excess of that already committed and at the present time there is very little, if any, of that. (See Part 15.)"
>
> (Emphasis added)

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[189] Exhibit P-9, [1984] 1 S.C.R., p. 333.
[190] *Id.,* p. 334.
[191] Exhibit P-26.

[359] At the same time on August 4, 1983, Judge Jules Beauregard of the Quebec Superior Court[192] allowed H.Q.'s recourse in these words:

> [Translation] "DECLARE that under energy contract R-1, the petitioner is obligated to purchase and the respondent is obligated to sell and deliver to the petitioner, all the power, all the electrical energy that might be generated at the current hydro-electric station operated by the respondent at Churchill Falls on the Churchill River, in accordance with the provisions of paragraphs 2.1, 6.2, 6.4 and 6.6 of the contract, Exhibit R-1.
>
> DECLARE that the respondent's failure to sell and deliver to the petitioner, all the power and energy that might be generated at the current hydro-electric station operated by the respondent at Churchill Falls on the Churchill River, in accordance with the foregoing conclusion, constitutes a breach of contract and a default with regard to the energy contract (R-1):"

[360] Appeals of the Goodridge and Beauregard judgments lodged by Newfoundland will be dismissed by the Courts of Appeal of the relevant jurisdictions[193].

[361] In this matter, H.Q. filed CF(L)Co's *Factum* in Supreme Court regarding the appeal from the judgment of the Court of Appeal of Québec upholding Judge Beauregard's decision. Following is an excerpt which H.Q. directs to the Court's attention:

> "Secondly, it is obvious that failure by CFLCo to supply all the electricity it generates to Hydro-Québec is an event of default under the contract, this obligation being the very essence of the Power Contract. One must conclude therefore, that there is no difficulty whatsoever between the parties, be it in fact or law.[194]

[362] The Supreme Court of Canada dismisses Newfoundland's appeal on the 800 MW Recall brought before the courts of Newfoundland on June 9, 1988[195] and, on same date, also dismisses the recourse in the matter brought before the courts of Québec since it became moot[196].

[363] This concludes the first part of the tug of war between the parties. There will be a second one much later which will give rise to the judgment rendered by Judge Joël Silcoff on July 24, 2014[197].

[364] In paragraphs 6 and 7 of his judgment, Judge Silcoff reproduces CF(L)Co's conclusions in its recourse and which the parties referred to under the heading of Good Faith Case. The Courts recaps them:

> "[6] Accordingly, for the reasons more fully described in the Motion, CFLCo asks the Court to:
>
> **DECLARE** that in the circumstances of this case the civil law principle of good

[192] Exhibit P-38.
[193] Exhibits P-38/58 and P-26 A/1.
[194] Exhibit P-236/22.
[195] Exhibit P-26 A/10.
[196] Exhibit P-38/88.
[197] Exhibit P-336.

faith in all its forms, including without limitation abuse of rights, the "spirit of justice" and "fair play" requires modification for the future of the contract price set out in the Power Contract entered into between Plaintiff and Defendant so as to provide a fair and equitable purchase price to Plaintiff;

DECLARE that, in all the circumstances, a fair and equitable purchase price to the Plaintiff requires as a minimum that **for the future the commercial value of the power generated by the Churchill Falls project be shared between CFLCo and Hydro-Québec** in a reasonable manner consistent with the current realities and the continued existence of the Power Contract and **in** consequence;

ORDER that the **pricing terms of the Power Contract be modified as of November 30. 2009** so as to provide that the mill rate payable by Hydro-Québec to CFLCo in each calendar year for energy purchased from CFLCo shall equal the sum of the following:

[Emphasis added]

in accordance with a formula more fully described.

[7] Subsidiarily, CFLCo asks that the Court:

ORDER that the Power Contract be resiliated with effect six (6) months from the date of judgment."[198]

[365] Judge Silcoff singles out the main questions at issue as follows:

"[273] The questions in issue in these proceedings can be summaried [sic] in the following manner:

(1) In the circumstances giving rise to the negotiation and signature of the Power Contract and in light of the events occurring subsequent thereto, in refusing to renegotiate the pricing structure for the future, is Hydro-Québec in breach of its civil law duties of good faith and cooperation and that of exercising its contractual rights in a reasonable manner?

(2) In the affirmative, can the Court intervene in order to grant what it considers appropriate equitable relief?

(…)"[199]

[366] Judge Silcoff adds this question to his analysis and concludes as follows:

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[198] Exhibit P-336/7, pars. 6 and 7.
[199] Exhibit P-336/76, par. 273.

> "[551] CFLCo has failed to satisfy the Court that, in the context of the nature and equilibrium of the relationship and the legitimate expectations of the parties as reflected in the Power Contract, by refusing to renegotiate the pricing terms of the Power Contract, Hydro-Québec has breached its civil law duty of contractual good faith, cooperation and the reasonable exercise of its rights.
>
> *[552] CFLCo would have the Court conclude that the* "true nature of the relationship", *to which it frequently refers, is that of « ...a* long-term, interdependent relationship that would require a tremendous level of cooperation, trust and compromise, **based on an equitable sharing of risks and benefits.***"[4271 [emphasis added].*
>
> [553] This latter characterization is not supported by the evidence or, at best, requires the Court to disregard the clear language and binding force of the Power Contract as negotiated between the parties by their own free will.
>
> [554] Referring elsewhere to the «*true nature of the relationship*» [428], CFLCo would seem to infer and have the Court accept that because the nature of the relationship was previously otherwise crystallized or defined in the Letter of Intent or elsewhere other than in the Power Contract, it is accordingly entitled to an equitable sharing of the alleged «windfall profits» earned by Hydro-Québec.
>
> [555] Such inference is not supported by the evidence. Neither the Letter of Intent nor any other reference by counsel to some nebulous source of this allegedly «*interdependent relationship*» defines the true nature and conditions of the contractual relationship between the parties.
>
> [556] It is solely to the Power Contract and, to the extent of any ambiguity, to the evidence regarding negotiations preceding its signature that the Court must direct its attention in order to identify the true nature and equilibrium of the relationship, the risks and benefits assumed thereunder and the rights and obligations of the respective parties.
>
> [557] CFLCo is clearly not satisfied with the nature and equilibrium of the relationship freely negotiated and defined in the Power Contract. Along with the Government of Newfoundland, it has complained for some time of the allegedly «*inequitable sharing of risks and benefits».*
>
> [558] It seeks to have the Court decree and impose a new equilibrium, not in any way founded on the terms of the existing Power Contract but rather reflected in a new contract, more favourable to its objectives and to those historically sought by the Government of Newfoundland.[200]

[367] CF(L)Co filed an appeal from Judge Silcoff's decision.

[368] While this matter was under advisement, the Court of Appeal, on August 1, 2016, dismissed CF(L)Co's appeal.

[369] This file, besides the issue of good faith, dealt with the unforeseeability which entails that CF(L)Co was clearly disadvantaged.

[200] Exhibit P-336/159/160, pars. 551 to 558.

[370] One important piece of the evidence administered by Judge Silcoff dealt with the negotiations surrounding the entire contract and, obviously, the price setting.

[371] The Court of Appeal dwells thereon. Following are some interesting findings in this matter:

> " [79] The judge drew conclusions from the manner in which the parties fixed the price and from the reasons which motivated them. His assessment of the documentary and testimonial record (particularly the expert evidence) led him to conclude that the Respondent accepted to assume the majority of the financial risks which allowed the Appellant to debt finance the construction of the plant without dilution of its equity in the project. Since the repayment of the loan in 2010, Respondent has become the owner of a valuable plant – estimated at 20 billion dollars by Thierry Vandal – whose long life expectancy would enable Appellant, after expiry of the contract in 2041, to sell the energy produced at market prices for many decades. In consideration of substantial and indispensable financial undertakings needed to obtain the financing, Respondent received the guarantee of stable, predetermined pricing as well as protection from the inflation of operating costs.
>
> [91] Appellant has not succeeded in challenging one of the judge's most significant factual conclusions – i.e. that in the context of the original contractual equilibrium, the Respondent assumed any risk in the fluctuation of energy prices. Two factual elements indicate that the contract allocates such risk to the Respondent:
>
> 1. The need for Appellant to obtain the "take or pay" clause because, as explained by each parties' expert, Appellant could not assume the risk of price fluctuation, and;
>
> 2. Respondent's agreement to fixed pricing.
>
> [92] The need to include the "take or pay" clause in the contract attests that Appellant was not able to assume the risk associated with fluctuations in the market price for electricity. This clause obliges Respondent to take virtually all the power produced by the plant, thus guaranteeing to Appellant revenue sufficient to service its debt.
>
> [95] The "take or pay" clause resulted from Appellant's refusal to assume the risk related to fluctuations in the value of energy and its inability to obtain financing had it assumed suck risk."[201]
>
> (Emphasis added)
> (Footnotes omitted)

[372] Finally, one noteworthy fact, the Court of Appeal relates in its decision that the parties, during the term of the contract, have already negotiated new agreements mutually advantageous to both parties.[202] Similarly, it seems to invite the parties to come to terms on

[201] *Churchill Falls (Labrador) Corporation Limited* c. *Hydro-Québec*, 2016 QCCA 1229, pars. 79, 91, 92 and 95.
[202] *Id.*, par 157.

their own.[203]

[373] Notwithstanding this legal jousting, the parties on the ground continue to collaborate and, better still, to talk to one another.

[374] This collaboration as well as certain political interventions will lead to other rounds of negotiations.

C) NEW ROUNDS OF NEGOTIATIONS

[375] There will be three new negotiating rounds between H.Q. and CF(L)Co, that is, from 1989 to 1992 and from 1995-1996 and, lastly, in 1998. The Court will briefly dwell on the first two rounds since the conclusion of the so-called Guaranteed Winter Availability Contract (GWAC) results therefrom.

[376] The evidence surrounding these two negotiating rounds is not only documentary but also the fact that Mr. Claude Dubé, engineer and senior executive, now retired from H.Q., who at well past 76 years of age, testified in this case for two days with remarkable aplomb.

[377] Mr. Dubé's testimony is important since he was employed by H.Q. from 1963 to December 1996 in the sectors highly pertinent to this dispute. A summary of his professional career is necessary.

- He began working for H.Q. in 1963, and joined system planning management. In 1969, he headed the department and held this position until 1971.
- In 1971, he became the assistant director of long-term planning.
- From 1975 to 1976, he headed the production equipment department.
- In 1976, he became assistant to planning management until 1980 when he was promoted to director. His title is amended in 1981 to become vice-president of planning, the responsibilities remaining the same.
- In 1984, change of course, he becomes vice-president, industrial customer pricing, a position he held until 1987.
- After having worked for a subsidiary of H.Q. between 1987 and 1989, he returns to the fold to become corporate vice-president in 1989 and external market vice-president in 1992 until his retirement in 1996[204].

[378] While involved in the new negotiating rounds, Mr. Dubé also testified on certain historical and technical aspects surrounding H.Q,'s operation of its system, whether in terms of production or transmission. The Court will come back to this aspect of the evidence later on.

[379] Now then, let's return to these rounds of negotiations.

---

[203] *Id.*, par. 154.
[204] Stenographic notes of Claude Dubé, October 28, 2015, pp. 8 to 24.

1) 1989 to 1992

[380] The backdrop of the first one, *i.e.,* from 1989 à 1992, is the financial viability of CF(L)Co. As H.Q., had a contractual obligation to make up for any liquidity shortfall caused by the operations of the Power Plant, it has a certain interest.

[381] One important point to underscore is the fact that CF(L)Co was bound to pay dividends to its shareholders or, there again, royalties to Newfoundland, even if it was deprived of funds that would eventually be required, whether in terms of fixed assets or maintenance of the Generating Station[205].

[382] Mr. Dubé divides the framework of the 1989 negotiations into two parts as follows:

1) Purchase of power and energy from new power plants. *i.e.*, Muskrat Falls and Gull Island to be located in the portion of the Churchill River named Lower Churchill compared to CF(L)Co's generating station located in Upper Churchill.

2) Discussion on the ways to ensure CF(L)Co's financial viability[206].

[383] Remember that the possibility of establishing a generating station at Gull Island had already been raised in 1976 by Premier Moores in the letter he had sent to Premier Bourassa[207].

[384] As for the financial viability, following is the finding reached by the negotiating committee in its report dated December 12, 1988:

> "This 'Reference Case' shows that in the absence of changes in the financial arrangements which presently govern the operation of the Corporation, CF(L)Co will experience cash difficulty in the year 2000 from which it will be unable to recover unless Clause 12.4 of the Power Contract and the provisions of the Voting Trust Agreement of October 28, 1968 would apply."[208]

[385] Following are the preliminary remarks regarding the contemplated solutions:

> "It was clear from the results of this original analysis that for CF(L)Co to remain financially viable and stable over the long term, one or more of the following factors must change:
>
> (a) expenditures must decline significantly;
>
> (b) revenues must be increased significantly; or
>
> (c) dividends must be severely restricted.[209]
>
> Note that the time horizon contemplated by the negotiating teams was limited to 2016.

[386] These negotiations will lead the committee to table three scenarios in a report dated

[205] Exhibit P-247/40.
[206] Stenographic notes of Claude Dubé, October 29, 2015, p. 260.
[207] Exhibit P-228/5.
[208] Exhibit P-247/10.
[209] *Id.*

January 28, 1991 even though the time horizon considered on the topic of the financial health of CF(L)Co extends to 2041[210].

[387] As a result of this report, we learn about the existence of "une convention d'exploitation"[211], an operating agreement signed on November 1, 1990[212], it is, in fact, the forerunner of GWAC. Following is how Mr. Dubé briefly summarizes it;

> [Translation] "It was an agreement between operators whereby Hydro-Québec had purchased the guarantee of availability from the 11 units in peak period, by paying a certain amount for this guarantee and also by ensuring that the inventory of spare parts be increased and maintained by CF(L)Co."[213]

[388] This operating agreement expired on December 31, 1996. The problem of spare parts, as expressed by Mr. Dubé, is an important component of this agreement, since the acquisitions to be made by CF(L)Co amounted to $4,950,000.00 during the first term of the contract and $10,880,410.00 for the second term[214].

[389] As for the contemplated scenarios, they will be refined in the second version of this report, the one dated February 12, 1991[215].

[390] A little later, that is, on May 9, 1991, H.Q. will submit an offer to CF(L)Co covering, *inter alia*, the following points:

- Guaranteed Winter Availability Contract.
- Unanimous Shareholders' Agreement.
- Purchase of power and energy from generating stations located in Lower Churchill[216].

[391] As for the Guaranteed Winter Availability Contract, it is, in fact, an enhanced Operating Agreement. In fact, we learn from it that H.Q. was looking for 856 MW of power for the period of five (5) winter months and that the term of the contemplated contract extended from November 1, 1994 to March 31, 2041.

[392] A draft GWAC was attached to this proposal. The Court deems it advisable to reproduce one of the Whereas clauses and the object of the contract:

> "WHEREAS <u>that power contract also provides that whenever additional capacity can, in the opinion of CF(L)Co, be made available, such capacity shall also be made available to HYDRO-QUÉBEC on request</u>:
>
> OBJECT:
>
> During the existence of this present contract, CF(L)Co agrees to guarantee

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[210] Exhibit P-249.
[211] In English, an operating agreement.
[212] Exhibit P-248C.
[213] Stenographic notes of Claude Dubé, October 29, 2015, p. 275, lines 13 to 20.
[214] Exhibit P-248C/30 to 33.
[215] Exhibit P-249/16.
[216] Exhibit P-250.

> maximum availability of all eleven (11) generating units of the Plant necessary to provide the Additional Availability each year during the Availability Period and HYDRO-QUÉBEC agrees In consideration thereof to pay to CF(L)Co the monetary consideration provided for In Article V hereof."[217]
>
> (Emphasis added)

[393] CF(L)Co will respond to H.Q.'s proposal on May 31, 1991. Following is an excerpt dealing with the purchase of power and energy from the generating stations located in Lower Churchill.

> "As I pointed out at the meeting, there is no difference between the last 25 years of the Upper Churchill contract (i.e. from 2016 to 2041) and the 30 year contract we are negotiating with you for power and energy from the Lower Churchill. In both cases, Hydro-Quebec will have a contractual right to blocks of power and energy and we will have a contractual obligation to supply. Failure by either party to live up to the contracts would be subject to the laws governing such matters. Therefore, neither side requires any special covenants covering what are normal commercial dealings.
>
> At was further pointed out at the May 28, 1991 meeting, Hydro-Quebec made it absolutely clear at the start of our negotiations that it was not prepared to consider any changes to the existing Hydro-Quebec/CF(L)Co contract, nor the wheeling of power across Quebec. We accepted these pre-conditions. I am sure you will appreciate that we have an equal reticence in these negotiations to do anything which might be construed as confirming or improving for Hydro-Quebec's benefit, the existing arrangements."[218]

[394] Mr. Dubé who was present at the meeting, to which the May 31, 1991 letter refers, expresses his vision of "Blocks" as follows:

> [Translation] "Not blocks, it's a term that means quantities, it does not mean fixed and equal quantities, some quantities." [219]

[395] This leads us to deal with other historical or background notions as understood by H.Q. when Mr. Dubé worked there. They are notions of Bundle, interruptible sales and excess energy.

[396] In his testimony, Mr. Dubé stipulates that at the time, notions of power and energy were considered in a Bundle or in a package.[220]

[397] Moreover, following is how he describes interruptible sales in the 1960s:

> [Translation] **"A.** Power, energy, yes, it is always grouped together. Yes, there were interruptible sales in the 60s.
>
> **Q.** Well, that interests me. So, can you explain to the Court what interruptible sales existed in 60s?

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[217] Exhibit P-250/11 and 13.
[218] Exhibit D-141, p. 3 to 4.
[219] Stenographic notes of Claude Dubé, October 29, 2015, p. 296, lines 7 to 10.
[220] This English term "Bundle" was used by Mr. Dubé on October 29th, pages 298 and 299. According to Le Robert et Collins Dictionary, the term "Bundle" is translated by "package, bunch, wad, …"

> **A.** It is quantities of power and energy that were offered at a discount mostly to large-scale industries, provided it was possible to interrupt them on prior notice.
>
> **Q.** And, I am going to go even further and suggest to you that, in addition to large-scale industries, Hydro-Québec had made such arrangements with its neighbour, Hydro-Ontario. Do you recall that?
>
> **A.** Yes. For two reasons. The first, is that, to have a permit from the National Energy Board, you had to always demonstrate that the energy exported exceeded Canadian needs. In addition to that, when we sold excess energy, we could not know in advance how long these surpluses would last and what events could possibly occur. So, on either side, under these contractual agreements, we agreed that they were interruptible sales, but in consideration of a prior notice. So, it could be several years, several months, several days." [221]

[398] As for excess energy, following is how Mr. Dubé describes it:

> [Translation] **"Q.** Could you explain to the Court what is meant by excess energy?
>
> **A.** It is energy that exceeds Hydro-Québec's needs and is impossible to store. Normally, there are always extreme variations in hydro-electric supplies, hydraulic rather. And when there are temporary excesses, we try as much as possible to store them, which is not possible if the reservoirs are at full capacity, it would be spilled. So, instead of spilling, if we can find a customer to take them, we are going to do it." [222]

[399] Under the section of expert valuations, we will see that CF(L)Co has a whole other interpretation of what constitutes excess energy.

[400] Enough said on this historical point and let's return to the negotiations.

[401] Despite the negotiators' efforts, the parties did not reach any agreement further to this round of negotiations, the whole coming to an abrupt end in 1992 according to Mr. Dubé. He blames the Government of Newfoundland for this failure [223].

2) 1995 to 1996

[402] Now for the second round of negotiations held in 19951996.

[403] These are restarted at the urging of Mr. Claude Dubé and Mr. Dave Mercer, president and chief executive officer of CF(L)Co while both are members of CF(L)Co's board of directors.

[404] Once again they are both concerned about the financial stability of CF(L)Co since the operating agreement, source of significant revenue for CF(L)Co, expires on December 31, 1996

[221] Stenographic notes of Claude Dubé, October 30, 2015, p. 91, lines 4 to 25, p. 92, lines 1 to 13.
[222] Stenographic notes of Claude Dubé, October 30, 2015, p. 93, lines 9 to 24.
[223] Stenographic notes of Claude Dubé, October 29, 2015, p. 303.

[224].

[405] On July 7, 1995, Mr. Andrew Grant, who Mr. Dubé describes in his testimony as being CF(L)Co's Chief Financial Officer, signs a memo addressed to Messrs. Mercer and Dubé[225]. This memo informs us that the agreement between CF(L)Co and Twinco would end on December 31, 2014 and that, after this date, the energy made available would be sold to third persons at the same price as the one billed to H.Q.

[406] On September 5, 1995, Mr. Mercer, under two (2) separate covers, sends Mr. Claude Dubé, five (5) financial forecasts which, according to him, would ensure the financial viability of CF(L)Co. The first dispatch considers a financial time horizon extending to 2016[226] while the second contemplated a time horizon until 2041[227].

[407] On page two (2), the cover letter refers to what Mr. Mercer qualifies as "very thick computer outputs" which form an integral part of the submitted forecasts[228].

[408] From this document, it emerges that the only sales to third persons that could occur, would happen upon expiry of the contract binding CF(L)Co to Twinco, the term of which expires in 2014. Thus, effective 2015, a new heading appeared entitled "Other Customers" showing potential revenue in the area of $4,676,000.00[229].

[409] That being said, the teams of negotiators considered other avenues to increase CF(L)Co's revenue. They went from enhancing the equipment to increase productivity to a modified payment method by H.Q. known by the term Front Loading.

[410] Mt. Dubé relates, moreover, that there was never any discussion, during this negotiating round, on the notion or definition of "Continuous Energy" as far as the renewed contract is concerned[230].

[411] Finally, H.Q. considering that the negotiations had come to an end, tables an offer to CF(L)Co on October 8, 1996[231].

[412] This document covers the following five (5) points:

1) Shareholder's agreement

2) Operating agreement

3) Requests for maintenance

4) Open Access

5) Guaranteed Winter Availability Contract

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[224] Exhibit P-253/1, point 2 and Stenographic notes of Claude Dubé, October 30, 2015, p. 7, lines 16 to 23.
[225] Exhibit P-253.
[226] Exhibit P-254.
[227] Exhibit P-255.
[228] Exhibit P-254/4.
[229] Exhibit P-256/11.
[230] Stenographic notes of Claude Dubé, October 30, 2015, p. 38.
[231] Exhibit P-259.

[413] In light of these sections, we can pinpoint the following three (3) major topics:

- Shareholders' Agreement.
- Operating Agreement converted to a GWAC.
- Open Access.

[414] Even though there is no immediate follow-up to this proposal, it constitutes nonetheless the basis of the various agreements that will be reached in 1998.

[415] It is worthwhile to fully reproduce the section dealing with Open Access and to focus thereon.

> **"4. Open access:**
>
> To allow **CF(L)Co:**
>
> - to recall the remaining approx. 130MW starting in November 1997 instead of the 3 year delay.
> - to wheel the related capacity and energy through Hydro-Québec's system
> - at the open access tariff that shall be effective from time to time according to FERC rules[232]
> - to market the recall outside of Québec (subject to FERC approval of Hydro-Québec's filing for open access) in the market(s) of its choice.
> - the transmission losses over the Hydro-Québec system are at the seller's expense (i.e. CF(L)Co)
> - HQ offers to market that power for CF(L)Co, at a fee to be negotiated.
> - Preferred dividends and royalties payable to Newfoundland are calculated on the additional revenues in accordance with the current practices.
> - HQ requests non-discriminatory access to Labrador & Newfoundland (reciprocity).[233]
>
> (Emphasis added)

[416] A brief remark is called for at this time.

[417] By way of introduction, we saw that Open Access is the result of a fundamental structural modification, among our neighbours to the south, intended to open up all electricity

[232] FERC refers to an American body, the Federal Energy Regulatory Commission.
[233] Exhibit P-259.

transmission systems to the market.

[418] Messrs. Sylvain Clermont, chef commercialisation des services de transport, and Pierre Paquet, directeur contrôle des mouvements d'énergie, both at H.Q.T.[234] testified to explain the regulatory structure surrounding Open Access as well as its enforcement in the field by H.Q.

[419] Let's now take a look at the framework of this regulatory structure. The American body at the origin of this change and that oversees it is the Federal Energy Regulatory Commission (FERC).

[420] In its introduction, the Final Rule dated February 16, 2007[235] explains, in concise terms, this drastic change introduced in the mid 1990s, following is an excerpt:

> **"I. Introduction**
>
> 1. This Final Rule addresses and remedies opportunities for undue discrimination under the pro forma Open Access Transmission Tariff (OATT) adopted in 1996 by Order No. 888. This landmark rulemaking fostered greater competition in wholesale power markets by reducing barriers to entry in the provision of transmission service. In the ten years since Order No. 888, (...)"
>
> Footnotes omitted

[421] The Final Order refers to public utility service operators forming part of the North American Electric Reliability Corporation (NERC) as well as the *pro forma* Open Access Transmission Tariff (OATT).

[422] Mr. Clermont specifies that HQT forms part of one of the eight (8) regional councils of the NERC, that is, the North East Power Coordinating Council (NPCC).

[423] He also specifies that Hydro-Québec's Transmission Services Rates and Conditions[236] are based on the *pro forma* OATT adopted by the FERC. That being said, the rate must be approved by the Régie de l'Énergie.

[424] In a subsequent section, we will see in further detail the impact of this regulation on point 2 of H.Q,'s proposal of October 8, 1996 "to wheel the related capacity and energy through Hydro-Québec's system". [237]

(Emphasis added)

[425] Let's end this brief remark for the time being.

3) 1998

[426] 1998 will mark a pivotal year in the relations between H.Q. and CF(L)Co.

[427] Mr. Thierry Vandal attributes these negotiations and agreements to discussions that took

[234] Exhibit P-367.
[235] Exhibit D-192, Order No. 890.
[236] Exhibit P-345.
[237] Exhibit P-259.

place during a tour of Asia by political and business representatives from Québec and Canada such as the Honourable Jean Chrétien, Prime Minister of Canada, the Honourable Lucien Bouchard, Premier of Québec, the Honourable Brian Tobin, Premier of Newfoundland, Mr. André Caillé, President of H.Q. as well as representatives from NLH.

[428] According to Mr. Vandal, the central point of the discussion between CF(L)Co and H.Q., brought about by political bodies, revolved around the development of Lower Churchill [238].

[429] The negotiators for H.Q. will be Thierry Vandal and Marie-Josée Nadeau while CF(L)Co will be represented by its president and chief executive officer, Mr. Bill Wells[239], who will be assisted by Mr. Fred Way, a senior civil servant from Newfoundland.

[430] Some ancillary agreements to the development of Lower Churchill will be quickly reached no doubt because of a real political will. These agreements will cover the following points:

1) Twinco Block
2) 300MW Recall
3) GWAC
4) Shareholders' Agreement

[431] Let's take a look at each of these agreements.

i) TWINCO BLOCK

[432] As we previously saw, the Twinco Block of 225 MW had been segregated from the outset of the negotiations in order to guarantee the energy needs of the customers of the Twin Falls Power Plant[240].

[433] That being said, this obligation was ending on December 31, 2014 and, from then on, according to Mr. Vandal, by the switching effect, this block of 225 MW became available for H.Q. as of January 1, 2015.

[434] In connection with the four (4) agreements reached in 1998, H.Q. agreed that the Block of 225 MW previously reserved for the needs of Twin Falls' customers not form part of the power and energy that could be made available to H.Q. at the price agreed to in the principal contract but could instead be resold to third persons, the whole at a commercially acceptable price.

[435] This agreement on the Twinco Block was crystallized in the Shareholders' Agreement and, more specifically, in articles 3.6.1 and 3.6.2 therein which the Court reproduces:

> "3.6.2 HQ waives any right HQ may have under the Power Contract or otherwise to claim the Twinco Power upon termination of the Twinco Sublease.
>
> 3.6.2 Upon the termination of the Twinco Sublease, CF(L)Co will make available at the delivery point at which the Twinco Power Is being delivered at the date of

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[238] Stenographic notes of Thierry Vandal, October 20, 2015, p. 45, lines 5 to 25 and p. 46, lines 1 to 15.
[239] Also president and chief executive officer of NLH.
[240] Exhibit P-1/13, art. 4.2.2, principal contract.

> this Agreement, the Twinco Power for distribution and consumption in Labrador West to N&LH or any other company which replaces N&LH as the distributor of hydro-electric energy In Labrador West (either being the 'Distributor') for a price expressed In cash. Inclusive of all transmission charges and on terms and conditions which are in each case commercially reasonable based on the fact that the Twinco Power Is to be distributed and consumed In Labrador West, as decided by a majority of directors of CF(L)Co entitled to vote thereon under the provisions of the Act and providing for the conditions specified in section 3.6.3 (the 'Twinco Power Agreement')[241]

ii) 300 MW RECALL

[436] Article 6.6 of the principal contract provides that CF(L)Co may recall up to 300 MW for resale outside the Province of Québec by giving a prior written notice of three (3) years to this effect.

[437] In 1998, CF(L) Co had already recalled some 170 MW.

[438] As proof, on September 1, 1976, CF(L)Co and NLH entered into a contract which, though it deals primarily with the sale of the Twinco Block, contains some provisions on the sale by CF(L)Co to NLH of any portion of the Block of 300 MW having formed the subject matter of the Recall [242].

[439] On March 9, 1998, a contract entitled Notice of Recapture and Waiver is entered into.[243]

[440] This very simple contract notes that CF(L)Co gives the prior notice provided under article 6.6 of the principal contract with regard to what had not yet been recalled, that is, exactly 130.7 MW and, second, H.Q. waives the written prior notice of three (3) years conceding, from then on, CF(L)Co's right in the 130.7 MW not having yet been the subject of the Recall.

[441] In fact, effective this date, the 300 MW, subject of the Recall, was sold by CF(L)Co at the price stipulated in the principal contract to NLH which, in turn, resold a portion thereof to H.Q. at the market price, which, according to Mr. Vandal, was at a price ten (10) times higher than the one provided in the principal contract [244].

[442] In fact, a contract was entered into on the same date, *i.e.,* March 9, 1998, between CF(L)Co and NLH pursuant to which CF(L)Co sold 300 MW to NLH. This contract, valid until August 31, 2041, set the KWH price according to the principal contract between H.Q. and CF(L)Co[245].

[443] Also, on the same date, NLH and H.Q. entered into a contract pursuant to which NLH undertook to sell and H.Q. undertook to purchase a portion of the 300 MW having been the subject of the Recall, the whole at the price of 2.39 cents per KWH. Some of the

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[241] Exhibit P-3C/16, articles 3.6.1 and 3.6.2.
[242] Exhibit P-29.
[243] Exhibit D-1: On the exhibit as such D-54 appears as being the number given to this document in another file involving the same parties. This was as it appears on the list of the defendant's exhibits. This contract is clearly Exhibit D-1.
[244] Stenographic notes of Thierry Vandal, October 19, 2015, p. 204, lines 1 to 21 and P-292C.
[245] Exhibit P-30, art. 2 – Term, art. 3 – Quantity, art 4 - Price

Whereas clauses are important. They read as follows:

> "**WHEREAS,** pursuant to an agreement dated March 9, 1998 between the Intervenant and N&LH (the "N&LH PPA"), the Intervenant has agreed to sell to N&LH, and N&LH has agreed to purchase, all of such recaptured quantity of power and energy:
>
> WHEREAS N&LH utilizes a portion of the total recaptured quantity for sales in Labrador (the "Labrador Load"), the amount of which may vary from time to time;
>
> WHEREAS, **while this Contract is in effect.** N&LH **agrees not to use any portion of the said recaptured quantity for sales outside Labrador except quantities sold to** HQ: **and"**[246]
>
> (Emphasis added)

[444] The initial contract in effect as of March 9, 1998 but signed on September 14 and 25, 1998 was for a term of three (3) years, that is, until March 8, 2001.

[445] This contract was renewed a first time on February 19, 2001 until March 31, 2004[247] and a second time on March 31, 2004 to extend to April 1, 2009[248].

[446] The contract between NLH and H.Q. will not be renewed after April 1, 2009 and the next stages regarding the Recall of the 300 MW will be addressed in the next section[249].

ili) GWAC

[447] As we saw earlier on, in 1990, the parties had implemented an operating agreement intended to guarantee H.Q., in consideration of compensation, additional power during peak periods, in particular, in winter.

[448] Remember that Firm Capacity had been established at two (2) levels in the principal contract, namely:

From October to May	= 4,382 MW
For June to September	= 4,163 MW[250]

[449] According to Mr. Vandal, the fact that H.Q. agreed to pay for additional power beyond the Firm Capacity originates in the wording of article 6.4 of the principal contract. The Court reproduces the first paragraph of this article:

> "**Firm Capacity**
> The Firm Capacity shall be available at all times when Hydro-Quebec has requested it. In addition whenever additional capacity can, in the opinion of

[246] Exhibit P-31C/1: note that the intervenant to the contract is CF(L)Co.
[247] Exhibit P-32C/3, art. 5.3.
[248] Exhibit P-33C/2, art. 3.
[249] Exhibit HQ-DEM-5, summary table of the various agreements regarding the 300MW Block from 1976 to 2015.
[250] Exhibit P-1/8, definition of Firm Capacity.

> CFLCo. be made available, such capacity shall also be available to Hydro-Quebec on request."
>
> (Emphasis added)

[450] Following are Mr. Vandal's comments in this respect in the course of his testimony:

> [Translation] "**A.** Because as the contractual provision indicates, making this additional power beyond firm capacity available to Hydro-Québec, it is subject to CF(L)Co's opinion on its availability. So then, what we wanted to do with the GWAC, is basically to lift that constraint or that qualifier by removing the provision whereby the additional power, that additional power, was subject to CF(L)Co's opinion on its availability. What the GWAC does, is that it gives us a guarantee that is not subject to CF(L)Co's opinion on its availability for firm capacity, for a quantity of power of 682 megawatts which allows us, at that time, to schedule that power and, by scheduling the power, to produce energy in the winter, from November to March, energy that we would have otherwise received in the summer, because in the summer, there would have been available capacity."[251]
>
> (Emphasis added)

[451] Daniel Garant, member of H.Q.'s negotiating team in 1998, reveals in his testimony an important part of both H.Q.'s and CF(L)Co's motivation surrounding the conclusion of the GWAC. The Court reproduces the relevant portion of his testimony:

> [Translation] "**A.** O.K. Pursuant to the Power Contract, Hydro-Québec had the right to all the generating station's quantity of power and energy, minus the TwinCo, block, minus the recapture we just talked about. In the Power Contract, there was, there still is, a term referred to as Firm Capacity that described the capacity that was guaranteed to Hydro-Québec in megawatts.
>
> At certain given times, the generating station could produce more than this Firm Capacity. Historically, it was always made available to Hydro-Québec pursuant to the Power Contract.
>
> People from Newfoundland told us that, as time passed, they gave us this available capacity without compensation, because there was no additional revenue in doing this, and that, in the end, we could expect that we would no longer have this additional available capacity that would be supplied to us because it was not Firm Capacity.
>
> The context of the GWAC was to reinforce, it was to create a guarantee for that capacity by paying to ensure that the Churchill Falls Generating Station supplied us with the power capacity that was available and that was guaranteed to us. We wanted the guarantee."
>
> **THE COURT:**
>
> [Translation] **Q.** If I understand correctly, it was over and above the Firm Capacity?
>
> **A.** Yes, in fact, when you build a hydro-electric plant, you have a capacity from

[251] Stenographic notes of Thierry Vandal, October 20, 2015, p. 14, lines 18 to 25 and p. 15, lines 1 to 19.

> the turbine-generator unit, but you cannot guarantee that everything is available at the same time. So, in the contract, you put a lower percentage, but that additional capacity exists at certain given times depending on maintenance schedules and other things.
>
> Therefore, we, what we wanted, for the winter period, is to obtain that additional capacity, to guarantee it. We already had it pursuant to the contract, but it was not guaranteed." [252]
>
> (Emphasis added)

[452] Although it was signed in June 1999, the GWAC[253] was retroactive since the respective obligations of each of the parties were met effective November 1998.[254]

[453] CF(L)Co's resolution dated May 18,1999, authorizing the signature of the GWAC as well as the shareholders' agreement notes, moreover, that this contract will ensure CF(L)Co's financial viability until 2041[255].

[454] Some of the conditions of this contract should be specified.

[455] The guarantee of power, made available to H.Q., is 682 MW in addition to the firm capacity provided in the principal contract for the winter period, that is, 4,382 MW for a total of 5,064 MW[256]

[456] The availability period of this 682 MW capacity ("the Availability Period") is the winter period, that is, from November 1st to March 31st [257].

[457] The term of the contract runs from November 1, 1998 until 2041[258].

[458] Mr. Vandal is categorical on the fact that when the GWAC was negotiated, there was never any question of splitting its term, that is, for a period before September 1, 2016, and a second period starting on such date for the next 25 years with some ceiling as a backdrop effective 2016[259].

[459] Article 4 of the contract provides that H.Q. must notify CF(L)Co of its needs in terms of capacity at least seven (7) days in advance, such needs being accompanied by an estimate of its needs for the three (3) weeks following this first period of seven (7) days. Moreover, sub-section 4.2.3 allows H.Q. to modify its requests during each hour, the whole according to the following conditions:

> "4.2.3 In addition, HQ <u>may modify its capacity requirements during each hour of the Availability Period</u>. In such event, CF(L)Co shall use commercially reasonable efforts to meet these new capacity requirements and, if CF(L)Co can do so, such modified

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[252] Stenographic notes of Daniel Garant, October 28, 2015, p. 216, lines 10 to 25, p. 217, lines 1 to 25 and p. 218, lines 1 to 11.
[253] Exhibit P-2C.
[254] Stenographic notes of Thierry Vandal, October 20, 2015, p. 16, lines 21 to 25 and p. 17, lines 1 to 10.
[255] Exhibit P-36/60
[256] Exhibit P-2C/1, last "Whereas clause".
[257] Exhibit P-2C/2, sub-sec. 1.2.2
[258] Exhibit P-2C, art. 17.
[259] Stenographic notes of Thierry Vandal, October 20, 2015, pp. 25 and 26.

request shall be considered as revising such seven day schedule to the extent set forth in the modified request.[260]

[460] Further on we will see that this scheduling is almost consistent with the interconnection guide[261]' adopted by the parties in accordance with the Principal Contract, except for the fact that last-minute changes under the GWAC do not have to be justified by a serious reason or an emergency.

[461] As for the compensation to be paid by H.Q., it appears in Schedule B to the contract. Therein we note that the starting price per KW was $5.00 in 1998-1999 which was increased by $5.00 annually to reach $50.00 in 2007-2008, subsequently, the parties applied a constant annual indexation of 1.0% until the end of the term in 2041[262].

[462] According to Mr. Vandal, the aggregate consideration paid since 1998 and to be paid until 2041 to CF(L)Co under the GWAC totals almost 1 billion, 500 million dollars[263].

[463] As for the price H.Q. agrees to pay for the GWAC, an excerpt from Mr. Vandal's testimony is one again relevant:

> [Translation] "**Q.** Would the interpretation of the Renewed Contract that is proposed by CF(L)Co in this case, with these monthly energy limits, have an impact on the benefits that Hydro-Québec derives from the GWAC?
>
> **A.** Yes, absolutely, there would be a major impact. As I mentioned, such an interpretation distorts the GWAC, as we established it, as we agreed to it. And the impact would be to limit Hydro-Québec's capacity to schedule these 682 megawatts by paying for the megawatts made available to produce energy. If the energy itself is limited, we would find ourselves having to pay for available megawatts, without being able to gain any advantage. In other words, they would say to us: "The engine is there, the engines are there, they are available, you pay, but moreover, you have reached the limit of the water you are able to pass through the engine." So then, that would seriously distort the functioning of the GWAC.
>
> **Q.** If we take into account the monthly energy limit that CF(L)Co would want to see apply as of the 2016-2017 season, would there be an impact on the number of hours per month during which Hydro-Québec could derive benefit from the GWAC ? And, where applicable, how can that be established?
>
> **A.** According ... we looked at some scenarios. According to a simulation of such functioning, which is that of the Newfoundland party, raised by the Newfoundland party, over one reference year like 2013, therefore the recent 2013 year, there would be between 25 and 35% of the hours during which we would no longer have the capacity to use the GWAC because we would have reached the limit of energy that would have been capped according to the interpretation of this Newfoundland party."[264]

[260] Exhibit P-2C/5.
[261] Exhibit P-17.
[262] Stenographic notes of Thierry Vandal, October 20, 2015, p. 25, lines 12 to 19.
[263] *Id.*, p. 52, lines 19 to 25 and p. 53, lines 1 to 4.
[264] *Id.*, p. 27, lines 16 to 25, p.28, lines 1 to 25, p. 29, lines 1 to 11.

(Emphasis added)

[464] Mr. Vandal's position on the 1998 GWAC is shared by Mr. Dubé, while commenting on the 1996 proposal for this same GWAC concept:

> [Translation] "rephrase the question for Mr. Dubé.
>
> **Q.** What is the impact of a change on Hydro-Québec's scheduling rights in connection with the GWAC that was the subject matter of discussions in 96?
>
> **A.** Well, I would question the relevance of the GWAC and, if it had not been clarified, I, for one, would have withdrawn the proposal regarding the GWAC.
>
> **Q.** And why?
>
> **A.** Because it lost its significance and the commercial value of the GWAC was far from being the same." [265]

[465] The GWAC has been in effect since November 1998. H.Q.'s use of this capacity is especially well demonstrated using certain graphs[266].

[466] These graphs clearly show an increased use of power during the winter months, power that decreases during the summer months.

[467] The evidence showed, that for obvious reasons, the units or, there again, the transmission lines are maintained during the summer. Once again, we will come back to this point further on in a next section.

iv) SHAREHOLDERS' AGREEMENT

[468] As we saw earlier, the Shareholders' Agreement [267] was approved by the board of directors of CF(L)Co on May 18, 1999 and is dated June 18, 1999 and terminates on August 31, 2041[268].

[469] Besides the issue of the Twinco Block that was already dealt with, the main achievement of this agreement revolves around the creation of a reserve fund intended to ensure the financing of fixed assets.

[470] The lack of this fund was, until then, a major concern for H.Q.

[471] It is advisable to recall that at the time of the operating agreement of November 11, 1990 (forerunner of the GWAC) CF(L)Co undertook "to supply and maintain a sufficient reserve of spare parts and equipment". [269]

[472] However, it should be noted in this agreement that any capital expenditure of over five (5) million entailing a change in the budget in the area of ten (10) million requires a majority of

[265] Stenographic notes of Claude Dubé, October 30, 2015, p. 81, lines 8 to 21.
[266] Exhibits HQ-DEM-16/1 and 2, HQ-DEM-15/4.
[267] Exhibit P-3C.
[268] Exhibit P-3C/30, art. 12.
[269] Exhibit P-248C/8, sub-sec. 2.2.2.

the board of directors but with the distinctive feature that it must be approved by at least one of the representatives designated by NLH and H.Q.[270]

[473] This agreement will resolve other matters of concern, such as dividends, governance, etc. As these matters have little or no impact on this decision, except perhaps and very generally the dividends, the Court does not intend to dwell thereon.

