English translation of the original reasons for judgment filed in French by the Court

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-024690-141
(500-17-056518-106)

DATE: **August 1, 2016**

CORAM: THE HONOURABLE **FRANCE THIBAULT, J.A.**
YVES-MARIE MORISSETTE, J.A.
MARIE ST-PIERRE, J.A.
MARK SCHRAGER, J.A.
ROBERT M. MAINVILLE, J.A.

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

HYDRO-QUÉBEC
RESPONDENT – Defendant

JUDGMENT

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[1] This is an appeal from the judgment of the Superior Court, District of Montreal (the Honourable Joël A. Silcoff) of July 24, 2014, which dismissed Appellant's motion introductory of suit.[1]

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[1] *Churchill Falls (Labrador) Corporation Ltd. v. Hydro-Québec*, J.E. 2014-1469 (C.S.), 2014 QCCS 3590 [Judgment in appeal].

1- INTRODUCTION

[2] On May 12, 1969, after several years of negotiation, the parties signed a power contract in virtue of which Respondent undertook to purchase virtually all of the electricity produced by the Churchill Falls hydroelectric plant.[2] The contract provided that Appellant, as the owner/operator of the plant would receive a fixed price for the electricity purchased which price would decrease in steps over the 65 year term of the contract. The price as set forth in the contract would be determined according to the final capital cost of the project.

[3] Appellant submits that at the time the contract was signed, the parties intended to share equitably the risks and benefits flowing from it. As an indication of such intention, Appellant raises the interdependence of the parties and the circumstances surrounding the execution of the contract. According to Appellant, the extent of profits now being received by Respondent upon the resale of electricity was unforeseeable at the time that the risks and benefits were agreed upon. This disproportionate division of profit is incompatible with the interdependent relationship of the parties and is divorced from the original division of risk and benefit agreed upon in the power contract. Respondent's enrichment does not originate in the contract because, Appellant argues, the allocation of this windfall was not foreseen by either party.

[4] Appellant continues that in the circumstances, Respondent's obligation to act in good faith, to cooperate and to exercise its contractual rights reasonably, requires that the pricing under the contract be renegotiated.

[5] Given Respondent's refusal to renegotiate the power contract and following the final reimbursement of the loan undertaken to finance the construction of the power plant, Appellant instituted proceedings. The suit was dismissed. The judge concluded that the relationship between the parties was not based on an equal sharing of the risks and benefits flowing from the contract. To the contrary, Respondent incurred the majority of the risk to enable Appellant to debt finance the construction of the plant without any reduction in Appellant's equity in the project. In consideration of the risk assumed, Respondent obtained the guarantee of fixed stable pricing as well as the protection against inflation of operating costs. In the judge's opinion, Appellant's position that the price should be renegotiated would deprive Respondent of the benefits which motivated it to sign the power contract in 1969.

[6] For the reasons which follow, the Court is of the opinion that the appeal should be dismissed with legal costs.

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[2] Then under construction, the first Churchill Falls power is delivered in November 1971: Judgment in appeal, *supra*, note 1, annex II, Revised Time Line, at "November 1971".

2- THE FACTS

[7] On April 17, 1953, the British Newfoundland Corporation Limited ("Brinco") was incorporated. The shareholders were a consortium of British and Canadian industrial, banking and mining companies.[3]

[8] On May 20, 1953, the legislature of Newfoundland and Labrador passed a law[4] to enable Brinco to explore and develop the hydroelectric resources of the Hamilton River, renamed Churchill in 1965.[5] Brinco undertook to invest the monies necessary for this purpose. In exchange, Brinco received the exclusive right to explore and develop a large portion of Labrador[6] for 99 years renewable for a second term of 99 years.[7]

[9] On January 31, 1958, Hamilton Falls Power Corporation Limited was incorporated as a wholly owned subsidiary of Brinco.[8] It subsequently became Churchill Falls (Labrador) Corporation Limited,[9] the Appellant.[10]

[10] On June 30, 1958, Brinco assigned to Appellant part of its rights to develop the hydroelectric potential of the upper Churchill River.[11] On May 26, 1960, Appellant gave notice of the exercise of its rights to develop as provided by the agreement of May 21, 1953.[12]

[11] On March 13, 1961, the House of Assembly of Newfoundland and Labrador enacted legislation approving a lease to Appellant. This legislated lease signed on May 16, 1961 granted to Appellant for a period of 99 years, renewable at its option for an additional 99 years, the exclusive right to certain parts of the Churchill River and its watershed for the purpose of generating hydroelectric power[13] in consideration of a rental equal to 8% of the profits plus a fixed royalty.[14]

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3 Under Newfoundland and Labrador law. Judgment in appeal, *supra*, note 1, para. 27, and annex II, Revised Time Line, at "April 17, 1953".