VIII. OPERATIONS OF THE POWER PLANT AND TRANSMISSION OF ENERGY

[474] This section is essential for a sound understanding of the next one which will be devoted to expert valuations, therefore, to the more technical aspect of the evidence.

[475] The Court will address it using the following three sections:

A) **Interaction between H.Q. and CF(L)Co** regarding the operations of the Power Plant whether in terms of production, maintenance and communications in general.

B) **New reality in the transmission of the energy** coming from the Power Plant whether in terms of Open Access or the contractual amendments made by the parties.

C) **Events surrounding H.Q.'s awareness** of the existence of the so-called interruptible sales as well as CF(L)Co's position on the interpretation of the renewed contract.

A) INTERACTION BETWEEN H.Q. AND CF(L)CO

[476] The first deliveries of electricity started as of May 1, 1972[271].

[477] The Power Plant was fully operational, that is to say, the 11th unit installed and functional as of September I, 1976[272].

[478] For this section, it is advisable to reproduce Schedule II of the Principal Contract.

[270] Exhibit P-3C/15, sub-secs. 3.4 and 3.4.2.
[271] Exhibit P-35.04 (1972)/5 and 15.
[272] Exhibit P-35.08 (1976)/9.

P-1 /48

SCHEDULE II

INTENDED AVAILABILITY OF CAPACITY AND ENERGY

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
Date	Cumub-tiva, number of Turbine-Generator Unib	Capacity at Generator Teiminais Kilowatts	Capacity at Delivery Point Kilowatts	Firm Capacity at Delivery Point (One Unit Deducted) Kilowatts	Energy at Delivery Point Million Kilowatt-hours per month	Energy at Delivery Point t (One Unit Deducted) Million Kilowatt-hours per month
May 1, 1972	 2	940,000	910,800	448300	676.05	332.66
December 1, 1972 .	 3	1,410,000	1,373,100	910.800	1,017.13	676.05
September 1, 1973 .			1,836,100	1.373,100	1,358.39	1.017.13
December 1, 1973 .	 5	2,330,000	2,297,300	1,836,100	1,599.01	1358J59
September 1, 1974 .	 6	2,820,000	2,7'57,9C0	2397,500	2,038.57	1,599.01
December 1, 1974 .	 7	3,290,000	3,223,000	2,737,900	3,381.72	2.036.37
September 1, 1S7S .	 8	3,780,000	3,462300	3323,000	2.539.36	2,381.72
December 1, 1973 .	 9	4,230,000	3,923,600	3,462,800	2,623.00	2,53938
April 1, 1978	 10	4,700,000	4,382,600	3.923,800	2,625:00	2,625.00
September 1. 1975	.. 11	3,170.000	4,541.500	4362,600	2,625.00	2,625.00

Notes: ,

(1) All amounts referred to in Columns 4 to 7 inclusive are after the deduction of local loads and of transformation and transmission losses. The local load deductions respecting Twin Falls Power Corporation Limited have been calculated at 225,000 kilowatts for capacity and 164.95 million kilowatts per month for energy.

(2) Columns 6 and 7 are calculated on the basis of a month **of** 730 hours.

(3) All references to the Delivery Point assume the same to he as referred to in the last sentence of Section 7.1.

(4) Estimated allowances with eleven units on line of 17,500 kilowatts and 8,270,000 kilowatthours per month for station service and town-site load, and assumed transmission and transformer losses *of* approximately 1.8% have been deducted from generator output in preparing this Schedule.

(5) This Schedule is subject to adjustment in the event contemplated by Section 8.3.

(6} Hydra-Quebec has the right to elect prior to June 1, 196S to reduce by 40% its commitment under Sections 2.1 and 8.2 with respect to Column 6 during the period from May 1, 1972 to September 1, 1972.

[479] Under Column 7 of this schedule, we see that as of April 1976 with (10) units installed, the total KWH is 2,625 million. This figure remains the same with 11 units. The 11th unit intended to ensure continuity during maintenance. Transposed annually, this monthly quantity represents 31.5 terrawatthours or 31.5 million KWH, that is, the initial AEB.

[480] Remember that the eleventh unit could be used as a spinning reserve, therefore, able to reach full speed in very little time. Also, remember that the water used for the spinning reserve was accounted for, thus becoming a component of the AEB.

[481] The Power Plant's load factor is 82% compared to an average of 67% for the entire network of H.Q. power plants.

[482] This 82% constitutes the utilization factor of the 11 units to produce the same energy that 8 or 9 units spinning at full speed could produce.

[483] Moreover, one other special feature specific to the Churchill Falls Generating Station is the fact that although the power indicated in Schedule II of the principal contract [273] was 5,170 MW for 11 units, the reality is that once installed they would produce actual power of 5,428 MW[274]

[484] It is advisable to specify that on the ground, communications regarding the operations of the Power Plant between H.Q. and CF(L)Co are good.

[485] These communications are governed by an operating manual known as the Interconnection Guide[275] created pursuant to sub-section 4.2.8 of the principal contract.

[486] The preamble of the Guide stipulates that:

> [Translation] "The provisions of the CF(L)Co/HYDRO-QUÉBEC INTERCONNECTION GUIDE - SECTION A, the purpose of which is defined in paragraph 1 entitled INTRODUCTION, are subject to the terms of the contract entered into on May 12, 1969 between the Commission hydro-électrique de Québec and Churchill Falls (Labrador) Corporation Limited, which take precedence over them. These provisions may, under the same reserve, be amended by decision of the CF(L)Co/HYDRO-QUÉBEC Operating Committee."

[487] The Guide provides, among other things, for the formation of an operating committee comprised of four delegates, that is, two (2) for H.Q. and two (2) for CF(L)Co.

[488] Following is a summary of the Operating Committee's chief concerns as set out in the Guide.

- Interconnection of the parties' electrical systems
- Equipment maintenance and modifications
- Load forecasts and management of hydraulic reservoirs
- Any other consideration related to power and energy exchanges covered by the contract

[489] This Guide is comprehensive and, among other things, mirrors the principal contract but, this time, in its technical aspect.

[490] Thus, liability for spills, spinning reserve, reservoir management, etc., are addressed.

[491] More specifically, the Guide deals with the issue of planning. The Court deems it advisable to fully reproduce article 6.2 of the Guide setting out the basic principles:

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[273] Exhibit P-1/48.
[274] Stenographic notes of Hugo Sansoucy, October 21, 2015, p. 112, lines 21 to 25.
[275] Exhibit P-17.

> [Translation] "6.2 Basic principle
>
> While complying with the provisions and limits set out in the contract, it is beneficial for both parties to optimize the use of their respective water resources with a view to maintaining the most balanced situation possible between Hydro-Québec's reservoirs and CF(L)Co's reservoirs. In order to ensure this balance within each period considered, Hydro-Québec has recourse to computer models to optimize the hydro-electric production of both parties taking into account CF(L)Co's commitments to Twinco and the deliveries of energy for recall to Newfoundland and Labrador Hydro.
>
> Consequently, CF(L)Co's optimal production is taken into consideration in scheduling its deliveries to Hydro-Québec."

[492] Four (4) planning time horizons exist and they are designated as follows in the Guide.

- Annual planning (article 6.3)
- Weekly scheduling (article 6.4)
- Daily scheduling (article 6.5)
- Hourly scheduling (article 6.6)

[493] H.Q. submits the annual planning four (4) times per calendar year for the next twelve (12) months, divided on a weekly basis. This plan takes into account the status of the reservoirs as well as the maintenance schedules contemplated on the parties' two (2) systems.

[494] The weekly scheduling establishes an hourly schedule of H.Q.'s power needs for the following week and is sent to CF(L)Co not later than 4:00 p.m. on the Wednesday of the preceding week. Each transmission of this schedule is accompanied by H.Q.'s estimates of its needs for the following three (3) weeks. At 3:00 p.m. on the Thursday, CF(L)Co must notify H.Q. if the requested schedule can be applied. Moreover, each party may make a change to the scheduling but must promptly notify the other party thereof.

[495] The daily scheduling sent each day before 2:00 p.m. by H.Q. is either a confirmation or a revision of the weekly scheduling. That being said, if there is a revision, H.Q. confirms that it will do everything in its power to notify CF(L)Co at least 72 hours ahead of time, owing to hydrological delays between the Lobstick regulator and the Power Plant. Furthermore, during the hour following the dispatch of the daily scheduling, H.Q. and CF(L)Co agree on the hourly scheduling for the next day and the following days.

[496] The hourly scheduling takes place in real time between Hydro-Québec's System Control Centre (S.C.C.) dispatcher and CF(L)Co's operator who are used to complying with the daily scheduling. However, [translation] "the hourly scheduling set by the daily schedule is only modified owing to serious reasons or an emergency situation".[276]

[497] Mr. Hugo Sansoucy, chef stratégie et caractérisation at H.Q., is also one of the two

[276] Exhibit P-17/32, sub-sec. 6.6

delegates on the Operating Committee as regards the Churchill Falls Generating Station. He testified, among other things, on the operations of the Generating Station in conjunction with the H.Q. network.

[498] He outlines the constraints to which H.Q. is subject in preparing its scheduling as follows:

- Variability of water supplies
- Particular head and flow rate and yield at Churchill Falls
- Maintenance - production and transmission

[499] Water constitutes a power plant's raw material. Now then, it can vary from one year to the next depending on precipitation, whether rain or snow. Thus, using a table[277], he shows that while the first years (1976-1984) were rich in supplies, the following period (1985-1996) was negative. According to Mr. Sansoucy, the wealth or paucity of these supplies influences H.Q. scheduling.

[500] A brief aside is necessary to address the issue of Spills in the principal contract, which are assumed by H.Q. since it exercises control of the reservoirs.

[501] The evidence regarding spills shows that the most significant ones occurred at the very outset of the operations of the Power Plant when the reservoirs were full [278] coupled with heavy supplies of water (precipitation) during the period between 1976 and 1981[279].

[502] Further to the spill in the summer of 1981, only three (3) other spills occurred, *i.e.,* in 1992, 1997 and, lastly, in 2005. According to the evidence, these spills were caused by the temporary loss of transmission capacity caused by equipment breakdown with the result that production at the Power Plant had to be cut[280].

[503] If the water wasted further to a spill is accounted for, the water used, as the case may be, for the spinning reserve, is also used as though it were a spill then being integrated into the AEB.[281]

[504] Moreover, Mr. Sanscoucy informs us that, in fact, H.Q., according to its internal documentation, would never have requested or obtained any spinning reserve since 1976.[282]

[505] One other element considered by H.Q. is the fact that owing to the constancy of the head and flow rate of the Churchill Falls Generating Station, it offers a greater yield in the winter compared to the other power plants of the H.Q. network.

[506] The last constraint is the maintenance of the power plant's equipment or transmission

[277] H.Q. - DEM-11, compiled based on P-362.
[278] The witness explains that subsequently the reservoirs were no longer ever full.
[279] Exhibit P-355.
[280] 1992 spill: P-252, 1997 spill: P-267, 2005 spill: P-283.
[281] Stenographic notes of Hugo Sansoucy, October 21, 2015, p. 153, lines 2 to 25, p. 154, lines 1 to 22.
[282] Stenographic notes of Hugo Sansoucy, October 21, 2015, p. 157, lines 13 to 23.

lines which takes place specifically in the summertime.

[507] The period during which maintenance is carried out is confirmed by Mr. Chad Wiseman, production manager at the Churchill Falls Generating Station.

[508] He stipulates that each of the 11 units (turbine/alternator) must be taken off production every year for maintenance. Thus, in 2015, two units were taken off in April and May, three units in June, three units for a week in July and two units for three weeks in July. Moreover, the situation was relatively similar in 2014 in terms of units taken off for maintenance.[283]

[509] According to H.Q., the summer maintenance of the units, notably because of their number, much like the transmission lines, affects CF(L)Co's capacity to supply it with what it qualifies as Continuous Energy during the summer period.

[510] In short, for years, *i.e.,* until 2009, collaboration on the ground was excellent. That being said, before addressing the post-2009 situation, we must now consider the evidence surrounding the transmission of energy

B) NEW REALITY IN THE TRANSMISSION OF ENERGY

[511] We note from the outset that the relevance of this portion of the evidence falls under the issue of interruptible sales.

[512] In 1972, when the first deliveries of energy started and the Power Plant was in full production, the energy transmission situation is relatively simple.

[513] We saw that it is provided by three (3) 735 KV transmission lines from the Power Plant.

[514] The Labrador portion of these 735 KV lines belongs to CF(L)Co and, from the border with Québec, belongs to H.Q.T.

[515] Poste Montagnais (the Montagnais Substation) immediately to the south of the Québec border ensures the measurement of the quantities of energy coming from the Power Plant on each of the three (3) transmission lines. This is the first substation on Québec soil, however, it does not represent the delivery point defined in the principal contract[284] which is a geographic point.

[516] Until 2009, H.Q. was the only customer of the energy from the Power Plant that was carried on the 735 KV transmission lines. Remember, in fact, that besides the purchases between H.Q. and CF(L)Co, H.Q. purchased from NLH a portion of the 300 MW recall unused in the Province of Newfoundland. In short, everything that passed through the 735 KV lines from the Power Plant was intended for H.Q.

[517] This situation changed in 2009 when the regulatory framework surrounding the Open Access concept expanded. A more in-depth look is necessary.

[283] Stenographic notes of Chad Wiseman, November 24, 2015, p. 18, lines 1 to 16, p. 21, lines 9 to 25, pp. 22, 23, 24 and 25, p. 26, lines 1 to 9.

[284] Exhibit P-332/39.

[518] Previously and very briefly, we saw the American context of Open Access[285], now, let's look at its impacts on the H.Q. and CF(L)Co situation.

[519] It should be noted right away that CF(L)Co is not part of the NERC or the NPCC unlike H.Q. That being said, NLH is registered with these bodies as a Purchasing-selling entity[286].

[520] In North America, the following four (4) recognized interconnections are subject to reliability standards:

- Texas
- West
- East
- Québec (including Labrador)

[521] Reliability control is ensured by H.Q. pursuant to a decision rendered on August 14, 2007 by the Régie de l'Énergie[287] (Energy Board) (hereinafter referred to as "the Régie"). A reproduction of the context of this decision which comprises an excellent summary of the situation is necessary:

> "2. CONTEXT OF THE APPLICATION
>
> [Translation] In its evidence, the Carrier mentions that on August 14, 2003, there was a major power blackout in the American Northeast thus highlighting the importance of ensuring the reliability of electricity transmission systems. This power outage deprived approximately 50 million people of electricity and caused substantial economic losses, evaluated at between four and ten billion U.S. dollars in the United States and over two billion Can. dollars in Canada. Further to this power outage, a Canada – U.S. working group was formed to review the functioning of the regime regulating reliability and to reinforce the obligations of carriers in North America. The working group then made several recommendations, including the implementation of mandatory reliability standards for electricity transmission applicable to all of North America. This new regime contemplated for Québec, Canada and the United States, characterized by its mandatory nature, is expected to replace the old voluntary regime in place, that is, the one coordinated by the NERC since 1968 and in which the Carrier participated until then.
>
> In its new energy strategy, the Government of Québec recognizes the importance of issues related to the reliability of electricity transmission and confirms the government's intentions with regard to implementing mandatory reliability standards for electricity transmission. It is also indicated that the

[285] Pars. 418 to 425 of this judgment.
[286] Stenographic notes of Sylvain Clermont, October 29, 2015, p. 54, lines 1 to 14.
[287] Exhibit P-303/19.

> government plans to give the Régie the powers that are necessary to apply mandatory standards in Québec.
>
> On December 13, 2006, the Government of Québec follows up on its energy strategy and passes Bill 52 (hereinafter "Act No. 463") that confers, *inter alia,* new powers on the Régie to oversee the application of the mandatory standards of reliability for transmission systems, including the one to designate the Québec Reliability Coordinator.
>
> This application therefore constitutes the first phase of the implementation of the new mandatory reliability standards in Québec."
>
> (Emphasis added)
> (Footnotes omitted)

[522] The Reliability Coordinator ensures the following various functions:

1) Balancing Authority or "Responsable de l'équilibrage".

2) Transmission Operator or "Exploitant de réseau de transport".

3) Interchange Authority or "Responsable des échanges".

[523] The Court uses the English terms since they are defined in the Glossary of Terms used in NERC Reliability Standards[288].

[524] Moreover, H.Q.T. is registered with the NERC as regards these three functions[289], the whole confirmed by a June 2015 decision in this respect by the Régie[290].

[525] However, on the occasion of this decision, the Régie adopted a French glossary in which it defines these functions [291].

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[288] Exhibit P-351.
[289] Exhibit P-365/5.
[290] Exhibit P-366/32/36.
[291] Exhibit P-366/232/249/250.

Term	Acronym	Definition
Balancing Authority	BA	The responsible entity that integrates resource plans ahead of time, maintains load-interchange-generation balance within a Balancing Authority Area, and supports Interconnection frequency in real time. **Source: Glossary of Terms used in reliability standards (NERC)**
Transmission Operator	**TOP**	The entity responsible for the reliability of its "local" transmission system, and that operates or directs the operations of the transmission facilities. **Source: Glossary of Terms used in reliability standards (NERC)**
Interchange Authority	IA	The responsible entity that authorizes implementation of valid and balanced Interchange Schedules between Balancing Authority Area, and ensures communication of Interchange information for reliability assessment purposes. **Source: Glossary of Terms used in reliability standards (NERC)**

[526] Mr. Pierre Paquet is the individual designated within H.Q.T. to ensure the role of reliability coordinator. He testified on these three (3) functions which the Court summarizes as follows:

> Balancing Authority: Must ensure having sufficient energy resources to meet needs. From time to time, he may give instructions to the SCC to increase the Power Plant's production or cut others[292].

> Transmission Operator: Is responsible for all transmission lines, including the three (3) 735 KV lines, from the Power Plant even if the portion located in Labrador belongs to

[292] Stenographic notes of Pierre Paquet, November 4, 2015, pp. 73, 74 and 75.

CF(L)Co. This responsibility includes powering off one or more lines for maintenance purposes.[293]

Interchange Authority: Ensure the reliability of the H.Q. system and the neighbouring systems with which there will be interchanges or ensure having sufficient resources to meet the needs of H.Q. as well as of the operating agreements.[294]

[527] It is expedient to specify that the Régie, in a decision dated May 11, 2010, qualified the Churchill Falls Generating Station as follows, in relation to the reliability coordinator:

> "248. The fact that HQT controls power flows from the CF Generating Station is proven by uncontradicted evidence provided by witness Rioux from HQT, who explained the following:
>
> - The CF Generating Station is considered a designated resource and dealt with as such on a daily basis;
> - This generating station forms part of Québec's control area and is considered "on system";
> - HQT has access to electric power from the CF Generating Station to supply its native load at all times, up to the capacity required;
> - In terms of operations, the parties agree that the management, programming, safety control and balancing authority are all functions carried out by HQT.[295]
>
> (Footnotes omitted)

[528] The Court intentionally used the term "qualified" in the foregoing paragraph since, in a decision dated March 29, 2012, the Régie stipulated the following:

> [Translation] "[57] The Régie recalls that the standards it is adopting in exercising its jurisdiction cannot have any extra-territorial scope. Their application is strictly limited to the facilities located within Québec territory. The Régie also recalls that, during the hearing, the Coordinator acknowledged that no reliability standard applies to CF(L)Co's facilities:
>
> (…)
>
> The evidence on file also shows that no reliability standard applies to the CF(L)Co plant, as is clearly indicated in, for example, Exhibit HQCME-3, Document 3.2, i.e. the responses of the reliability coordinator to information request no. 3 from Newfoundland and Labrador.
>
> **[58]** The Régie points out that the Register, as revised following the

[293] *Id.*, p. 57.
[294] *Id.*, p. 123, lines 20 to 25 and pp. 124, 125 and 126.
[295] Exhibit P-329/185, para. 248.

Decision, lists the elements related to each of the entities subject to the standards “in order to adequately circumscribe the applicability of the standards in Quebec”.

[59] However, like NLH, the Régie notes that certain facilities not located in Quebec appear on the Register without any indication that they are not subject to the reliability standards.

[60] In addition, for transmission circuits L7051, L7052 and L7052, which are located mainly in Labrador, no particular wording specifies that the reliability standards apply only to the Quebec portion thereof.

[61] In this regard the Régie notes that the Coordinator amended the Register filed on December 20, 2011 by deleting all references to installations of which only a part is located in Quebec, rather than specifying this in Schedule B of the Register as was agreed with NLH during their conversation on January 19, 2012. The Coordinator justifies this by the fact that these particulars concerning portions of facilities located in Quebec are not the subject of any order by the Régie in the Decision.

[62] The Régie considers that these particulars concerning facilities only partially located in Quebec is clearly necessary in order to dispel any ambiguity that may persist at this stage. **Consequently, the Régie requests that the Coordinator again include these particulars concerning the facilities in question, as they are relevant**.

[63] In addition, the Régie asks the Coordinator to delete from the Register all references to facilities not located in Quebec. [296]

(Underlining added)
(Bold in the original)
(References omitted)

[529] In short, the reliability standards apply to the operations of HQ or HQI. And the contract between HQ and CF(L)Co forms part of those operations, even though CF(L)Co’s generating facilities are not subject to the Régie’s jurisdiction. However, HQ’s contractual exploitation of those facilities is subject to the Régie’s jurisdiction.

Exhibit D-219, par. 57 to 63.

[296] Exhibit D-219, par. 57 to 63

[530] The fact that HQT is responsible for re-balancing led it to prepare two documents, namely the Guide to Business Practices for Hydro-Québec TransÉnergie Transmission Services[297] (the "**GSTHQ**") and the Hydro-Québec Open Access Transmission Tariff (the "**HQ Transmission Tariff**") which is largely inspired by the Open Access Transmission Tariff or GATT developed by the FERC. It should be specified that the HQ Transmission Tariff was required to be and was approved by the Régie, which is not the case with the GSTHQ.

[531] Let us now return to the duties of Mr. Paquet.

[532] He explained that as the balancing authority, he must retain a security reserve, i.e. a sufficient amount of power to meet unforeseen demands.

[533] In the following excerpt from the transcript of his testimony, he explains the technicalities of this reserve:

> **Q.** So Mr. Paquet, about this 3,000 MW room for manoeuvre – can you explain to us what exactly that is?
> **A.** First of all, the required reserve for the network is 1.5 times the worst possible production contingency. In fact it's 1.0 times the worst possible contingency plus 0.5 times the second-worst. A contingency means the most serious type of production failure. At Churchill Falls that means a transformer representing two units, or 1,000 megawatts. So, 1.0 times that and 0.5 times the second-worse contingency, which is also a transformer failure, and you arrive at 1,500 megawatts. So I always have to have in reserve, in real time, at least 1,500 megawatts. That's the minimum for the operational reliability of the network. [298]
> ...
>
> Mtre SOPHIE MELCHERS:
>
> **Q.** Again, what is the second-worse contingency?
> **R.** The second-worse contingency is also a transformer at the Churchill Falls plant, so half of the second-worse contingency is the same transformer or another transformer at the Churchill Falls plant, whence the 1,500 megawatts.

> **Q.** Following in the same vein as His Lordship was exploring, why don't you call upon a unit at Manic or LG-2 in order to achieve the minimum number of megawatts for the reserve?
> **A.** Because the power from those units is not as great, or their configuration may mean that you would lose one because the units are radial on one transformer, for example. [299]
> **...**
>
> Mtre SOPHIE MELCHERS:
>
> I'll find that for you.

---

[297] Exhibit P-338.
[298] Transcript of testimony of Pierre Paquet, 4 November 2015, p. 91, lines 22 to 25 and p. 92
[299] *Id.,* p. 95, lines 10 to 25 and p. 96, lines 1 to 4.

Q. Just one clarification: His Lordship said that a unit at Churchill Falls is 1,000 megawatts, but you spoke of a transformer.

A. That's correct.

Q. Could you explain the difference?

A. Yes. The way the plant is configured means that a transformer is connected to two units of 500 megawatts each. The loss of the transformer is the worst contingency.

Q. So it's not the loss of the unit, but the loss of the transformer...

R. Yes.

Q. ... that is connected to two units?

A. That's correct.

Q. So if 1,500 megawatts is your minimum reserve in real time, why is the reserve on the eve of the next day 3,000 megawatts?

R. The evening before, in preparation for the next day, we have to protect more than the minimum reserve, which is a situation we never want to find ourselves in, so we'll procure what we call a provision for contingencies. So we still must have a provision of 1,500 additional megawatts of available power that can be dispatched over the entire network to respond to various contingencies.[300]

> **Q.** And in that case, to return to my question – I'm sorry I sidetracked you with the word "program" – is the available power from Churchill Falls taken into account in establishing your general power reserves and availabilities?
> **A.** Absolutely – like all the other plants in our portfolio, it contributes to our power availability from all resources.[301]

[534] On June 5, 2013 a contract was entered into between HQP and HQD, Schedule A of which is entitled: "Description of generally acknowledged services required to ensure the security and reliability of the Heritage Pool" and which specifies the following regarding the maintaining of reserves:

> 4. Maintaining reserves
>
> Make available a maximum quantity of normal reserve service of 1,500 MW of available resources in 30 minutes, of which 1,000 MW must be available in 10 minutes, this latter quantity to include a 250 MW spinning reserve. The resources in reserve must be able to make electricity available for one hour if mobilized.
>
> Make available a stability reserve corresponding to 3% of the synchronized power, up to a maximum of 1,000 MW. The latter must be distributed among

[300] *Id.,* p. 97, lines 8 to 25 and p. 98, lines 1 to 17

[301] *Id.,* p. 103, lines 21 to 25 and p. 104, lines 1 to 8.

> the synchronized generating units in the network and included in the normal reserve of 1,500 MW.[302]
>
> (References omitted)

[535] According to Mr. Sansoucy, this contract was rendered necessary because of requirements in the HQ Tariff Conditions. [303]

[536] We shall see later on that this matter of a power reserve is relevant these proceedings.

[537] As we have seen, HQT also uses the GSTHQ.

[538] The GSTHQ is inspired in particular by the North American Energy Standard Board.

[539] The GSTHQ covers all energy transportation or transmission activities, and specifies inter alia how to become a customer and the available transmission types and categories.

[540] There are several electricity transmission categories. For present purposes, we note that the principal ones are "Firm" and "Non-firm". There is also one called "Wheel Through", which is defined in the guide as follows:

> 4.3 Wheel through service
>
> Wheel through is a service whereby the Transmission Provider receives a quantity of energy at one service point and simultaneously delivers the same quantity of energy, less losses, to another service point. The energy transmitted comes from a generation resource in a neighboring system which delivers it to the POR, and it is destined to another neighboring power system which picks up the delivery at the POD. An exchange between Ontario and New England, for example, could wheel through the ON-NE path.[304]

[541] The distinction between "firm" and "non-firm" is relevant because firm transmission has priority over non-firm in the event that the reliability coordinator, for any number of reasons, such as loss of production or transmission line failure, must reduce deliveries of power and energy from a given plant.

[542] This then is the regulatory framework within which HQ has managed the transmission of NLH's exports since 2009.

[543] We must now clarify, as this too is relevant going forward, the commercial and technical framework that NLH uses for its exports.

[544] Following the end of the agreement between NLH and HQ regarding the sale of part of the 300 MW Recall Block, four transmission contracts were entered into between HQT and NLH for 265 MW sold by NLH to Massena, New York[305] for the period April 1, 2009 to March 31, 2014.

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302 Exhibit P-325/19.
303 Transcript of testimony of Hugo Sansoucy, 22 October 2015, p. 275, lines 9 to 18.
304 Exhibit P-338/14.
305 Exhibit P-294

[545] It should be noted that each of the contracts between HQ and NLH specifies that the control area, managed by the balancing authority, is Quebec.[306] Thus, NLH was not only aware of this fact, it deliberately subjected itself to it.

[546] For the purposes of these exports, NLH sold the unused portion of the 300 MW to an independent entity named Emera Energy which, as it was a "purchasing-selling entity" on the U.S. market, acted as a reseller to U.S. customers.[307]

[547] This relationship between NLH and Emera continued until April 1, 2015, when Nalcor Energy Marketing Corporation, or NEMC, also a "purchasing-selling entity", became NLH's new agent.[308]

[548] The GSTHQ also provides for the creation of a transmission circuit, which was created in 2009 when NLH stopped selling the 300 MW Recall Block to HQ and began selling it to third parties, and which is identified as LAB-HQT 0/5150. The zero indicates that there is no export capability to Labrador, while the number 5150 indicates the import capacity from Labrador, i.e. 5,150 MW.

[549] In connection with its transmission services, HQT uses a digital marketing tool called "Open Access Same Time Information System" (OASIS), which indicates that the 5,150 MW import capacity is allocated as follows:

- 4885 MW for HQ's needs [309]
- 265 MW for NLH pursuant to four separate transmission contracts.

[550] Transmission of the 4,885 MV for HQ's needs and of the 265 MW for NLH is done on a "Firm" basis, meaning that these transmissions take priority over those that are on a "Non-firm" basis.

[551] The way to initiate a transmission is provided for in the GSHTQ. The customer must file its program using either the "Normal" or "Dynamic" tag within a prescribed period before service begins.[310] That being said, transportation of electricity in the latter category can be further categorized as "Firm" or "Non-firm", and this category must take into account whether the capacity of the residual program of the associated reservation is sufficient.[311]

[552] Up until May 2015, there were only two types of tags, i.e. "Normal" and "Dynamic". The circumstances surrounding the creation of a third type of tag, called "Power/Capacity", are described later on.

[553] Mr. Robert Henderson, currently employed by Nalcor Energy, was in 2009 employed by NLH as "Manager - Systems Operations", a position he had held there since 1995.

[306] Exhibit P-294/6/13/20/27.
[307] Transcript of testimony of Robert Henderson, 5 November 2015, p. 129, lines 11 to 16.
[308] See the description of Nalco above in the chapter on the protagonists in this case.
[309] This information appears on OASIS under the heading QCRD, for Quebec – Designated Resources [Ressources désignées].
[310] Exhibit P-338/32/33.
[311] Exhibit P-338/9/10.

[554] Mr. Henderson indicated to the Court that from March 9, 1998 until March 31, 2009, CF(L)Co never contemplated selling power to NLH beyond the 300 MW Recall Block, i.e. the portion unused by HQ, so that CF(L)Co could engage in interruptible sales.[312]

[555] In fact, the first delivery of power to NLH in excess of the 300 MW limit was made in April 2009. Mr. Henderson specified that these were not sales but rather deliveries.[313]

[556] Both Mr. Henderson and Mr. Martin indicated that the desire to explore the area of interruptible sales is attributable to a Nalcor working group created soon after Mr. Martin assumed his position at Nalco and CF(L)Co in 2005.

[557] However, it must be noted that a contract dated September 1, 1976 between CF(L)Co and NLH specifically refers to the possibility for CF(L)Co to sell to NLH what it describes as "Interruptible Energy" in the following terms:

> 501. CF(L)Co agrees to deliver to Hydro up to and including 31 December 2014 interruptible Energy from its generating facilities resulting from underutllization of Energy reserved for its existing obligations when, in the sole discretion of CF(L)Co, it can be made available, and the price of such Energy shall be determined in the manner prescribed in Clause 5.02. [314]

C) EVENTS SURROUNDING HQ's DISCOVERY OF THE EXISTENCE OF INTERRUPTIBLE SALES, AND CF(L)Co's POSITION ON THE INTERPRETATION OF THE RENEWED CONTRACT

[558] According to Mr. Henderson, between August and November 2011, at the instance of NEMO, a trial period for interruptible sales began, for the portion of Firm Energy not used by HQ that potentially could exceed the 300 MW of the Recall.

[559] Mr. Wiseman thinks that this trial period was in 2012. That being said, whenever the trial period was, the result is that CF(L)Co made sales of interruptible energy up until the summer of 2015.

[560] In fact, CF(L)Co sold NLH the portion of HQ's production not used by it. It must be remembered that under the principal contract, HQ could require all of the firm capacity (taking the GWAC into account during the winter) but was not obliged to do so. Here is what Mr. Henderson had to say in this regard:

> A. That's right, it would have been utilizing the capacity in the Churchill Falls generation facility that Hydro-Québec wasn't utilizing at the time. So, CF(L)Co were able to offer that for that pilot project. [315]

[561] Going forward, it is worth recalling part of the two parties' arguments regarding interruptible sales:

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[312] Transcript of testimony of Robert Henderson, 5 November 2015, p. 128, lines11 to 17.
[313] *Id.,* p. 138, lines19 to 25 and p. 139, lines 1 to 20.
[314] Exhibit P-29/8, clause 5.01.
[315] Transcript of testimony of Robert Henderson, 5 November 2015, p. 155, lines 10 to 15.

CF(L)Co: Maintains that it can use the portion not used by HQ for export purposes, since if HQ makes a last-minute request, it can stop selling to NLH and thus meet its obligations towards HQ.

HQ: Maintains that it is entitled to all the power and energy under the principal contract, and that if it made a last-minute request CF(L)Co would not be able to fulfill it due to regulatory constraints prevailing in the American market, and due to the transmission method for this energy, i.e. "Wheel Through".

[562] Which of these positions is legitimate?

[563] It is admitted that CF(L)Co is not part of the NERC.

[564] NLH has been selling what the parties term interruptible energy to NEMC since April 1, 2015, and the latter is a "purchasing-selling entity" duly authorized to engage in transactions in U.S. markets.

[565] Mr. Venne specified that in order to sell power in the United States, the agent or broker must obtain a licence from the FERC, thereby becoming a "Participant Agreement" [sic, probably "Market Participant" pursuant to a "Market Participant Agreement"] allowing the agent or broker to sell or purchase electricity in a specific market such New York, New England or PJM.[316]

[566] Thus, by referring to various tags[317] from the OASIS system, Mr. Venne was able to establish that NLH, through its agent NEMC, is active in the following markets:

- Ontario
- New York
- New England
- New Brunswick[318]
- PJM
- Nova Scotia

[567] These same tags indicate that for the purposes of the FERC, the applicable control zone is that of the Quebec interconnection (including Labrador).

[568] However, the regulators of these U.S. markets impose time-limits following which deliveries can be cancelled or stopped, known in the industry as "lock-in periods". Mr. Yannick Venne, coordinator of compliance activities for energy sales in neighbouring markets at HQ,

[316] Acronym for Pennsylvania, New Jersey, Maryland.
[317] Exhibit P-319, various tags covering the period from August 2012 to April 2014.
[318] New Brunswick is a bilateral market, contrary to the other markets, which are termed "organized".

testified in this regard.

[569] For all of North America, the NERC standard establishes a minimum 20-minute lock-in period before electricity can be transmitted. Thus, even if the seller or purchaser wanted to unilaterally stop the transaction 15 or 19 minutes before it began, it could not do so.

[570] And local markets may have longer lock-in periods. These are the lock-in periods in the markets where NLH is present:

- Ontario = 30 minutes[319]
- New Brunswick = 30 minutes[320]
- New York = 45 minutes[321]
- New England = 60 minutes[322]
- Nova Scotia = 30 minutes[323]
- PJM = 60 minutes[324]

Exhibit P-76/22.
Exhibit P-76/91.
Exhibit P-76/185.
Exhibit P-76/235.
Exhibit P-374/405.
Exhibit P-376/112.

[571] In March 2012, HQ was becoming suspicious, and sent CF(L)Co a request for information regarding the 300 MW Recall Block, in particular in order to know whether a quantity greater than that limit had been sold to NLH.[325]

[572] Several exchanges occurred after this request, particularly with Mr. Cyril Penton of Nalcor, but they unfortunately were fruitless and HQ did not directly obtain the information it was seeking from either CF(L)Co or Nalcor.

[573] In late July 2012, through OASIS, HQ realized that NLH was making abnormally large

[319] Exhibit P-76/22.
[320] Exhibit P-76/91.
[321] Exhibit P-76/185.
[322] Exhibit P-76/235.
[323] Exhibit P-374/405.
[324] Exhibit P-376/112.
[325] Exhibit P-313/1.

deliveries.[326]

[574] Various exchanges then took place between HQ and CF(L)Co, including a missive from Mr. Wiseman on August 1, 2012 in which he confirmed CF(L)Co's position that it was entitled to sell power in interruptible form, provided HQ's requests were met.

[575] To buttress its evidence regarding sales by NLH over and above the 300 MW Recall Block, HQ used a document generated by HQT, namely the "Interchange Transaction System", which compiled the deliveries made by NLH on these exports markets[327]

[576] It should be specified that the evidence shows that for power and energy transmissions of more than 265 MW, NLH uses HQT's "Non-Firm" class of service.

[577] HQ also produced a compilation of deliveries made by CF(L)Co to NLH between April 18, 2009 and November 29, 2014.[328] This compilation was shown to expert Johannes Pfeifenberger who determined that, on at least 37 occasions, CF(L)Co was not able to meet HQ's requests (most which had been amended by HQ).[329]

[578] Mr. Sansoucy testified at length regarding one of these 37 occasions, i.e. that on July 8, 2013 when HQ's program had to be truncated pending delivery of 427 MW by CF(L)Co to NLH.

[579] That being said, Mr. Sansoucy admitted that HQ's program had been amended at 10:00 p.m. the evening before July 8, 2013 so as to increase it from 2,650 MW to 3,200 MW.[330]

[580] The Court will revisit the quantity of interruptible sales made by CF(L)Co in the following chapter dealing with the experts' reports.

[581] Before finishing with this aspect of the evidence, one fact should be recalled and another established.

[582] The transmission of interruptible sales is effected by HQI on the basis of the "Wheel Through" principle, meaning they are carried out to the nearest second. Thus, NLH's July 8, 2013 delivery of 427 MW began at a precise time on the HQI network and at that same moment HQT delivered an identical quantity of power and energy to the interconnection concerned.

[583] In the case of July 8, 2013, the delivery was effectively made. However, if for whatever reason during the course of delivery CF(L)Co had not been able to sustain it, it would have continued nonetheless, the power and energy then coming not from CF(L)Co but rather from the network of HQP.

[584] This is what Mr. Clermont had to say in this regard:

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[326] Exhibit P-293: Digital record of deliveries made by NLH from 1 April 2009 to 30 April 2012. Exhibit P-326/3/11/13.
[327] Exhibit P-19: Digital record of deliveries made by NLH on certain neighbouring networks. The print version of this exhibit covers deliveries made by NLH on 1 September 2012.
[328] Exhibit P-75.
[329] Exhibit P-80/21, Pfeifenberger Report, Figure 5.
[330] Exhibit P-326/3/11/13.

THE COURT:

Q. I'm trying to transpose this to the case of NLH. So, if NLH has to fulfill a contract for 53 MW, and for whatever reason there are only 48, five are missing. This means that, because the tag was for 53, you have to go to the clearing house, if you will, which is to say the production system's reserves, in order to obtain and deliver the remaining five?

A. Yes.

Q. OK, I understand.[331]

[585] Responsibility for such a situation has been provided for in the Tariff since 2012, in the form of a supplementary service called the "compensation for received shortfalls service". The terms and conditions applicable to this service, including the fees that can be billed, are set out in Schedule IV of the Tariff.[332]

[586] Mr. Clermont however expressed a qualification about how effective this service is, to wit that if several entities are transiting at the same time, HQT can hardly find the guilty party among them to be billed accordingly. Here is what he had to say in this regard:

THE COURT:

Q. You said that you have only three users on LAB-HQT?

A. Yes.

Q. NLH, Nalcor and HOD?

A. Yes.

Q. DCR or HOP, is that right?

A. Yes.

Q. And don't you have a report, a report that's available at midnight the next day where you see exactly what was programmed by each of the users?
A. Yes, you can see from that what was programmed. But in real time, you've measured what was ...

Q. And don't you have information on that?

A. Yes, we actually have the measurement. But let's suppose that the sum of the three programs, of the three individuals, if I add together the NLH program, the MEMO program and the HOP program, let's say it totals 3,000, then I can measure. And if I measure 2,995, there are five megawatts that were programmed but not delivered. Which of the three is responsible for those five?

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[331] Transcript of testimony of Sylvain Clermont, 29 October 2015, p. 142, lines 12 to 25.
[332] Exhibit P-345/21/23 and P-345/118, (Schedule IV).

> **Q.** So you have no means ...
>
> **A.** No objective and verifiable means to determine which customer is responsible for the variance. And the Régie has indicated that if you cannot determine by objective and measurable means which customer to bill, then the service does not apply in those cases.[333]

[587] In support of his point Mr. Clermont added that HQ bills only $50,000.00 per year for received shortfall fees, on total revenues of $3.6 billion.

[588] Regarding this aspect, CF(L)Co contends that it could easily provide HQ with the relevant information for determining who is responsible for the received shortfall.

[589] In the spring of 2015, when this matter was taken to court, an amendment was made to the GSTHQ involving tags allowing it to implement a power program so as to eliminate any possibility for NLH to use the transmission lines for interruptible sales, being limited to only 265 MW. Here is how Mr. Clermont explains this decision:

> **A.** No. What happened, in fact, we're going to distinguish some time periods, if I may, and I'll do so very briefly. Up until the summer of 2014, HQ didn't put together programs like we spoke of. I touched on that in my testimony a little earlier this morning. They started doing so in 2014 when they programmed the energy that was going to supply the local demand. In May of that year, they also began programming the reserve that they offered to the reliability coordinator. Whether you program it with a "power" type tag or some other type of tag, the reality is that now, you're correct, the programs submitted by our clients are equal to the reserves, such that there is no more residual capacity. But it's not the use of the tag per se, it's the idea that the programs total the same thing as the available capacity.[334]

[590] The evidence shows that since May 2015 the power reserve has been systematically sourced from Churchill Falls. To justify this Mr. Paquet explained that it is the producer, i.e. HOP, who designates the generating stations from which this reserve of power comes. These are his exact words:

> "So I look at where the producer has prioritized where I have to find the additional production to satisfy the requirements. The tags are not relevant at that point. I look ... and the producer determines those priorities according to its own interests."[335]

[591] It should be noted that no evidence was provided by HQ for the period before May 2015 regarding the following two specific points:

A) if in fact HQ applied its reserve policy, and if so,

B) which generating stations this reserve came from prior to May 2015.

[592] In any event, on December 1, 2015, NLH and NEMC together submitted a complaint to

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[333] Transcript of testimony of Sylvain Clermont, 29 October 2015, p. 145, lines 13 to 25 and p. 146, lines 1 to 22.
[334] *Id.,* p. 205, lines 11 to 25 and p. 206, lines 1 to 12.
[335] Transcript of testimony of Pierre Paquet, 4 November 2015, p. 112, lines 14 to 21.

the Régie that requested the following conclusion:

> 121. The Complainants request that HWT act in compliance with its GATT and Guide. More precisely, they ask that HOT *i)* stop accepting and recognizing the standby capacity tags submitted by HOP, for itself or for the benefit of HQD, *ii)* allow and re-instate the assignment of PBNs, and *iii)* cease to curtail or refuse access to firm and non-firm transmission services over the LAB-HQT path and to prevent access to the neighbouring markets namely the NYISO market as it has been doing since May 26, 2015.[336]

[593] The parties agree that the Régie has exclusive jurisdiction over this complaint, to the exclusion of the courts.

[594] Now let us deal with the issue of how CF(L)Co interprets “Continuous Energy”.

[595] It should first of all be noted that there is contradictory evidence regarding the date on which CF(L)Co purportedly clearly indicated to HQ its position regarding the interpretation of the renewed contract.

[596] Thus, Mr. Oral Burry, formerly a member of the operations committee, submitted a sheet containing his handwritten notes of a meeting on December 9, 2008 at the offices of HQ in Montreal. One of those notes indicated that a discussion took place among the committee members regarding the concept of “Continuous Energy”.[337]

[597] Mr. Burry indicated that this point and the conception CF(L)Co had of the monthly allocation representing “Continuous Energy” was raised by Mr. Andrew MacNeil. He specified that José Chatel had indicated to him that HQ did not share this interpretation of the renewed contract.

[598] Now let’s jump ahead in time to the spring of 2012.

[599] As we have seen, the interconnection guide provided for annual planning. That being said, HQ also sent out five-year plans.

[600] On June 4, 2012, HQ sent CF(L)Co a five-year plan for the period June 2012 to May 2017. [338]

[601] A meeting of the operations committee was held on June 7, 2012. Mr. Sansoucy attended that meeting, an extract of the minutes of which indicates the parties’ positions regarding the renewed contract:

“3. Update on the Hydrology Report and Forecast

> ...
>
> CF(L)Co stated that it does not agree with the forecasted monthly imports after August 2016. According to CF(L)Co's interpretation of the Renewed Power Contract (effective from September 1st, 2016), CF(L)Co has to sell the

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[336] Exhibit P-409/15.
[337] Exhibit D-145.
[338] Exhibit P-12.

> Continuous Energy to Hydro-Québec and the Continuous Energy is defined as monthly fixed blocks of energy based on the Annual Energy Base effective during the renewed power contract period.
> HQP will take a close look at this interpretation since in its opinion, there is no difference between the Power Contract and Renewed Power Contract regarding energy imports in terms of quantities. HQP mentioned that the Continuous Energy, which is based on the AEB, is a concept used mainly for billing purposes under the RPC.[339]

[602] Thus, according to CF(L)Co's interpretation, the amount of energy available for HQ as of September 1, 2016 is based on the final AEB and is allocated monthly more or less equally depending on the number of days in the month.

[603] CF(L)Co has not changed its position since June 2012, whence these proceedings.

[604] Obviously, because of this interpretation, the calculation of the AEB can have an impact for both parties.

[605] Thus, the lower the result is compared to the initial AEB, the more energy and power destined for either local consumption or export CF(L)Co has at its disposal. The inverse is also true of course, and HQ will accordingly have less energy at its disposal.

[606] We have seen that contractually, a review of the AEB was to be undertaken after eight years of operation, and thereafter every four years.

[607] The renewed contract does not provide for any adjustment of the AEB, such that the last adjustment is of critical importance for the parties, particularly because of CF(L)Co's interpretation of the renewed contract.

[608] On June 27, 2013 Mr. Jean Matte wrote to Mr. MacIssac[340] to indicate his disagreement with the calculation proposed by Mr. Wiseman establishing the AEB at 28.79 TWH since, according to him, the calculation should be made by strictly applying the provisions of clause 9.2 of the principal contract.

[609] That being said, in his testimony Mr. Sansoucy admitted that previous calculations had been made according to the method advocated by CF(L)Co. Here is how he explains this situation:

> **A.** So, we wanted to apply clause 9.2 because that was the method that best reflected the cumulative experience since the effective date, in our view, and the
>
> method that was previously used by the parties was more or less applicable since the complete recall of the Recapture by CF(L)Co.[341]

[610] Mr. Sansoucy summarized the application of clause 9.2 of the principal contract by using exhibit HQ-DEM-13/19.

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[339] Exhibit P-12/10.
[340] Exhibit D-149.
[341] Transcript of testimony of Hugo Sansoucy, 21 October 2015, p. 179, lines 7 to 14.

[611] Mr. Sansoucy also demonstrated the respective proposals of CF(L)Co and HQ for the adjustment of the AEB by using the chart filed as exhibit HQ-DEM-14.

[612] Essentially, the difference between the two calculations is due to the fact that CF(L)Co wants to deduct the 300 MW Recall Block from the calculation and HQ wants to include it.[342]

[613] Be that as it may, pursuant to a question by the Court in this regard, the parties have agreed that the calculation method for the final AEB, be it that advocated by HQ or the one proposed by CF(L)Co, is not one of the issues to be decided by the Court.[343]

[614] Mr. Edmund Martin, president and chief operating officer of CF(L)Co and NLH since July 22, 2005 testified, both in and out of court, and shed useful light on the sequence of events pertaining to both the interpretation of the renewed contract and interruptible sales.

[615] It should be noted moreover that Mr. Martin, like his erstwhile HQ counterpart Mr. Vandal, gave remarkable testimony setting out their conception of the subjects at issue. While on occasion their testimony tended more towards argument than an exposé of the facts, it nonetheless remains that their testimony was very useful to the Court.

[616] Upon arriving at CF(L)Co and NLH in 2005, Mr. Martin became involved in formulating the energy plan arrived at by the province of Newfoundland in 2007 entitled “Focusing our Energy”. The application of this plan led to the creation of Nalcor Energy.

[617] Mr. Martin explained that as soon as he assumed his position at Nalcor, he sought to identify new sources of revenue which, according to him, were necessary to ensure the long-term viability of CF(L)Co’s facilities.

[618] In 2009, a landmark event occurred.

[619] On November 10, 2009, Nalcor and CF(L)Co submitted to the PUB an application to establish their rights in connection with the development of the Churchill River.[344]

[620] Nalcor and CF(L)Co’s interpretation of the power and energy available to HQ under the renewed contract can be found in the exhibits filed in support of this application:

> As a result, HQ will be entitled to essentially equal amounts of energy during each month after renewal. However, HQ will remain entitled to schedule the hourly deliveries of its monthly entitlement of Continuous Energy at any time during the month. [345]

[621] Mr. Martin also specified that pursuant to Nalcor and CF(L)Co’s interpretation of the renewed contract, HQ loses all control over the reservoirs, which is assumed by CF(L)Co. [346]

[622] In the same vein, he specified the following:

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[342] Id., p. 196, lines 10 to 25 and p. 197, lines 1 to 4.
[343] See inter alia Schedule III where each of the protagonists submitted its understanding of the questions at issue in these proceedings.
[344] Exhibit P-11.
[345] Exhibit P-11/42.

[346] Out-of-court examination of Edmund Martin, 5 February 2015 (the first page of the transcript shows the date as 4 February 2015) p. 381/408, lines 20 to 25.

A. Well, to the extent that a party controls the Reservoir and that introduces risk in fulfilling terms of a contract, then the party controlling the Reservoir should generally, you know, bear the implications of that.[347]

[623] In his interpretation of the renewed contract, Mr. Martin agreed that if for any reason, such as insufficient water in the reservoirs, CF(L)Co were not able to provide the monthly scheduled energy and power, HQ would still be obliged to pay for the energy and power not delivered.

[624] With respect to hydrology, he agreed to discuss the Muskrat Falls project which, as we have seen, has been on the province of Newfoundland's drawing board of for years.

[625] That project is now underway. Concurrently, a transmission line from Churchill Falls to Muskrat Falls is being installed, as well as an undersea cable to connect Labrador to Newfoundland as of 2017. This connection will continue on to Nova Scotia via an undersea cable and thence overland to New Brunswick and ultimately to the New England market.[348]

[626] Mr. Martin specified that in order to have access to the U.S. market and because of organizations such as NERC and the NPCC, the energy arm of the Newfoundland government is reconfiguring the technical aspects of its system and the province is also modifying its legislative framework for energy.

[627] In short, Muskrat Falls is a major energy development project for Newfoundland, for both local consumption and export markets.

[628] It should be noted that the Muskrat Falls generating facility, located in the Lower Churchill River, is also fed by the Upper Churchill. Thus, how the Churchill Falls facility, located in the Upper Churchill, is operated, particularly insofar as its reservoirs are concerned, could have an impact on generating facilities in the Lower Churchill, including Muskrat Falls.

[629] The nature of that impact and which entity would benefit therefrom was hotly debated by HQ's lawyers and Mr. Martin during his out-of-court examination on February 5, 2015.[349]

[630] For one of HQ's contentions, or rather one of the scenarios raised by it, is the possibility that during a year of decreased water availability, CF(L)Co would be unable to meet what it terms its "Continuous Energy" requirements, even during the summer when payment by HQ is guaranteed. And that leads to the scenario where CF(L)Co would want to maximize the water supply to Muskrat Falls, to HQ's detriment.

[631] Here is Mr. Martin's answer at the end of this exchange:

THE WITNESS:
So, It's similar, you know, It provides certainty of one of the inputs to management of the river. So, the Newfoundland and Labrador legislation ensures that all operators on the river, any river in the province, are instructed to work together to maximize the value of the river, within the confines of existing

[347] Id., p. 381/408, lines 14 to 19.
[348] Exhibit D-221.
[349] Out-of-court examination of Edmund Martin, 5 February 2015, p. 381/420 to 430.

arrangements. So, to the extent that there is certainty from one of the inputs in that river, certainty has value.[350]

[632] Later on in that examination and in reference to a document entitled "Nalcor Energy 2014 Annual General Meeting Questions and Answers",[351] the following exchange occurred:

> **A.** And the question is again? I'm sorry.
>
> **Q.808** I'm asking you to confirm that the sentence I am reading means that in order for Muskrat Falls to achieve Its full potential of producing the measures that are here, you have projected the seasonal pattern of demands of Hydro-Québec under the original 1969 Contract?
>
> **A.** That's correct.
>
> **Q.809** And If the Renewal Contract means what you say it means, then more confidence will be derived In Nalcor's water management arrangements? That's what this means, correct?
>
> **...**
>
> **Q.810** Well, they're your statements and they come one after the other. So, I'm assuming that they have some link.
> **A.** Well, you shouldn't assume that, that's what I'm telling you. There's two statements there and you're making a direct link that I don't see. It's two statements. One is that there's, as you mentioned, the full potential of producing the 824 and the 4.9 if Hydro-Québec continued, if that sequence was continued, the seasonal pattern of demands of the first 40 years. So, that's a statement that the full potential of producing the 824 and 4.9 would be there. End of sentence. I went on here. It says:
>
> "The language of the Renewal Contract for the last 25 years of the Churchill Falls contract, with respect to the demands which Hydro-Quebec can make upon CF(L)Co, is more advantageous, compared with the original 1969 Contract and inspires confidence In Nalcor's water management arrangements."
> I've already indicated that certainty is the value that I'm referring to there in terms of the flow in the river.
> **Q.811** And your position, as I understand it, is that there is more certainty under your interpretation of the Renewed Power Contract than there was during the first 40 years, correct?
> **A.** That's correct.[352]
>
> (Underlining added)

[633] The upshot of this exchange is that while Muskrat Falls can meet its production goals if the reservoirs and the Churchill River are exploited the same way they have been for the last 40 years, Mr. Martin is of the view that applying his interpretation of the renewed contract would, to a certain point, guarantee (depending on water availability of course) stability in Muskrat Falls' production.

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[350] Out-of-court examination of Edmund Martin, 5 February 2015, p. 381/428, lines 1 to 12.
[351] Thus document was identified as EM-16 at the time of the examination.
[352] Out-of-court examination of Edmund Martin, 5 February 2015, p. 381/433, lines 8 to 22; P-381/434, lines 16 to 25; P-381/435, lines 1 to 25; P-381/436, lines 1 to 4.

[634] Now let's turn our attention to interruptible sales.

[635] In 2011, Mr. Martin was informed by two officers of NLH, Messrs. Kieley and Jones, of the possibility of making interruptible sales from the portion not used by HQ. That being said, he admits however to having being informed that there had been deliveries of electricity pursuant to interruptible sales since 2009.

[636] Mr. Martin defined interruptible sales in terms of three tranches. Here is an excerpt from his testimony:

> **A.** When I look at the contracted amounts of capacity [they] are in three tranches: one contracted amount of capacity is with recapture, one contracted amount is with what we call TwinCo Block, and one tranche is a tranche that is contracted to Hydro-Québec. So, the interruptible arrangements are, you know, linked to the Hydro-Québec Block. And in the Hydro-Québec Block, in the Power Contract, in the Renewed Contract, the contracted right to Hydro-Québec is to request capacity and we will provide it. And we do, and we will. If they don't request it, Hydro-Québec doesn't request it, therefore, it's not Hydro-Québec's contracted right to have it. It's available. It's a product that is there for the moment in time, if we don't use it, it's gone. .[353]..
>
> (Underlining added)

[637] It should be noted that for interruptible sales in 2013-2014, the revenue generated thereby was shared between NLH, who sold it, and CF(L)Co, who produced the energy, in the following approximate proportion:

CF(L)Co	=	8.5%
NLH	=	92.5%

[638] Mr. Martin justifies this imbalance by the indemnity that was granted by NLH to CF(L)Co for any potential contestations by HQ[354] of the legality of such sales.

IX. EXPERTS

A) PREAMBLE

[639] The Court will deal with the subject matter of this chapter in two separate sections, one dealing with the experts' interpretation of Continuous Energy, and the other with their views on interruptible sales.

CONTINUOUS ENERGY

CF(L)Co - Expert Witness Report on Industry Practises In Power Contracts as pertaining to the dispute between HydroQuébec and CF(L)Co.

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[353] Out-of-court examination of Edmund Martin, 5 February 2015, p. 381/465, lines 22 to 25 and p. 381/466, lines 1 to 15.

[354] Exhibit D-40, p. 3, section H.

By Robert Kendall[355]

- Continuous Energy: an overview of Contemporaneous Industry context.

By Tanya Bodell[356]

HQ **-** An Economic and Financial Analysis of the Renewed Power Contract between Hydro-Québec and Churchill Falls (Labrador) Corporation Limited.

By Carlos Lapuerta [357]

INTERRUPTIBLE SALES

CF(L)Co **-** Interruptlble Power and overview of Industry context and CF(L)Co's ability to sell.

By Tanya Bodell[358]

HQ **-** CF(L)Co's Sales of "Interruptlble" Power.

By Johannes P. Pfeifenberger[359]

B) QUALIFICATION OF THE EXPERTS

[640] Following the voir-dire on the qualifications of Ms. Bodell and Messrs. Kendall, Lapuerta and Pfeifenberger, the Court immediately acknowledged Messrs. Lapuerta and Pfeifenberger as experts but reserved its decision regarding Ms. Bodell[360] and Mr. Kendall.

[641] The subject of the qualification of an expert should therefore be dealt with now.

[642] An overview of the criteria used by our courts to qualify an expert is thus in order. The Court summarizes them as being the following:

- Knowledge of the area of expertise
- Impartiality - objectivity
- Credibility

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[355] Exhibit D-153.
[356] Exhibit D-155.
[357] Exhibit P-79.
[358] Exhibit D-154.
[359] Exhibit P-80.
[360] Solely with respect to the area of expertise of Continuous Energy; the Court has no hesitation in acknowledging her expertise in the area of interruptible sales.

KNOWLEDGE OF THE AREA OF EXPERTISE

[643] This may seem obvious. However, it must be borne in mind that knowledge of an area of expertise is not necessarily gauged in terms of the number of diplomas an individual has, as in-depth knowledge of a particular field may entitle a person to be considered an expert even if he is not festooned with diplomas.

[644] The contrary is also true, as an expert may have extensive knowledge of a given area of activity without having in-depth knowledge of certain aspects of that particular area. For example, an expert in e-commerce will not necessarily, or automatically, be an information technology expert.

[645] Ultimately, an expert must have in-depth knowledge of the subject or subjects covered by his report.

IMPARTIALITY - OBJECTIVITY

[646] Impartiality and objectivity are essential for fulfilling the expert's duty, which is to enlighten the Court rather than to act as an advocate for his client's case.

[647] Impartiality is unfortunately a quality that many experts appear not to possess. Impartiality manifests itself in particular where the expert does not hesitate to disclose all of the facts, even when some of them do not necessarily support the position of his principal.

[648] Impartiality or the lack thereof can also be measured in terms of the distancing of the expert from his principal.

[649] The following is a passage from a decision of Justice André Roy endorsing certain comments made by Justice Crête in the matter of *Fortin* v. *Compagnie d'assurance Wellington,* Superior Court - Montreal, no. 500-05-024245-969, March 7, 2000:

> "[75] In commenting on the role and necessary objectivity of an expert, Justice Crête stated the following:

> "The role of an expert, even one paid by one of the parties, is to help the Court better understand the technical nature of a problem and not to defend, at all costs, the theory of the case of his principal. The expert must remain detached and objective, as in the final analysis this will make his position defensible, credible and convincing.
>
> ...
>
> ... Contrary to what the witness appears to believe, an expert's role is not to defend the theory of the case of his principal, to 'work on behalf of the victim'.
>
> An expert must show that he is objective and disinterested.
>
> An expert must be impartial. His role is to enlighten the Court and not to advocate for a particular party.
> An expert must enlighten the Court by informing it of his findings, the plausible hypotheses and the conclusions to be drawn therefrom. He must not feign ignorance of relevant facts on the pretext that they might 'cloud his judgment' or lead him to a potentially unfavourable conclusion for his client. In short, an expert must never be the vassal of his client.[361]

(References omitted)

CREDIBILITY

[650] The credibility of an expert witness can be assessed at two stages, i.e. when he testifies before the Court and in connection with the preparation of his report.

[651] When an expert testifies, the Court can assess his credibility from his demeanour, his answers, his reasoning and the plausibility of his testimony.

[652] That being said, equally important for the expert's credibility is the form and substance of his report.

[653] In this regard, the Court must take into account the rigor with which the expert gathered data and information, the latter's relationship to his opinion, and finally the degree of impartiality evident in his report.[362]

[654] The Court will now apply these principles to Mr. Kendall and Ms. Bodell.

MR. ROBERT KENDALL

[655] The areas of expertise that CF(L)Co is asking the Court to recognize Mr. Kendall as an

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[361] Cie d'assurances St-Paul/St-Paul Fire & Marine Insurance Co. *v.* SNC Lavalin Inc., *2009 QCCS 56, par.75.*

[362] *Marais* v. *Provencher,* 2009 QCCS, par. 144.

expert in are as follows:[363]

> Mr. Robert Kendall is an expert on electric utility industry practice in the context of power contracts, including commercial arrangements undertaken in the electricity industry for both regulated and competitive markets. His expertise includes the administration, development, evaluation and the negotiation of power contracts for the purchase and sale of electricity products, and for transmission services.[364]

[656] The status of Mr. Kendall and his report is problematic in several regards.

[657] The Court's first ground for concern is the fact that Mr. Kendall, an engineer by training, completed studies in law during his career, which was essentially spent in California in the employ of Southern California Edison. Subsequently Mr. Kendall became a consultant.

[658] It has been established that Mr. Kendall negotiated and managed electricity purchase and sale agreements, primarily in and around the City of Los Angeles. Now, in that area the only generating station with a reservoir comparable to those in Quebec or that of Churchill Falls is that of the Hoover Dam, whose construction was financed by the U.S. federal government. That context is thus markedly different from the one we are dealing with. It is also worth noting that only 5.5% of the electricity consumed in California comes from hydro-electricity.[365]

[659] That being said, as in the case of Ms. Bodell, the Court was initially prepared to accept Mr. Kendall as an expert in certain areas of his claimed expertise, but unfortunately the form and substance of his report irredeemably undermine his credibility.

[660] Contrary to the usual practice, Mr. Kendall did not append to his report a list of the documents he consulted but rather made the following general statement:

> C. Documents Reviewed
>
> 15. The findings and opinions contained in this report are based on a review of the Contracts, other relevant contracts such as the Letter of Intent and the GWAC, the pleadings in the litigation and the exhibits appended thereto, the documents communicated by the parties pursuant to the pre-discovery and discovery process, the hydropower-based power purchase agreements from a number of utilities discussed herein, documents and information on the Hydro-Québec Web site, reliability rules for Québec and neighboring provinces and states, decisions in previous litigations related to the Power Contract and records of production of the Plant. In addition, I toured the Plant in May 2015 and had the opportunity to talk with the Plant operating personnel.[366]

[661] The absence of such a list of documents led to this exchange at the outset of his cross-examination:

> **<u>Q.</u>** And could you tell us what they were?

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363 As described in the re-amended joint declaration of readiness for trial dated 18 September 2015, p. 60 and 61.
364 Joint declaration of readiness for trial, p. 60.
365 Transcript of testimony of Robert Kendell, 30 November 2015, p. 87, line 25 and p. 88, lines 1 to 23.
366 Exhibit D-153, p. 3

A. These were documents that were generally related to the drafts of the various contracts, the LOI or the Power Contract. So these might have been letters, memos, board minutes, things of that nature that really related to items in these draft contracts.

Q. Does that list, Mr. Kendall, include memoranda?

A. I'm not sure how you're defining memoranda.

Q. Well, internal CF(L)Co or Brinco memos, for example, relating to the exchange of drafts?

A. There were some internal documents, yes, that were part of that, that related to again contract drafts. I think the common thread was the documents related to drafts of these various contracts.

Q. I'm going to ask you, sir, and to my colleagues, if you could provide us with a list and copies of documents that you reviewed for the purposes of your report which have not been disclosed to the Plaintiff in the discovery process.[367]

(Underlining added)

[662] It was not until the second day of his testimony that Mr. Kendall produced a list of the documents[368] he purportedly consulted for the purpose of preparing his report.

[663] In addition, during his cross-examination, he was not able to answer a number of questions, as he had not consulted the document in question:

Q. Mr. Kendall, can you tell us if you can recall any particular documents that you reviewed which related to the negotiation of the Renewed Power Contract, not the earlier ones, but the ones ... any documents relating to that period of time when the terms of the Renewed Contract were being discussed between the parties?

A. There were very few documents that related to that. For example, there was a Board ... I think it's an exhibit in this case, so ...

Q. I think you're referring to Exhibit P-8, the Joint Executive Committee meeting?

A. I believe that's correct, yes.

Q. Okay.

A. There may have been ... I believe there were maybe a couple of other documents related to the renewal.

[367] Transcript of testimony of Robert Kendall, 30 November 2015, p. 230, lines 22 to 25 and p. 231, lines 1 to 22.
[368] Exhibit D-239

> **Q.** Can you recall what they were ?
>
> **A.** No. I can't, standing here right now.
>
> **Q.** Perhaps tomorrow we'll see if they are in your list.
>
> Did you review the engineering report which was prepared by Acres Canadian Bechtel and of which we have seen some of the plates date from December 1967?
> **A.** I did look at that report. I didn't study it, but I have seen it, and I did a cursory read of it.
> **Q.** And was that cursory read something you did before you signed your report?
>
> **A.** I'm not sure of the timing.
>
> **Q.** So, it could have been something that you looked at...
>
> **A.** It could have been ... [369]
>
> (Underlining added)

[664] Also, and perhaps because of his legal training, he occasionally exceeded the scope of his mandate, which he defined as follows:

> 11. I was asked by Stikeman Elliott LLP to provide an independent review and assessment, in light of my experience and knowledge of electric utility Industry practices, including my experience related to power contract matters, of some of the issues in dispute between Hydro-Québec and CF(L)Co concerning the May 12, 1969 Power Contract between Hydro-Québec and CF(L)Co (the **"Power Contract"**), Schedule III of the Power Contract (the "**Renewal Contract**", and collectively the "**Contract") ...**

[665] Thus, in paragraph 13 of his report, he makes the following judgment:

> Hydro-Québec's interpretation, on the contrary, is in my view, incompatible with the terms of the Contracts and industry practices and the documents described in Paragraph 15 of this report.[370]
>
> (Underlining added)

[666] It goes without saying that the interpretation of the terms of a contract where the parties are not in agreement thereon is within the exclusive purview of the Court.

[667] The same observation applies to Mr. Kendall's conclusions regarding the absence in the renewed contract of the equivalent of clause 6.2 in the principal contract, in respect of which Mr. Kendall makes a judgment justified by "Industry Practices". Here is the exchange in question:

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[369] Transcript of testimony of Robert Kendall, 30 November 2015, p. 233, lines 22 to 25, p. 234, lines 1 to 25 and p. 235, lines 1 to 7.
[370] Exhibit D-153, Kendall Report, p. 3, par. 13.

> **Q.** So, you're interpreting the contract, are you not?
>
> **A.** I'm looking at the ... what was done In the Contract, what was taken out, what was added in and applying industry practice to that, to come up with my conclusions that I had. I'm not trying to interpret the Contract, that's up to the Court to do.
> **Q.** Well, let's pause on that statement, Mr. Kendall. You've mentioned 6.2 a number of times today. And you say what you're doing is not interpreting the Contract because you're infusing industry practice into your analysis. Where do you see industry practice coming into play and what you've just told the court with regard to 6.2?
>
> **A.** The fact that it was removed and that a provision like 6.2 is interpreted in the industry practice as providing virtually complete operating flexibility to the buyer. And the removal of that, I'm trying to give meaning in the industry to why.
>
> In the industry, would we remove a provision like that if it wasn't to signal, to provide that there's less operational flexibility?[371]

[668] Clearly, the omission from the renewed contract of a clause found in the principal contract cannot be interpreted in relation to industry practice, as Mr. Kendall has done.

[669] These two examples are indicative of Mr. Kendall's lack of objectivity.

[670] In his report Mr. Kendall produces many contracts, pertaining primarily to the Southwestern U.S. market, that according to him are consistent with CF(L)Co's interpretation of the concept of Continuous Energy in a context of monthly blocks of energy. However, in his report he fails to point out an important fact, as indicated in the following exchange:

> **A.** It's different. I wouldn't say it's totally different, no. You can have annual blocks, you can have monthly blocks like we have here. So they can be in different timeframes.
> **Q.** Yes, but you've not found a single contract with equal fixed monthly blocks of energy 12 months of the year, have you?
>
> **A.** No, I have not.[372]

[671] In his report Mr. Kendall criticizes part of Mr. Lapuerta's report which, it should be recalled, is based on economic principles, by quoting an excerpt from a website dealing with "economic efficiency" in order to discredit this aspect of Mr. Lapuerta's report, despite the fact that this is not his area of expertise.[373]

[672] To top it all off, in paragraph 54 of his report Mr. Kendall separates the contractual practices pertaining to electricity contracts into five categories, which are purportedly the chapters of his report. However, the Court had difficulty referring to those chapters because their titles in the body of the report differ considerably from the wording used in paragraph 54.

[673] Thus, the fifth category in paragraph 54 is identified as follows:

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[371] Transcript of testimony of Robert Kendall, 1 December 2015, p. 139, lines 18 to 25 and p. 140, lines 1 to 21.
[372] Id., p. 116, lines 12 to 20.
[373] Exhibit D-153, Kendall Report, p. 29, paragraph 118.

> v) using generations resources to match the buyer's system needs.

However, the corresponding chapter in the report is entitled:

> Use of the Plant as a base Load Plant.

and consists of only four paragraphs which entirely overlook the fact that since 1960 HQ has sought to and in fact has integrated the production of the Churchill Falls plant into its overall system.

[674] The Court considers this to be a major omission, committed solely for the purpose of buttressing CF(L)Co's position.

[675] The Court concludes that despite having a degree of expertise regarding contracts for the purchase and sale of electricity, in the preparation of his report Mr. Kendall displays a lack of partiality [sic] and objectivity that completely undermines his credibility.

MS. TANYA BODELL

[676] The areas of expertise that CF(L)Co is asking the Court to recognize Ms. Bodell as an expert in are as follows:

> Ms. Tanya Bodell is an expert on commercial arrangements undertaken in the electricity industry for both regulated and competitive markets, as well as an expert on the design of wholesale and retail energy markets and rules surrounding these markets. Her expertise includes assessments of said markets, as well as the evaluation of financial and physical energy transactions, transmission and distribution assets and the analysis of power purchase and sale agreements.[374]

[677] At the outset of her report on Continuous Energy, Ms. Bodell describes her mandate as having the following two aspects:

> a) Provide an analysis of the custom and usage of the term "continuous energy" contemporaneous to the negotiation and signing of the Power Contract and the Renewal Contract* (together referred to as **"the Contracts")** between Churchill Falls (Labrador) Corporation (CF(L)Co) and Québec Hydro-electric Commission ("**Hydro-Québec**"); and
>
> b) Examine the underpinnings of the Annual Energy Base, which is the basis for Continuous Energy as defined in the Renewal Contract, to understand how it relates to industry context and the intent of the parties regarding the interpretation of Continuous Energy.[375]
>
> (References omitted)

[678] The Court's reservations concerning Ms. Bodell stem from the fact that she makes some analyses in her report, particularly regarding the second aspect thereof which,

[374] Joint declaration of readiness for trial, p. 61
[375] . Exhibit D-155, Bodell Report, p. 2, par. 5.

in the Court's view, are more within the purview of an engineer than of someone with an MBA, even though her professional experience has always centered on the electricity industry.

[679] When Ms. Bodell proposes to "examine the underpinnings of the Annual Energy Base ... to understand how it relates to industry context ..." she is entering completely unknown territory for two reasons:

1) The interpretation of the manner in which the AEB should be calculated is a matter for the Court alone, as it is provided for contractually in Article IX of the Principal Contract.

2) The underpinnings of the initial AEB, which in a way constituted the calculation basis, result from the application of various physical and mathematical principles by qualified engineers. Ms. Bodell thus does not have the required qualifications to interpret how those principles have been applied by the engineers, so as to reach her conclusion that the latter always considered that there would be excess energy.

[680] While her area of expertise allows her to issue an opinion on the practices associated with the use of the term "Continuous Energy" since the 1960s, the Court considers that the portion described in paragraph 5 b) is not within her area of expertise.

[681] Due to the foregoing, the Court will only take into account the first aspect of Ms. Bodell's report, i.e. that dealing with the use of the term "Continuous Energy" during the period when the principal contract was signed.

[682] It is now time to consider the experts' reports.

G) EXPERTS' REPORTS

- BODELL REPORT: Continuous Energy: an overview of Contemporaneous Industry context

[683] Ms. Bodell's report is in two stages. The first stage is intended to demonstrate what the term "Continuous Energy" means, and the second seeks to establish a link between that concept and the "Annual Energy Base".

[684] Ms. Bodell's report is essentially aimed at demonstrating that the concept of "Firm Energy" is equivalent to what CF(L)Co interprets as being "Continuous Energy", and that consequently any energy produced in excess of "Firm Energy" becomes "Excess Energy", which is not covered by the renewed contract.

[685] In order to make this demonstration, she establishes a link between the characteristics of various electrical products used over time in contracts, studies and books, in order to reach the conclusion that Continuous Energy is in fact Firm Energy.

[686] Her interpretation actually goes much further, since once she has established a parallel between Firm Energy and Continuous Energy, she asserts that the discussions that took place between HQ and CF(L)Co regarding various products not necessarily identified as Firm Energy but which could be likened thereto attest to the fact that the concept of Continuous Energy is one that was current in the 1960s. Here are some paragraphs from her report that illustrate her reasoning:

> 51. Both "continuous energy" and "excess energy" are concepts used in the industry at the time of the drafting of the contract and were known to the negotiators, preparers, and signers of the contractual arrangements surrounding Churchill Falls.
>
> 54. Documents and minutes from meetings taking place in the early 1960's indicate early introduction of the concept of continuous energy by CF(L)Co and Hydro-Québec during negotiations.
>
> 55. Initially, the parties defined three different types of energy products that could be produced from the hydroelectric facility: "Guaranteed Energy" (later termed "Assured Energy"), "Probable Additional Energy" and "Excess Energy".[376]
>
> (References omitted)

[687] That being said however, she specifies the following:

> 11. Although these products may have different names from one contract to the next and within contemporaneous documents, the concept of firm versus nonfirm energy and firm versus nonfirm power generally holds (see Appendix 0).
>
> **...**
>
> 17. Many of the terms or definitions from one discipline would be used in the context of another to the point where there were a number of different names for what effectively was the same type of electricity product. Differences in terminology between power contracts continue today. Thus, terms related to economic concepts such as firm or nonfirm products could end up in engineering textbooks, and an engineering term such as primary, secondary or continuous energy may appear in a commercial contract.[377]
>
> (References omitted)

[688] By way of example, she includes an excerpt from what she terms a report but which is in fact from a book published in 1960 entitled "Energy in the American Economy, 1850-1975: An Economic Study of its History and Prospects", neglecting to mention that the excerpt applies to run-of-river generating plants. The excerpt reads as follows:

> ... there is at any site a minimum flow below which the stream normally can be expected not to fall. The power capability that this flow and the available head represent is termed the **"continuous power"** or **"prime power"** that can or could be produced at that site. The principal function of a storage reservoir for power purposes is usually to increase the minimum flow, hence the **continuous power** level.[378]

[689] It is interesting to note however that right after this particular passage, the book in question goes on to cover the subject of "Terminology of Hydropower Resources" in which the authors make the following assertion:

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[376] Exhibit D-155, Bodell Report, p. 17 and 18.
[377] Exhibit D-155, Bodell Report, p. 6 and 8.
[378] *Id.,* par. 27.

> The rationale and methodology of estimating hydropower resources have received a good deal of attention in recent years. especially under the aegis of the World Power Conference. Interest has been stimulated in improving and standardizing concepts and measurement techniques. As a result, there is currently coming into acceptance outside the United States a standard terminology in defining and measuring hydropower resources.[3] The reason for the lack of enthusiasm for the subject in the United States does not appear in the literature but is obviously related to the difference of its energy position from that of most other countries. [379]
>
> (References omitted)
> (Underlining added)

[690] Thus, the same authors cited by Ms. Bodell highlight the emergence in 1960 of a standardization of concepts and measuring techniques in the field of hydro-electricity. Thus, this is clearly far from being an era of recognized and consistent usage.

[691] On the basis of her analysis she comes to the following conclusion:

> 36. Although the term "continuous energy" is not used as an explicit term in the contracts I have reviewed, energy that is [sic] can be made continuously available is equated to "firm energy" and "primary energy." In contrast, "nonfirm energy," "secondary energy" and "interruptible energy" are equated with excess energy, consistent with industry phraseology and language of the parties negotiating the Letter of Intent, Power Contract and Renewal Contract, as described in the next section. [380]

[692] The phraseology referred to by Ms. Bodell in paragraph 36 of her report turns out to pertain to projects or contracts in which the concepts of “Firm Energy” and “Secondary Energy”[381] are dealt with, and a third in which the terms used are “Basic Energy” and “Additional Energy”.[382]

[693] In addition, in the course of her cross-examination, Ms. Bodell agreed that the two engineering manuals that she consulted in preparing her report do not use the term “Continuous Energy” per se, which is instead the result of her interpretation. Here is the excerpt from the transcript:

> **A.** It is correct that the hydroelectric engineering textbooks that we looked for and found do not use the term "continuous energy" in a defined format. However, there was another important aspect of those hydroelectric engineering textbooks which was helpful to us in understanding how the parties may have been using these terms. And that was the fact that primary energy, which is defined as a block of energy, can be increased with reservoir storage. And when looking at the Clinch and McParland calculations, it was very helpful to note that that was a similar calculation that they had made.[383]

[694] The same observation applies to paragraph 21 of her report where she states “... and

[379] Exhibit P-392, p. 440.
[380] Exhibit D-155, Bodell Report, p. 12, par. 36.
[381] Id., p. 13, section 3.3.1 Hoover Dam, p. 13 to 15, section 3.3.2 Power authority of the State of New York.
[382] Id., p. 15, section 3.3.3 Parker-Davis Project.
[383] Transcript of testimony of Tanya Bodell, 3 December 2015, p. 136, lines 7 to 21.

continuous energy was defined as the amount of energy available at minimum hydrological conditions". Here is the relevant excerpt from the transcript:

> **Q.** Where was it defined?
>
> **A.** I see.
>
> **Q.** Where do we find that definition in the textbooks, Ms. Bodell?
>
> **A.** That is not defined in the textbooks.[384]

[695] Once again, it is evident that her use of the expression "was defined" is incorrect, as it is her interpretation, not a definition.

[696] Moreover, Ms. Bodell agreed that the Glossary of Electric Utility Terms sent by Mr. McParland to Mr. Hobson of CF(L)Co on November 14, 1963[385] does not contain a definition of "Continuous Energy". [386]

[697] The Court notes from this part of the Bodell Report dealing with authors and other contracts that Ms. Bodell makes a connection between various electrical products in order to substantiate her opinion that "Firm Energy" is equivalent to "Continuous Energy". However, it turns out that the term "Continuous Energy" was neither used nor defined by those authors or in those contracts.

[698] Subsequently, Ms. Bodell turns to the engineering reports prepared in connection with the Churchill Falls project in order to support her theory.

[699] Again in order to establish a link between "Continuous Energy" and "Firm Energy", Ms. Bodell engages in an exhaustive analysis of the report of engineer Clinch from Acres, prepared in 1964.[387]

[700] For the purpose of her analysis Ms. Bodell presents a table in which she attributes to Mr. Clinch definitions of energy classifications, namely "Firm Energy", "Additional Firm Energy" and "Excess Energy".[388] These definitions, which are presented as if they were verbatim, are actually not.

[701] Based on this table, Ms. Bodell concludes that the "Firm Energy" of which Mr. Clinch spoke is in fact "Continuous Energy".

[702] Taking her approach a step further, she goes on to analyze the notes and calculations prepared, also in 1964, by Mr. Donald MacParland, the engineering vice president of CF(L)Co, and comments on the figures he arrived at.

[703] Even though the Court has decided that Ms. Bodell does not have the necessary

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[384] *Id.,* p. 139, lines 9 to 13.
[385] Exhibit P-83
[386] Transcript of testimony of Tanya Bodell, 3 December 2015, p. 161.
[387] Exhibit D-155, Bodell Report, p. 19.
[388] Id., p. 19, par. 60.

expertise to opine on aspect (B) of her report, some comments are in order regarding the link she establishes between aspect (A) and aspect (B) in order to buttress the position of CF(L)Co.

[704] Thus, in paragraph 66 of her report, based on the numbers appearing in Mr. MacParland's notes, Ms. Bodell determines the additional energy available to be 9%, or 2.9 terawatt-hours. All this, according to Ms. Bodell, shows that Excess Energy was contemplated by CF(L)Co during the negotiations and that the corollary is that Firm Energy was what the parties had in mind for the definition of "Continuous Energy" in the renewed contract.

[705] Subsequently, based on her analysis of the terms either used or repeated in the LOI, the principal contract and the renewed contract, Ms. Bodell notes that the term "Excess Energy" does not appear in the renewed contract.

[706] She also goes on to comment on the fact that in the course of the negotiations the value of the Annual Energy Base was revised downwards, which prompts her to state:

> 95. As illustrated in Figure 5, the starting point for the Annual Energy Base is not and never was intended to be an estimate of the average energy that could be produced by the plant. The estimate of continuous energy set in the Letter of Intent at 32.2 TWh per year reduced to 31.5 TWh per year to be the Initial Annual Energy Base under the Power Contract reflects the amount that the parties were willing to consider firm for purposes of capacity payments.
>
> 114. An additional factor which demonstrates that the AEB was not meant to constitute an average of the energy that can be produced by the plant is the starting value for the Annual Energy Base, which was initially calculated at 32.2 TWh per year and finally set at 31.5 TWh per year, at the time representing firm energy that CF(L)Co could provide on a continuous basis, <u>not an annual average</u> of available energy. Considering the provision of the Power Contract which prevents increases or decreases to the Annual Energy Base in excess of 3 1/3 % compared to the value previously in effect, it is obvious that the parties did not intend the Annual Energy Base to be a true average.
>
> (References omitted)

[707] Thus, based on the principle that Excess Energy was not mentioned in the renewed contract and that the initial AEB had been revised downwards between the negotiations and the conclusion of the contract, the necessary implication is that the parties considered that there would be excess energy that would not be part of the Continuous Energy.

[708] Ms. Bodell also proceeds to analyze the positions of each of the parties concerning the calculation of the "Final Annual Energy Base" and makes the following conclusion:

> 116. Hence, actual numbers show that the Annual Energy Base is not equal to, but rather lower than the average energy that can be made available from the plant to Hydro-Québec on an annual basis according to 40 years of hydrological flows and operations.
>
> 118. As provided for in the Power Contract and as proposed by Hydro-Québec in 2012, the Final Annual Energy Base can be no more than the original estimate of

> the amount of energy that could be made continuously available to Hydro-Québec less recaptured energy. Therefore, at the very least, the Final Annual Energy Base cannot and will not include excess energy above the maximum limit defined in the Power Contract.
>
> (Underlining added)

[709] In short, according to Ms. Bodell, even if though the term “Continuous Energy” was not used during the period when the principal contract was concluded and renewed, various documents, be they books, reports or contracts, allow her to infer that “Continuous Energy” is equivalent to “Firm Energy” and thus does not include “Excess Energy” and that the “Final Annual Energy Base” on which CF(L)Co based itself to determine the quantity of energy equivalent to “Continuous Energy” should not include “Excess Energy”.

[710] As we shall see, Mr. Lapuerta has a different conception altogether of both the initial and final AEB.

- LAPUERTA REPORT: An Economic and Financial Analysis of the Renewed Power Contract between Hydro-Québec and Churchill Falls (Labrador) Corporation Limited.

[711] Mr. Lapuerta defined his mandate as follows:

> I have been asked by Norton Rose Fulbright Canada LLP on behalf of Hydro-Québec to provide an economic and financial analysis of the long-term power contract signed on May 12, 1969 by Churchill Falls (Labrador) Corporation Limited **(CF(L)Co)** and the Commission hydroélectrique de Québec **(Hydro-Québec)** (the **Contract),** with a particular focus on Schedule III, known as the Renewed Power Contract, which comes into force on September 1, 2016, and expires on August 31, 2041 (the **Renewal Period),** I have focused the analysis on matters that can provide Insight into the different interpretations of the Renewed Power Contract put forth by Hydro-Québec and CF(L)Co.[389]

[712] Mr. Lapuerta insists that the economic and financial analysis of both the principal contract and the renewed contract is essential due to the unique nature of the private financing of the project for both Brinco, as an investor, and HQ as co-participant and principal customer.[390]

[713] The economic approach also appears to the Court to be the most appropriate, as the decisions made regarding both the principal contract and the renewed contract were prompted by business considerations.

[714] Mr. Lapuerta explained that from an economic point of view, HQ’s decision to invest in the Churchill Falls project rather than in constructing generating facilities in Quebec was based on the production capacity of Churchill Falls, which would allow it to increase the flexibility of its network.

[715] For according to Mr. Lapuerta, even after taking into account the Twinco Block and the Recall Block, the amount of energy dedicated to HQ was still considerable.

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[389] Exhibit P-79/5, Lapuerta Report, par. 6.
[390] Transcript of testimony of Carlos Lapuerta, 9 November 2015, p. 17 and 18.

[716] Mr. Lapuerta emphasized the financial concessions that HQ agreed to in order to get the project built, which he associated with what he terms Volume Risk. Here are his comments in that regard:

> **A.** For the first 40 years, my report describes the take or pay commitment which is part of the volume risk, as two thirds, one third, while also recognizing that there were provisions that would kick in after the beginning of eight years and then once every four years to allow refunds or payments going from one side

> to another to address variations in the output of the plant relative to Annual Energy Base. Volume risk in the first 40 years was also addressed by such issues as the completion guarantee which was a commitment by Hydro-Québec to ensure the solvency of the project, to make sure that it would be constructed, despite costs overruns and there are also ... there's also provision for Hydro-Québec to rebuild the facility in the event of force majeure. And so that also is a way of addressing volume risk. Those provisions allocated risk to Hydro-Québec. And then, over the last 25 years in the Renewed Power Contract, the volume risk is 100% with Hydro-Québec, except for plant deficiency in which CF(L)Co bears volume risk. I should say there's also an exception for plant deficiency in the first 40 years.[391]

[717] Another element he takes into consideration is the utilization factor of the Churchill Falls plant, which he evaluates at 82% of its capacity, a percentage that is consistent with a sole purchaser wanting some flexibility. Moreover, he describes the Churchill Falls facility as a "Flexible Base Load Plant".[392]

[718] Mr. Lapuerta places a great deal of emphasis on this flexibility, which is dealt with in the following four sections of his report:

- The Value of Seasonal Flexibility
- The Seasonal Flexibility of Churchill Falls
- Multi-Annual Flexibility
- The alleged sacrifice of Seasonal and Multi-Annual Flexibility

[719] It comes as no surprise that Mr. Lapuerta identified weekdays during the winter as the peak demand period for electricity and the trough as the summer months.

[720] This North American reality means that generating stations with reservoirs use the springtime to replenish them for the next season and take advantage of the summer demand trough to perform maintenance on their facilities.

[721] Mr. Lapuerta explained that most generating stations in the HQ system have variable chute heights, which means that at winter's end, when the reservoirs are at their lowest, the efficiency of the generating stations is reduced, as they require more water to generate the same amount of energy.[393]

[722] This accounts for the significance of the Churchill Falls facility. Because of its vast reservoirs and topographical situation, it is unique in having a constant chute height throughout the year, making it particularly efficient at producing energy.

[723] In Mr. Lapuerta's view, this particular feature of the Churchill Falls plant, which was known of before it was even built, represents a financial advantage for HQ, as in periods of high demand, it can use energy produced by Churchill Falls rather than by so-called peaking stations such as thermal power plants, which are much more expensive to operate.

[724] The following is an excerpt from the Lapuerta Report dealing with the integration of the

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[391] Transcript of testimony of Carlos Lapuerta, 9 November 2015, p. 94, lines 12 to 25 and p. 95, lines 1 to **17.**

[392] *Id.,* p. 155, lines 5 to 11.

[393] See Exhibit H.Q. DEM-12, which aptly illustrates the phenomenon of chute height.

Churchill Falls station into the HQ system from the standpoint of flexibility:

> 61. The memo further said "they [Hydro-Québec] feel our plant should be fully integrated into their own system". Here, "the system" is the set of all power stations owned directly by Hydro-Québec, and "integrating" refers to the ability to co-ordinate the operation of Churchill Falls with all other power stations in the Hydro-Québec portfolio, so that Hydro-Québec could make the most efficient decisions concerning which power stations to operate at which times of year. Integrating Churchill Falls into their system meant that Hydro-Québec could use the seasonal flexibility of Churchill Falls to reduce its reliance on hydro-electric facilities that became less efficient as their reservoir levels depleted in winter.

[725] Using a diagram,[394] Mr. Lapuerta showed that HQ benefited from multi-year flexibility thanks to the Churchill Falls plant, as it took more energy from it in years when water supply was abundant and less during years when water was not as plentiful.

[726] According to Mr. Lapuerta, by exploiting its reservoirs on a multi-year basis, HQ thereby avoided the risk of spills.[395]

[727] Finally, with respect to flexibility, Mr. Lapuerta takes issue with the principle put forward by CF(L)Co to the effect that, according to its interpretation, HQ would benefit from the same flexibility, but intra-monthly.

[728] It will be recalled that according to CF(L)Co's interpretation of Continuous Energy, deliveries of energy and power to HQ represent the "Final Annual Energy Base" spread out almost equally over the 12 months of the year.[396]

[729] It should also be recalled that according to CF(L)Co's interpretation, deliveries of power under the GWAC would also be affected and would be subject to the intra-monthly flexibility.

[730] In furtherance of his position on flexibility, he examines the following major issues:

- Economic inefficiency of the scenario envisaged by CF(L)Co.
- The economic efficiency arguments put forward by CF(L)Co.
- The negotiations that took place between the parties.

[731] Mr. Lapuerta first of all explains that it would not be profitable for CF(L)Co to sell electricity to HQ exclusively as Continuous Energy as it proposes to do, unless CF(L)Co intends to use the plant's residual or excess capacity to sell energy and power to third parties, which is the logical conclusion.

[732] Remember that in her report Ms. Bodell, in addition to her analysis of the term Continuous Energy, also commented at length on and made a connection with its counterpart, Excess Energy.

[733] And therein lies the problem, in his view.

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[394] Exhibit P-79/28, Lapuerta Report, Figure 5.
[395] *Id.,* p. 25, par. 69.
[396] There will in fact be a slight variation depending on the number of days in a given month. Exhibit H.Q. DEM-18/3 provides an example of this intra-monthly flexibility, where maximum energy deliveries would be during the day on weekdays, while only the minimum capacity would be available to HQ at night and on weekends.

[734] He pointed out that sales to third parties could lead CF(L)Co to manage its reservoirs differently. Thus, if CF(L)Co increased its production to satisfy new customers and water availability was below average, it is possible that CF(L)Co would not be able to deliver the Continuous Energy as it itself defines it, whereas under the renewed contract HQ assumes 100% of the hydrology related risk.

[735] And as Mr. Lapuerta showed, insufficient water availability is not, under the principal contract or the renewed contract, a "deficiency" for which CF(L)Co is required to pay compensation.

[736] At this point the Court would like to correlate the calculation of the final AEB and the possibility of making sales to third parties. Thus, CF(L)Co's calculation is lower than that of HQ, which means that there would be less energy and power sold to HQ at the rate established in 1969 and more energy and power for export at today's rate. This constitutes an obvious financial incentive for CF(L)Co.

[737] Mr. Lapuerta also contends that the change in the risk borne by HQ between the principal contract, which provides for a tariff that is 2/3 fixed and 1/3 according to deliveries, and the renewed contract, which transitions to 100% Take or Pay, is incompatible with the economic approach contemplated by the negotiators. Here is an excerpt from his testimony that aptly summarizes his thoughts regarding the hydrology-related risk:

> **A.** Yes, so during the first 40 years, the way the contract was, is efficient in the sense that the party who controls the reservoir is the one that bears the risk of insufficient water. And so if Hydro-Québec were to manage the reservoir in a way that was inefficient, Hydro-Québec itself would bear the costs. Now, that alignment of risk and control no longer occurs under the CF(L)Co interpretation of the Renewed Power Contract. Under the CF(L)Co interpretation, CF(L)Co would control the reservoir level but would not bear the risk of insufficient water.[397]

[738] Mr. Lapuerta also considers that the theory of intra-monthly flexibility proposed by CF(L)Co would be economically inefficient for CF(L)Co, as its implementation, especially during the winter months, would involve frequent and abrupt start-ups and shutdowns of production units, which would prematurely wear down the equipment.

[739] Mr. Lapuerta also considers that the loss of multi-year flexibility currently enjoyed by HQ would be inefficient for CF(L)Co, as the management of deliveries that HQ would have to undertake would increase the risk of spills during periods when the water supply is plentiful.

[740] Finally, with respect to flexibility, he concluded that a drastic change in the way the facility was managed during the first 40 years versus the way it would be managed during the next 25 years as suggested by CF(L)Co is not the most efficient way to operate a generating station with reservoirs such as those at Churchill Falls.

[741] Mr. Lapuerta also addresses the various inconsistencies in the existing contractual relations between HQ and CF(L)Co that would arise if CF(L)Co's interpretation were followed. Thus, part of the clause dealing with the operational flexibility given to HQ, which is found in

[397] Transcript of testimony of Carlos Lapuerta, 9 November 2015, p. 58, lines 19 to 25 and p. 59, lines 1 to 8.

both the principal contract and the renewed one, particularly regarding hydrology, would become meaningless.[398]

[742] As for the impact of CF(L)Co's interpretation on the GWAC, Mr. Lapuerta stated the following, wherein he insists on the fact that nothing in the documentation he consulted pertaining to the negotiation and conclusion thereof by the parties indicated that there would be a fundamental change as of September 1, 2016:

> **A.** Yes. So, under the CF(L)Co interpretation, the GWAC can no longer do what I described as pulling summer generation into the winter where it's more valuable. What it would continue to do, or what it would begin to do, would be to allow Hydro-Québec within a winter month to pull generation from the less- valuable off-peak periods of the winter month into the peak periods that have the most value within that same winter month, but it would no longer be bringing summer energy into the winter.
>
> **Q.** Did you see anything in the GWAC which in any way reflects a switch in the regime from before August 31st, 2016 to afterwards?
>
> **A.** I have seen nothing in the GWAC agreement itself or in the negotiating documents leading up to the agreement that would suggest a significant change in its function on the commencement of the Renewed Power Contract.[399]

[743] Mr. Lapuerta also commented on the constant increase in the price schedule related to the GWAC:

> ... And furthermore, the CF(L)Co interpretation of the Renewed Power Contract implies a significant reduction in the value of the GWAC after 2016. And before a buyer and seller would agree a price schedule for the GWAC that involved constant percentage increases over time, they would have ... they would analyze the implied decrease in value by the CF(L)Co interpretation and you would have seen either a refusal to have the 1% increase or at least a negotiation in which Hydro-Québec would have sought a decrease in the price of the GWAC after 2016 to reflect its reduction in value.[400]

[744] With respect to the concept of Continuous Energy based on the final AEB, Mr. Lapuerta profoundly disagrees with Ms. Bodell's opinion to the effect that it is simply Firm Energy and nothing more:

> **Q.** If you apply any of the definitions of firm energy, the concept of firm energy and its various descriptions that Ms. Bodell uses in her report, can you describe the final Annual Energy Base as being made up entirely of firm energy?
> **A.** No, no, she describes firm energy as the amount that the facility can

[398] Exhibit P-1, clause 4.2.1 of the principal contract and clause 4.1 of the renewed contract.
[399] Transcript of testimony of Carlos Lapuerta, 9 November 2015, p. 203, lines 16 to 25 and p. 204, lines 1 to 13.
[400] Id., p. 62, lines 23 to 25 and p. 63, lines 1 to 12.

> produce under the worst year on record. We have the engineering study which anticipated that the worst year, over 40 years, would be only 26 terawatt-hours, and then we also have the actual experience which shows indeed that a year arose under which the average annual ... the output of the plant was only 26 terawatt-hours.[401]

[745] At this point the Court should specify the essence of the conclusions Mr. Lapuerta arrives at regarding the final AEB, on which the quantum of Continuous Energy is based. Here is what he said in this regard:

> **A.** It reflects the average potential of the plant to produce energy as informed by the hydrological conditions over the previous 40 years.
> **Q.** Is there any certainty that the plant will be able to produce all of this final Annual Energy Base in every year going forward?
> **A.** No, no, in fact, the expectation would be that it would produce ... if there would be dry years in which it would produce less than that, going forward, and if it sought to operate the plant, if the parties sought to operate the plant, giving
>
> constant amounts of energy every month, then the average long-term output of the plant would even be lower [than] that suggested by the accumulated experience over the previous 40 years, because the system of operating the plant over the previous 40 years was calculated to maximize the average energy output. By a regime of operating under fixed monthly quantities, it would be calculated to incur greater spill and therefore reduce the average annual output of the plant.[402]

[746] In support of this assertion, Mr. Lapuerta testified at length on part of the Acres report entitled "Technical Abstract and Engineers Evaluation"[403] and particularly on chart no. 32, prepared in connection with the bond issue led by Morgan Stanley.

[747] The relevance of chart no. 32 is that it shows how the engineers arrived at an initial evaluation of 31.9 billion KWH, taking into account both the years when the water supply was plentiful and those when it was not.

[748] In addition, during his testimony and with the aid of this same report and the Offering Memorandum, Mr. Lapuerta explained how the initial AEB came to be established at 31.5 whereas the engineers' evaluation was 31.9 billion KWH.[404]

[749] Thus, according to him, the engineers' lower evaluation was more or less arbitrary and based on the premise that it was ultimately only an estimate.

[750] According to Mr. Lapuerta, this chart patently demonstrates that the AEB was never envisaged as solely Firm Energy, as the years of poor hydrology shown thereon would not have even allowed achieving the levels of Firm Energy on which the parties had agreed upon when the principal contract was concluded.

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[401] Id., p. 153, lines 4 to 19.
[402] Id., p. 152, lines 2 to 25 and p. 153, lines 1 to 3..
[403] Exhibit P-198.
[404] Transcript of testimony of Carlos Lapuerta, 9 November 2015, p. 112, lines 17 to 25, p. 113 to 119, p. 120, lines 1 to 7

[751] He aptly summarizes his opinion in the following exchange:

> **A.** Yes. So, the average ability to generate electricity is a broad term that encompasses all types of electricity whether we call it firm or non-firm. Now, the concept of firm electricity is just part of the electricity that the facility can produce.
>
> So. it's less ... it's less than the average total output of the plant, it's inherently less because some of the output of the plant is variable depending on hydrological conditions.
>
> **Q.** So, if I understand you correctly, you're saying that the amount of firm energy a plant can produce is less than the average annual?[405]
>
> **A.** Yes, yes. The final Annual Energy Base just includes the total without screening out anything that may have been called excess over the first 40 years, everything is included. There's no express limitation to firm.

(Underlining added)

[752] Finally, commenting on the various electricity sale contracts relied upon by Ms. Bodell and Mr. Kendall, he makes the following assertion:

> **A.** So, the contracts provided by Mr. Kendall and Ms. Bodell show that parties define flexibility in their long-term power contracts, and they also show that there's no contract that they have provided that shows a shift in the flexibility terms over the course of a long-term contract of the nature that is being proposed or is involved in the CF(L)Co interpretation of the Renewed Power Contract. So, it is ... I would have expected if the flexibility ranges were to change so significantly, that you would see something more explicit in the Renewed Power Contract.[406]

(Underlining added)

[753] Mr. Lapuerta concludes his report with the following five assertions, which the Court loosely summarizes as follows:

- Both the principal contract and the renewed contract provide that nearly the entire production of Churchill Falls would be purchased by HQ, who however assumed 100% of the Volume Risk for the last 25 years.
- By dint of its characteristics, the plant gave HQ the benefit of flexibility during the first 40 years, but the interpretation of CF(L)Co's obligations for the next 25 years now advocated by it would render the plant's operation inefficient, which is definitely not what the parties intended at the time.
- Sales by CF(L)Co of residual or excess energy to third parties pursuant to its

405 Transcript of testimony of Carlos Lapuerta, supra, p. 102, lines 20 to 25 and p. 103, lines1 to 15.
406 Id., p. 198, lines 5 to 19.

interpretation could prevent it from meeting its obligations towards HQ, particularly during periods of poor hydrology.

- Nothing in the documentation pertaining to the negotiation and conclusion of the principal contract or the renewed contract suggests that the parties contemplated such a drastic change for the last 25 years of the contract.

- CF(L)Co's interpretation to the effect that energy and power were considered separate products during the 1960s is incorrect, as they are rather the result of the deregulation of the North American market in the late 1990s.[407]

• PFEIFENBERGER REPORT: CF(L)Co's Sales of "Interruptible" Power.

[754] Mr. Pfeifenberger's area of expertise is interruptible sales. He defines the essence of his mandate as follows:

> 4. I have been asked by Norton Rose Fulbright Canada LLP on behalf of Hydro-Québec to provide an independent economic and industry-practices analysis concerning the sale of "interruptible power" by Churchill Falls (Labrador) Corporation Limited **("CF(L)Co")** above and beyond the 300 MW recapture block provided in the May 12, 1969 agreement between Québec Hydro-Electric Commission **("Hydro-Québec")** and CF(L)Co (the **"Power Contract",** including Its Schedule III, known as the **"Renewed Power Contract").**[408]

[755] Mr. Pfeifenberger has assumed, and it is not denied moreover, that CF(L)Co is making interruptible sales to NLH over and above the 300 MW Recall Block, for export to the U.S. market.

[756] During his testimony Mr. Pfeifenberger defined as follows the two main thrusts of his report.

- Is the 300 MW Recall Block intended for export a maximum?

- Are interruptible sales truly interruptible, i.e. can they be interrupted in due time so as to give HQ access to the capacity it may require under the contract?

[757] By definition, analysis of this second point assumes that the interruptible transaction is over and above the limit of the recalled 300 MW and is destined for export.

IS THE 300 MW RECALL BLOCK A MAXIMUM?

[758] Mr. Pfeifenberger maintains that the wording used in both clause 6.6 of the principal contract and clause 5.4 of the renewed contract, i.e. "in the aggregate shall not exceed 300 MW during the term of the contract" denotes an absolute limit, since at the time of the negotiations the concepts of power and energy were closely linked. It is useful in this regard to consider paragraph 32 of his report:

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[407] Exhibit P-79/55/56, Lapuerta Report, par. 159 to 163.
[408] Exhibit P-80/4, Pfeifenberger Report, par. 4.

> 32. Given these definitions, industry participants in the 1960s at the time of the contract signing (as well as today) would have understood that specifying any limits to the delivery of "power and energy" meant limiting both the maximum MW rate at which power is transferred as well as the total MWh of delivered energy. Because the Power Contract defines Recapture as "withholding from the power and energy agreed to be sold" to Hydro-Québec, any industry participant in the 1960s (as well as today) would have reasonably concluded that the recapture provisions of the Power Contract were meant to limit both the power and energy that CF(L)Co could withhold from contractual commitments to Hydro-Québec.[409]
>
> (References omitted)

[759] Moreover, in his view the fact that the negotiators at the time thought fit to take into account the load factor of the plant while establishing a maximum of 2,362 billion kilowatt hours indicates that it was definitely a maximum. For clause 6.6 of the principal contract specifies “for a maximum withholding of 2,362 billions kilowatt hours per year” while clause 5.4 of the renewed contract expresses it this way: “for a maximum withholding thereunder and hereunder of 2,362 billions kilowatt hours per year ...”.[410]

[760] To support his opinion, he points to certain terms used in a brief that CF(L)Co submitted in February 1973 to an energy committee struck by the Newfoundland government. [411]

[761] In his testimony Mr. Pfeifenberger also referred to Mr. Henderson’s testimony to the effect that the 300 MW constitutes an absolute maximum. Here is the relevant portion of the transcript:

> **Q.** And you will confirm to the Court that, if you take 300 megawatts and you apply the load factor of 90%, and you multiply it by the number of hours in a year, it will give you the quantity of energy of 2.362 billion kilowatt-hours per year?
>
> **A.** Not precisely.
>
> **Q.** No?
>
> **A.** No. And I can't explain why there's a difference, but I think it's maybe 2.3652.
>
> **Q.** So, the last decimal is rounded off for some reason?
>
> **A.** For some reason, it was, and it ... anyway, I'm not sure why, but anyway I know it's a fact because we had to deal with this in the other agreements.
>
> **Q.** And the price payable by NLH to CF(L)Co tracks the price of the Power Contract between CF(L)Co and Hydro-Québec?
>
> **A.** That's correct.

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409 Exhibit P-80/16, Pfeifenberger Report, par. 32..
410 Exhibit P-80/17, Pfeifenberger Report, par. 35 and 36.
411 Exhibit P-80/18, Pfeifenberger Report, par. 37 and P-41/106, Factum of CF(L)Co

> **Q.** And the Recall PSA expires on August 31, 2041 which corresponds to the end date of the Power Contract between Hydro-Québec and CF(L)Co?
>
> **A.** That's correct.
>
> **Q.** And again, Mr. Henderson, in this March 1998 version of the Recall PSA, there is no provision contemplating the sale by CF(L)Co to NLH of interruptible power?
>
> **A.** That's correct.
>
> **Q.** And, in fact, you confirmed during your testimony back in May of 2015 that you could not recall that the possibility of NLH purchasing interruptible power from CF(L)Co over and above the 300 megawatts even ever came up during those negotiations?
>
> **A.** That's correct.[412]

[762] Finally, Mr. Pfeifenberger explained that if CF(L)Co were able to exceed this 300 MW limit that would mean more flexibility for it and less for HQ.

[763] That is the essence of Mr. Pfeifenberger's contention regarding the 300 MW limit, which is found in paragraphs 30 to 39 of his report.

ARE INTERRUPTIBLE SALES TRULY INTERRUPTIBLE?

[764] Mr. Pfeifenberger establishes three conditions that in his view are essential for characterizing electricity sales as interruptible, which the Court loosely summarizes as follows:

1. Sales by NLH to customers other than HQ should have a lower priority than sales to HQ, including during periods when the production capacity of the plant is limited.
2. It should be possible for CF(L)Co to interrupt its sales to NLH at any time if HQ requires deliveries.
3. NLH should also be able to interrupt its sales to third parties if such sales are pursuant to interruptible sales by CF(L)Co [413]

[765] That being said, Mr. Pfeifenberger agrees that CF(L)Co's Operations Handbook[414] establishes the order of priority for deliveries as follows:

- Twinco (225 MW)
- NLH Recapture Energy (300 MW)
- Hydro-Québec Production (3863.5 MW in the summer, 4082.6 MW non-summer, plus 682 MW during GWAC)

[412] Transcript of testimony of Robert Henderson, 5 November 2015, p. 123, lines 6 to 25 and p. 124, lines 11 to 18.
[413] Exhibit P-80/19, Pfeifenberger Report, par. 41.
[414] Exhibit D-39.

- NLH interruptible power

[766] Thus, according to its Operations Handbook, CF(L)Co appears to meet the first premise posited by Mr. Pfeifenberger.

[767] However, Mr. Pfeifenberger makes the following qualification:

> **A.** What I saw from the schedule and power-flow data was that, if there was a problem at the Churchill Falls plant that made it impossible for CF(L) Co to deliver both interruptible power to NLH and firm sales to Hydro-Québec, it curtailed the firm sales to Hydro-Québec before changing sales to NLH of interruptible power.
>
> **Q.** We will look at examples of that in a moment. What does the handbook provide or contemplate in terms of the ability for Hydro-Québec to change its schedules?
>
> **A.** Reading the Operations Handbook, from an industry practice perspective, it recognizes that Hydro-Québec can change its schedules in real time and during the delivery hour, and it lays out actions that are supposed to be taken if CF(L)Co needed to accommodate such a real-time or within-hour scheduling change by Hydro-Québec.[415]

[768] In fact, the difficulty raised by Mr. Pfeifenberger is apparently due to a schedule change by HQ, as appears from his cross-examination:

> **Q.** But because of these provisions, you would agree with me, we've talked about lock-down periods and the market rules that, under the contract, HydroQuébec, has its own lock-down period because of that and cannot change its daily schedule after 14:00 the day before except in emergency cases. Correct?
>
> **A.** I disagree. It says it can change its schedules in real time for major reasons and emergency conditions. And major reasons, I would think, would include energy needed from reserves.[416]

[769] Based on the premise he has established, Mr. Pfeifenberger goes on, with the aid of his Figure 5, to examine situations where CF(L)Co delivered quantities of energy and power to NLH in excess of the 300 MW Recall Block and consequently reduced deliveries to HQ.[417]

[770] It should be noted that in his testimony Mr. Pfeifenberger specified that the 13 examples in the original Figure 5 in his report are based on a compilation of some 800 hours during which the interruptible sales exceeded the 300 MW limit and a problem was encountered at the plant.

[771] And in fact the problems at the plant noted under the heading “Plant Capacity Change” were caused either by a breakdown or by over-utilization of equipment resulting in overheating

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415 Transcript of testimony of Johannes Pfeifenberger, 13 November 2015, p. 44, lines 21 to 25 and p. 45, lines 1 to 16.
416 Id., p. 146, lines 6 to 19.
417 Figure 5 of his report initially contained 13 examples (Exhibit P-80/21). At the hearing, Mr. Pfeifenberger produced a revised Figure 5 containing 37 examples (Exhibit P-80A).

of the stators.[418]

[772] It should also be noted that the 13 original examples are concentrated in a period of eight specific days, while the 24 other examples in the revised figure 5 are concentrated in an 11-day period.

[773] Mr. Pfeifenberger subsequently testified at length on these various examples while referring to a three-ring binder containing excerpts of various exhibits already filed.

[774] With respect to all of these examples, the Court notes the following:

- They were short in duration, varying from one to a few hours.
- Most of the time the reduction in the delivery to HQ was at the request of CF(L)Co, on the grounds of a "Plant Capacity Change" when the plant effectively encountered a problem due to either a breakdown or over-utilization of the equipment.
- During the period in question, exports to NLH were in excess of 300 MW.

[775] Mr. Pfeifenberger explained that CF(L)Co gave preferential treatment to NLH, at the expense of HQ, when the plant encountered technical problems, because of the lock-in periods that NLH had to respect with its U.S. customers, which prevented it from interrupting its exports.

[776] According to him, HQ should have access to the capacity of the plant, even where it did not initially request it. The following excerpt summarizes his thoughts on the matter:

> **A.** Yes. So as you use part of the operating reserve to make up for the shortcoming that you've just experienced, you need to supplement the operating reserves. So, you need to have spare capacity available elsewhere on the system to get back to the minimum reserve requirement that is the absolute minimum that every operator needs to keep. So, you need spare capacity on the system to keep the system reliable and you need to basically have more spare capacity so you can maintain the operating reserves after a reliability event.[419]

[777] Generally, Mr. Pfeifenberger affirms that interruptible sales affect the flexibility afforded HQ, because when it chooses not to use the full capacity of the plant to make exports itself to neighbouring markets, it is because it wants to preserve its reservoirs, including those of Churchill Falls, particularly in the spring and summer when they are being replenished.

[778] That being said, during cross-examination he admitted that interruptible sales, in their current quantities, have little long-term effect on the reservoirs:

> **Q.** I didn't put my question very well. What's the long-term impact on the reservoir about flexibility?

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[418] Transcript of testimony of Johannes Pfeifenberger, 13 November 2015, p. 62, lines 12 to 2e, p. 65, lines 14 to 25, p. 81, lines 22 to 25 and p. 82, lines 1 to 19.

[419] Transcript of testimony of Johannes Pfeifenberger, 13 November 2015, p. 94, lines1 to 14.

> **A.** The long-term impact on the reservoir is likely going to be small. It's more about the short-term impact about the availability of the firm capacity.[420]

[779] Finally, Mr. Pfeifenberger puts a good deal of emphasis on the fact that the North American market to which NLH exports, because of the rules surrounding the locking-in of orders, does not allow it to interrupt deliveries at any time. In this connection he refers to the various markets served by NLH such as New York, New England, Ontario and New Brunswick, and their respective lock-in periods.[421]

[780] Here are his conclusions about the possibility of interrupting interruptible sales:

> 80. The available data and industry practices also document that CF(L)Co's sales to NLH cannot generally be interrupted at any time to preserve Hydro-Québec's contractual rights under the Power Contract, for two important reasons.
>
> First, CF(L)Co lacks the physical (and apparently contractual) ability to interrupt or curtail its sales to NLH at any time. Second, NLH lacks the ability to immediately interrupt or curtail the vast majority [of] its purchases from CF(L)Co, which are transmitted through Québec and exported by NLH to neighboring power markets. The market rules applicable to the transmission and export of this power do not allow for the interruption and curtailment of such schedules on short notice. Rather, such transmission and export schedules are locked-in between 30 and 120 minutes prior to a delivery hour, and generally cannot be interrupted or curtailed based on a buyer's or seller's contractual circumstances.[422]

• BODELL REPORT: Interruptible Power and overview of Industry context and CF(L)Co's ability to sell.

[781] Ms. Bodell describes her mandate in this regard as follows:

> a) Analyze industry practices concerning interruptible power trades prior to the signing of the Power Contract and Renewal Contract through today; and
>
> b) Assess the ability of CF(L)Co to sell interruptible power to third parties while abiding by its contractual obligations concerning the sale of **Firm** Capacity and associated energy produced from the Churchill Falls hydroelectric generating station (**"Churchill Falls ")."**[423]

Industry Practises Prior to signing of the Power Contract and Renewal Contract.

[782] While little is said in the body of her report about prevailing practices in the industry with regard to interruptible sales, she expanded upon this somewhat during her testimony.

[783] She makes reference to a "Glossary of Electric Utility Terms" dating from 1961, which contains the following definition:

> "Interruptible: Power made available under agreements which permit curtailment

[420] Id., page 153, lines 8 to 14.
[421]. Exhibit P-80/28/29/30, Pfeifenberger Report, par. 68 to 74.
[422] Exhibit P-80/28/29/30, Pfeifenberger Report, par. 80.
[423] Exhibit D-154, Bodell Report, p. 2. paras. 5a) and 5b),

or cessation of delivery by supplier."[424]

[784] Ms. Bodell also refers to the minutes of a negotiation session between Brinco and HQ on March 14, 1963 during which the sale of interruptible electricity to Consolidated Edison (New York) was specifically discussed.[425]

[785] Ms. Bodell also reports that H.Q. was already conducting interruptible sales towards Ontario in the 1960s, and towards Vermont in the 1980s.[426]

[786] Ms. Bodell also refers to interruptible sales conducted in the 1950s originating from U.S. generating stations, but this time transmitted to industrial clients.[427]

[787] In short, Ms. Bodell believes that this product has been recognized in the industry since the 1950s. She even claims that because interruptible sales between H.Q. and Consolidated Edison had been invoked in 1963, that very fact means that the possibility that CF(L)Co might directly engage in interruptible sales had been considered.

[788] Finally, Ms. Bodell presents the Generating Station's capacity using a table illustrating the unused capacity for the April 2013 to April 2015 period, specifying that it could reach 2,000 MW during the summer season. [428]

[789] This table serves to illustrate, obviously setting all contractual undertakings aside, that even with the deliveries required by H.Q. factored in, the Generating Station enjoys a considerable residual capacity over the course of the years.

CF(L)Co can meet its contractual obligations for Firm Capacity

[790] Ms. Bodell is of the opinion that even if it conducts interruptible sales, CF(L)Co can honour its obligations to H.Q.

[791] First, she specifies that even if CF(L)Co is not subject to the NERC, it acts nonetheless as a "Transmission Operator" and, as such, has the obligation to "[ORIGINAL ENGLISH] manage plant schedules and power flows into Québec".[429]

[792] Consequently, according to Ms. Bodell, the fact that H.Q. submits its orders in advance allows CF(L)Co to schedule its interruptible sales accordingly.

[793] As such, she places strong emphasis on the fact that H.Q.'s orders are placed at least one week ahead of time. That being said, she admits that the orders can be changed within a very tight timeframe in cases of emergency.

[794] Regarding this last point, Ms. Bodell prepared a table illustrating the interrelation between requests for delivery prepared by NLH for interruptible sales and H.Q.'s orders. This is what she has to say on the subject:

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[424] Exhibit P-83/34.
[425] Exhibit D-50, para 1.
[426] Exhibit D-154, p. 8, paras. 22 to 24.
[427] Exhibit D-154, pp. 10 to 13.
[428] Exhibit D-154, pp. 6 to 7, para. 18 and Figure 1.
[429] Exhibit D-154, p. 22, para. 64 and p. 23, para. 68.

> [ORIGINAL ENGLISH]
>
> 73. One way in which CF(L)Co minimizes the potential need for curtailment is by notifying its interruptible power customer of potential availability (i.e., unused capacity) after Hydro-Québec has submitted its week-ahead and day-ahead schedules, taking into account generation availability. This information is updated in real-time, allowing customers to adjust their schedules for interruptible power and thus proactively mitigate impending physical curtailments.
>
> (Figure 3 omitted)
>
> 74. As shown in Figure 3, around 95 percent of the time, NLH orders are scheduled after Hydro-Québec has submitted its final schedule. This behaviour is consistent with dispatch that places a higher priority on firm capacity requests and adjusts interruptible power sales as required to abide by its lower priority status.[430]

[795] Ms. Bodell agrees that in certain cases (which she claims are rare), due to the locked periods specific to the market serviced by NLH, even if the power flow were to be cut at the Generating Station, that flow would continue to be delivered, only this time through the H.Q. system. On that subject, she points out that the various existing contractual undertakings would allow to mitigate for such a situation. Here is the relevant excerpt:

> [ORIGINAL ENGLISH]
>
> 99. As both interruptible power and Hydro-Quebec's firm power currently flow on the same transmission line to the Quebec-Labrador Delivery Point, "curtailment" is simply a reallocation of power flows and accounting, which is accomplished by informing both the interruptible power client and Hydro-Quebec that the appropriate portion of the power is being reallocated and now belongs to Hydro-Quebec. <u>It is then the responsibility of those parties to arrange or modify transmission service for the newly scheduled amounts and/or settle with the transmission operator for imbalance charges or fees associated with delivery failures</u>.[431]
>
> (emphasis added)

[796] What is more, Ms. Bodell criticized Mr. Pfeifenberger's assertion that the 300 MW Recall Block is a maximum threshold, since according to her:

> [ORIGINAL ENGLISH]
>
> The recapture provision is not a limitation on CF(L)Co's rights but rather an assurance that the 300 MW of recapture will have priority over Hydro-Québec's allotment of Firm Capacity…

[797] To summarize, Ms. Bodell believes that the limit placed on the 300 MW Recall Block is not a maximum and, based on that premise and seeing as CF(L)Co receives H.Q.'s delivery request at least one week in advance, it is able to schedule its interruptible sales accordingly.

[798] Ms. Bodell, citing the number of isolated cases of relatively short duration of these events, minimizes the importance of these periods in which CF(L)Co was unable to respond to H.Q.'s request, since it was unable to interrupt NLH's sales destined for export.

---

430 Figure 3 provided by Ms. Bodell was criticized by Mr. Pfeifenberger, which led Ms. Bodell to produce a new table and relevant exhibits under Exhibit D-220. The criticized variations are for the most part minor, and do not affect the overall image that this Court must infer.

431 Exhibit D-154, Bodell Report, p. 35, para. 112.

X. PARTIES' POSITION

A) H.Q.

[799] As we have seen, H.Q. brings up two situations that it believes are problematical. The first is related to how CF(L)Co interprets the capacity and power available to H.Q. under the Renewed Power Contract, namely starting September 1, 2016. The second pertains to the so-called interruptible sales that CF(L)Co has already been conducting for a number of years now and that it intends to continue to conduct in the future.

INTERPRETATION OF THE RENEWED POWER CONTRACT REGARDING POWER AND CAPACITY AVAILABLE TO H.Q. STARTING SEPTEMBER 1, 2016

[800] H.Q. argues that the Principal Power Contract, the Renewed Power Contract as well as the GWAC constitute a contractual whole that must therefore be interpreted collectively.

[801] Consequently, according to H.Q., CF(L)Co's interpretation of the expression "Continuous Energy" was never considered or even contemplated at the time that this contractual whole was negotiated and entered into.

[802] H.Q. posits that one of the essential considerations in its decision to invest in the Churchill Falls project was the integration of that Generating Station into its existing Facilities, reason for which the operational flexibility clause is found in both the Principal Power Contract and the Renewed Power Contract. According to H.Q., the material and exotic financial risks that it agreed to assume in order to complete this project is evidence of this.

[803] H.Q. disagrees with CF(L)Co's position and argues that it represents neither the parties' intent as recorded in the contracts, nor even the manner in which it conducts itself, including among others, in respect of the conclusion of the GWAC in 1998.

[804] This flexibility was seasonal and multi-annual, allowing it to import in the winter what power was not used in the summer, whereas CF(L)Co interpreted the notion of "Continuous Energy" in such a manner as to define that flexibility as only intra-monthly.

[805] What is more, according to H.Q., CF(L)Co's interpretation of "Continuous Energy" is such that the GWAC is stripped of all meaning. In that vein, the argument that the compensation paid by H.Q. to CF(L)Co in the context of the GWAC between 2016 and 2041 is inconsistent, from a financial perspective, with CF(L)Co's interpretation of "Continuous Energy" and constitutes a further indication of both parties' interpretation of their rights.

[806] According to H.Q., use of the term "Continuous Energy" in the Renewed Power Contract as opposed to Section 2.1 of the Principal Power Contract does not have the scope or even the restriction that CF(L)Co proposes.

[807] Consequently, "Continuous Energy" is merely a formula for payment of the power and capacity available to H.Q. resulting from the final AEB, which represents the concrete result of 40 years of the Generating Station's operation, during which time virtually all possible hydrological conditions took place.

[808] According to H.Q., evidence of this can be seen in the fact that the notion of "split tariff" was dropped in the Renewed Power Contract, a notion that required CF(L)Co to bear a portion

of the risk, which is no longer the case in the Renewed Power Contract, H.Q. assuming the risk in its entirety.

[809] A further indication is the fact that, still according to CF(L)Co, the latter would begin managing the reservoirs starting September 1, 2016 without bearing the risks thereof, which is contrary to the usual practice in the hydroelectric power industry.

[810] What is more, H.Q. contends that during periods of low water inflows and given that maintenance periods are usually scheduled during the summer, both for units and for the transmission system,[432] it would be technically possible, and even more likely if CF(L)Co sold to third parties, that the latter would not even be able to deliver the Continuous Energy to H.Q. during that summer period.

INTERRUPTIBLE SALES

[811] H.Q. argues that it has the right under the Principal Power Contract and Renewed Power Contract to all capacity and power generated by the Generating Station, obviously minus the Reserves.

[812] As for the 300 MW limit, it argues that this is a 2362 terawatt/hour capacity and power maximum that may not be exceeded, something that CF(L)Co systematically does due to NLH's exports.

[813] H.Q. contends that even if it does not require all of the available capacity, it may not be sold to third parties since this capacity belongs to H.Q., and the fact that it does not use that capacity is a component of H.Q.'s management strategy for its Facilities, specifically as regards the reservoirs of its various generating stations.

[814] H.Q. also maintains that the interruptible sales carried out by CF(L)Co are not truly interruptible, and this owing to the locking rules in the markets that NEMC services as an agent of NLH purchaser of CF(L)Co for this power and capacity.

B) CF(L)Co

[815] Now on to CF(L)Co's position regarding these two same situations.

INTERPRETATION OF THE RENEWED POWER CONTRACT REGARDING POWER AND CAPACITY AVAILABLE TO H.Q. STARTING SEPTEMBER 1, 2016

[816] From the outset, CF(L)Co sees the situation from an entirely different perspective seeing as it is proposing that this Court interpret the Renewed Power Contract as being an individual contract, as opposed to a contractual whole as suggested by H.Q.

[817] To do this, CF(L)Co relies on the clear terms of section 3.2 of the Renewed Power Contract, which states in its third paragraph:

> [ORIGINAL ENGLISH]
>
> 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

[432] Paras. 508 to 510 of this judgment.

effect beyond the expiry date hereof and shall not thereafter be binding upon the parties to the Renewed Power Contract.

[818] Continuing in this vein, CF(L)Co posits that the Renewed Power Contract reveals no ambiguity giving rise to its interpretation.

[819] CF(L)Co submits that the negotiators specifically chose to use the expression "Continuous Energy" in association with the definition of "Firm Capacity" to designate what H.Q. would be entitled to as of September 1, 2016.

[820] According to CF(L)Co, this compromise results from the fact that H.Q. enjoys a preferred price for energy generated by Churchill Falls for the 25 years of the Renewed Power Contract.

[821] CF(L)Co places a lot of emphasis on the fact that clause 6.2 of the Principal Power Contract was dropped in the Renewed Power Contract. The Court reproduces the relevant paragraphs on the subject from CF(L)Co's outline of argument:

[ORIGINAL ENGLISH]

110. Section 6.2 of the Power Contract reads as follows:

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.

Hydro-Quebec, in purchasing power and energy hereunder, shall have no obligation to purchase, prior to the Effective Date, during any stage of construction, energy in excess of that contemplated by Column 6 of Schedule II as intended to be then available.

(emphasis added)

➢ Power Contract, Exhibit P-1, p. 14.

111.It is important to note that Hydro-Quebec itself relied on Section 6.2 of the Power Contract in the context of the 1982 Quebec Declaratory Judgment Case to support the proposition that it was entitled, under the terms of that contract, to request the delivery of all of the power and energy that can be generated by the Plant.

➢ Amended Motion for Declaratory Judgment filed by Hydro-Quebec dated November 18, 1982, **Exhibit D-18**, p. 22-23.

➢ For more details on the Declaratory Judgment and earlier proceedings, please refer to CF(L)Co's Comprehensive and Contextual Analysis of the Evidence Part III.

112.Given the fact that s. 6.2 of the Power Contract was not reproduced in the Renewal Contract, Hydro-Quebec has no claim to request or take delivery of energy which is not specifically provided for under the definition of Continuous Energy and the ambit of s. 7.1 of the RC."

[822] Consequently, CF(L)Co also supports its argument on the fact that pursuant to the Renewed Power Contract, several other provisions or concepts of the Principal Power Contract were dropped. These are:

Section 4.2.6 - The right to the spinning reserve.

Section 4.6 - Establishment of liability in cases of spillage.

- Definitions of “Basic Contract Demand” and “Applicable Base Rate”.

[823] In support of its position regarding the definition for “Continuous Energy”, CF(L)Co argues that dropping the spinning reserve in the Renewed Power Contract is a further indication that the parties never considered the Excess Energy as being part of the Continuous Energy.

[824] Obviously, on this subject, CF(L)Co relies on the findings of the Bodell Report dealing with Continuous Energy, assimilating it solely to the Firm Energy.

[825] As for the operational flexibility clause, CF(L)Co argues that H.Q. still benefits from that clause even if it has been reduced, going from seasonal and multi-annual to intra-monthly.

INTERRUPTIBLE SALES

[826] CF(L)Co forcefully argues that only it, and not H.Q., owns the electricity products generated by the Generating Station.

[827] Subsidiarily, while recognizing its contractual undertakings to H.Q., CF(L)Co argues that at no time did it grant H.Q. exclusivity over CF(L)Co’s production.

[828] More specifically and in this vein, CF(L)Co argues that the 300 MW limit provided for in the Principal Power Contract does not seek to limit its rights but rather those of H.Q.

[829] What is more, the notion of interruptible sales has been a reality in the industry for decades, and it is a commercialisation method also used by H.Q.

[830] As for the interruptible sales it conducts, CF(L)Co submits that it is not bound by the various rules regarding system reliability and balancing since its facilities, pursuant to the Régie’s decisions, are not contemplated by the reliability standards any more than those standards apply to it.

[831] CF(L)Co also argues that its interruptible sales in excess of the 300 MW limit do not affect the compliance with its contractual undertakings to H.Q., pointing out that the scheduling thereof is submitted 14 days in advance and that a last-minute change can only be requested for serious reasons or in emergency situations.

[832] What is more, in those rare cases where sales cannot be interrupted owing to locked periods on the serviced markets, H.Q. may receive monetary compensation under the “generator imbalance service”.

XI. ISSUES IN DISPUTE

[833] The evidence adduced before this Court was considerable and concentrated over a period of 26 days, with arguments lasting for four (4) days.

[834] The lawyers' mastery of this evidence was remarkable, on both sides of the aisle.

[835] Confronted with a huge quantity of evidence that this Court will describe as being mixed, as it dealt with two specific topics that overlapped, led it to suggest that the parties submit what they each believe to be the specific issues that this Court must deal with in order to resolve this dispute.

[836] It would be a euphemism to say that the parties responded to this request enthusiastically. That said, this exercise was rather useful for the Court's development of the issues in dispute, allowing it to cover in its analysis all of the respective concerns of the parties. This Court has appended to this decision those issues in dispute that were developed by H.Q. and CF(L)Co.

[837] Here, then, are the issues in dispute as elaborated by this Court.

GENERAL

(A) Do the Principal Power Contract, the Renewed Power Contract and the GWAC constitute a contractual whole?

(B) Is the contractual whole ambiguous such as to give rise to this action?

REGARDING THE INTERPRETATION OF "CONTINUOUS ENERGY"

(C) In light of the answers given above as well as the provisions of the Civil Code of Québec governing the interpretation of contracts or the provisions of any other applicable law and the evidence adduced, which interpretation of the Renewed Power Contract should the Court adopt ─ that of CF(L)Co (in whole or in part) or that of H.Q.?

REGARDING INTERRUPTIBLE SALES

(D) Does the fact that there are currently no interruptible sales due to the actions taken by H.Q. prevent a declaratory judgment from being issued?

(E) In light of the Court's finding regarding the issue of "Continuous Energy", what impact will that finding have on interruptible sales?

XII. ANALYSIS

(A) Do the Principal Power Contract, Renewed Power Contract and GWAC constitute a contractual whole?

[838] Here is what H.Q. alleges in its proceedings:

> [TRANSLATION]
>
> "13. Hydro-Québec and CF(L)Co are parties to three principal contracts governing their relations, including the operation of the Generating Station, all of which contracts expire August 31, 2041. These three contracts complete each other and form a contractual whole."

[839] The three contracts to which H.Q. is referring are the Principal Power Contract, the Renewed Power Contract and the GWAC.

[840] H.Q.'s position evolved, seeing as it argues in its pleadings that the Principal Power Contract, the Renewed Power Contract and the GWAC are one, using clause 1.5 of the Renewed Power Contract, among others, in support of this contention:

> [ORIGINAL English]
>
> "1.5 Schedule
>
> Schedule I of the original power contract, which contract is hereby renewed, is an integral part of this contract."

[841] Regarding the integrality of these contracts, H.Q. argues that the only change contained in the automatically Renewed Power Contract is the price of power, reason for which the Court must interpret the Principal Power Contract and Renewed Power Contract as being a single contract.

[842] In light of Court's conclusions regarding the description of the three (3) contracts as an alleged contractual whole, the outcome as far as the interpretation of the Principal Power Contract and Renewed Power Contract is concerned will not be affected, regardless what H.Q. might argue now.

[843] Here's why.

THE LAW

[844] The notion of contractual whole, which until recently has only received lip service in case law, has been defined by authors and case law alike.

[845] The Court of Appeal's *Les Billards Dooly's Inc.* spent a great deal of time on this issue. Here is a long excerpt:

> [TRANSLATION]
>
> [58] As stated in article 1425 C.C.Q., it is "[t]he common intention of the parties rather than adherence to the literal meaning of the words [that] shall be sought in interpreting a contract." Article 1426 C.C.Q. adds that it is the nature of the contract, the circumstances in which it was formed, and the interpretation which has already been given to it by the parties that must be taken into account.
>
> [59] In that case, the judge disregarded the contractual wholeness of the franchise agreements. As a result, his reading of their clause respecting the franchise agreements' term was devoid of context.
>
> [60] Actually, the five agreements must be read together in order to determine the parties' intention as at September 3, 2003. Indeed, these are concomitant and interdependent agreements whose purpose is to conduct a global transaction and specify its contractual circle. Every single agreement shares the same cause; the reason they were signed is to give effect to all of the undertakings agreed to by the parties. Hence, these contracts constitute an indivisible contractual whole.
>
> [61] As Jean-Louis Baudouin and Pierre-Gabriel Jobin emphasized in *Les obligations*, 7th Edition, by Pierre-Gabriel Jobin and Nathalie Vézina, Cowansville, Éditions Yvon Blais, 2013, at

para. 490, the notion of contractual indivisibility is now well received in France when there are several “interdependent” contracts, regardless of whether they are concurrent or successive, so long as they convey the same transaction.

[62] In fact, the Cour de cassation (the French court of appeal) no longer hesitates to infer the legal consequences of the general economy of a set of interdependent contracts. This higher court has recognized that tacit contractual indivisibility takes precedence over an explicit severability clause (Cour de cassation, Ch. Mixte, May 17, 2013, decision nos. 275 (11-22.768) and 276 (11-22.927), and that a contractual clause contradicting the general economy of the transaction contemplated by the parties was void (Cour de cassation, Ch. Commerciale, April 24, 2007, appeal no. 06-12.442 and February 15, 2000, appeal n7-19.793). It also specified that the “objective” cause of a contract could exist outside that contract in the case of a global transaction consisting of a set of contracts “forming an indivisible whole” (Cour de cassation, Ch. Civile 3e, March 3, 1993, appeal no. 91-15.613, Bull. III, No. 28). The Cour de cassation ruled that one legal consequence of this indivisibility was that the rescission of an agreement could have the effect of voiding the other agreements belonging to the same contractual group (Cour de cassation, Ch. Civile 1re, April 4, 2006, appeal no. 02-18.277, Bull. Civ. I, no. 190; Cour de cassation, Ch. Commerciale, June 5, 2007, appeal no. 04-20.380, Bull. IV, no. 156).

[63] Nothing in the *Civil Code of Québec* prevents these principles from being adopted (Pierre-Gabriel Jobin, “Comment résoudre le casse-tête d’un groupe de contrats”, (2012) 46 *R.J.T.* 9; Baudouin and Jobin, *Les obligations*, supra, paras 488-490). Quite the contrary, articles 1425 and 1426 C.C.Q. invite us to do just that in order to give full effect to the parties’ intent; and this is precisely what the Court did, without elaborating thereon too much, in *Domtar* v. *Grantech*, J.E. 2002-1256, paras. 39 et seq.

[64] Here, an analysis of the agreements signed concurrently on September 3, 2003 reveals that they are interdependent.[433]

(emphasis added)

[846] So the Court of Appeal adopted as its own the theory of cause developed by Pierre-Gabriel Jobin, which the Court reproduces below:

[TRANSLATION]

490 – Potential Solution. The cause – The traditional notions, cause being one of them, were conceived for autonomous agreements that exist in isolation. Can they be used in the context of a commitment that is but one part of a greater whole? From the outset, what prevents a link from being created between the components of a contractual whole is the principle of the relative effect of the agreement “except where provided by law” (art. 1440 C.C.Q.). To work their way around this obstacle in those cases where the law remains silent, French judges and authors first turned to the classic notion of cause: <u>the goal of each agreement being to complete the global transaction</u>, if that transaction is impossible or were to become impossible in the course of its completion, then all of the components may be repealed due to default or, where applicable, due to its cause having ceased to exist.[260] This initiative had its imperfections (upon its creation, each agreement making up the whole has its own specific cause), but what led to its downfall is the fact that it became the centre of a heated controversy over the resurgence of cause.[261]

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[433] *Billards Dooly’s Inc.* v. *Entreprises Prébour Ltée*, 2014 QCCA 842, paras,. 58 to 64.

> Recently, French case law and doctrine developed a new notion, namely that of the interdependency of agreements forming a whole:[262] when this interdependency is compromised, (one of the agreements belonging to the whole is not executed, for instance), it is expedient to rescind, terminate or even void each and every agreement – a new but justified use of a rescission.[263] Prudently, so as to avoid having too great an effect on the binding force of agreements and to refrain from frustrating the legitimate expectations of a co-contracting party, it is a requirement under French law that at the time of contracting the undertaking, the co-contracting party be aware or should have been aware that the agreement was part of a contractual whole, allowing to conclude that it tacitly consented thereto.[264] The presumption of knowledge, depending on the circumstances, can play an important role here, which is why a subjective criterion has been added to the objective criterion of interdependency.[265]
>
> This line of authority can go far.[266] Once a connection is established between the components of the whole, the French tribunal will repeal the explicit clause of one of the agreements stipulating that it is independent of any other agreement that may be connected thereto – an application of the French principle of coherence.[267]
>
> This interdependency, required both at the time the contract is formed as well as throughout its performance, appears to bear similarities with the new notion of cause advocated by a French author.[268] This is not a classical legal notion that sanctions the unlawful intentions of a party (articles 1410 and 1411 of the C.C.Q.) or an interdependency of obligations contained in a single accord. Rather, the cause in question here is broader and draws its basis from the more conventional meaning of the word cause, referring to the *raison d'être* of the undertaking from the economic perspective of the contract. Or, to put it in other terms, it is an extension of the objective meaning of the cause giving rise to the reciprocal obligations of *a contract*, extending it to the interdependency between the obligations found in *separate contracts* that form an indivisible contractual whole.[434]
>
> […]
>
> [emphasis added]
>
> [references omitted]

[847] Consequently, the Court must consider whether the three (3) contracts described by H.Q., namely the Principal Power Contract, the Renewed Power Contract and the GWAC, share the goal of completing a global transaction.

APPLICATION OF THE LAW TO THE FACTS

[848] Let's identify what the global transaction is.

[849] It contemplates the construction of a Generating Station that will supply H.Q. with such electrical products as capacity and energy.

[850] Funding of the Generating Station is a core component of this transaction. Obviously, the amounts incurred for the Generating Station and the power transmission lines are considerable and directly related with the economic life of the Generating Station which, it should be remembered, varies between 100 and 120 years for the works, and between 50 and 60 years for the equipment.[435]

[851] Consequently, the term of the supply contract is dependent on these parameters.

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[434] Jean-Louis BAUDOUIN and Pierre-Gabriel JOBIN, *Les Obligations*, 7th Ed., by P.-G. JOBIN and Nathalie VÉZINA, Cowansville, éditions Yvon Blais, 2013, pp. 586-587, para. 490.

[435] Para. 87 of this judgment

[852] We see that the suggested term of the contract is 25 years in the first round of negotiations back in 1961 but evolved during the negotiations, such that when the letter of intent was signed, the term was set at 40 years, plus a renewal period that was indefinite at the time.[436]

[853] This renewal period was established in April of 1968 for a 25-year period owing to the increased costs of the project.[437]

[854] The Court notes that there is a link between the project's construction, the costs of that construction and the term of the supply contract.

[855] Consequently, the "completion of the global transaction" has two aspects, namely the construction of the Generating Station on the one hand and the supply of electrical products on the other.

[856] The costs incurred upon completion of the first aspect, namely the Generating Station and power transmission lines, had a direct impact on the second aspect, the parties establishing the term for the supply of electrical products at 65 years.

[857] The components of the construction and funding aspects are in the Principal Power Contract but disappear in the renewed Principal Power Contract for the pure and simple reason that starting in 2016, not only did everything related to the construction become irrelevant, but the amount obtained to fund the project had been completely reimbursed, hence the decision to create two contracts, the second being incorporated into the first and which, it bears reminding, comes into force automatically on September 1, 2016.

[858] It bears noting, and this is at the very heart of H.Q.'s contentions, that the operational flexibility clause can be found in both the Principal Power Contract as well as the Renewed Power Contract.

[859] All of these elements taken together allow the Court to conclude that the Principal Power Contract as well as the Renewed Power Contract constitute an indivisible contractual whole.

[860] The situation with the GWAC is different.

[861] We have seen that the GWAC was preceded by what the parties describe as an operating agreement starting from the early 1990s that was, to borrow the words of Mr. Dubé, a "[TRANSLATION] guarantee of availability of the eleven units in on-peak hours".[438]

[862] The GWAC is a continuity of this operating agreement and also targets a guaranteed capacity during on-peak hours, namely the winter season.

[863] Even if some describe this type of agreement as a "Pure Capacity Product", the Court instead considers that it actually is a guarantee of a higher transmission rate than that of "Firm Capacity" for energy delivered from the Generating Station.

[864] Even if the GWAC does partially correspond to what Mr. Dubé described as a "Bundle", it is markedly different.

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436 Paras. 151 and 269 of this judgment.
437 Paras. 314 to 317 of this judgment.
438 Para. 388 of this judgment.

[865] What is more, remember that the round of negotiations that led to the conclusion of the GWAC took place against the backdrop of Lower Churchill, the GWAC being only ancillary.[439]

[866] Can the GWAC be connected to the contractual whole that is the Principal Power Contract and Renewed Power Contract? The Court believes that it cannot, because we are not really speaking here of the completion of a global transaction. Even if this notion of increased capacity in the winter season was initially considered, it was never retained at the time the Principal Power Contract was concluded and renewed.[440]

[867] In short, the contractual whole is limited to the Principal Power Contract and the Renewed Power Contract. This being said and as we will see later, this does not strip the GWAC of its importance.

(B) IS THE CONTRACTUAL WHOLE AMBIGUOUS SUCH AS TO GIVE RISE TO THIS ACTION?

THE LAW

[868] It is taken for granted that in order for a contract to be open to interpretation, an ambiguity must exist in respect of a portion thereof. The following oft-cited text penned by authors Baudouin and Jobin presents a good summary of the state of law:

> “[TRANSLATION]
>
> **413 ─ Need for ambiguity ─** If a contract is clear, the judge’s role is one of application and not interpretation. The difference between application and interpretation is not merely semantic: the application process attempts to match a defined legal standard with a given factual situation, whereas interpretation seeks to define the scope of the legal standard before being able to apply it. <u>It is therefore necessary that there be an ambiguity or reasonable doubt as to the meaning to ascribe to the terms of the contract in order to trigger the process of interpretation; as was ruled time and time again, where there is no such ambiguity a court cannot, on the pretext of searching for this intention, adulterate a clear text.</u>[15] The court will have to content itself with applying what is literally expressed, taking for granted that the text accurately reflects the parties’ intention. The prerequisite of an ambiguity, according to this sound formulation of the two authors, “[TRANSLATION] acts as a bulwark” against the risk of an interpretation that might stray from the true will of the parties and upset the economy of their contract.[16]
>
> The so-called clarity may, however, be misleading. If placed back within the context of the other stipulations of the contract or the circumstances of its conclusion, the apparently limpid terms of a stipulation may reveal themselves to be ambiguous and contradict the contract’s economy, the true intention of the parties. The court’s non-intervention rule when confronted with clear words is a simple presumption.[17] Consequently, the formal description that the parties give to their contract (sale, leasing, lease financing) or to certain aspects thereof must not prevent the court from verifying whether that description actually corresponds to the effects sought, as we have seen above.[18] For example, it is not because the parties have given their document the title of “sales” or “leasing” agreement that the judge is ipso facto bound to apply the rules specific to those contracts, if the stipulations and circumstances reveal that the parties truly wanted to enter into another type of contract.

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439 Paras. 429 and 431 of this judgment.

440 Para. 287 (peaking availability) of this judgment.

> The ambiguity can stem from the very wording of the contract; a word can have several meanings, a phrase can be poorly constructed or a contradiction may exist between certain clauses of the contract, to name but a few examples. The possibilities are endless.[19,441]
>
> […]
>
> [emphasis added]
>
> [references omitted]

[869] What is more, the Court has the discretion (though it may be paradoxical) to first determine whether an ambiguity exists before resolving it once the parties have been heard and the evidence adduced, each case being unique.

[870] But what happens to this premise in the case of an indivisible contractual whole?

[871] Once again, author Pierre-Gabriel Jobin sheds light on this subject:

> "[TRANSLATION]
>
> One point appears to be quite accepted: when interpreting an ambiguous clause of one of the group's components, the judges will consider its place in the whole along with the contents of the other components.[18] Moreover, its place in article 1426 of the Code explicitly requires judges to consider all of "the circumstances" in which the contract to be interpreted was formed.[442]
>
> [emphasis added]
>
> [references omitted]

[872] Therefore, to determine whether or not an ambiguity exists, that ambiguity must be perceived through the prism of the contractual whole, not only one of its components.

APPLICATION OF THE LAW TO THE FACTS

CONTINUOUS ENERGY

[873] In the case at bar, the ambiguity stems from the presence of an operational flexibility clause in both the Principal Power Contract and the Renewed Power Contract.

[874] More specifically, the presence of this clause in the Renewed Power Contract combined with the definition of "Continuous Energy" which was not found in the Principal Power Contract creates a genuine ambiguity, thus allowing the Court to proceed with an interpretation of the disputed clauses.

INTERRUPTIBLE SALES

[875] The interruptible sales situation is different. Indeed, if at the time of negotiations the concept did exist, it was only once the rules governing the transmission of electric products were made more flexible that this market developed.

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441 Jean-Louis BAUDOUIN and Pierre-Gabriel JOBIN, *Les obligations*, 7th Ed., by P.-G. JOBIN and Nathalie VÉZINA, Cowansville, Éditions Yvon Blais, 2013, pp. 491-492, para. 413.

442 [2012] 46, R.J.T. 9.

[876] Consequently, the ambiguity surrounds the following fact. Based on section 6.6 of the Principal Power Contract and 5.4 of the Renewed Power Contract, can CF(L)Co sell energy and capacity to third parties that are not required by H.Q., and occasionally exceed the 300 MW Recall Block in the context of these sales? In other words, does H.Q. have the right to all capacity and energy that may be produced by the Generating Station?

(C) IN LIGHT OF THE PROVISIONS OF THE CIVIL CODE OF QUÉBEC GOVERNING THE INTERPRETATION OF CONTRACTS OR THE PROVISIONS OF ANY OTHER APPLICABLE LAW AND THE EVIDENCE ADDUCED, WHICH INTERPRETATION OF THE RENEWED POWER CONTRACT SHOULD THE COURT ADOPT – THAT OF CF(L)CO (IN WHOLE OR IN PART) OR THAT OF H.Q.?

[877] Before dealing with the issue that is at the heart of this dispute, it would be expedient to rule whether this interpretation must be carried out based on the provisions of the *Civil Code of Lower Canada* that was in force in the 1960s or pursuant to the *Civil Code of Québec* that is currently in force, seeing as an essential component of interpretation revolves around the negotiations that led to the conclusion of the contractual whole.

[878] This problem, which is actually not a problem, was dealt with by H.Q. in its outline of argument.

[879] Seeing as the Court agrees with the intellectual line of thought and conclusion reached by H.Q. both in terms of applicable law as well as the principles of interpretation that apply in this case, and so as to not reinvent the wheel, the Court will give Caesar his due by citing paragraphs 598 through 610 of H.Q.'s outline of argument in their entirety.

> [TRANSLATION]
>
> (a) Interpretation of contracts and transitional law
>
> 598.However, as regards the contractual situations that were underway when the C.C.Q. came into force on January 1, 1994, lawmakers opted, in some regards, to ensure the survival of the former law, namely the *Civil Code of Lower Canada*. Consequently, section 4 of the *Act respecting the implementation of the reform of the Civil Code* (AIRCC) provides that:
>
> [ORIGINAL ENGLISH]
>
> 4. In contractual situations which exist when the new legislation comes into force, the former legislation subsists where supplementary rules are used to determine the extent and scope of the rights and obligations of the parties and the effects of the contract.
>
> However, the provisions of the new legislation apply to the exercise of the rights and the performance of the obligations, and to their proof, transfer, alteration or extinction.
>
> 599.The contract, including its Schedule III (the Renewed Power Contract), was formed in 1969 under the aegis of the C.C.L.C. It will produce its effects until 2041. The contractual situation was therefore in progress when the C.C.Q. came into force. <u>According to the first paragraph of section 4 AIRCC, it is therefore the provisions and the law in force under the C.C.L.C. that govern the interpretation of the Power Contract, including the Renewed Power Contract.</u>
>
> 600.In his comments, the Minister for Justice explains as follows the legislative choice to ensure the subsistence of the former law when it comes to contractual interpretation for situations that were in progress during the coming into force of the C.C.Q.:

[TRANSLATION]

The first paragraph introduces, for these contractual situations, the rule that the former residual legislations subsists for all that concerns the determination of rights and obligations of the contracting parties, or the determination of the legal effects or consequences of their contract.

In other words, each time that the parties' silence or an ambiguity in the expression of their will requires that the law be consulted to define the contents and effects of the contract entered into before the coming into force of the new law but still existing at that time, it is the former law that was in force at the time the contract was entered into that must be resorted to, even if the facts calling for this definition arose after the new law came into force.

This rule is an exception to the principle that would otherwise apply, namely the immediate effect of the new law on legal situations in progress stipulated in section 3. This rule seeks to account for the fact that the contracting parties entered into their agreement based on the suppletive law then in force at the time the contract was entered into, and that they may even in many cases have remained willingly silent on certain aspects of their agreement to subject themselves globally to that suppletive law.

➢Department of Justice, *Commentaires du ministre de la Justice: Le Code civil du Québec — Un mouvement de société*, vol. III (Québec: Québec Government, 1993), pp. 7-8, CAHQ, vol., tab 8.

601.Professors Côté and Jutras explain the principle of survival of the former legislation when interpreting a contract entered into before January 1, 1994:

[TRANSLATION]

Theoretically, when it comes to specifying the obligations under a previous contract, one must turn to the suppletive rules in force at the time of its creation. […] [T]he suppletive rules of the new code bearing on the interpretation of contracts, the terms and conditions of contractual obligations, the sale of a thing to another or the bearing of risks, do not apply to prior agreements. Briefly put, the determination of the rights and obligations of the parties to a prior agreement must be carried out using the former legislation.

➢P.-A. Côté and D. Jutras, "Le droit transitoire relative à la réforme du Code civil" in *La réforme du code civil*, V. III (Sainte-Foy (Québec), Presses de l'Université Laval, 1993), para. 176 (pp. 999-1000), CAHQ, vol. 1, tab 1.

602.Case law is to the same effect. In *L'archevêque & Rivest Limitée* v. *Commission scolaire le Gardeur*, the Superior Court explained that according to section 4 AIRCC, it is the law in force at the time a contract was entered to that applies. Consequently:

[TRANSLATION]

Seeing as the contract was entered into prior to the coming into force of the *Civil Code of Québec*, the contract interpretation rules that apply are those that were enacted in articles 1013 through 1021 of the C.C.L.C.

➢*L'archevêque & Rivest Limitée* v. *Commission scolaire le Gardeur*, EYB 2007-124456 (S.C.), para. 23; see also para. 26, CAHQ, vol. 2, tab 26;

➢See also: *Langevin* v. *Gestion François Cousineau Inc.* J.E. 2000-2 (C.A.), pp. 7 and 9, CAHQ, vol. 2, tab 27; and

➢ Bernèche v. Diioia, 2008, QCCA 595, para. 12, CAHQ, vol. 1 tab 13;

(b)The same principles govern the interpretation of contracts under the *Civil Code of Lower Canada and the Civil Code of Québec*

603.The fact that the Power Contract is interpreted pursuant to the C.C.L.C. has no impact in this case, seeing as the applicable principles of the former code and the new code are the same.

604.Articles 1013 to 1021 of the C.C.L.C. prescribed a series of principles that were supposed to guide the Tribunal in interpreting contracts:

[ORIGINAL ENGLISH]

1013. When the meaning of the parties in a contract is doubtful, their common intention must be determined by interpretation rather than by an adherence to the literal meaning of the words of the contract.

1014. When a clause is susceptible of two meanings, it must be understood in that in which it may have some effect rather than in that in which it can produce none.

1015. Expressions susceptible of two meanings must be taken in the sense which agrees best with the matter of the contract.

1016. Whatever is doubtful must be determined according to the usage of the country where the contract is made.

1017. The customary clauses must be supplied in contracts, although they be not expressed.

1018. All the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act.

1019. In cases of doubt, the contract is interpreted against him who has stipulated and in favor of him who has contracted the obligation.

1020. However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract.

1021. When the parties in order to avoid a doubt whether a particular case comes within the scope of a contract, have made special provisions for such case, the general terms of the contract are not on this account restricted to the single case.

605. The same is true for articles 1425 to 1432 C.C.Q.:

[ORIGINAL ENGLISH]

1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.

1426. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.

1427. Each clause of a contract is interpreted in light of the others so that each is given the meaning derived from the contract as a whole.

1428. A clause is given a meaning that gives it some effect rather than one that gives it no effect.

1429. Words susceptible of two meanings shall be given the meaning that best conforms to the subject matter of the contract.

1430. A clause intended to eliminate doubt as to the application of the contract to a specific situation does not restrict the scope of a contract otherwise expressed in general terms.

1431. The clauses of a contract cover only what it appears that the parties intended to include, however general the terms used.

1432. In case of doubt, a contract is interpreted in favour of the person who contracted the obligation and against the person who stipulated it. In all cases, it is interpreted in favour of the adhering party or the consumer.

606.Articles 1013 C.C.L.C. and 1425 C.C.Q. identify the objective of contractual interpretation, namely the search for the shared intention of the parties at the time the contract was formed. This objective is imposed on the person doing the interpretation and constitutes the theoretical foundation of the other provisions of the two codes governing the interpretation of contracts.

607.Indeed, articles 1014 et seq. C.C.L.C. and 1426 et seq. C.C.Q. are tools or "guides" to establishing this shared intention.[702] They are placed at the interpreter's disposal, but are not imposed on him.

➢D. Lluelles and B. Moore, *Droit des obligations*, 2nd Ed. (Montréal: Thémis, 2012), No. 1587, p. 875, CAHQ, vol. 1, tab 7.

608.Articles 1427 to 1431 C.C.Q. represent the interpretation arguments referring to the text of the contract, whether regarding its internal coherence (art. 1427 to 1429 C.C.Q.) or presumptions of intent grounded on the existence of a contractual stipulation (art. 1430 and 1431 C.C.Q.). These same interpretation rules existed under the former code:

Civil Code of Québec	Equivalent provisions of the Civil Code of Lower Canada
Art. 1427	Art. 1018
Art. 1428	Art. 1014
Art. 1429	Art. 1015
Art. 1430	Art. 1021
Art. 1431	Art. 1020

609.If article 1426 C.C.Q. does not have an equivalent in the former code, it is well recognized that this provision does not amend the law and is merely a codification of adjudicative law. Therefore, even if some of the elements mentioned in that article are nowhere to be found in the text of the former code, case law did recognize them.

➢*P.-G. Jobin and N. Vézina, Les obligations,* 7th Ed. (Cowansville (Québec): Yvon Blais, 2013, p. 500, CAHQ, vol. 1, tab 5.

> 610.In short, whether it be under the C.C.L.C. or the C.C.Q., the Tribunal's role in this case is to identify the shared intention of the parties at the time the Power Contract was created and the tools to achieve this are the same.
>
> (references omitted)
>
> (emphasis added in paragraphs 599 and 609 of the citation)

[880] In other words, the basic principles for interpreting contracts, whether under the *Civil Code of Lower Canada* or the *Civil Code of Québec*, remain the same as those developed below.

APPLICABLE LAW

[881] As reported in the citation above, the applicable law was codified in order to reflect the former legislation and the diktat of case law, the main articles being 1425, 1426 and 1428 C.C.Q., which the Court reproduces below:

[ORIGINAL ENGLISH]

> **1425**. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.
>
> **1426**. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.
>
> **1428**. A clause is given a meaning that gives it some effect rather than one that gives it no effect.

[882] Consequently, article 1426 establishes the four following interpretation criteria:

- the nature of the contract;
- the circumstances in which it was formed;
- the interpretation which has already been given to it by the parties; and
- the usage.

[883] This Court believes that another element should be considered, namely that of the identity of the contracting parties and their motivation regarding the joint project. Indeed, in the case of complex projects with several aspects, one party's motivation regarding only a single aspect may help to explain the ins and outs of the others.

NATURE OF THE CONTRACT

[884] The nature of the contract is the first thing broached by the authors and case law seeing as, in most cases, it is quite obvious. Consequently, a sales contract or an adhesion contract will trigger rules facilitating their interpretation.

[885] Qualifying the nature of a contract is just as important in the case of a mixed contract or an innominate contract.

[886] In the case at hand, the contractual whole presents all of the features of a mixed contract, in that it has a joint venture aspect and a sales aspect.

[887] The definition of an enterprise has been codified, and can be found in the third paragraph of article 1525 of the C.C.Q.:

> [ORIGINAL ENGLISH]
>
> The carrying on by one or more persons of an organized economic activity, whether or not it is commercial in nature, consisting of producing, administering or alienating property, or providing a service, constitutes the operation of an enterprise.

[888] In this case, the construction component of the Generating Station as well as the operation thereof for the first 40 years when in actual fact H.Q. controls the reservoir levels in interaction with its own production facilities, constitutes the enterprise.

[889] The identity of the contracting parties, their connection or absence of connection is important when describing the project.

[890] Another no less important element must be added to the equation, seeing as H.Q. was a co-shareholder of CF(L)Co at the time of negotiations, holding 34.2% of shares alongside Brinco, which held 65.8% the shares.[443]

[891] And so, for the enterprise aspect of the commercial whole, the Court will need to take into consideration the reasonable expectations of each of the shareholders.

[892] While this aspect has not been argued by the parties, it may play a part in the context of the circumstances surrounding the conclusion of the contract which we will examine later. Indeed, an unrelated party's approach to a contract will be quite different from that adopted by parties connected through their shareholding.

[893] If H.Q.'s vocation has remained constant since its creation, the same cannot be said for the controlling shareholders of CF(L)Co. During the negotiations that led to the creation of the contractual whole, Brinco was the project developer and, at that time, it most certainly did not have the same vision of this joint venture as did its successor starting in 1975, namely NLH which was, until quite recently, the power branch of the province of Newfoundland.

CIRCUMSTANCES SURROUNDING ITS CONCLUSION

THE LAW

[894] Courts and authors alike have attempted to define the term "circumstances".

[895] Generally speaking, they all agree that the circumstances include ancillary documents of the contract such as prior offers, draft contracts, etc.[444]

[896] Authors Baudouin and Jobin go even further in what they describe as being the commercial context:

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443 Para. 39 of this judgment.

444 See Didier LLUELLES and Benoit MOORE, *Droit des obligations*, 2nd Ed., Montréal, Éditions Thémis, 2012, pp. 885-886, para. 1602; *Vidéotron ltée* v. *Rogers Wireless Partnership*, 2009 QCCS 996, para. 40; Jean-Louis BAUDOUIN and Pierre-Gabriel JOBIN, *Les Obligations*, 7th Ed., Cowansville, Éditions Yvon Blais, para. 418.

> [TRANSLATION]
>
> **415 — Reasonableness —** Aside from the principles of shared intent, equity and good faith, the courts sometimes interpret ambiguous contracts in light of another principle, actually a complementary one: that of reasonableness. As mentioned earlier, a judge cannot allow himself, on the pretext of interpreting, to rewrite the contract in such a manner that it produces effects contrary to what was clearly stipulated. But more and more often, judges will give a reading to obscure clauses that are both reasonable and compatible with the agreement;[32] when choosing between two interpretations, judges will set aside the one that appears unreasonable because it would lead to an incongruous, illogical result compared to the parties' objective, or would be frankly absurd. The objective targeted by the parties when forming the contract plays an increasingly important role in the exercise of interpretation.[33] In the same vein, the search for a reasonable meaning is often conducted by referring to the commercial or other context surrounding the contract's formation.[35] Hasn't the Supreme Court taught us that one must set aside a literal interpretation that would have an unrealistic outcome that would not have been contemplated by the parties in the commercial context in which the agreement was reached; and did it not maintain that when choosing between two interpretations, preference must be given to the most reasonable one, the one that will produce a "fair outcome"?[35] In its rules of interpretation, the *Code* does not speak of reasonableness; therefore, judges often make use of that notion by invoking the search for the parties' shared intention.[36]
>
> This approach is similar to the taking into consideration of circumstances surrounding the contract's formation (art. 1426 C.C.Q.), which will be dealt with in a few moments. It bears noting that the *Projet de réforme du droit des contrats* seeking to reform contract law under France's civil code, actually stipulates that "[TRANSLATION] where no shared intention of the parties is detected, a contract will be interpreted in light of the meaning that would be given to it by a reasonable person placed in the same situation";[37] a substantially similar provision can be found in *Principes d'UNIDROIT*.[38] This relatively new rule enriches the contract interpretation regime. However, it must be used wisely, even with restraint: it must not lead to arbitrary rulings from judges.[445]

(emphasis added)

[897] The Court retains from these texts that not only does the documentary and/or peripheral portion of a contract constitute circumstances, so does the shared intention when the reasonableness test is applied.

[898] In this matter, for obvious reasons no one who participated in the negotiations testified. Consequently, the search for the shared intention in the contractual documents in question, on the whole quite unique, can be gleaned from the identity of the actors then present, the socio-economic and political context, and the ancillary documents.

APPLICATION OF THE LAW TO THE FACTS

[899] In 1958, Newfoundland granted Brinco rights to the Churchill River for an initial period of 99 years, renewable upon expiry for a second period of 99 years.

[900] The fact of entrusting the development of the Churchill River to a private enterprise was not surprising, seeing as the demographic and economic weight of Newfoundland did not justify the public development of this resource.[446]

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[445] Jean-Louis BAUDOUIN and Pierre-Gabriel JOBIN, *Les Obligations*, 7th Ed., by P.-G. JOBIN and Nathalie VÉZINA, Cowansville, Éditions Yvon Blais, 2013, pp. 495-496.

[446] Paras. 71 and 72 of this judgment.

[901] The cornerstone of this project, for Brinco and H.Q., was its funding.

[902] Remember that pursuant to the Prospectus, the Generating Station was almost entirely financed. That being the case, such financial risks as illiquidity, destruction of the work, exchange rates, fluctuating interest rates, and so forth were borne by the minority shareholder, in this case H.Q., and this for the first 40 years of the contract.

[903] Though it may be normal, under certain circumstances, for a richer shareholder to bear a greater portion of the financial risks of a joint venture, it nevertheless remains that this is an exceptional situation for a minority shareholder. Even if the evidence gives some idea of the importance that H.Q. may have ascribed to the fact of being a shareholder of CF(L)Co, it nevertheless remains that H.Q. has always had members of its senior management sitting on the board of directors of CF(L)Co. Hence, it is reasonable to believe that H.Q. viewed the project as a joint venture, with a partner that must necessarily take its expectations into consideration.

[904] In a nutshell, though the project was not very profitable, for all intents and purposes it presented no risk to the controlling shareholder.

[905] Early on in the equation, Brinco decided to develop Upper Churchill's full potential. This output at the time represented virtually all of H.Q.'s output for Québec, whose population was then 12 times greater than that of Newfoundland.

[906] Needless to say that this output was destined for Québec, seeing that in those days no transmission line connected Labrador to the island of Newfoundland, although that situation was changing.

[907] Brinco had to reach an energy sale contract with H.Q. if it wanted to secure the financing needed to build the Generating Station.

[908] Obviously, H.Q. demanded and obtained considerable concessions in terms of rates. As we will see, in the context of the negotiations, it personally agreed to the "Take or Pay" and "Split Tariff" commitments.

[909] What was the goal sought by the controlling shareholder CF(L)Co?

[910] The answer is two-fold:

- A return on investment of $60 million.
- The residual value of the Generating Station upon expiry of the 65 year-period.

[911] A $60 million return on Brinco's investment is reflected in the final report of Ebasco,[447] which specifies that Brinco quantified its investment at $60 million and wanted a corresponding return.

[912] How do we explain this expectation when the value of the works is somewhere close to one billion dollars. The answer can only be found in the residual value thereof, once the debt is reimbursed.

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447 Para. 327 of this judgment.

[913] Even though the residual value of the work was never invoked, it is inconceivable to think that the project developer, Brinco, was not aware of it. Consequently, the fact that Brinco obtained rights to the Churchill River for two periods of 99 years is evidence of their long-term vision, its corollary necessarily being the value of the work once the debt was reimbursed.

[914] Brinco secured the rights to Churchill River in 1953 in consideration for the obligation to invest $1,250,000 in five (5) year tranches. In 1974, 21 years later, Newfoundland purchased 4,989,330 shares of CF(L)Co held by Brinco for the amount of $160,000,000 million.[448] The return is all the more interesting, especially if we consider that a mere six years earlier, Brinco assessed its investment at $60 million.

[915] And what to say of the residual value in 2015 that Mr. Vandal estimates at $20 billion.[449]

[916] One can certainly presume that Brinco, then controlled by industrialists, was well aware of the importance of a work's residual value.

[917] Let us now look at the negotiations, properly speaking.

[918] We have seen that negotiations surrounding the conclusion of the set of contracts took place between February 1961 and July 1968, even though the contract was signed some ten (10) months later, namely on May 12, 1969.[450]

[919] The first round, which barely lasted several months, only set the table for future rounds. That being said, we can see that H.Q., when putting an end to negotiations, first made the strategic choice of developing its own facilities, in this case the Manicouagan project.[451]

[920] This choice was the first evidence of the importance H.Q. attributed to its Facilities as opposed to the project.

[921] The second round, which lasted from March 1963 to July 1964, fine-tuned the parties' position.

[922] The "take or pay" notion was discussed at length and produced a lot of back-and-forth between the negotiators. Although H.Q. was firmly opposed to the notion in the beginning,[452] it ended up accepting it as crucial to the financing.

[923] Other principles were also discussed and accepted, namely the Twinco Block and the Recall Block, even though the latter's quantity had not yet been determined.

[924] The documentary evidence reveals some of H.Q.'s concerns, the main being:

- Exports to New York;
- Quantity of energy available and guaranteed delivery.

[925] We will see a little later that confronted with the impossibility of exporting to the United States, H.Q. decided to go ahead with the project anyway.

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448 Exhibit P-227.
449 Para. 88 of this judgment.
450 Paras. 135 and 314 of this judgment.
451 Para. 152 of this judgment.
452 Paras. 714 to 189 and 193 to 195 of this judgment.

[926] Therefore, this leaves the issue of energy quantities and guaranteed delivery.

[927] In this second round of negotiations, the project (at least its technical aspect) was in its early stages. Thus, in 1963, Acres admitted that it still was unable to assess the quantity of "Firm Energy".[453]

[928] Another important point is the inconsistency of terminology used by the negotiators.

[929] Remember that in the first round, the quantity of energy was expressed in terms of horsepower, a term that was used on several occasions during the second round.

[930] During that round, several expressions pertaining to capacity and energy were used, including the following:

- Firm annual energy generation;
- Guaranteed minimum energy output.
- Second energy.
- Primary energy.
- Firm capacity and associated energy.
- Spare capacity and associated energy, etc.

[931] Clearly, CF(L)Co's negotiators realized that there was a certain inconsistency in the terminology used, seeing as Mr. McParland received a lexicon in November of 1963 entitled "Glossary of Electric Utility Terms".[454]

[932] This lexicon[455] contained a wealth of definitions for such various expressions as "Firm Energy", "Primary Energy" and "Secondary Energy". This being said, the term "Energy" contained no definition for "Continuous".

[933] This was confirmed by CF(L)Co's expert in her report on "Continuous Energy", seeing as in order to prove the existence of such a concept, she necessarily had to associate it with that of "Firm Energy".[456]

[934] Ms. Bodell admitted, moreover, in the context of her cross-examination that at the time, the expression "Continuous Energy" was not defined anywhere[457] in the technical works.

[935] In her expert report, she took pains to distinguish the notion of "Continuous Energy" from the notion of excess energy to conclude that it had never been considered by the parties as being available for H.Q. during the 25 years of the Renewed Power Contract.

[936] In fact, the expression "Continuous Energy" was dealt with in a letter that Mr. Winters from Acres sent to Mr. Lessard from H.Q. in March of 1964, which letter was not followed up on.[458]

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453 Para. 172 of this judgment.
454 Para. 191 of this judgment.
455 Exhibit P-83.
456 Para. 687 of this judgment.
457 Para. 694 of this judgment.

[937] The Court notes that following this second round, although certain concepts were taken for granted, such as “take or pay”, “Twinco Block”, “Recall Block”, the exact quantity of energy available to H.Q. remained undetermined.

[938] The Court also notes that the terminology used to describe the capacity and energy in the proposed letter of intent varies greatly in the course of the months and depending on the author.

[939] What is more, realizing that exporting electrical products to the United States was becoming problematical, H.Q. considered securing full control of the Generating Station’s output, a control that extended to the reservoirs.[459]

[940] Now, on to the final round.

[941] What was agreed on in the second round of negotiations not being questioned, the first draft letter of intent dated May 1, 1965 strongly resembled the draft sent by Mr. Winters in March of 1964. It, too, contained the notion of “Continuous Energy”.

[942] In June of 1965, H.Q. submitted two drafts of the letter of intent to CF(L)Co in which it defined “Continuous Energy”. The first draft contains the phrase “[ORIGINAL ENGLISH] shall mean all energy which can be made available on a monthly basis”, while the second draft eliminated the notion of “monthly basis” to read as follows: “[ORIGINAL ENGLISH] shall mean all energy made available at the agreed point of delivery”.[460]

[943] Still in June of 1965, clause 10 of the draft exchanged between the parties provided for the purchase by H.Q. of any available energy of the Generating Station, namely the “Continuous Energy” and excess energy.

[944] In other words, the expression “Continuous Energy”, when read together with all of the clauses contained in the drafts of the letter of intent, meant all energy produced by the Generating Station.

[945] This simple finding contradicts Ms. Bodell’s opinion, namely that CF(L)Co intended to reserve the excess energy for itself.

[946] In fact, the expression “Continuous Energy” would be used by the parties in the letter of intent to designate what would be available for H.Q. during the construction phase and commissioning of the units.[461]

[947] The quantity of energy available for H.Q. would also be fine-tuned, varying from 34 billion KWHs to 32.2 billion KWHs.

[948] In early 1966, H.Q. learned that its plan to export to the United States was definitively compromised, but still decided to proceed with the project. From that moment on, the full integration of Churchill Falls into the H.Q. network was analyzed in depth.[462]

[949] The integration of Churchill Falls into its network was always an option for H.Q. However, the fact that there were no more export possibilities made this integration a top priority of H.Q.

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[458] Para. 203 of this judgment.
[459] Paras. 207 to 210 of this judgment.
[460] Paras. 236 and 242 of this judgment.
[461] Exhibits P-4/11 and P-4/13, clause 18.
[462] Paras. 257 to 260 of this judgment.

[950] The letter of intent was signed October 3, 1966.

[951] These first three rounds shed light on the changing approach of each party.

[952] Consequently, for CF(L)Co, aside from the Twinco Block and Recall Block, the emphasis was on considerations directly related to the project's funding, namely the "Take or Pay" approach.

[953] As for H.Q., once it had processed CF(L)Co's demands, its considerations were more technical and linked to the compromise of exports to the U.S. These revolved around the following axes:

- Quantity of energy available, and at what price.
- Integration of Churchill Falls into its entire network.
- Term of the contract, then set at 40 years.[463]

[954] This left the final and most important round of negotiations, seeing as it witnessed a change of direction so important that one of the first clauses of the Principal Power Contract is the following:

> [ORIGINAL ENGLISH]
>
> "1.7 Letter of intent
>
> The letter of Intent executed between the parties hereto under date of October 13, 1966 is hereby fully superseded and replaced."

[955] The first material change is the "Split Tariff" issue, which was integrated into the Principal Power Contract but not the Renewed Power Contract.

[956] Under the "Split Tariff", H.Q. bears the risk associated with hydrology. This being said, in exchange, H.Q. obtained control over the reservoirs.

[957] Moreover, the expert Lapuerta placed much emphasis, and rightly so, on this risk associated with hydrology, as well as on management of the reservoirs.

[958] The Court believes that above and beyond the operational flexibility clause set forth both in the Principal Power Contract and the Renewed Power Contract, the treatment reserved for the "Split Tariff" clause sheds light on the parties' intention.

[959] Once the "Split Tariff" notion was accepted by H.Q., the "Continuous Energy" notion was abandoned, and the concept of "Annual Energy Base" was introduced.[464]

[960] Another material amendment is the identity of the party controlling the deliveries of energy. CF(L)Co first had to submit an evaluation to H.Q. of its energy availabilities with which H.Q. would have to content itself.[465]

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463 Para. 269 of this judgment.
464 Paras. 292 to 294 of this judgment.
465 Para. 300 of this judgment.

[961] This situation was unsatisfactory to H.Q., specifically as regarded the integration of Churchill Falls into its existing and future facilities.[466]

[962] This change would be accepted by CF(L)Co, thus ceding control over the reservoirs to H.Q. subject to certain assurances granted to CF(L)Co, namely:

> [ORIGINAL ENGLISH]
>
> "Hydro-Québec have [sic] recognized that CF(L)Co should not suffer any loss of revenue which would have been available to CF(L)Co under the previous concepts." [467]

[963] Furthermore, this significant change of course led to the introduction of the operational flexibility clause.

[964] Finally the renewal clause was negotiated, which until then had only received lip service.

[965] The main considerations invoked by H.Q. were the price and term of the renewal.

[966] The Court notes that no further change to the various concepts developed and accepted by the parties to the Principal Power Contract were questioned at the time.[468]

[967] In fact, the operational flexibility clause can be found in both the Principal Power Contract and the Renewed Power Contract.

[968] As mentioned earlier, the expert Lapuerta believes that the notion of "Split Tariff" resulting in H.Q.'s takeover of the reservoirs is consistent with the approach that the entity controlling the reservoirs must bear the risk.[469]

[969] Interestingly, Mr. Martin shares Mr. Lapuerta's opinion on the subject.[470]

[970] According to CF(L)Co's interpretation of the Renewed Power Contract, it takes back control over the reservoirs seeing as, thanks to the first 40 years of the Generating Station's operation and the AEB calculations, the parties can very accurately determine the Generating Station's generating capacity, and it is this capacity noted in the final AEB that H.Q. must pay, regardless of whether or not it takes delivery thereof or if it is available.

[971] Mr. Lapuerta specifies that the AEB specifies the average over 40 years of operation, which does not necessarily mean that in any given year the water inflows will be sufficient to even meet CF(L)Co's interpretation of "Continuous Energy".

[972] In such a case, the risk would be entirely borne by H.Q., according to Mr. Martin, as it would have to pay for the energy it had not received. [471]

[973] H.Q. argues that while it did agree to pay despite the hydrology-related risks, it never agreed to pay for energy not delivered to it, either owing to sales to third parties, or to the maintenance of units or transmission system.[472]

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466 Para. 306 of this judgment.
467 Paras. 306 to 308 of this judgment.
468 Para. 321 of this judgment.
469 Para. 737 of this judgment.
470 Para. 623 of this judgment.
471 Para. 624 of this judgment.
472 Paras. 507 to 509 of this judgment.

[974] Does the evidence adduced before the Court demonstrate that CF(L)Co's current interpretation of the expression "Continuous Energy" in the Renewed Power Contract was contemplated by the parties during the negotiations that led to the conclusion of the contractual whole?

[975] The Court does not believe so. Here's why.

[976] This is a unique project that was negotiated for a period spanning eight (8) years.

[977] During these eight (8) years, the evidence reveals that the parties used several different terms to describe either capacity or energy. Actually, during the short period of time in which the expression "Continuous Energy" was used, and this before the concepts of "Split Tariff" and "Annual Energy Base" were introduced, it designated the entire output of the "Generating Station".

[978] CF(L)Co's main argument relies on the expert report of Ms. Bodell, in which she assimilates "Firm Energy" to "Continuous Energy" and its corollary, namely that CF(L)Co had thus reserved for itself ownership of the excess energy.

[979] However, despite Ms. Bodell's opinion, one fact cannot be ignored: nothing in the documentary evidence supports this contention.

[980] On the contrary, considering the enormous debt associated with the project, how could CF(L)Co have convinced its creditors that the excess energy should be reserved for the future?

[981] The reality is that the entire projected output of the Generating Station was sold, either to H.Q. or through the Reserved Blocks.

[982] What, then, is meant by "Continuous Energy".

[983] Bear in mind, first of all, that at the time of the negotiations in which the expression "Continuous Energy" was used, that notion was associated with the excess energy, such that H.Q. undertook to purchase and CF(L)Co undertook to sell the entire output of the Generating Station, minus the Reserved Blocks.

[984] In fact, during the first 40 years of the contractual whole, this is exactly what happened. Consequently, CF(L)Co sold and H.Q. purchased, using the "Take or Pay" formula, the entire output of the Generating Station, minus the Reserved Blocks.

[985] The Court upholds Mr. Lapuerta's interpretation of the meaning and use of the term "Continuous Energy" in the Renewed Power Contract, certainly the most logical one under the circumstances.

[986] Indeed, the application of the "Split Tariff" and "Annual Energy Base" clauses that led to the expression "Continuous Energy" being abandoned had the effect that during the first 40 years of the contractual whole, H.Q. bore the hydrology-related risks, the consideration being that it would then control the reservoirs.

[987] Once this first period had elapsed, the energy rate became fixed for the next twenty-five years. This reality, coupled with the fact that H.Q. is still subject to the "Take or Pay" condition, makes it all the more likely that the parties wanted to gauge the Generating Station's actual output capacity by measuring the first forty-year period.

[988] The period after this, namely the next twenty-five years, the parties being aware of the Generating Station's exact output in both good and bad years, the "Split Tariff" approach was abandoned, and H.Q. became tributary to full payment of this output at the agreed-upon rate. Use of the expression "Continuous Energy" thus becomes understandable, especially since the last definition used by the parties is that it "[ORIGINAL ENGLISH] shall mean all energy made available at the agreed point of delivery".[473]

[989] Moreover, nothing in the highly documented evidence demonstrates that the parties had considered such a drastic change as the one proposed by CF(L)Co for the last twenty-five years of the contractual whole.

[990] Contrary to a drastic change, what to make of the repeated use of the term "extension" at a board of directors meeting dealing most exclusively with the renewal of the Principal Power Contract?[474]

[991] Here is the definition for the word "extension" taken from the Oxford dictionary of English.[475]

> "A part that is added to something to enlarge or prolong it (...)
>
> An application of an existing system or activity to a new area (...)".

[992] Bear in mind that according to CF(L)Co, H.Q. nonetheless enjoys a certain intra-monthly flexibility within which to manage the limit of the final AEB divided into monthly tranches. Beyond this monthly limit (and if H.Q. wants more capacity and energy), it must pay. Similarly, and this is especially true during the summer season, if H.Q. consumes less than the final AEB, also divided by 12, it is still required to pay.

[993] This avenue now proposed by CF(L)Co is nowhere to be found in the negotiations and discussions that were adduced into evidence.

[994] As opposed to this silence, the operational flexibility clause can be found in both the Principal Power Contract and the Renewed Power Contract.

[995] This operational flexibility is described by H.Q. and its expert, Mr. Lapuerta, as being multi-year and multi-seasonal. The first allows H.Q. to manage the water inflows for its entire system, while the second allows it to import during on-peak periods what power and capacity remains unused, specifically during the summer period.

[996] This flexibility prized by H.Q. is highly documented both in the written instruments generated by Brinco or CF(L)Co at the time and the documents submitted by H.Q.

[997] What is more, one cannot help but notice that the last paragraph of the operational flexibility clause, contained in both contracts of the contractual whole, speak of the hydrology reports that H.Q. must provide, reports that lose all of their meaning if the parties had intended to make a change as drastic as the one CF(L)Co is contending.

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473 Paras. 236 and 242 of this judgment.
474 Paras. 321 and 321 of this judgment.
475 Oxford Dictionary of English, third Edition, 2010.

[998] Consequently, as Mr. Sansoucy indicated in his testimony, the annual water inflow in the form of rain or snow can vary greatly for the La Grande, Manicouagan and Churchill Falls reservoirs.[476]

[999] This interdependency of two generating stations is not unique to H.Q. Remember the testimony of Mr. Martin on the relevance of managing the Churchill Falls reservoirs in Upper Churchill to ensure the stability of the Muskrat Falls Generating Station, which is located in Lower Churchill.

[1000] In sum, the Court concludes that nowhere in the evidence is it demonstrated that the negotiators wanted to give the meaning suggested by CF(L)Co to the notion of "Continuous Energy", seeing as the only time this expression was used other than during the construction period, it meant the Generating Station's entire output.

[1001] What is more, CF(L)Co's interpretation does not jive with the contractual whole that was considered and negotiated by the parties, and would constitute a drastic change of course that is nowhere to be found in the evidence adduced before this Court.

[1002] Now on to the third criterion mentioned in article 1426 C.C.Q., namely the parties' interpretation of the contract throughout its execution.

INTERPRETATION OF THE PARTIES

THE LAW

[1003] Although this is essentially a question of fact, the Court believes that a quote from author François Gendron is especially relevant regarding the state of law:

> [TRANSLATION]
>
> "According to Demolombe, the execution of a contract 'is a living and breathing interpretation; an avowal of the party'.[333] The Court of Appeal in *Richer* v. *La Mutuelle du Canada*,[334] following in the wake of *Perras* v. *Grace,*[335] refers here to a decision of the French Cour de cassation:
>
> Where there is any uncertainty over actions, explains the Court of cassation, the surest source of interpretation is the voluntary, formal and repeated execution of the interested parties, who cannot after the fact disavow their own actions."[477]
>
> (emphasis added)
>
> (references omitted)

[1004] This is the general principle that should guide this Court. This being said, certain facts specific to this case are such that upon analyzing the facts, this Court must review some of the concepts that were dealt with by our courts.

APPLICATION OF THE LAW TO THE FACTS

[1005] H.Q. has proven a certain number of facts that it believes support its position, including the fact that it was only around 2008 or 2009 that CF(L)Co developed its own interpretation of the Renewed Power Contract that resulted in these proceedings.[478]

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476 Examination of Hugo Sansoucy, October 21, 2015, pages 30 to 36.

477 François, GENDRON, *L'Interprétation des contrats*, 2nd Ed., Montréal, Wilson & Lafleur Ltée, 2016, p.114

[1006] On this very specific point, H.Q. cites *Sobeys Québec* v. *Coopérative des consommateurs de Ste-Foy*.[479]

> [TRANSLATION]
>
> It was only at the instigation of the auditors that it began contesting the fact that the non-residential immoveable tax was not deducted from the percentage rent, which is very late under the circumstances. What we have here is a type of opportunism, [the sub-tenant] seizing the opportunity to contest what is offered by the sub-lease's wording […], which it then realizes does not contain the non-residential immoveable tax clause that it had nonetheless agreed to, but which had unfortunately been omitted.

[1007] H.Q. also cites *Richer* v. *La Mutuelle du Canada, Compagnie d'assurance sur la vie*[480] already cited by the author Gendron, to support what it describes as "opportunism".

[1008] While the facts in *Sobeys* prompted the Court of Appeal to qualify a claim as being opportunistic, it is all too clear that this was a particular situation that resulted from an omission in the sub-lease.

[1009] That is far from being the case here. However, the time at which a new theory was developed regarding a contract's interpretation is one of the elements on which this Court will base its assessment.

[1010] This very period in which a new theory was developed speaks to the state of mind of a co-contracting party in the period that preceded its drafting.

[1011] Indeed, the interpretation a contract is given by one or several parties can be seen in their behavior.

[1012] What is more, this new theory cannot have the effect of annihilating the behavior of a party prior to this "revelation" that has certainly created legitimate expectations on the part of its co-contracting party.

[1013] In that regard, one example of this to bear in mind is the 1995-1996 negotiations, during which Mr. Mercer from CF(L)Co sent financial projections on September 5, 1995 to Mr. Dubé covering the period until 2041 without any mention being made of the notion of "Continuous Energy", as CF(L)Co is currently arguing.[481]

[1014] Equally revealing is the fact that a contract entered into between CF(L)Co and NLH on March 9, 1998, concurrently with the conclusion of the GWAC and bearing on the 300 MW Recall Block, is valid until August 31 2041, namely exactly the same term as the Renewed Power Contract.[482]

[1015] In fact, all of the evidence regarding the parties' conduct until 2007 demonstrates that they considered all of the documents as a whole, the term of which is 2041.

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[478] Paras. 597, 598 and 620, 621 of this judgment.
[479] 2005 QCCA 1172, para. 97.
[480] 1987 R.J.Q. 1703 (C.A.).
[481] Para. 407 of this judgment.
[482] Exhibit P-30.

[1016] All of the evidence leans towards this interpretation, with the exception of one isolated document during the negotiation round that took place between 1989 and 1992 on which CF(L)Co is placing a lot of emphasis.[483]

[1017] The simple statement that "[ORIGINAL ENGLISH] to do anything which may be construed as confirming or improving for Hydro-Québec's benefit, the existing arrangements" cannot, taken on its own, contradict all of CF(L)Co's conduct throughout the performance of the Principal Power Contract.

[1018] In this matter, above and beyond these findings and above and beyond the declaration set forth year after year in the financial statements of CF(L)Co, the most important element is the 1998 finding in the GWAC that definitively enshrines H.Q.'s rights, if that had not already been done.

[1019] The GWAC, whose term expired at the same time as the term of the Renewed Power Contract, is certainly a sign of the flexibility sought by H.Q.

[1020] Bear in mind that the GWAC had been preceded by the Operating Agreement the features of which highly resembled those of the GWAC.[484]

[1021] Besides, as we have seen earlier, even in the context of negotiations between the Letter of Intent and the conclusion of the Principal Power Contract, the idea of increased capacity during the winter months had been broached by the negotiators.[485]

[1022] However, the price paid by H.Q. for the increased capacity under the GWAC is slated to grow from year to year until 2041.

[1023] The ordinary witnesses as well as the expert Lapuerta are unanimous in saying that H.Q. would not have agreed to that contract, and especially its terms and conditions, had it been aware of the interpretation CF(L)Co intended to give the notion of "Continuous Energy" starting September 1, 2016.

[1024] In fact, even with the benefit of a flexibility that the parties describe as being intra-monthly, managing the GWAC as the parties have been doing since 1998 would become impossible. Thus, H.Q. would need to choose both daily and hourly times so as not to exceed the limit of what CF(L)Co conceives as being available for H.Q.

[1025] Remember, too, Mr. Vandal's statement, which perfectly illustrates the GWAC's situation in light of the CF(L)Co's interpretation:

> [TRANSLATION]
>
> […] If the power itself is limited, we would end up paying for the available megawatts without being able to benefit therefrom […].[486]

[1026] Clearly, this situation was never considered or even invoked in 1998.

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483 Para. 394 of this judgment.
484 Para. 388 of this judgment.
485 Para. 287 of this judgment.
486 Para. 463 of this judgment.

[1027] It is also an accepted fact that the GWAC is not a one-way contract, CF(L)Co drawing benefit therefrom seeing as this contract will generate approximately one billion five hundred million for CF(L)Co between 1998 and 2041.

[1028] The Court is astonished that CF(L)Co's interpretation, which could materially affect the implementation of the GWAC, was not immediately denounced, seeing as it was in the course of being executed.

[1029] Despite the testimony of Mr. Burry, this Court concludes that it was only in June of 2012 during the discussion on the five-year plan that included 2016-2017 that H.Q. was officially informed of the direction that CF(L)Co would be taking starting on September 1, 2016.[487]

[1030] The evidence and testimony have convinced this Court that until it developed its new interpretation, CF(L)Co always acted, where flexibility was concerned, as though the renewed contract was simply a continuation, over time, of what the parties had been doing for the first 40 years of the contractual whole.

[1031] This finding, for all intents and purposes, constitutes the "party's avowal" elaborated by the French author Demolombe, and cited by the author François Gendron.

USAGE

THE LAW

[1032] This being once again a question of fact, here is what authors Baudouin and Jobin teach us:

> [TRANSLATION]
>
> The relevance of usage in determining the parties' intention is based on one presumption: the shared intent of the parties to the agreement is inferred from the intent of the parties who have entered into a similar contract (for example, the payment of a commission, in the form of a percentage, to the agent or broker whose services were retained to sell an immoveable). <u>Naturally, the tribunal will privilege to whatever extent possible the factors more specific to the case at hand whenever any exist</u>. It is, in fact, entirely possible that well-informed parties specifically did not want to follow usage and wanted an atypical agreement. Remember that in the end, there is often an overlap or confusion between an interpretation based on usage, and an interpretation that reflects the subject matter of the contract.
>
> The *Civil Code of Lower Canada* did not ignore usage (including in matters involving contract interpretation,[66] as well as determining the implicit obligations[67]).[488]
>
> (emphasis added)
> (references omitted)

[1033] Authors Baudouin and Jobin referred in the above excerpt to the term "usage" that is mentioned in article 1016, which is used by legislators in article 1426 C.C.Q.

[1034] It would therefore be expedient to define the term "usage". This is how the dictionary defines it:

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[487] Para. 602 of this judgment.

[488] Jean-Louis BAUDOUIN and Pierre-Gabriel JOBIN, *Les Obligations*, 7th Ed., by P.-G. JOBIN and Nathalie VÉZINA, Cowansville, Éditions Yvon Blais, 2013, p. 503, para. 419.

> [TRANSLATION] Practice that is so customary or frequent as to be normal within a society.[489]

[1035] What is more, the author Hubert Reid defines it as follows:

> "[TRANSLATION]
>
> 2. A customary practice within a specific environment or profession to which individuals ascribe even though that practice has no legal foundation. For example, the custom of the Court, commercial practices."[490]

APPLICATION OF THE LAW TO THE FACTS

[1036] The evidence of usage was provided mainly by CF(L)Co in the form of the expert reports of Ms. Bodell and Mr. Kendall.

[1037] This evidence attempted to demonstrate that either the expression of "Continuous Energy" was known and used within the power industry or the sale of blocks of capacity and power were common practice.

[1038] Where the blocks of capacity and power are concerned, although this Court does not retain the opinion of Mr. Kendall, he did reveal the existence of certain contracts, three in fact, two of which are for negligible quantities of power as compares to the output of Churchill Falls.[491]

[1039] Ms. Bodell, for her part, focused her report on concluding that "Continuous Energy" was the equivalent of "Firm Energy" and, as such, H.Q. was not entitled to what she described as Excess Energy.

[1040] As this Court emphasized as regards the evidence consisting of Ms. Bodell's expert report, she extrapolated that the concept of "Continuous Energy" was well established and recognized in the power industry at the time the contractual whole was entered into.

[1041] Attempting to prove usage by extrapolation has the exact opposite effect.

[1042] Usage, by definition, is something that is recognized, well established, regularly used, and the evidence of which is relatively easy to establish.

[1043] Attempting to prove the usage of blocks based on two or three contracts or even the notion of "Continuous Energy" by extrapolation does not satisfy the degree of evidence needed to establish a constant usage.

[1044] This Court concludes that CF(L)Co failed to prove that the use of the expression "Continuous Energy" or even the sale of power and capacity in blocks was customary at the time of negotiations and the conclusion of the contractual whole.

[1045] This Court concludes that the evidence pertaining to the contract interpretation criteria, given the particular nature of the contractual whole at issue, does not permit to establish that under the circumstances in which this contract was reached, the usage and interpretation made thereof by the parties, whether CF(L)Co or H.Q., had extended to CF(L)Co's current

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489 *Le Nouveau Petit Robert de la langue française*, New 2008 edition Éditions Le Robert, pp. 2662 and 2663.

490 Hubert REID, *Dictionnaire de droit Québécois et canadien*, 4th Ed., Montréal, Wilson & Lafleur, 2016, p. 610.

491 Exhibit D-153, Kendall Report, p. 16, para. 73.

interpretation of the expression “Continuous Energy”. Quite the contrary, the evidence shows a continuity of intention between the Principal Power Contract and the Renewed Power Contract.

[1046] And now this Court will deal with some of the sub-issues presented by CF(L)Co in the draft questions in dispute that this Court has attached hereto.

SUB-ISSUES

[1047] In fact, the sub-issues revolve around excess energy, with CF(L)Co stridently arguing that if the Court were to retain H.Q.’s interpretation, the latter would obtain this excess energy at no cost.

[1048] Here are CF(L)Co’s comments on the subject in its outline of argument:

> [ORIGINAL ENGLISH]
>
> “269. Contrary to the Letter of Intent, which expressly provided for the sale of Excess Energy at a lower price than Continuous Energy, and the Power Contract which amounted to its sale at 1/3 of the price, the Renewal Contract only provides for the sale of Continuous Energy. It is silent on energy in excess of Continuous Energy. The Renewal Contract does not provide that CF(L)Co must make such energy available to Hydro-Quebec, nor does it provide for a price or even for the gratuity of such energy, as Hydro-Quebec implies.”

[1049] Consequently, in light of the interpretation that this Court ascribes to the contractual whole and given more specifically a notion of “Split Tariff” that applies solely throughout the work’s financing period, the only plausible explanation for using the term “Continuous Energy” was to confer on CF(L)Co a stability of revenues and inflow of cash for the second period of this contractual whole, in other words starting September 1, 2016.

[1050] A large portion of the evidence, whether from the relevant witnesses or experts, is focused on the concept of “Annual Energy Base”.

[1051] On this issue, this Court retains the opinion of the expert Lapuerta to the effect that, despite being an average, it nevertheless represents all of the power produced by the Generating Station.

[1052] Consequently, in the past, the “Annual Energy Base” took into account what the parties described as excess energy.

[1053] It is therefore out of the question that H.Q. would obtain the excess energy at no cost, the final AEB setting the limit to what H.Q. is entitled annually and for which it must pay. That in any given month, aside from the situation of the GWAC, H.Q. may demand and obtain excess energy does not change the final annual outcome.

[1054] Consequently, H.Q. is entitled to request and obtain, pursuant to Section 5.2 of the Renewed Power Contract, any projected firm capacity, and this at all times. What is more, it is entitled to the additional capacity and what is provided for in the GWAC in accordance with the terms and conditions set forth in that contract.

[1055] Still pursuant to section 5.2 of the Power Contract, in its appreciation of the availability of capacity in addition to the firm capacity that H.Q. might demand, CF(L)Co must act in good faith.

[1056] CF(L)Co asks what will become of the spinning reserve seeing as there is no clause on the subject in the Renewed Power Contract.

[1057] The evidence reveals that the water used for the spinning reserve is assimilated to a spill for the purposes of calculating the AEB.[492]

[1058] As a result, if the spinning reserve was used in the past, which Mr. Sansoucy denies, the water used would therefore become an integral part of the final AEB. This evidence was not contradicted by CF(L)Co.

[1059] H.Q. was aware, based on its 40 years of experience, that any spinning reserve it had used would have been accounted for, and the inclusion of a spinning reserve clause in the Renewed Power Contract would have become useless.

[1060] Another sub-issue of CF(L)Co consists in requesting that the Court determine who benefits from any increased capacity and energy outputs resulting from improvements made to the equipment of the Generating Station.

[1061] The evidence reveals that in the past, the issue of equipment upgrades was broached by the parties, even though they never materialized.

[1062] Here we ask that this Court rule on a hypothesis which, owing to the fact that the parties are co-shareholders bound by a Shareholders Agreement, is subject to the rights of the parties, with a view to making upgrades.

[1063] As no representation was submitted to this Court by H.Q. regarding CF(L)Co's intrinsic right to proceed or not proceed with upgrades, it is hazardous for this Court to opine on this specific point.

[1064] Besides, it bears noting on this point that the shareholder agreement provides that any capital expenditure of over five (5) million must be approved by a majority of the board of directors and by at least one of its members designated by NLH and H.Q.[493]

[1065] Briefly put, this Court does not intend to rule on this sub-issue of CF(L)Co.

CONCLUSION

[1066] This Court concludes that CF(L)Co's current interpretation of "Continuous Energy" was never considered by the parties since the beginning of negotiations, CF(L)Co having only developed this theory around 2008-2009.[494]

[1067] In fact, this expression, when it was considered during the negotiations for the entire term of the contract, and not for the construction period, referred to all energy, both firm and excess.

[1068] What is more, this finding is financially logical in light of the debt incurred for this project. How would CF(L)Co have explained to its creditors that it wanted to save the excess energy for the future without immediately cashing it in. To ask this question is to answer it.

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492 Para. 504 of this judgment.
493 Para. 473 of this judgment, and P-3C/15, articles 3.4 and 3.4.2.
494 Paras. 620 and 621 of this judgment.

[1069] Dropping this expression was the fruit of a new compromise agreed to by H.Q. upon the introduction of the notion of "Split Tariff".

[1070] In consideration for this compromise, H.Q. received control over the reservoirs, the addition of the operational flexibility clause and the introduction of the clause establishing the Annual Energy Base.

[1071] The AEB took into consideration the entire output of the Generating Station, including the spill-overs as well as the use of the spinning reserve, where applicable.

[1072] The AEB also took hydrologically rich or lean years into consideration.

[1073] The final AEB therefore represents the average of the entire first 40 years of the Generating Station's operation, and this under all imaginable conditions.

[1074] Consequently, as the final AEB included all available energy of the Generating Station, the use of this calculation coupled with the expression "Continuous Energy" does not confer on CF(L)Co anything but the stability of monthly payments.

[1075] This Court concludes that the contractual whole sought only to amend the rates and the payment formula, not to restrict the rights conferred on H.Q. under the operational flexibility clause.

[1076] Furthermore, the conclusion of the GWAC, its term as well as its conditions confirm that until a new interpretation was developed, both CF(L)Co and H.Q. perceived the Renewed Power Contract as a continuation of the Principal Power Contract.

[1077] In sum, this Court concludes that H.Q.'s rights in terms of programming, capacity and power planning are not limited, circumscribed or restricted, on a monthly basis, to the purchase of blocks that are subjected to a cap the quantity of which is supposedly established based on the notion of "Continuous Energy" provided for in the Renewed Power Contract, not including the capacity and energy associated with the Reserved Blocks.

INTERRUPTIBLE SALES

[1078] The legal framework of the interpretation principles applicable by this Court having already been explained, that issue will not be reviewed in the context of the issue of interruptible sales. This Court will therefore deal directly with the application of the law to the facts.

D) DOES THE FACT THAT THERE ARE CURRENTLY NO INTERRUPTIBLE SALES DUE TO THE ACTIONS TAKEN BY H.Q. PREVENT A DECLARATORY JUDGMENT FROM BEING ISSUED?

[1079] We have seen that since a capacity label was introduced that effectively blocked the non-firm transmission of sales conducted by NEMC on the export market, interruptible sales have ceased being an issue for now.[495]

[1080] The former article 453 of the C.C.P. and the new article 142 of the C.C.P. have one thing in common, namely the solution of a genuine problem.

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[495] Paras. 590 to 593 of this judgment.

[1081] The evidence reveals that interruptible sales, or at least the deliveries, have existed between 2009 and 2015.

[1082] After H.Q. began systematically programming a capacity label in the spring of 2015 in order to, as it contends, secure a reserve, the transmission of interruptible sales can no longer be carried out on 735 KV lines belonging to H.Q.T.

[1083] CF(L)Co apprised the Régie de l'énergie of a complaint on the subject, as that body has exclusive jurisdiction. Consequently, if CF(L)Co's complaint were to be dismissed, no interruptible sales may be transmitted on lines belonging to H.Q.T.

[1084] That being said, the evidence has revealed that a new transmission corridor will be completed in 2017, from Churchill Falls to Muskrat Falls. Starting from this generating station, a land and underwater transmission line will allow capacity and power to be transmitted from Churchill Falls to the northeastern American market without using H.Q.T.'s transmission lines.

[1085] As a result, regardless of what the Régie de l'énergie's decision may be and as soon as the new transmission line is commissioned in 2017, the evidence reveals that the genuine problem that reigned from 2009 to 2015 will reappear.

[1086] The very essence of the *Code of Civil Procedure* in force since January 1, 2016 seeks to achieve, amongst other things, "[ORIGINAL ENGLISH] the fair, simple, proportionate and economical application of procedural rules, [and] the exercise of the parties' rights in a spirit of cooperation and balance […].

[1087] The fact of having brought this dispute without disclosing to the Court the factual situation that has existed since May 2015 regarding the transmission or rather the lack of transmission of interruptible sales is not an example of H.Q. cooperating with the legal system.

[1088] That said, this Court has had the opportunity to express its view of the situation to all parties at issue, and it would be pointless to dwell on the issue.

[1089] This Court concludes that given the imminent resumption of interruptible sales and the desire to promote an efficient use of legal resources, it would be expedient to resolve this problem right now.

E) In light of the Court's finding regarding the issue of "Continuous Energy", what impact will that finding have on interruptible sales?

[1090] This is how the Court formulates the issue in dispute, as it is intimately related to the first issue dealing with "Continuous Energy".

[1091] Besides, CF(L)Co stridently claims in its outline of argument that H.Q. is entitled only to the "Continuous Energy", as it interprets that notion. Here is the relevant paragraph:

> [ORIGINAL ENGLISH]
>
> 112. Given the fact that s. 6.2 of the Power Contract was not reproduced in the Renewal Contract, Hydro-Quebec has no claim to request or take delivery of energy which is not specifically provided for under the definition of Continuous Energy and the ambit of s. 7.1 of the RC.

[1092] In this matter, the Recall or even the evidence on interruptible sales was transposed solely in terms of capacity (MW). However, it would be useful to bear in mind once again that capacity is used to deliver power.

[1093] Moreover, it should be specified that for the issue of interruptible sales, CF(L)Co attempts in its arguments to separate capacity from power.

[1094] Obviously, this Court's decision regarding the composition of the final AEB will have a major impact on this issue.

[1095] This being said, before answering the issue in dispute, a certain number of findings would be in order. First, these revolve around H.Q.'s position that the prior judgments have enshrined its right to all of the Generating Station's output and, second, around the manner in which the experts have qualified the Recall in terms of the reality of interruptible sales as practiced by CF(L)Co.

PRIOR JUDGMENTS

[1096] Although the Court did indeed conclude that H.Q. is contractually entitled to all power and capacity of the Generating Station, minus the Reserved Blocks, it is important to distinguish this case from the factual context of the prior judgments.

[1097] We have seen that H.Q. places much emphasis on certain excerpts of prior judgments, notably the Supreme Court's decision in a matter dealing with the *Reversion Act*.

[1098] Here is the excerpt in question from the Supreme Court:

> [ORIGINAL ENGLISH]
>
> Under the contract CFLCo agreed to supply and Hydro-Quebec agreed to purchase virtually all of the power produced at Churchill Falls […].

[1099] What is more, in its June 13, 1983 decision regarding the 800 MW Recall Block, Justice Goodridge of the Supreme Court of Newfoundland wrote the following:

> [ORIGINAL ENGLISH]
>
> "1275 Firstly, the proviso is interpreted to mean that upon the request of the Government the Newfoundland consumer shall be given by CFLCo a right of first refusal to purchase all energy that becomes available for sale and is not then otherwise committed when it is feasible and economic for CFLCo to supply such power and for the Newfoundland consumer to purchase such power. In that connection the power which has been committed for sale to Hydro-Quebec is not available for sale to another customer. The right of first refusal which is extended upon the request of the Government is exercisable only in respect of the power in excess of that already committed and at the present time there is very little, if any, of that. (See Part 15.)."
>
> (emphasis added)

[1100] Actually, H.Q. would like the Court to adopt these various comments, which enjoy the simple presumption of truth regarding the factual findings.

[1101] The following comments belong to author Léo Ducharme regarding simple presumption:

> [TRANSLATION]

"**554**. The second purpose of a simple presumption is to establish the certainty of an unknown fact that is often difficult to establish directly. But the certainty of this fact, in the case of simple presumption, is only relative. It is relative in that it is always possible for the adversary to destroy this certainty by bringing proof to the contrary. This is what is stated in the second paragraph of **article 2847** C.C.Q.: "A presumption concerning presumed facts is simple and may be rebutted by proof to the contrary […]."

It would be wrong to believe, however, that all simple presumptions have the same probative value. In fact, if the veracity of the presumed fact is always relative, it nonetheless remains that there are several degrees of relativity. The presumed fact is more or less certain depending on whether proof to the contrary is more or less easy to make. Therefore, a fact presumed to be true because it is probable and a fact presumed to be true because in the lawmaker's opinion, it must be held as absolutely certain, as in the case of the presumption of the authority of *res judicata*, are separated by an infinite number of degrees. The result is that dividing presumptions into two strict categories as the Code has done fails to accurately reflect reality.[496]

(emphasis added)

[1102] In the Court of Appeal's *Air Canada*, Justice Marie-Franche Bich establishes, and rightly so, a distinction between this simple presumption and an *obiter dictum*.

[TRANSLATION]

"[70] This opinion does not have the scope of the simple presumption sometimes referred to in doctrine and case law when describing the effect of factual findings made in a judgment that does not have the effect of *res judicata* on another dispute,[50] or this presumption has been refuted in this case. It is an ordinary fact that the trial judge could undoubtedly take into consideration,[51] and that he did indeed examine. It should not, however, and for obvious reasons,[52] be taken as a conclusive element seeing as ─ and this is primordial ─ the context of the dispute of which the judge is here apprised is not the same, no more than the issue in dispute.[53] What was being contested before Justice Newbould was the delegation of Air Canada's heavy maintenance activities to Aveos: however, Aveos no longer exists and the activities that had been entrusted to it have now been entrusted to others who, for the most part, operate outside the Montréal and Winnipeg areas (and to be more accurate, outside Canada). It is this most recent state of facts that is being discussed before the Superior Court of Québec and on which the judgment being appealed is ruling. In 2011, Justice Newbould could indeed, in obiter, opine that Air Canada was complying with the Act when it subcontracted its heavy maintenance activities to Aveos (which operated within the same premises) or that Air Canada was still engaging, at that time, in heavy maintenance activities through its online maintenance, but this finding is in no way binding upon the judge of the case that ruled, in 2013, based on the evidence adduced before him on an entirely different cause of action.[497]

(references omitted)
(emphasis added

[1103] There is no contesting that the Supreme Court's decision in the matter bearing on the Reversion Act was centered on an entirely different problem than the one currently before this Court. What is more, this Court deliberately revealed a factual error in that ruling specifically to show that this was not the issue in dispute.

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496 Léo, DUCHARME, *Précis de la preuve*, 6th Ed., Montréal, Wilson & Lafleur, 2005, p. 222.
497 *Air Canada* v. *Québec*, 2015 QCCA 1789. para. 70.

[1104] Actually, did the Supreme Court use this expression only to take into consideration the Reserved Blocks or any possible excess energy as CF(L)Co is currently arguing? The Court strongly doubts this, as that was not the core of the dispute.

[1105] The Court concludes that the Supreme Court comments in the matter dealing with the Reversion Act constitutes nothing more than *obiter dictums* that are not binding on this Court, regarding what is stated or not stated in the contractual whole binding CF(L)Co and H.Q. on the quantity of energy and capacity to which the latter is entitled.

[1106] As for Justice Goodridge's decision in the matter pertaining to the 800 MW Recall Block, specifically in paragraph 1275, it is not a factual finding but indeed the court's decision regarding the contract's interpretation. Once again, although useful, this decision is not binding on this Court.

[1107] The judgment of the Superior Court's Justice Silcoff, upheld by the Court of Appeal, which the parties identify as the "good faith case", dealt with CF(L)Co's desire to negotiate rates retroactively to 2009.

[1108] In this matter, all negotiations involved in the conclusion of the contractual whole are analyzed. This aspect is similar to our situation.

[1109] It makes much of the financial risks that H.Q. accepted in return for an advantageous rate. There are no such risks for CF(L)Co, which is the owner of a work valued at $20 billion according to the evidence.

[1110] The Court of Appeal lingers over the "Take or Pay" clause essential for financing and concludes: "[TRANSLATION] This clause provides for the purchase, by the respondent, of virtually all energy produced by the Generating Station, thus guaranteeing sufficient revenues for the appellant to reimburse its debt".[498]

[1111] This finding, linked to the crucial funding of the project, contradicts CF(L)Co's claim that at the time of the negotiations, it intended to reserve the excess energy for itself.

EXPERTS' CHARACTERIZATION OF INTERRUPTIBLE SALES

[1112] First finding.

[1113] From the outset, note that the Court concurs with the opinion of the expert Bodell to the effect that the notion of interruptible sales existed at the time of the negotiations that led to the conclusion of the contractual whole.

[1114] At that time, H.Q. was considering interruptible sales for export purposes.

[1115] What is more, as early as September 1, 1976, CF(L)Co reached an agreement with NLH providing for the sale of "[ORIGINAL ENGLISH] Interruptible Energy from its generating facilities resulting from underutilization of Energy reserved for its existing obligations […].[499]

[1116] This being said, even if that notion were known and potentially contemplated by H.Q., nothing in the evidence adduced during negotiations shows that this notion might have been implemented by CF(L)Co with a view to possibly exporting to clients other than H.Q.[500]

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498 *Churchill Falls (Labrador) Corporation Limited* v. *Hydro-Québec*, 2016 QCCA 1229. para. 92.
499 Exhibit P-29/8, s. 5.01.

[1117] On the contrary, note that during the 1995-1996 round of negotiations during which the financial viability of CF(L)Co was discussed for a horizon extending up until 2041, the only sales to third parties considered by CF(L)Co was supposedly to clients interested in the capacity and power of the Twinco Block, and this as of its expiry in 2014 [sic].[501]

[1118] This being said, the evidence reveals that the interruptible sale mechanism as it was known in the 1960s is very different from what is currently used.[502]

[1119] Actually, it is the emergence of a new market with the introduction of “Open Access” that gave rise to this idea at CF(L)Co.

[1120] A particularity intrinsic to the reality of interruptible sales today is the element of capacity; the delivery of power takes place over a short lapse of time, and the delivery rate or capacity must necessarily reflect this.

[1121] This combination of factors is such that the “interruptible sales” product of the 2000s is entirely different from what was known to the hydroelectric industry in the 1960s.

[1122] Briefly put, interruptible sales as we know them today were never contemplated by CF(L)Co or H.Q. in the context of negotiations that led to the conclusion of the contractual whole.

[1123] This leaves us with the proposal to the effect that CF(L)Co always wanted to retain some capacity and power to resell this to third parties, both during the first 40 years or throughout the entire term of the contractual whole.

[1124] The expert Bodell’s approach of breaking down the AEB calculation has failed to convince this Court. Her analysis of various studies conducted by engineers led her to conclude that CF(L)Co always wanted to give itself a little leeway. The problem is that she is not an engineer and has thus transposed an idea onto calculations to which she did not contribute. The adage is a familiar one: you can make numbers say whatever you want.

[1125] The problem for CF(L)Co is that it cannot connect these numbers or this potential to an intention that existed at the time of the negotiations, seeing as the interruptible sales that CF(L)Co can and wants to conduct were not even possible in 1960.

[1126] What is more, examples of conflicts between the demands of H.Q. and the deliveries by CF(L)Co resulting from interruptible sales have shown us that these only lasted several hours at the very most, contrary to what was commonly seen in the 1960s. This means that the July 8, 2013 incident lasted only one hour, from 3:00 p.m. to 4:00 p.m.[503] A further example would be the two April 9, 2014 incidents that also lasted just one hour.[504]

[1127] Besides, even if Ms. Bodell and the relevant witnesses of CF(L)Co minimize the capacity and power sold to third parties on an interruptible basis, it nonetheless remains that the evidence clearly reveals, on a balance of probabilities, that on numerous occasions these were made to H.Q.’s detriment.[505]

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[500] Stenographic notes of Claude Dubé, October 29, 2015, p. 257, lines 22 to 25, p. 258, lines 1 and 2.
[501] Para. 403 of this judgment.
[502] Para. 398 of this judgment.
[503] Exhibit P-80A/7 Revised figure 5, Pfeinbenberger report and P-75/170.
[504] Exhibit P-80A/7 Revised figure 5, Pfeinbenberger report and P-75/214/215.
[505] Exhibit P-80A/7 Revised figure 5, Pfeinbenberger report and para. ? to ? of this judgment.

[1128] Many will say that the situations demonstrated to the Court were caused by last-minute changes made by H.Q. to its programming, and that these may only be carried out for grave and serious reasons.[506]

[1129] Although no evidence was adduced demonstrating that in these specific cases the programming changes resulted from grave circumstances, it nevertheless remains that in the past, CF(L)Co always collaborated with these last-minute changes.

[1130] What is more, if grave and serious circumstances were to arise, it has been demonstrated that CF(L)Co would be unable to interrupt its deliveries to NLH and, consequently, it would be unable to satisfy H.Q.'s urgent requests.

[1131] It is equally troubling to see that the reports on these incidences most often attribute CF(L)Co's failure to honour its obligations to H.Q. to the "Plant Capacity Changes" and that in those cases, CF(L)Co's deliveries to NLH were systematically given priority.[507]

[1132] Bear in mind the reality of locked periods on the American market which, in actual fact, prevent NLH or CF(L)Co from interrupting exports to meet H.Q.'s needs.

[1133] Second finding.

[1134] The expert Pfeifenberger believes that there can be no interruptible sales seeing as the Recall is a maximum that cannot be exceeded and that CF(L)Co proceeding with interruptible sales actually constitutes an overrun of the Recall.

[1135] The Court does not agree with this contention, seeing as in actual fact this is not an overrun of the Recall maximum but rather the use of a portion of H.Q.'s unused energy and capacity to which it is entitled, such use having the effect of temporarily exceeding the maximum.

[1136] This is what CF(L)Co argues on the subject in its outline of argument:

> [ORIGINAL ENGLISH]
>
> "389. In the present case, CF(L)Co has specifically acknowledged and indicated to Hydro-Quebec that while it did sell in the past, and intends to continue to sell power on an interruptible basis above 300 MW to NLH, it never intends to exceed on a monthly basis the maximum amount of energy associated with the 300 MW block of power i.e. 196 GWh per month (or 2.362 TWh per year) under the Power Contract. Similarly, under the Renewal Contract, CF(L)Co intends to fully supply Hydro-Quebec with the entirety of the energy it is entitled to, i.e. the Continuous Energy, whether or not it sells interruptible power to NLH.
>
> (...)
>
> 396. Given Hydro-Quebec's priority call on power up to the Firm Capacity level, before the interruptible power is sold to NLH, CF(L)Co must first make it available to Hydro-Quebec. Hydro-Quebec must then decide whether or not to request it in accordance with the Power Contract. It is only then, when the power is not requested by Hvdro-Quebec that it can be sold to a third party such as NLH. Again, because this power is sold on an interruptible basis, it remains available to Hydro-Quebec should it require it at a later point, the whole in accordance

506 Para. 767 of this judgment.
507 Paras. 767 to 769 of this judgment.

with the scheduling procedure set up in the Power Contract and the Interchange Manual, which CF(L)Co will continue to respect, whether or not it sells interruptible power to NLH. [508]

(emphasis added

[1137] CF(L)Co wants to be able to sell to third parties the portion to which H.Q. would be entitled but has not ordered, in other words, either pursuant to its interpretation of “Continuous Energy” or pursuant to the first paragraph of Section 5.2 of the Renewed Contract.

[1138] Consequently, the Court having concluded that “Continuous Energy” corresponds to all energy generated by the Generating Station (with the exception of the Reserved Blocks), including excess energy, as established by 40 years of experience and reported in the final AEB, and that this must be paid by H.Q. under its “Take or Pay” obligation, the response to the issue in dispute is relatively simple.

[1139] Indeed, CF(L)Co cannot sell to third parties what it has already sold to H.Q.

[1140] Justice Goodrige’s comment in the matter of the 800 MW Recall Block is relevant, even if the context was different, when he states:

[ORIGINAL ENGLISH]

“In that connection the power which has been committed for sale to Hydro-Quebec is not available for sale to another customer”.

[1141] The Court concludes that CF(L)Co has no right to the capacity and energy produced by the Generating Station with the exception of the power associated with the 300 MW Recall Block and the 225 MW Twinko Block and, for greater certainty, CF(L)Co holds no right to the capacity and energy that H.Q. has not used but to which it is entitled due to having paid for it.

COSTS

[1142] H.Q. is claiming legal costs in its proceedings.

[1143] There is no need to specify that since January 1, 2016, the “expenses”, namely the legal costs, no longer hold the same meaning for the parties in terms of legal fees, but retain their significance in terms of expenses incurred, notably for expert costs.

[1144] The Court awards the legal costs to H.Q., but limits the expert costs to those of Mr. Carlos Lapuerta alone.

[1145] This expert report proved very useful to the Court and dealt with the issue globally, and not in as targeted a manner as Ms. Bodell with the help of her two reports and even that of Mr. Pfeifenberger.

[1146] As for Mr. Pfeifenberger’s expert report, the only element of expertise according to this Court was to determine whether the 300 MW limit in the Recall Block was a maximum. That aspect of his expert report consists of only 10 paragraphs. As for the second aspect of that report, namely the interruptibility of sales, other than the compilation of examples, the evidence could have been presented by relevant witnesses. Note the testimony of Mr. Sansoucy on the July 8, 2013 incident and that of Mr. Clermont on the locked periods.

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508 Outline of argument of CF(L)Co, p. 80, para. 389 and p. 81, par. 396.

[1147] The Court will therefore not award expert costs for the Pfeifenberger report.

ACKNOWLEDGEMENTS

[1148] The Court has already expressed its appreciation for the work performed by the attorneys at the hearing and in this judgment. If they were able to work in an environment that allowed them to perform seamlessly, it is thanks in large part to the support staff of their respective firms and also that of the Court. The Court would like to thank the clerks, Mr. Michel Deshaies as well as Ms. Nelia Fils, Ms. Francine Vallières, court usher. We must also not forget the work of Ms. Denise Turcot, official stenographer as well as that of the interpreters whose identity is unfortunately unknown to the Court.

FOR THESE REASONS, THE COURT:

[1149] **ALLOWS** Hydro-Québec's motion for a declaratory judgment;

[1150] **DECLARES** that pursuant to Schedule III (**Renewed Power Contract**) of the contract entered into on May 12, 1969 between Churchill Falls (Labrador) Corporation (**CF(L)Co**) and Hydro-Québec, Hydro-Québec has the exclusive right to purchase all available capacity and any power produced at the generating station of Upper Churchill, as defined in Section 1.1 of the original Power Contract and the Renewed Power Contract (in the definition for "Plant") and as maintained in accordance with subsections 4.2.4 of the original Power Contract and 4.1.4 of the Renewed Power Contract (Plant), with the exception of the capacity and power associated with:

[TRANSLATION]

> iThe 225 MW block that was reserved for CF(L)Co to meet its obligations to Twin Falls Power Corporation Limited until December 31, 2014 and which, subject to the conditions set forth in the "Shareholders' Agreement" entered into between Newfoundland & Labrador Hydro (NLH), Hydro-Québec and CF(L)Co on June 18, 1999, may be sold by CF(L)Co to be distributed to and consumed in Western Labrador starting January 1, 2015 (Twinco Block); and;
>
> iithe 300 MW block reserved for CF(L)Co to be sold to a third party for the purposes of power consumption outside Québec (300 MW Recall Block).

[1151] **DECLARES** that the rights conferred on Hydro-Québec under subsection 4.1.1 of the Renewed Power Contract, including its right to programming and planning the capacity and power, are in no way limited, circumscribed or restricted on a monthly basis to the purchase of blocks subjected to a cap the quantity of which would be established based on the notion of "Continuous Energy" provided for in the Renewed Power Contract, and that they may be exercised in respect of all capacity available and all energy produced at the Generating Station, excluding the capacity and power associated with the 300 MW Recall Block and the Twinco Block.

[1152] **DECLARES** that pursuant to the Renewed Power Contract, Hydro-Québec is not compelled to limit its requests for power delivery to the blocks subjected to a monthly cap the quantity of which would be established based on a notion of "Continuous Energy" provided for in the Renewed Power Contract.

[1153] **DECLARES** that pursuant to the Renewed Power Contract, CF(L)Co is under the obligation to deliver to Hydro-Québec, at the latter's request, any available capacity and any power produced at the Generating Station, with the exception of the capacity and power associated with the Twinco Block and the 300 MW Recall Block.

[1154] **DECLARES** that until August 31, 2041, CF(L)Co shall have no right over any quantity of capacity and power produced at the Generating Station with the exception of the capacity and power associated with the 300 MW Recall Block and the Twinco Block.

[1155] **DECLARES** that until August 31, 2041, CF(L)Co may not sell to a third party, including NLH, any quantity whatsoever of capacity and energy in excess of the quantities associated with the 300 MW Recall Block, and this regardless of the fact that the said sales are carried out on a firm or supposedly "interruptible" basis.

[1156] **DISMISSES** the contestation of Churchill Falls (Labrador) Corporation Limited.

[1157] **THE WHOLE** with legal costs in favor of Hydro-Québec, including the costs associated solely with the expert report and the presence of Mr. Carlos Lapuerta at Court.

(s) *Martin Castonguay*
Martin Castonguay, j.c.s.

M[tre] William Hesler
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Hearing dates: October 16,19, 20, 21, 22, 26, 28, 29 and 30, 2015;
November 4, 5, 9, 10, 12, 13, 18, 19, 23, 24, 26 and 30, 2015;
December 1, 2,3, 7, 8,14,15,16,17 and 18, 2015

ANNEXE I

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

NO : 500-17-078217-133

COUR SUPÉRIEURE

HYDRO-QUÉBEC
Demanderesse

- c. -

CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED
Défenderesse

LEXIQUE / GLOSSARY OF DEFINED TERMS

Action des 800 MW / Recall Case	Action intentée par le Procureur général de Terre-Neuve contre Churchill Falls (Labrador) Corporation Limited et la Commission hydroélectrique de Québec (Hydro-Québec), devant la Cour suprême de Terre-Neuve, en date du 13 septembre 1976, dans le dossier 1976 no. 812, pour faire déclarer que le paragraphe (e) de la Clause 2 de la partie I du Bail de 1961 lui permettait de faire la demande pour les 800 MW requis par l'arrêté en conseil du 6 août 1976. *Les pièces pertinentes sont P-26, P-26A, P-70 et P-237.* *** Action brought by the Attorney General of Newfoundland against Churchill Falls (Labrador) Corporation Limited and the Quebec Hydroelectric Commission (Hydro-Québec) before the Supreme Court of Newfoundland, on September 13, 1976, in file 1976 no. 812, seeking a declaration that Clause 2, subsection (e), of Part I of the 1961 Lease allowed the Attorney General to make the demand for the 800 MW requested by the August 6, 1976 Order in Council. *The relevant Exhibits are P-26, P-26A, P-70 and P-237.*
Bail de 1961 / 1961 Lease	Bail entre la province de Terre-Neuve-et-Labrador et Hamilton Falls (Power) Corporation Limited, en date du 16 mai 1961. *La pièce pertinente est D-8.* *** Lease between the Province of Newfoundland and Labrador and Hamilton Falls (Power) Corporation Limited, dated May 16, 1961. The relevant Exhibit is D-8.
Bloc de 300 MW / Recall Block	Un bloc d'au plus 300 MW que CF(L)Co a le droit de rappeler aux termes de l'article 6.6 du Contrat et de l'article 5.4 du Contrat renouvelé, sur préavis écrit d'au moins trois ans à Hydro Québec, et que CF(L)Co ne peut vendre que pour consommation en dehors du Québec. *La pièce pertinente est P-1.* *** A block of 300 MW at most, which CF(L)Co has the right to recall under Section 6.6 of the Power Contract and Section 5.4 of the Renewed Power Contract / Renewal Contract upon written notice of at least three years to Hydro-Québec, and which CF(L)Co may sell for consumption only outside of Quebec. The relevant Exhibit is P-1.

Bloc patrimonial ou électricité patrimoniale / Heritage Pool	Volume maximal annuel de 165 térawattheures dont Hydro-Québec doit assurer l'approvisionnement pour le marché québécois depuis l'adoption, en 2000 et 2001, de la *Loi modifiant la Loi sur la Régie de l'énergie et d'autres dispositions législatives*, d'amendements à la *Loi sur Hydro-Québec* et du Décret 1277-2001. *** Maximum annual volume of 165 terawatt-hours, the supply of which must be assured by Hydro-Québec to the Quebec market since the enactment of the *Act amending the Act respecting the Régie de l'énergie and other legislative provisions* in 2000 and 2001, and of amendments to the *Act respecting Hydro-Québec and the Decree 1277-2001.*
Bloc Twinco / Twinco Block	Un bloc de 225 MW réservé à CF(L)Co pour satisfaire ses « *existing obligations to supply power and energy in respect of the Twin Falls Power Corporation Limited loads* » aux termes de l'article 4.2.2 du Contrat original et 4.1.2 du Contrat renouvelé, et qui, aux termes de l'article 3.6 de la Convention d'actionnaires, est destiné à être rendu disponible pour distribution et consommation au Labrador Ouest. *Les pièces pertinentes sont P-1 et P-3C.* ***
	A block of 225 MW reserved for CF(L)Co to satisfy its "existing obligations to supply power and energy in respect of the Twin Falls Power Corporation Limited loads" under Section 4.2.2 of the Power Contract and 4.2.1 of the Renewed Power Contract / Renewal Contract which block, pursuant to Section 3.6 of the Shareholders' Agreement, is to be made available for distribution and consumption in Labrador West. The relevant Exhibits are P-1 and P-3C.
Bond Offering Memorandum	« *Churchill Falls (Labrador) Corporation Limited – First Mortgage Bonds – Series A & B – Offering Memorandum* » préparé par Morgan Stanley & Co., révision en date du 7 octobre 1968. *Il s'agit de la pièce D-29.* *** "Churchill Falls (Labrador) Corporation Limited – First Mortgage Bonds – Series A & B – Offering Memorandum" prepared by Morgan Stanley & Co., October 7, 1968 revision. *This is Exhibit D-29.*

Brinco	British Newfoundland Corporation Limited, une société de droit terre-neuvien, constituée en 1953. Les actionnaires sont alors les suivants : N. M. Rothschild & Sons, Anglo American Corporation of South Africa, Anglo-Newfoundland Development Company Limited, The Bowater Paper Corporation Limited, The English Electric Company Limited, Frobisher Limited et Rio Tinto Company Limited. À l'époque de l'incorporation de CF(L)Co en octobre 1958, les actions de CF(L)Co étaient détenues à hauteur de 80 % par Brinco, ce consortium formé d'investisseurs privés, et de 20 % par une filiale de la Shawinigan Water and Power Company. *** British Newfoundland Corporation Limited, a company incorporated under the laws of Newfoundland and Labrador in 1953. The shareholders at the time of incorporation were: N. M. Rothschild & Sons, Anglo American Corporation of South Africa, Anglo-Newfoundland Development Company Limited, The Bowater Paper Corporation Limited, The English Electric Company Limited, Frobisher Limited, and Rio Tinto Company Limited. At the time of the incorporation of CF(L)Co in October 1958, CF(L)Co's shares were owned by Brinco (80%), this consortium of foreign investors, and by a subsidiary of Shawinigan Water and Power Company (20%).
Capacité de transfert disponible ou/or Available Transfer Capability ou/or ATC	Mesure de la capacité de transfert résiduelle du réseau physique de transport permettant d'assurer une activité commerciale en sus des utilisations déjà convenues. Elle est définie comme étant la capacité totale de transfert (TTC), moins les engagements de transport en vigueur (ETC) (incluant le service de détail à la clientèle), moins la marge de partage de capacité (CBM), moins la marge de fiabilité de transport (TRM), plus les capacités réoffertes et les transits inverses. *Les pièces pertinentes sont P-366/220, P-345, art. 15.2 et Appendice C et P-310.* *** A measure of the transfer capability remaining in the physical transmission network for further commercial activity over and above already committed uses. It is defined as Total Transfer Capability less Existing Transmission Commitments (including retail customer service), less a Capacity Benefit Margin, less a Transmission Reliability Margin, plus Postbacks, plus counterflows. *The relevant Exhibits are P-366/220, P-345, art. 15.2 and Attachment C and P-310.*

-Centre de conduite du réseau ou/or Control Center ou/or CCR	Lieu où s'effectue la conduite du réseau de transport principal et où s'exercent, en temps réel, les fonctions de coordonnateur de la fiabilité, responsable de l'équilibrage, exploitant du réseau de transport et responsable des échanges. *La pièce pertinente est P-366/270.* *** Site where are hosted computer systems, applications, systems and devices critical for meeting Main Transmission System reliability criteria such as stability limits, frequency, voltage, reserves and SPS that allow data acquisition, monitoring and control of more than one geographically distinct facility and at least two facilities of the Main Transmission System. The control center allows the Reliability Coordinator, Balancing Authority, Transmission Operator or Interchange Authority to fulfill its real time responsibilities. *The relevant Exhibit is P-366/270.*

CF(L)Co ou/or Churchill Falls (Labrador) Corporation Limited	Churchill Falls (Labrador) Corporation Limited, une société de droit fédéral, constituée le 31 janvier 1958, anciennement connue sous le nom de Hamilton Falls Power Corporation. Ses actions ordinaires sont actuellement détenues à 65,8 % par NLH et à 34,2 % par Hydro Québec. *** Churchill Falls (Labrador) Corporation Limited, a company incorporated under federal law on January 31, 1958, formerly known as the Hamilton Falls Power Corporation. Its common shares are currently held by NLH (65.8%) and by Hydro-Québec (34.2%).
Clause de renouvellement / Renewal Clause	Article 3.2 du Contrat. *La pièce pertinente est P-1.* *** Article 3.2 of the Contract. *The relevant Exhibit is P-1.*
Commission hydroélectrique de Québec ou Hydro-Québec ou HQ / Quebec Hydro-Electric Commission or Hydro-Québec or HQ	Créée le 14 avril 1944 par la *Loi établissant la Commission hydroélectrique de Québec,* S.Q. 1944, chapitre 22. La Commission hydroélectrique de Québec pouvait aussi être appelée Hydro-Québec, aux termes de l'article 4 de cette loi. À compter du 1er octobre 1978, la personne morale est désignée sous le seul nom d'Hydro-Québec (voir **Hydro-Québec**). *** Created on April 14, 1944 by the *Act establishing the Hydro-Electric Commission of Quebec*, S.Q. 1944, chapter 22.. The Hydro-Electric Commission could also be called Hydro-Québec pursuant to Article 4 of this Act. As of October 1, 1978, the legal entity is only designated as Hydro-Québec (see **Hydro-Québec**).
Complexe Manic-Outardes	Un développement hydroélectrique d'Hydro-Québec sur les rivières Manicouagan et Outardes, au Québec. *** A hydroelectric development of Hydro-Québec on the Manicouagan and Outardes rivers in Quebec.
Consolidated Edison Company of New York, Inc. ou/or ConEd	Consolidated Edison Company of New York, Inc. *La pièce pertinente est P-137. / The relevant Exhibit is P-137.*

Contrat / Contract or Power Contract	Contrat entre CF(L)Co et la Commission hydroélectrique de Québec, signé le 12 mai 1969. *Il s'agit de la pièce P-1.* *** Contract between CF(L)Co and the Quebec Hydro-Electric Commission, signed on May 12, 1969. *This is Exhibit P-1.*
Contrat Renouvelé ou/or Renewed Power Contract (selon Hydro-Québec) ou/or Renewal Contract (selon CF(L)Co)	Cédule III du Contrat signé le 12 mai 1969, entrant en vigueur le 1er septembre 2016 et se terminant le 31 août 2041. *Il s'agit de la Pièce P-1.* *** Schedule III of the Power Contract, signed on May 12, 1969, coming into force on September 1, 2016 and terminating on August 31, 2041. *This is Exhibit P-1.*
Convention d'actionnaires / Shareholders' Agreement	Convention entre actionnaires entre NLH, Hydro-Québec et CF(L)Co, intervenue en date du 18 juin 1999. *Il s'agit de la pièce P-3C.* *** Shareholders' agreement between NLH, Hydro-Québec and CF(L)Co, dated June 18, 1999. *This is Exhibit P-3C.*
Convention d'exploitation / Operating Agreement	Convention d'exploitation concernant la Centrale Churchill Falls intervenue entre HQ et CF(L)Co, en date du 1er novembre 1990 / du 14 janvier 1991, amendé par une première Convention supplémentaire en date du 30 juin 1993 et une deuxième Convention supplémentaire en date du 1er janvier 1994. *Il s'agit de la pièce P-248C.* *** Operating Agreement between HQ and CF(L)Co regarding the Churchill Falls power plant, dated November 1, 1990 / January 14, 1991, amended by a Supplemental Agreement dated June 30, 1993 and the Second Supplemental Agreement dated January 1, 1994. *This is Exhibit P-248C.*

Coordonnateur de la fiabilité ou/or Reliability Coordinator ou/or RC	Tel que défini par NERC, l'entité qui a le plus haut pouvoir de décision pour assurer la fiabilité de l'exploitation du système de production-transport d'électricité, et qui dispose pour ce faire d'une vue de la zone étendue de ce système et a les outils, les processus et les procédures nécessaires, de même que le pouvoir, pour empêcher, ou du moins atténuer, les situations d'exploitation d'urgence apparaissant dans l'analyse des conditions d'exploitation du lendemain aussi bien que dans l'exploitation en temps réel. Le coordonnateur de la fiabilité dispose de l'information d'une portée suffisamment large pour pouvoir calculer les limites d'exploitation pour la fiabilité de l'Interconnexion, limites qui peuvent être basées sur les paramètres d'exploitation des réseaux de transport qu'aucun exploitant de réseau de transport n'est en mesure d'appréhender. *Les pièces pertinentes sont P-351/71 et P-366/289.* ***
Coordonnateur de la fiabilité ou/or Reliability Coordinator ou/or RC	As defined by NERC, the entity that is the highest level of authority who is responsible for the reliable operation of the Bulk Electric System, has the Wide Area view of the Bulk Electric System, and has the operating tools, processes and procedures, including the authority to prevent or mitigate emergency operating situations in both next-day analysis and real-time operations. The Reliability Coordinator has the purview that is broad enough to enable the calculation of Interconnection Reliability Operating Limits, which may be based on the operating parameters of transmission systems beyond any Transmission Operator's vision. *The relevant Exhibits are P-351/71 and P-366/289.*
Emera ou/or Emera Inc.	Emera Inc., une entreprise privée d'énergie ayant son siège social en Nouvelle-Écosse. *** Emera Inc., a private energy corporation who has its head office in Nova Scotia.

Énergie électrique / Electric energy	Produit de la puissance d'une centrale par le temps pendant lequel cette puissance est utilisée ou produite; ce produit s'exprime en wattheure (Wh) et multiples de wattheure. Le Contrat contient une définition du terme « *energy* » à l'article 1.1 (P-1/6). *** A product of the power of a power plant multiplied by the time during which this power is used or produced; this product is expressed in watthours (Wh) and multiples thereof. The Contract contains a definition of the term « *energy* » at article 1.1 (P-1/6).
EPCA	*Electrical Power Control Act*, S.N.L. 1994, ch. E-5.1.
Exploitant de réseau de transport ou/or Transmission Operator ou/or TOP	Tel que défini par NERC, entité qui est responsable de la fiabilité de son réseau de transport « local » et qui exploite ou dirige l'exploitation des installations de transport. *Les pièces pertinentes sont P-351/89 et P-366/295.* *** As defined by NERC, the entity responsible for the reliability of its "local" transmission system, and that operates or directs the operations of the transmission facilities. *The relevant Exhibits are P-351/89 and P-366/295.*
Federal Energy Regulatory Commission ou/or FERC	La *Federal Energy Regulatory Commission*, l'agence de réglementation de l'énergie du gouvernement fédéral américain. *La pièce pertinente est D-192.* *** The Federal Energy Regulatory Commission, the regulatory energy agency of the U.S. Federal Government. *The relevant Exhibit is D-192.*

Hamilton Falls Power Corporation ou/or HFPCo	Hamilton Falls Power Corporation, une société de droit fédéral, constituée le 31 janvier 1958. Suite à un changement de dénomination sociale en 1965, la société devient Churchill Falls (Labrador) Corporation Limited (voir **CF(L)Co**). *** Hamilton Falls Power Corporation, a company incorporated under federal law on January 31, 1958. Following a corporate name change in 1965, the company becomes Churchill Falls (Labrador) Corporation Limited (see **CF(L)Co**).
Guaranteed Winter Availability Contract ou/or GWAC	« *Churchill Falls Guaranteed Winter Availability Contract* » intervenu entre HQ et CF(L)Co, en date 18 juin 1999 avec effet rétroactif au 1er novembre 1998 et amendement en date du 29 mars 2000. *Il s'agit de la pièce P-2C.* *** "Churchill Falls Guaranteed Winter Availability Contract" between HQ and CF(L)Co, signed on June 18, 1999 and with retroactive effect to November 1, 1998, and amendment dated March 29, 2000. *This is Exhibit P-2C.*
Guide des pratiques d'affaires pour les services de transport d'Hydro-Québec TransÉnergie **GSTHQ**	*Il s'agit de la pièce P-338.* *This is Exhibit P-338.*
Hydro-Québec ou/or HQ	Société mandataire de l'État de la province du Québec créée le 14 avril 1944 sous le nom de Commission hydroélectrique de Québec. Actionnaire de CF(L)Co détenant actuellement 34,2 % des actions ordinaires et 1 action privilégiée de catégorie « B ». *** State agent corporation of the Province of Quebec created on April 14, 1944, under the name of the Quebec Hydro-Electric Commission. Shareholder of CF(L)Co, currently holding 34.2% of its common shares and 1 preferred Class "B" share.

Hydro-Québec Distribution ou/or HQD	Hydro-Québec dans ses activités de distribution d'électricité. *** Hydro-Québec in its distribution activities.
Hydro-Québec Production ou/or HQP	Hydro-Québec dans ses activités de production d'électricité. *** Hydro-Québec in its generation activities.
Hydro-Québec TransÉnergie ou/or HQT ou/or le Transporteur	Hydro-Québec dans ses activités de transport d'électricité. *** Hydro-Québec in its transmission activities.
IESO	*Independent Electricity System Operator* (Ontario).
ISO-NE	Independent System Operator New England
ITS	*Interchange Transactions Scheduler*
Lettre d'intention / Letter of Intent ou/or LOI	Lettre d'intention – Base d'un contrat définitif d'énergie, intervenue entre CF(L)Co et la Commission hydroélectrique de Québec, en date du 13 octobre 1966. *Il s'agit des pièces P-4 (version française) et D-12 (version anglaise).* *** Letter of Intent – The basis for a definitive Power Contract between CF(L)Co and the Quebec Hydro-Electric Commission, dated October 13, 1966. *These are Exhibits P-4 (French version) and D-12 (English version).*

Loi-Bail / Lease Act	Loi intitulée « *An Act to Authorize the Lieutenant-Governor in Council to Execute and Deliver an Indenture Leasing Certain Water Powers in Labrador to Hamilton Falls Power Corporation Limited and to Make Provision Respecting Other Matters Connected Therewith* », en date du 13 mars 1961 avec, en annexe, le bail signé, daté du 16 mai 1961. *La pièce pertinente est D-8. Une version ultérieure et amendée est disponible à la pièce P-221.* *** An Act entitled « An Act to Authorize the Lieutenant-Governor in Council to Execute and Deliver an Indenture Leasing Certain Water Powers in Labrador to Hamilton Falls Power Corporation Limited and to Make Provision Respecting Other Matters Connected Therewith », dated March 13, 1961, and the signed lease, dated May 16, 1961, appended thereto. *The relevant Exhibit is D-8. A subsequent and amended version is available at Exhibit P-221.*
Mill :	Millième partie d'une unité. Dans le présent litige, un mill fait référence à un millième d'un dollar. 1 mill = 1/10 de cent ou 0,1 cent ou 0,001 $ Selon la définition de l'article 1.1 1) du Contrat : Mill : 1/1000 de dollar en monnaie légale du Canada. *** A thousandth of a unit. In the context of the present litigation, one mill refers to a thousandth of a dollar. 1 mill = 1/10 of a cent or 0.1 cent or $0.001 Pursuant to the definition of Article 1.1 1) of the Power Contract: Mill: means 1/1000 of a dollar in lawful money of Canada.
NAESB	*North American Energy Standards Board*.
Nalcor ou/or Nalcor Energy	Nalcor Energy, un agent de la Couronne de la province de Terre-Neuve-et-Labrador, qui a été créé en 2007 par la *Energy Corporation Act*, S.N.L. 2007, chapitre E-11.01. *** Nalcor Energy, a Crown agent of the province of Newfoundland and Labrador, which was created in 2007 by the *Energy Corporation Act*, S.N.L. 2007, chapter E-11.01.

Nalcor Energy Marketing Corporation ou/or NEMC	Nalcor Energy Marketing Corporation, une filiale à part entière de Nalcor Energy, qui a été créée le 24 mars 2014. *Les pièces pertinentes sont P-290/440 et P-EM-1 (confidentielle).* *** Nalcor Energy Marketing Corporation, a wholly-owned subsidiary of Nalcor Energy, which was incorporated on March 24, 2014. *The relevant Exhibits are P-290/440 and P-EM-1 (confidential).*
New England Power Pool ou/or NEPOOL	Le « *New England Power Pool* », établi en 1971 et formé par des participants au marché des six États de la Nouvelle-Angleterre (Connecticut, Maine, Massachussetts, New Hampshire, Rhode Island et Vermont). *La pièce pertinente est D-212.* *** The New England Power Pool established in 1971 and made up of the market participants from the six New England states (Connecticut, Maine, Massachussetts, New Hampshire, Rhode Island et Vermont). *The relevant Exhibit is D-212.*
Newfoundland and Labrador Hydro ou/or NLH	Newfoundland and Labrador Hydro, un agent de la Couronne de la province de Terre-Neuve-et-Labrador, constituée en 1975, filiale à part entière de Nalcor Energy et actionnaire de CF(L)Co détenant 65,8 % des actions ordinaires, 1 action privilégiée de catégorie « A » et 1 action privilégiée de catégorie « C ». *** Newfoundland and Labrador Hydro, a Crown agent of the Province of Newfoundland and Labrador, incorporated in 1975, a wholly-owned subsidiary of Nalcor Energy and a shareholder of CF(L)Co holding 65.8% of its common shares, 1 preferred Class "A" share and 1 preferred Class "C" share.

North American Electric Reliability Corporation ou/or NERC	La « *North American Electric Reliability Corporation* », un organisme sans but lucratif formé en 2006 et dont le prédécesseur était le « *National Electric Reliability Council* » mis en place en 1968 pour veiller à la fiabilité et suffisance des systèmes de transport de l'électricité en Amérique du Nord. *Les pièces pertinentes sont P-301, P-351, P-352, P-365, D-202 et D-216.* *** The North American Electric Reliability Corporation is a non-profit organization formed in 2006 whose predecessor was the National Electric Reliability Council established in 1968 to ensure the reliability and adequacy of electricity transmission systems in North America. *The relevant Exhibits are P-301, P-351, P-352, P-365, D-202 and D-216.*
Northeast Power Coordinating Council ou/or NPCC	Le « *Northeast Power Coordinating Council* », un organisme sans but lucratif nord-américain formé en 1966 pour promouvoir l'exploitation fiable et efficace des principaux réseaux d'électricité interconnectés du nord-est de l'Amérique du Nord. Le NPCC comprend les six États de la Nouvelle-Angleterre, l'État de New York, l'Ontario, le Québec, la Nouvelle-Écosse et le Nouveau-Brunswick. *** The Northeast Power Coordinating Council is a North American non-profit organization established in 1966, responsible for promoting and improving the reliability of the international, interconnected bulk power system in Northeastern North America. The NPCC includes the state of New York, the sixth states of New England, Ontario, Quebec, Nova Scotia and New Brunswick.
NYISO	*New York Independent System Operator*
OATT	*Open Access Transmission Tariff*
Office national de l'énergie ou/or ONÉ National Energy Board ou/or NEB	L'Office national de l'énergie est un organisme fédéral indépendant créé en 1959 par une loi du Parlement du Canada pour réglementer les aspects internationaux et interprovinciaux des secteurs du pétrole, du gaz et de l'électricité. La raison d'être de l'ONÉ est de réglementer, dans l'intérêt public canadien, les pipelines, la mise en valeur des ressources énergétiques et le commerce de l'énergie. *** The National Energy Board is an independent federal agency established in 1959 by the Parliament of Canada to regulate international and interprovincial aspects of the oil, gas and electric utility industries. The purpose of the NEB is to regulate pipelines, energy development and trade in the Canadian public interest.

Open Access Same-Time Information System ou/or OASIS	Le système d'information et de réservation prévu à la partie 37 des règlements de la FERC, 18 C.F.R. (1996) et conforme aux décisions, ordonnances et règlements de la Régie de l'énergie. *La pièce pertinente est P-345/15.* *** The information and reservation system contained in Part 37 of the FERC regulations, 18 C.F.R. (1996) and consistent with Régie de l'énergie decisions, orders and regulations. *The relevant Exhibit is P-345/15.*
Principal Agreement	« *Agreement for Exploration and Development of Newfoundland and Labrador* » intervenu entre Terre-Neuve, Brinco et N. M. Rothschild, en date du 21 mai 1953. *Les pièces pertinentes sont D-4 et D-5.* *** « *Agreement for Exploration and Development of Newfoundland and Labrador* » between Newfoundland, Brinco and N. M. Rothschild, dated May 21, 1953. *The relevant Exhibits are D-4 and D-5.*
Prospectus de Morgan Stanley **Offering Memorandum O.M.**	*Prospectus en vue d'une émission obligatoire.* *Il s'agit de la pièce D-29.* *First Mortgage Bonds* *This is Exhibit D-29.*
PSA	*Purchase and Sale Agreement* **Premier PSA / First PSA :** « *Purchase and Sale Agreement* » intervenu entre Hydro-Québec, NLH et CF(L)Co, en date du 9 mars 1998. *Il s'agit de la pièce P-31C.* *** « *Purchase and Sale Agreement* » between Hydro-Québec, NLH and CF(L)Co, dated March 9, 1998. *This is Exhibit P-31C.*

	Deuxième PSA / Second PSA :	« *Amended and Restated Purchase and Sale Agreement* » intervenu entre Hydro-Québec, NLH et CF(L)Co, en date du 19 février 2001 avec une entrée en vigueur suivant l'expiration du Premier PSA. *Il s'agit de la pièce P-32C.* *** « *Amended and Restated Purchase and Sale Agreement* » between Hydro-Québec, NLH and CF(L)Co, dated February 19, 2001 with entry into force upon the expiry of the First PSA. *This is Exhibit P-32C.*
	Troisième PSA / Third PSA :	« *Purchase and Sale Agreement* » intervenu entre Hydro-Québec, NLH et CF(L)Co, en date du 31 mars 2004 avec une entrée en vigueur à l'expiration du Deuxième PSA. *Il s'agit de la pièce P-33C.* *** « *Purchase and Sale Agreement* » between Hydro-Québec, NLH and CF(L)Co, dated March 31, 2004 with entry into force upon the expiry of the Second PSA. *This is Exhibit P-33C.*

PUB	*Board of Commissioners of Public Utilities* de la province de Terre-Neuve-et-Labrador / of the Province of Newfoundland and Labrador.
Puissance / Power	Le taux de livraison de l'énergie électrique mesuré à un point donné; exprimée en kilowatts et ses multiples. *** As defined in the Contract, the rate at which energy is transferred at any point measured in kilowatts and multiples thereof.
PURPA	*Public Utility Regulatory Policies Act of 1978*, 16 USC ch. 46. *Il s'agit de la pièce D-180. / This is Exhibit D-180.*
Recall PSA	Entente intervenue entre CF(L)Co et NLH en date du 9 mars 1998 (P-30), amendée le 1er avril 2009, le 1er mai 2012 et le 26 mai 2015 (D-40) et se terminant le 31 août 2041. *Il s'agit des pièces P-30 et D-40.* *** Agreement between CF(L)Co and NLH, dated March 9, 1998, amended on April 1, 2009, on May 1, 2012 and on May 26, 2015 and terminating on August 31, 2041. *These are Exhibits P-30 and D-40.*
Réglage automatique de la production ou/or Automatic Generation Control ou/or AGC	Tel que défini par NERC, équipement qui règle automatiquement la production dans une zone d'équilibrage à partir d'un endroit central de façon à maintenir le programme d'échange du responsable de l'équilibrage ainsi que la compensation en fréquence. L'AGC peut aussi comprendre la remise automatique d'échanges involontaires et la correction de l'écart de temps. *Les pièces pertinentes sont P-351/8 et P-366/246.* *** As defined by NERC, equipment that automatically adjusts generation in a Control Balancing Authority Area from a central location to maintain the Balancing Authority's interchange schedule plus Frequency Bias. AGC may also accommodate automatic inadvertent payback and time error correction. *The relevant Exhibits are P-351/8 and P-366/246.*

Renvoi sur la *Reversion Act* / Reference on the *Reversion Act*	Renvoi à la Cour suprême de Terre-Neuve, Division d'appel, conformément à *The Judicature Act*, R.S.N. 1970, chapitre 187, article 6 et modifications, relativement à *The Upper Churchill Water Rights Reversion Act*, S.N. 1980, chapitre 40, adressé par le Procureur général de la province de Terre-Neuve-et-Labrador, en date du 10 février 1981. *Les pièces pertinentes sont P-9, P-243 et D-37.* *** Reference to the Supreme Court of Newfoundland, Appellate Division, pursuant to *The Judicature Act*, RSN 1970, chapter 187, section 6 and amendments, with respect to *The Upper Churchill Water Rights Reversion Act*, SN 1980, Chapter 40, submitted by the Attorney General of the Province of Newfoundland and Labrador, on February 10, 1981. *The relevant Exhibits are P-9, P-243 and D-37.*
Responsable de l'équilibrage ou/or Balancing authority ou/or BA	Tel que défini par NERC, entité responsable qui intègre d'avance les plans de ressources, maintient l'équilibre charge-échange-production à l'intérieur d'une zone d'équilibrage, et soutient en temps réel la fréquence de l'Interconnexion. *Les pièces pertinentes sont P-351/10 et P-366/266.* *** As defined by NERC, the responsible entity that integrates resource plans ahead of time, maintains load-interchange-generation balance within a Balancing Authority Area, and supports Interconnection frequency in real time. *The relevant Exhibits are P-351/10 and P-366/266.*
Responsable des échanges ou/or Interchange Authority ou/or IA	Tel que défini par NERC, entité responsable qui autorise la mise en œuvre de programmes d'échange équilibrés et valides entre des zones d'équilibrage, et veille à la communication de l'information sur les échanges pour les besoins de l'évaluation de la fiabilité. *Les pièces pertinentes sont P-351/43 et P-366/250.* *** As defined by NERC, the responsible entity that authorizes implementation of valid and balanced Interchange Schedules between Balancing Authority Areas, and ensures communication of Interchange information for reliability assessment purposes. *The relevant Exhibits are P-351/43 and P-366/250.*
Reversion Act	*The Upper Churchill Water Rights Reversion Act*, S.N. 1980, ch. 40.

RPTC	Rejet de production et télédélestage de charges *** *Generation Rejection & Remote Load Shedding*
Twinco ou/or Twin Falls Power Corporation Limited	Twin Falls Power Corporation Limited, une compagnie dont CF(L)Co détient 33,3 % des actions ordinaires et est l'actionnaire de contrôle. *** Twin Falls Power Corporation Limited, a corporation of which CF(L)Co holds 33.3% of the common shares and is the controlling shareholder.

Unités de mesure de l'électricité / Electricity Units

Puissance / Power	**Symbole / Symbol**	**Multiples**	**Équivalence**
watt	W	1	
kilowatt	kW	1 000 = 10^3	1 Watt *1 000
mégawatt	MW	1 000 000 = 10^6	1 Watt * 1 000 000 ou/or 1 kW *1 000
gigawatt	GW	1 000 000 000 = 10^9	1 Watt * 1 000 000 000 ou/or 1 MW *1 000
térawatt	TW	1 000 000 000 000 = 10^{12}	1 Watt * 1 000 000 000 000 ou/or 1 GW * 1000
Énergie / Energy			
wattheure	Wh	1	
kilowattheure	kWh	1 000 = 10^3	1 Wh *1 000
mégawattheure	MWh	1 000 000 = 10^6	1 Wh *1 000 000 ou 1 kWh *1 000
gigawattheure	GWh	1 000 000 000 = 10^9	1 Wh * 1 000 000 000 ou/or 1 MWh *1 000
térawattheure	TWh	1 000 000 000 000 = 10^{12}	1 Wh * 1 000 000 000 000 ou/or 1 GWh *1 000

ANNEXE II

CANADA

PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° 500-17-078217-133

COUR SUPÉRIEURE

HYDRO-QUÉBEC
Demanderesse
c.
CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED
Défenderesse

CHRONOLOGIE – CHURCHILL FALLS[509]
CHURCHILL FALLS TIME LINE[510]

DATE	ÉVÉNEMENT
14 avril 1944 / April 14, 1944	Création de la Commission hydroélectrique de Québec. *** Creation of the Commission hydroélectrique de Québec.
31 mars 1949 / March 31, 1949	Terre-Neuve se joint à la Confédération canadienne. *** Newfoundland joins the Canadian Confederation.

[509] Afin de faciliter la lecture et d'économiser l'espace, la présente chronologie utilise, dans la mesure du possible, des abréviations et des termes définis dans le Glossaire (« Lexique ») dont les parties ont convenu et qu'elles ont déposé conjointement.

[510] For ease of reference and economy of space, where possible this Time Line uses abbreviations and defined terms as they appear in the Glossary of Terms ("*Lexique*") agreed upon and filed jointly by the parties.

DATE	ÉVÉNEMENT
Août 1952 / August 1952	Le premier ministre de Terre-Neuve, Joseph R. Smallwood, se rend en Grande-Bretagne dans le but d'inciter des investisseurs à participer à l'exploration et l'exploitation des ressources naturelles de Terre-Neuve-et-Labrador, incluant le potentiel hydroélectrique des chutes (Chutes Hamilton) de la rivière Hamilton (renommée en 1965 en l'honneur du feu premier ministre anglais, Winston Churchill). *** Newfoundland Premier Joseph R. Smallwood travels to Great Britain in an effort to entice investors to help explore and develop Newfoundland & Labrador's natural resources, including the hydroelectric potential of the 245-foot Grand Falls (aka Hamilton Falls) of the Hamilton River (renamed Churchill River in 1965 to honour deceased British Prime Minister, Winston Churchill).
17 avril 1953 / April 17, 1953	Constitution en société de Brinco (P-81 et D-3). *** Incorporation of Brinco (P-81 and D-3).
20 mai 1953 / May 20, 1953	Terre-Neuve adopte la loi intitulée *The Government – British Newfoundland Corporation Limited – N.M. Rothschild & Sons (Confirmation of Agreement) Act, 1953* qui approuve une convention accordant une option à Brinco aux fins de la mise en valeur des ressources hydroélectriques, forestières et minérales du Labrador (D-4). *** Newfoundland adopts *The Government – British Newfoundland Corporation Limited – N.M. Rothschild & Sons (Confirmation of Agreement) Act, 1953* approving an agreement granting an option to Brinco to develop the hydro-electric, timber and mineral resources of Labrador (D-4).

DATE	ÉVÉNEMENT
21 mai 1953 / May 21, 1953	Terre-Neuve, Brinco et N.M. Rothschild & Sons signent l'« *Agreement for Exploration and Development of Newfoundland and Labrador* » (le « **Principal Agreement** ») (D-5). *** Newfoundland, Brinco and N.M. Rothschild & Sons execute the "*Agreement for Exploration and Development of Newfoundland and Labrador*" (the "**Principal Agreement**") (D-5).
31 janvier 1958 / January 31, 1958	Constitution en société de la filiale de Brinco, HFPCo (renommée CF(L)Co le 1er octobre 1965).[511] *** Incorporation of Brinco's subsidiary HFPCo (renamed CF(L)Co on October 1, 1965).[512]
30 juin 1958 / June 30, 1958	Brinco cède à CF(L)Co ses droits en regard du potentiel hydraulique du Haut Churchill (D-6). *** Brinco assigns to CF(L)Co its water power rights in respect to the water power potential of the Upper Churchill River (D-6).
8 octobre 1958 / October 8, 1958	La Shawinigan Engineering Company Limited (« **Shawinigan Engineering** ») acquiert une participation de 20 % dans CF(L)Co moyennant 2,25 M$ (P-82). *** The Shawinigan Engineering Company Limited ("**Shawinigan Engineering**") purchases a 20% share in CF(L)Co for $2.25 million (P-82).
26 mai 1960 / May 26, 1960	CF(L)Co exerce son option conformément à l'article 9 du Principal Agreement et s'engage à mettre en valeur les ressources hydroélectriques du Haut Churchill (D-7). *** CF(L)Co exercises its option pursuant to s. 9 of the Principal Agreement and undertakes to develop the hydro-electric resources of the Upper Churchill River (D-7).

[511] Afin de faciliter la lecture, HFPCo et CF(L)Co seront ci-après appelées uniquement CF(L)Co.
[512] For ease of reference hereinafter, HFPCo and CF(L)Co will be referred to solely as CF(L)Co.

DATE	ÉVÉNEMENT
22 juin 1960 / June 22, 1960	Suite au décès du premier ministre du Québec Maurice Duplessis en septembre 1959, les Libéraux de Jean Lesage sont élus au pouvoir. *** Following the death of Quebec Premier Maurice Duplessis in September of 1959, Jean Lesage's Liberals come to power in Quebec.
March 6, 1961	Brinco rencontre des représentants de HQ (P-84). *** Brinco meets with HQ representatives (P-84).
13 mars 1961 / March 13, 1961	Terre-Neuve adopte la loi intitulée *The Hamilton Falls Power Corporation Limited (Lease) Act, 1961* (la « **Loi-Bail** ») et le Bail de 1961 entre Terre-Neuve et CF(L)Co, d'une durée de 99 ans, renouvelable pour 99 ans, prend effet le 16 mai 1961[513] (D-8). *** Newfoundland adopts *The Hamilton Falls Power Corporation Limited (Lease) Act, 1961* (the "***Lease Act***") and the 99-year 1961 Lease between Newfoundland and CF(L)Co, renewable for 99 years, comes into effect on May 16, 1961[514] (D-8).

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513 La Loi-Bail et le Bail de 1961 ont été amendés par des lois subséquentes datées du 29 mars 1963, du 10 juin 1964, du 25 avril 1967, du 28 mai 1968, du 9 mai 1969 et du 18 juin 1970. À une exception près, le Bail a été modifié au moyen de conventions supplémentaires dont le modèle était joint à chacune de ces lois modificatrices. L'exception se rapporte à la loi datée du 29 mars 1963, qui amendait le Bail sans convention prévue par la loi. Fait particulièrement important, le 10 juin 1964, Terre-Neuve a adopté la loi intitulée *The Government - British Newfoundland Corporation Limited - N.M. Rothschild & Sons (Supplemental Agreement) Act, 1964* dans l'objectif de transférer, de Brinco à CF(L)Co, l'obligation contenue dans le Principal Agreement, la Loi-Bail et le Bail de 1961 visant le paiement à Terre-Neuve d'un loyer annuel équivalant à 8 % des profits nets de Brinco et de ses affiliées (pièce P-126). Le même jour, Terre-Neuve a adopté la loi intitulée *The Hamilton Falls Power Corporation Limited (Lease) (Amendment) Act, 1964* aux termes de laquelle la Loi-Bail et le Bail de 1961 ont été amendés afin d'exclure la fourniture d'hydroélectricité produite à Churchill Falls à HQ de l'application de la loi intitulée *The Public Utilities* Act. Une version consolidée de la loi intitulée *The Churchill Falls (Labrador) Corporation Limited (Lease) Act, 1961* figure à la pièce P-221.

514 The *Lease Act* and the 1961 Lease were amended by subsequent Acts dated March 29, 1963, June 10, 1964, April 25, 1967, May 28, 1968, May 9, 1969, and June 18, 1970. With one exception, the Lease was amended by supplemental agreements the forms of which were attached to each of these amending Acts. The exception was the Act dated March 29, 1963, which amended the Lease without any statutory agreement. Of particular significance, on June 10, 1964, Newfoundland adopted *The Government - British Newfoundland Corporation Limited - N.M. Rothschild & Sons (Supplemental Agreement) Act, 1964* with a view to transferring from Brinco to CF(L)Co the obligation contained in the Principal Agreement, the Lease Act and the 1961 Lease to pay to Newfoundland an annual rent equivalent to 8% of the net profits of Brinco and its affiliates (Exhibit P-126). On the same day, Newfoundland adopted *The Hamilton Falls Power Corporation Limited (Lease) (Amendment)*

DATE	ÉVÉNEMENT
23 mars 1961 / March 23, 1961	Brinco présente une offre à HQ (D-9). *** Brinco presents an offer to HQ (D-9).
15 mai 1961 / May 15, 1961	HQ rejette l'offre de Brinco, indiquant que dans les conditions économiques actuelles, il était préférable d'aller de l'avant avec le développement de ses propres ressources hydrauliques sur la rivière Manicouagan (D-10). *** HQ rejects Brinco's offer, asserting that "under present economic conditions, it is preferable to go ahead with the development of its own hydraulic resources on the Manicouagan River" (D-10).
16 mai 1961 / May 16, 1961	Le Bail de 1961 entre Terre-Neuve et CF(L)Co prend effet. *** The 1961 Lease between Newfoundland and CF(L)Co comes into effect.
Mars 1963 / March 1963	Des discussions ont cours entre Brinco et HQ. *** Discussions take place between Brinco and HQ.
29 avril 1963 / April 29, 1963	Brinco, HQ et ConEd émettent un communiqué de presse conjoint confirmant l'intérêt de ConEd à acheter d'HQ à la frontière internationale toute l'énergie qui soit économiquement disponible en provenance de Hamilton Falls après que les besoins canadiens eurent été satisfaits (P-88). *** Brinco, HQ and ConEd issue a joint press release confirming ConEd's interest in purchasing "*from HQ at the international border of as much power as may be economically available from Hamilton Falls after Canadian requirements have been met*" (P-88).

Act, 1964 pursuant to which the *Lease Act* and the 1961 Lease were amended to exclude the supply of hydroelectric power developed at Churchill Falls to HQ from application of *The Public Utilities Act*. A consolidated version of *The Churchill Falls (Labrador) Corporation Limited (Lease) Act, 1961* is found at Exhibit P-221.

DATE	ÉVÉNEMENT
Mai 1963 / May 1963	Ce qu'on a communément appelé la « nationalisation de l'électricité » au Québec est achevée : HQ fait l'acquisition des actions de la presque totalité des compagnies privées d'électricité au Québec. L'acquisition comprend Shawinigan Water and Power, la société mère de Shawinigan Engineering qui détenait 20 % des actions ordinaires de CF(L)Co depuis 1958, de sorte que HQ devient un actionnaire (indirect) de CF(L)Co à hauteur de 20 %. *** Quebec's "nationalization" of the electricity sector is completed as HQ acquires the shares of substantially all the private power companies in Québec. The acquisition includes Shawinigan Water and Power, the parent company of Shawinigan Engineering which held 20% of the CF(L)Co common shares since 1958, and HQ becomes an (indirect) 20% shareholder of CF(L)Co.
8 octobre 1963 / October 8, 1963	Le Ministre fédéral du Commerce et du Développement, l'honorable Mitchell Sharp, émet un énoncé de politique énergétique nationale dans lequel il confirme une nouvelle politique se rapportant à l'exportation d'électricité qui, pour la première fois, permet des contrats d'exportation à long terme d'au plus 25 ans dans la mesure où l'énergie vendue est en surplus aux besoins canadiens (P-99). *** Federal Minister of Trade and Commerce, the Honourable Mitchell Sharp, issues a "Statement of National Power Policy" in which he confirms a new policy with respect to the export of electricity which for the first time allows long-term export contracts of up to 25 years, provided that the energy sold is surplus to Canadian requirements (P-99).
Juillet 1964 / July 1964	Les négociations entre Brinco et HQ sont interrompues (P-129). *** Negotiations break down between Brinco and HQ (P-129).
Printemps 1965 / Spring 1965	Les négociations reprennent entre Brinco and HQ. *** Talks resume between Brinco and HQ.

DATE	ÉVÉNEMENT
9 décembre 1965 / December 9, 1965	ConEd et Niagara Mohawk remettent un projet de lettre d'intention à HQ visant l'achat de 10,5 milliards de kilowattheures d'énergie électrique de HQ à la frontière internationale, pour une période de 25 ans commençant en 1971, au prix de 4 mills US par kWh (P-137/1). *** ConEd and Niagara Mohawk provide a draft Letter of Intent to HQ for the purchase of "10.5 billion kilowatt hours of *electric energy from Hydro-Quebec at the International Boundary"*, for a period of 25 years starting in 1971, at the price of 4 mills US per kWh (P-137/1).
December 1965 – early February 1966	La « *Court of Appeals* » de l'État de New York annule le permis accordé par la Federal Power Commission visant la construction d'une usine à réserve pompée à Storm King Mountain près du fleuve Hudson. *** The New York State Court of Appeals rescinds ConEd's Federal Power Commission license to build a pumped storage facility at Storm King Mountain along the Hudson River.
28 janvier 1966 / January 28, 1966	ConEd et Niagara Mohawk remettent un projet de lettre d'intention à HQ visant l'achat de 10,5 milliards de kilowattheures d'énergie électrique d'Hydro Québec à la frontière internationale, pour une période de 25 ans, au prix de 4 mills US par kWh (P-137/7). Aucune date de début n'est indiquée. *** ConEd and Niagara Mohawk provide a draft Letter of Intent to HQ for the purchase of "10.5 billion kilowatt hours of electric energy from Hydro-Quebec at the International Boundary", for a period of 25 years, at the price of 4 mills US per kWh (P-137/7). No starting date is indicated.
5 juin 1966 / June 5, 1966	Le gouvernement Lesage est défait par l'Union nationale de Daniel Johnson. *** The Lesage Government in Quebec falls to Daniel Johnson's Union Nationale.
13 octobre 1966 / October 13, 1966	HQ et CF(L)Co signent la Lettre d'intention (P-4 en français et D-12 en anglais). *** HQ and CF(L)Co sign the Letter of Intent (P-4 in French and D-12 in English).

DATE	ÉVÉNEMENT
Printemps 1967 / Spring 1967	Les négociations relatives au Contrat débutent entre CF(L)Co/Brinco et HQ. *** Negotiations with respect to Power Contract between CF(L)Co/Brinco and HQ begin.
3 juin 1968 / June 3, 1968	HQ adopte une résolution approuvant le projet de Contrat (P-207). *** HQ adopts a resolution approving the draft Power Contract (P-207).
13 juin 1968 / June 13, 1968	CF(L)Co adopte une résolution ratifiant la décision de son comité exécutif du 14 mai 1968 d'approuver le projet de Contrat (P-209). *** CF(L)Co adopts a resolution ratifying its executive committee's decision of May 14, 1968, approving the draft Power Contract (P-209).
10 juillet 1968 / July 10, 1968	Le gouvernement du Québec adopte l'arrêté en conseil n° 2100 autorisant HQ à conclure le Contrat avec CF(L)Co (D-120). *** Quebec adopts Order in Council No. 2100 authorizing HQ to enter into the Power Contract with CF(L)Co (D-120).
25 juillet 1968 / July 25, 1968	HQ injecte 15 M$ dans le capital de CF(L)Co en contrepartie d'actions ordinaires et s'engage à souscrire des obligations portant hypothèque générale de CF(L)Co d'un capital de 100 M$ (P-214). *** HQ contributes $15 million in equity to CF(L)Co in return for common shares and undertakes to subscribe to General Mortgage Bonds of an amount of $100 million (P-214).
Octobre 1968 / October 1968	Morgan Stanley émet un Offering Memorandum visant les obligations de CF(L)Co et les courtiers de CF(L)Co mettent en vente les obligations portant première hypothèque sur les marchés américain (500 millions de dollars américains) et canadien (50 millions de dollars) (D-29). *** Morgan Stanley issues CF(L)Co's Bond Offering Memorandum and CF(L)Co's brokers offered the First Mortgage Bonds for sale on the US (US $500 million) and Canadian ($50 million) markets in October 1968 (D-29).

DATE	ÉVÉNEMENT
18 et 22 novembre 1968 / November 18 and 22, 1968	CF(L)Co offre des obligations portant hypothèque générale d'un capital de 100 M$ aux fins d'achat exclusif par HQ (P-218). HQ confirme son acceptation de l'offre visant l'achat d'obligations portant hypothèque générale de CF(L)Co d'un capital de 100 M$ (P-219). *** CF(L)Co offers for purchase by HQ alone General Mortgage Bonds in the amount of $100 million (P-218). HQ confirms its acceptance of the offer to purchase CF(L)Co General Mortgage Bonds in the amount of $100 million (P-219).
12 mai 1969 / May 12, 1969	Les arrangements financiers étant en place, CF(L)Co et HQ signent le Contrat (P-1). *** With financial arrangements finally in place, CF(L)Co and HQ execute the Power Contract (P-1).
Novembre 1971 / November 1971	Les premières livraisons à HQ d'énergie en provenance de Churchill Falls surviennent, quatre mois et demi en avance sur l'échéancier. *** The first Churchill Falls power is delivered to HQ, some four and a half months ahead of schedule.
18 janvier 1972 / January 18, 1972	Le gouvernement libéral de Terre-Neuve dirigé par M. Smallwood est remplacé par un gouvernement progressiste-conservateur dirigé par Frank D. Moores. *** Smallwood's Liberal Government in Newfoundland falls to Frank D. Moores' Progressive Conservatives.
16 juin 1972 / June 16, 1972	Cérémonie d'ouverture de la centrale de Churchill Falls. *** Opening ceremony of Churchill Falls plant.

DATE	ÉVÉNEMENT
4 juin 1974 / June 4, 1974	La Newfoundland Industrial Development Corporation fait l'acquisition, moyennant 160 M$, de la totalité de la participation en actions de CF(L)Co et de son affiliée, la Gull Island Power Company, détenue par Brinco, ainsi que les droits hydrauliques et hydroélectriques de Brinco aux termes du Principal Agreement (P-227). *** Newfoundland Industrial Development Corporation acquires for $160 Million all of Brinco's shares in CF(L)Co and its affiliate, the Gull Island Power Company, together with Brinco's hydraulic and hydro-electric rights under the Principal Agreement (P-227).
7 novembre 1975 / November 7, 1975	La Newfoundland Industrial Development Corporation transfère ses actions de CF(L)Co à NLH. *** Newfoundland Industrial Development Corporation transfers its shares in CF(L)Co to NLH.
6 janvier 1976 / January 6, 1976	NLH demande à HQ de livrer à Terre-Neuve-et-Labrador un bloc additionnel de 600 MW en provenance du Haut Churchill à compter du 1er janvier 1982 (P-228/2). *** NLH requests HQ to supply Newfoundland & Labrador with 600 MW of additional energy from the Upper Churchill commencing January 1, 1982 (P-228/2).
30 janvier 1976 / January 30, 1976	HQ rejette la demande de NLH, déclarant que bien qu'HQ n'ait pas d'objection à fournir de la puissance et de l'énergie à NLH à long terme à compter du 1er janvier 1982, il est pratiquement impossible pour HQ de faire face à une réduction de 600 MW de sa capacité de production sans considérer de possibles modifications à sa planification ou à son programme de construction (P-228/4). *** HQ rejects NLH's request, asserting that "While Hydro-Québec has no opposition to supply power and energy to Newfoundland and Labrador Hydro on a long-term basis starting January 1, 1982, it is practically impossible for us to face a reduction of 600 MW from our generation capacity without considering a possible modification in our planning and/or our construction program" (P-228/4).

DATE	ÉVÉNEMENT
18 mai 1976 / May 18, 1976	Le premier ministre Frank Moores demande au premier ministre Robert Bourassa « *an additional 800 megawatts of power by 1982, without prejudice to any other rights we have, and at the same costs as are paid by Hydro-Quebec...* » (P-228/5 à 9). *** Premier Frank Moores requests Premier Robert Bourassa "*an additional 800 megawatts of power by 1982, without prejudice to any other rights we have, and at the same costs as are paid by Hydro-Quebec...*" (P-228/5 à 9).
25 mai 1976 / May 25, 1976	Le premier ministre Robert Bourassa répond que la réclamation de Terre-Neuve semble non fondée, mais qu'il est disposé à examiner toute proposition raisonnable (P-228/10). *** Premier Robert Bourassa responds that Newfoundland's claim appears unfounded but that it is willing to consider any reasonable proposal (P-228/10).
6 août 1976 / August 6, 1976	Le gouvernement de Terre-Neuve-et-Labrador adopte l'arrêté en conseil n° 1001-'76 exigeant, conformément au Bail de 1961, que CF(L)Co livre à NLH « *a total of 800 MW of electrical power generated from the waters of the Upper Churchill Watershed* » à compter du 1er octobre 1983 (P-231). *** Newfoundland & Labrador adopts Order in Council No. 1001-'76 requesting, pursuant to the 1961 Lease, that CF(L)Co supply to NLH a total of 800 MW of power generated from the waters of the Upper Churchill Watershed commencing on October 1, 1983 (P-231).
31 août 1976 / August 31, 1976	CF(L)Co répond qu'elle ne peut, compte tenu de ses obligations aux termes du Contrat et du Deed of Trust and Mortgage Securing First Mortgage Bonds, donner suite à la demande du 6 août 1976 (P-70). *** CF(L)Co responds that, in light of its obligations under the Power Contract and the Deed of Trust and Mortgage Securing First Mortgage Bonds, it cannot comply with the August 6, 1976 request (P-70).
1er septembre 1976 / September 1, 1976	La centrale de Churchill Falls est mise en service à pleine capacité. Il s'agit de la « *Effective Date* » aux termes du Contrat. *** Churchill Plant is fully commissioned. This is the "Effective Date" under the Contract.

DATE	ÉVÉNEMENT
1er septembre 1976 / September 1, 1976	CF(L)Co et NLH concluent une entente relative au Bloc de 300 MW et au Bloc Twinco (P-29). *** CF(L)Co and NLH enter into an agreement relating to the Recall Block and to the Twinco Block (P-29).
13 septembre 1976 / September 13, 1976	Le gouvernement de Terre-Neuve-et-Labrador intente le *Recall Case* (P-237). *** The Government of Newfoundland & Labrador institutes the Recall Case (P-237).
27 mai 1977 / May 27, 1977	HQ intente en parallèle une requête en jugement déclaratoire contre CF(L)Co dans la province de Québec relativement à l'obligation de CF(L)Co de vendre et de livrer de l'énergie à HQ en vertu du Contrat (D-18). *** HQ brings a parallel action against CF(L)Co in the province of Quebec seeking declaratory relief in relation to CF(L)Co's obligation to sell and supply power to HQ under the Power Contract (D-18) (the "**Declaratory Judgment Case**").
17 décembre 1980 / December 17, 1980	Le gouvernement de Terre-Neuve-et-Labrador adopte la loi intitulée *The Upper Churchill Water Rights Reversion Act* (la « **Reversion Act** »). *** Newfoundland & Labrador adopts *The Upper Churchill Water Rights Reversion Act* (the "***Reversion Act***").
10 février 1981 / February 10, 1981	Le gouvernement de Terre-Neuve-et-Labrador renvoie la *Reversion Act* à la Cour d'appel de Terre-Neuve pour qu'elle se prononce sur sa validité constitutionnelle (le « **Renvoi sur la *Reversion Act*** »). *** Newfoundland & Labrador refers the *Reversion Act* to the Newfoundland Court of Appeal to pronounce on its constitutional validity (the "**Reference on the *Reversion Act***").

DATE	ÉVÉNEMENT
5 mars 1982 / March 5, 1982	La Cour d'appel de Terre-Neuve déclare que la *Reversion Act* est *intra vires* du pouvoir de la législature de Terre-Neuve. HQ interjette subséquemment appel de la décision auprès de la Cour suprême du Canada (P-243). *** The Newfoundland Court of Appeal declares the *Reversion Act intra vires* of the Newfoundland Legislature. HQ subsequently appeals the decision to the Supreme Court of Canada (P-243).
13 juin 1983 / June 13, 1983	La Cour suprême de Terre-Neuve rejette le *Recall Case*. Le gouvernement de Terre-Neuve-et-Labrador interjette subséquemment appel de la décision auprès de la Cour d'appel de Terre-Neuve (P-26). *** The Newfoundland Supreme Court dismisses the Recall Case. Newfoundland & Labrador subsequently appeals the decision to the Newfoundland Court of Appeal (P-26).
4 août 1983 / August 4, 1983	La Cour supérieure du Québec accueille la requête en jugement déclaratoire de HQ. CF(L)Co interjette appel de la décision à la Cour d'appel du Québec par la suite (P-38). *** The Quebec Superior Court grants HQ's Motion for Declaratory Judgment. CF(L)Co subsequently appeals the decision to the Quebec Court of Appeal (P-38).
3 mai 1984 / May 3, 1984	La Cour suprême du Canada déclare que la *Reversion Act* est *ultra vires* du pouvoir de la législature de Terre-Neuve (P-9). *** The Supreme Court of Canada declares the *Reversion Act ultra vires* of the Newfoundland Legislature (P-9).
18 février 1985 / February 18, 1985	La Cour d'appel du Québec rejette l'appel interjeté par CF(L)Co à l'égard de la décision de la Cour supérieure du Québec sur la Requête en jugement déclaratoire de HQ au sujet du Contrat. CF(L)Co interjette ensuite appel de la décision devant la Cour suprême du Canada (P-38/58). *** The Quebec Court of Appeal dismisses CF(L)Co's appeal of the Superior Court's decision on HQ's Motion for Declaratory Judgment regarding the Power Contract. CF(L)Co subsequently appeals the decision to the Supreme Court of Canada (P-38/58).

DATE	ÉVÉNEMENT
25 octobre 1985 / October 25, 1985	La Cour d'appel de Terre-Neuve rejette l'appel interjeté par Terre-Neuve-et-Labrador à l'égard du jugement du tribunal inférieur dans la cause relative au rappel. Terre-Neuve-et-Labrador interjette ensuite appel de la décision devant la Cour suprême du Canada (P-26A/1). *** The Newfoundland Court of Appeal dismisses Newfoundland & Labrador's appeal of the lower Court's decision in the Recall Case. Newfoundland & Labrador subsequently appeals the decision to the Supreme Court of Canada (P-26A/1).
9 juin 1988 / June 9, 1988	La Cour suprême du Canada rejette le pourvoi de Terre-Neuve-et-Labrador à l'égard du jugement du tribunal inférieur dans le *Recall Case*. Le même jour, eu égard à sa décision dans la cause relative au rappel, la Cour suprême du Canada déclare théorique le pourvoi de CF(L)Co concernant la Requête en jugement déclaratoire de HQ (P-26A/10). *** The Supreme Court of Canada dismisses Newfoundland & Labrador's appeal of the lower Court's decision in the Recall Case. On the same day, and in light of its decision in the Recall Case, the Supreme Court of Canada declares CF(L)Co's appeal regarding HQ's Motion for Declaratory Judgment to be moot (P-26A/10).
1989–1992 / 1989-1992	NLH et HQ entament une période de négociations axées principalement sur le développement du Bas-Churchill et la viabilité financière à long terme de CF(L)Co. *** NLH and HQ undertake a round of negotiations focusing primarily on the development of the Lower Churchill and the long term financial viability of CF(L)Co.
1er novembre 1990 – 14 janvier 1991 / November 1st, 1990 – January 14, 1991	HQ et CF(L)Co concluent la Convention d'exploitation (P-248C et P-281). *** HQ and CF(L)Co enter into the Operating Agreement (P-248C et P-281).
1995–1996 / 1995-1996	CF(L)Co et HQ entreprennent une nouvelle période de négociations portant principalement sur la viabilité financière à long terme de CF(L)Co. *** CF(L)Co and HQ undertake a new round of negotiations focusing primarily on the long-term financial viability of CF(L)Co.

DATE	ÉVÉNEMENT
10 mai 1996 / May 10, 1996	La U.S. Federal Energy Regulatory Commission (FERC) adopte l'ordonnance 888, laquelle entre en vigueur le 1er janvier 1997. *** The US Federal Energy Regulatory Commission (FERC) adopts Order 888, which comes into force on January 1, 1997.
11 décembre 1996 / December 11, 1996	HQ adopte le Règlement 652 sur les conditions et tarifs du service de transport en gros de l'électricité, qui a été approuvé par le gouvernement du Québec aux termes du Décret n° 1559-96 (P-263). *** HQ adopts By-Law 652 on the conditions and tariffs for wholesale transport of electricity, which is approved by the Government of Quebec by way of Order-in-Council No. 1559-96 (P-263).
Mai 1997 / May 1997	HQ crée la division Hydro-Québec TransÉnergie et rend son réseau de transport accessible à tous les intervenants sur les marchés nord-américains. *** HQ creates Hydro-Québec TransÉnergie and implements an open access transmission tariff.
9 mars 1998 / March 9, 1998	Les premiers ministres de Terre-Neuve-et-Labrador et du Québec publient une Déclaration conjointe annonçant le cadre de référence devant guider la suite des négociations au sujet du développement du réseau de Churchill River et des projets connexes au Québec (P-270). À la même époque, des hauts dirigeants de HQ et de NLH s'échangent un résumé des pourparlers qui ont eu lieu jusque-là, lesquels couvrent également le rappel de 130 MW, le GWAC et la Convention entre actionnaires (P-272). *** The Premiers of Newfoundland & Labrador and Quebec issue a Joint Statement announcing the framework for further negotiations regarding development of the Churchill River system and related projects in Quebec (P-270). At the same time, executives from HQ and NLH exchange a summary of the discussions held thus far, which also covers the 130 MW recall, the GWAC and the Shareholders Agreement (P-272).

DATE	ÉVÉNEMENT
14 septembre 1998 / September 14, 1998	CF(L)Co et HQ s'entendent sur les dispositions d'un Notice of Recapture and Waiver, avec effet rétroactif au 9 mars 1998, aux termes duquel CF(L)Co donne à HQ un avis écrit formel de son intention de rappeler immédiatement la portion du Bloc de 300 MW qui n'a toujours pas été récupérée depuis la conclusion du Contrat (130,7 MW) et HQ renonce à son droit à un préavis de trois ans (D-1). *** CF(L)Co and HQ agree to the terms of a Notice of Recapture and Waiver, with retroactive effect to March 9, 1998, whereby CF(L)Co gives HQ formal notice of its intention to immediately recall the portion of the 300 MW Recall Block that had yet to be recalled since entering into the Power Contract (130.7 MW) (D-1).
25 septembre 1998 / September 25, 1998	CF(L)Co conclut un contrat d'achat et de vente avec NLH (« **Recall PSA** »), également avec effet rétroactif au 9 mars 1998, aux termes duquel CF(L)Co convient de vendre à NLH l'énergie correspondant au Bloc de rappel de 300 MW aux mêmes prix que ceux prévus dans le Contrat, et ce, jusqu'en 2041 (P-30). Le Recall PSA remplace une convention entre ces mêmes parties, en date du 1er septembre 1976 (P-29). ***
25 septembre 1998 / September 25, 1998	CF(L)Co enters into a Purchase and Sale Agreement with NLH (the "**Recall PSA**"), also with retroactive effect to March 9, 1998, pursuant to which CF(L)Co agrees to sell to NLH the energy corresponding to the 300 MW Recall Block at the same prices as those stipulated in the Power Contract, up until 2041 (P-30). The Recall PSA replaces an agreement between those two parties, dated September 1, 1976 (P-29).
Décembre 1998 / December 1998	NLH conclut le Premier PSA avec HQ, également avec effet rétroactif au 9 mars 1998, aux termes duquel NLH vend à HQ, au prix de 2,39 ¢ le kWh, le surplus du Bloc de 300 MW qui n'est pas utilisé à ce moment-là par NLH au Labrador[515] (P-31C). *** NLH enters into the First PSA with HQ, also with retroactive effect to March 9, 1998, pursuant to which NLH sells to HQ, at the price of 2.39¢ per kWh, all surplus energy from the 300 MW Recall Block not then used by NLH in Labrador[516] (P-31C).

[515] Ce premier PSA entre NLH et HQ a expiré le 8 mars 2001. Il a été successivement remplacé par un *Amended and Restated Purchase and Sale Agreement* daté du 19 février 2001 (pièce P-32C) et par un *Purchase and Sale Agreement* ultérieur daté du 31 mars 2004 (pièce P-33C) qui a expiré le 31 mars 2009. NLH n'a ni renouvelé ni remplacé ce dernier PSA lorsque ce dernier a expiré le 31 mars 2009 (pièce P-72).

[516] This first PSA between NLH and HQ expired on March 8, 2001. It was subsequently replaced by an *Amended and Restated Purchase and Sale Agreement* dated February 19, 2001 (Exhibit P-32C) and

DATE	ÉVÉNEMENT
18 juin 1999 / June 18, 1999	CF(L)Co et HQ concluent le GWAC, avec effet rétroactif au 1er novembre 1998 et d'une durée expirant en 2041[517], et HQ, NLH et CF(L)Co concluent la Convention entre actionnaires avec effet rétroactif au 1er novembre 1998 et d'une durée expirant au plus tard le 31 août 2041 (P-2C et P-3C). *** CF(L)Co and HQ enter into the GWAC, with retroactive effect to November 1, 1998 and a term expiring in 2041[518] and HQ, NLH and CF(L)Co enter into a Shareholders' Agreement with retroactive effect to November 1, 1998 with a term expiring at the latest on August 31, 2041 (P-2C and P-3C).
19 février 2001 / February 19, 2001	HQ et NLH concluent le Deuxième PSA, d'une durée de 3 ans (P-32C). *** HQ and NLH enter into the Second PSA, which has a 3-year term (P-32C).
31 mars 2004 / March 31, 2004	HQ et NLH concluent le Troisième PSA, d'une durée de 5 ans (P-33C). *** HQ and NLH enter into the Second PSA, which has a 5-year term (P-33C).
20 mars 2009 / March 20, 2009	HQT et NLH concluent 4 conventions pour le service de transport ferme à long terme de point à point — LAB-MASS 106 MW, LAB-MASS 53 MW (#1), LAB-MASS 53 MW (#2) et LAB-MASS 53 MW (#3) (P-294). *** HQT and NLH enter into 4 service agreements for firm long-term point-to-point transmission service — LAB-MASS 106 MW, LAB-MASS 53 MW (#1), LAB-MASS 53 MW (#2) et LAB-MASS 53 MW (#3) (P-294).

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a subsequent *Purchase and Sale Agreement* dated March 31, 2004 (Exhibit P-33C) which expired on March 31, 2009. NLH did not renew nor replace this last PSA when it came to term on March 31, 2009 (Exhibit P-72).

517 Le GWAC a été ensuite modifié le 29 mars 2000 pour corriger une omission involontaire dans le texte original. La modification est également incluse dans la pièce P-2C/17.

518 The GWAC was subsequently amended on March 29, 2000 to correct an inadvertent omission in the original text. The amendment is also included in Exhibit P-2C/17.

DATE	ÉVÉNEMENT
2 avril 2009 / April 2, 2009	Annonce de la province de Terre-Neuve-et-Labrador intitulée « *Historic Arrangement Sees Newfoundland and Labrador Wheel Upper Churchill Power through Quebec to North American Markets* » (P-295) *** Announcement by the province of Newfoundland and Labrador that NLH will wheel Churchill Falls power through Québec (P-295).
23 février 2010 / February 23, 2010	CF(L)Co intente un recours contre HQ dans le dossier 500-17-056518-106. *** CF(L)Co institutes proceedings against HQ in file 500-17-056518-106 (the "**Good Faith Case**").
December 15, 2010	La dette reliée au projet de Churchill Falls est pleinement remboursée. *** The debt relating *to* the Churchill Falls project is completely reimbursed.
1er mai 2012 / May 1, 2012	Le *Recall* PSA est amendé (D-40). *** The Recall PSA is amended (D-40).
9 mai 2013 / May 9, 2013	Les 4 conventions pour le service de transport ferme à long terme de point à point entre HQT et NLH sont renouvelées pour une période de 10 ans — LAB-MASS 106 MW, LAB-MASS 53 MW (#1), LAB-MASS 53 MW (#2) et LAB-MASS 53 MW (#3) (P-294). *** The 4 service agreements for firm long-term point-to-point transmission service between HQT and NLH are renewed for a ten-year period — LAB-MASS 106 MW, LAB-MASS 53 MW (#1), LAB-MASS 53 MW (#2) et LAB-MASS 53 MW (#3) (P-294).
22 juillet 2013 / July 22, 2013	HQ intente le présent recours contre CF(L)Co. *** HQ institutes the present proceedings against CF(L)Co.

SCHEDULE III

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No. 500-17-078217-133

SUPERIOR COURT

HYDRO-QUÉBEC
Plaintiff

v.

CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED
Defendant

LIST PREPARED BY HYDRO-QUÉBEC OF THE ISSUES OF FACT AND LAW IN DISPUTE IN THIS CASE

[1158] Issues common to both disputes

a) Do the Original Power Contract[509] and the Renewed Power Contract constitute one and the same juridical act and, if so, must the contract interpretation rules be applied to the Contract as though it were a whole?

b) Does the evidence establish that at the time the Contract was entered into, Hydro-Québec was the sole purchaser disposed to acquire the available capacity and power to be generated at Churchill Falls, save for a quantity (ultimately set at 225 MW) allowing CF(L)Co to satisfy its pre-existing obligations to Twin Falls Corporation Limited, and another quantity (ultimately set at 300 MW) to satisfy the future needs of the province of Newfoundland?

c) Under the Contract, does Hydro-Québec have the exclusive right to purchase all available capacity and power produced at the Generating Station,[510] with the exception

[509] The defined expressions used in this document have the meaning given in Hydro-Québec's demand originating a proceeding.

[510] "Generating Station" has the same meaning given in the definition for "Plant" in section 1.1 of the Original Power Contract and Renewed Power Contract, as such Generating Station is maintained in accordance with sections 4.2.4 of the Original Power Contract and 4.1.4 of the Renewed Power Contract, and section 4 of the Shareholders Agreement.

of the capacity and power associated with the Twinco Block and the 300 MW Recall Block, and this for a period of 65 years? This issue could lead the Court to consider the following sub-issues:

i) How was Contract's interpretation impacted by the multiple previous representations of CF(L)Co, NLH and Nalcor that were precisely to that effect, and the testimony of Mr. Ed Martin holding that the right claimed by CF(L)Co to dispose of the quantities of capacity that had allegedly not been scheduled by Hydro-Québec resulted in the theory developed by Nalcor and NLH around the year 2011?

d) Are the positions defended by CF(L)Co in this case regarding the two dispute compatible with the parties' interpretation of the Contract in the agreements entered after the Contract, including the GWAC (Exhibit P-2), the Notice of Recapture and Waiver (Exhibit D-1), the Purchase and Sales Agreement (Exhibit P-31C), the Amended and Restated Purchase and Sales Agreement (Exhibit P-32C) and the Purchase and Sales Agreement (Exhibit P-33C)?

e) Regardless of the ruling handed down in respect of Hydro-Québec's objections to the evidence,[511] does the expert evidence provided by CF(L)Co establish the "usage" alleged by CF(L)Co in its Defense pursuant to the requirements of Québec law governing evidence of usage?

I. Issues relating to the first dispute

f) Does the evidence establish that the shared intent of the parties[512] regarding the renewal of the Original Power Contract, was to automatically extend the said Contract for a 25-year period ("[ORIGINAL ENGLISH] a 25 year extension of the contract", Exhibit P-8)? This issue may lead the Court to consider the following sub-issues:

i) Does the evidence allow to conclude, as CF(L)Co argues, that despite the inclusion of sections 4.1.1 and 5.3 in the Renewed Power Contract, which reprise sections 4.2.1 and 6.5 of the Original Power Contract, the shared intent of the

[511] A list of these objections is appended to this list.

[512] This expression refers to the shared intent of the parties at the time the Contract was entered into, as is reflected in its terms and conditions and, where applicable, as determined in light of the nature of the Contract, the circumstances in which it was entered into, the interpretation that the parties have already given it or that the Contract has received (including in prior judgments handed down in respect of the Contract), as well as the legally proved usage.

parties was to strip Hydro-Québec, as of the coming into force of the Renewed Power Contract, of the right to operate the reservoir and to schedule the capacity and power of the Generating Station on a seasonal and multi-annual basis, and this in a manner integrated with its own production facilities ("[ORIGINAL ENGLISH] in relation to the Hydro-Quebec system", Exhibit P-1)?

ii) Does the evidence allow to conclude, as CF(L)Co argues, that the shared intent of the parties was to confer on Hydro-Québec, as of the coming into force of the Renewed Power Contract, an "intra-monthly" operating flexibility and, where applicable, is Hydro-Québec right to maintain that this flexibility would be more restrictive than what it would have enjoyed under the draft versions of the Contract prior to April 17, 1968 (date of Exhibit P-7), as well as pursuant to section 8.0(c) of the Letter of Intent?

iii) Does the evidence allow to conclude, as CF(L)Co argues, that the shared intent of the parties was to have Hydro-Québec bear all of the hydraulic risk throughout the term of the Renewed Power Contract while stripping it of any control over the reservoir's operation that would have allowed it to manage that risk?

g) Does the evidence establish that the shared intent of the parties, as of the coming into force of the Renewed Power Contract, was to place a monthly cap corresponding to the Continuous Energy limiting Hydro-Québec's right to schedule the power generated by the Generating Station? This issue could lead the Court to consider the following sub-issues:

i) Does the evidence allow to conclude, as alleged in Hydro-Québec's Response, that the notion of Annual Energy Base set forth in the Contract, as well as its expression on a monthly basis, namely the Basic Contract Demand of the Original Power Contract or the Continuous Energy of the Renewed Power Contract, draw their origins from the objective pursued by CF(L)Co to benefit from revenue stability despite the variability of hydrological conditions?

ii) Does the evidence allow to conclude that it is possible, over the 25 years of the Renewed Power Contract, for the variability of hydrological conditions to cause the power available to Hydro-Québec to be lower or greater than the Continuous Energy in some months, and to be lower or greater than the Annual Energy Base

in some years? If, during certain months or years, Hydro-Québec were to receive less than the Continuous Energy or Annual Energy Base, as the case may be, was the shared intent of the parties to deprive Hydro-Québec of the possibility of recovering the energy paid for but not received by limiting its right to a monthly energy cap?

h) Does the evidence establish that the shared intent of the parties was to reserve the so-called “excess” energy under the Renewed Power Contract for CF(L)Co? In that respect, can the word “excess” describe the energy which, during certain months, would be available above and beyond the Continuous Energy if, over the 25 years of the Renewed Power Contract, the variability of hydrological conditions might be such that during other months, the energy available would be less than the Continuous Energy? This issue could lead the Court to consider the following sub-issues:

i) Does the evidence allow to conclude that the notion of Annual Energy Base in the Original Power Contract, as well as the notions of Annual Energy Base and Continuous Energy in the Renewed Power Contract, extend to any so-called “excess” energy, including energy that had been defined as “excess energy” in the Letter of Intent?

[1159] Issues relating to the second matter

a) Does CF(L)Co have the right, until expiry of the Contract, to sell to third parties, including NLH, quantities of capacity and power generated by the Generating Station above and beyond the quantities of capacity and power associated with the Twinco Block and the 300 MW Recall Block? This issue could lead the Court to consider the following sub-issues:

i) Is Hydro-Québec right to maintain that section 6.6 of the Original Power Contract and section 5.4 of the Renewed Power Contract reflect the shared intent of the parties to limit CF(L)Co’s rights in respect of the 300 MW Recall Block to a 300 MW capacity cap and a 2.362 TWh power cap?

ii) Does the evidence establish that capacity, as an electricity product sold separately from any power, existed in the 1960s?

iii) Is CF(L)Co right to claim that the 300 MW Recall Block is a capacity and energy block over which CF(L)Co enjoys a “priority”, the 300 MW limit not preventing CF(L)Co from selling quantities of capacity in excess of that amount?

b) Given the rules in force on the markets (outside Labrador), are the capacity quantities in excess of 300 MW that CF(L)Co delivers to NLH, including those quantities it has delivered thereto since April 1, 2009, physically interruptible at any time, at the option of CF(L)Co or NLH?

Montréal, February 8, 2016

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NORTON ROSE FULBRIGHT CANADA LLP
Counsel for Plaintiff
HYDRO-QUÉBEC

Schedule A

Objections to the evidence raised by Hydro-Québec and taken under deliberation at trial

i) Objections as to Mr. Kendall’s and Ms. Bodell’s qualification as experts to testify on the topics contemplated by their respective expert reports.

ii) Objection as to the admissibility into evidence:

2.1 of Mr. Kendall’s expert report;

2.2 of Ms. Bodell’s expert report entitled “*Continuous Energy: An Overview of Contemporaneous Industry Context*”;

2.3 the yellow-highlighted portions in the version of Ms. Bodell’s expert report entitled “*Interruptible Power: An Overview of industry Context and CF(L)Co’s Ability to Sell*” attached to the document entitled

“[TRANSLATION] Notes in support of Hydro-Québec’s objection as to the qualification of T. Bodell as expert witness, and the admissibility into evidence of her expert report entitled “[ORIGINAL ENGLISH] *Continuous Energy: An Overview of Contemporaneous Industry Context*” and the motion to dismiss certain sections of her expert report entitled “[ORIGINAL ENGLISH] *Interruptible Power: An Overview of Industry Context and CF(L)Co's Ability to Sell*”;

2.4 the contracts invoked by Mr. Kendall and Ms. Bodell; and

2.5 Exhibit D-21, for the reasons given in Hydro-Québec’s letter dated August 14, 2015 (Exhibit P-399).