4 *An Act to Authorize the Lieutenant-Governor in Council to Enter into an Agreement with British Newfoundland Corporation Limited and N. M. Rothschild & Sons*, May 20, 1953. See Exhibit P-4, *The Government - British Newfoundland Corporation Limited - N.M. Rothschild & Sons (Confirmation of Agreement) Act*, 1953, A.F. (Appellant's Factum), vol. 3, p. 975; Judgment in appeal, *supra*, note 1, para. 39, and annex II, Revised Time Line, at "May 20, 1953".

5 Judgment in appeal, *supra*, note 1, para. 39, and annex II, Revised Time Line, at "August 1952".

6 Judgment in appeal, *supra*, note 1, paras. 39 and 40.

7 Exhibit P-4, *supra*, note 4, p. 983. See also: Judgment in appeal, *supra*, note 1, para. 41.

8 Judgment in appeal, *supra*, note 1, paras. 13 and 42, and annex II, Revised Time Line, at "January 31, 1958".

9 In 1965. Judgment in appeal, *supra*, note 1, annex II, Revised Time Line, at "January 31, 1958".

10 The judge specified Appellant's allocation of the capital stock. In 1968, Respondent held 34.2% of the shares. Judgment in appeal, *supra*, note 1, para. 20.

11 Exhibit D-7, Memorandum of Agreement …, June 30, 1958, A.F., vol. 17, p. 6300; Judgment in appeal, *supra*, note 1, para. 43, and annex II, Revised Time Line, at "June 30, 1958".

12 Judgment in appeal, *supra*, note 1, para. 44, and annex II, Revised Time Line, at "May 26, 1960".

13 *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*

[12] Until the early 1960's one of the obstacles to the development of the hydraulic power of the Churchill River was financial. To obtain a loan, the Appellant required a creditworthy customer who would undertake to purchase on an ongoing basis virtually all of the electricity generated by the plant irrespective of its needs. Respondent met these requirements. Discussions commenced in March 1961,[15] and on the 23rd of that month,[16] Brinco made a proposal to Respondent which was refused by Respondent on May 15, 1961 by a letter indicating its preference to develop its own hydraulic resources.[17]

[13] There ensued several unsuccessful negotiations between Appellant and Respondent and between Appellant and other potential purchasers in Ontario and the United States of America.[18] Correspondence of March 19, 1964,[19] and a statement by the Quebec Premier on July 8, 1964,[20] indicate that negotiations had completely broken down. Respondent resumed work on its own energy projects.[21] However, in 1965, discussions between the parties resumed and a draft letter of intent was prepared.[22] In its annual report, Respondent wrote that the construction of Manic-3 could be deferred if work on the Churchill Falls project would commence in the near future.[23]

Provision Respecting Other Matters Connected Therewith, March 13, 1961. See: Exhibit P-5, *The Hamilton Falls Power Corporation Limited (Lease) Act*, A.F., vol. 3, p. 994; Judgment in appeal, *supra*, note 1, paras. 45 and 46, and annex II, Revised Time Line, at "March 13, 1961" and "May 16, 1961".

14 Judgment in appeal, *supra*, note 1, para. 49.

15 Judgment in appeal, *supra*, note 1, para. 56, and annex II, Revised Time Line, at "March 6, 1961".

16 Judgment in appeal, *supra*, note 1, annex II, Revised Time Line, at "March 23, 1961".

17 Judgment in appeal, *supra*, note 1, paras. 56 and 57; Exhibit D-70, Lettre de M. Léo Roy, General Manager de la Commission hydroélectrique de Québec, adressée à M. R. E Heartz, président de Hamilton Falls Power Corporation Limited, May 15, 1961, A.F., vol. 23, p. 8828.

18 Judgment in appeal, *supra*, note 1, para. 58; Exhibit D-10.1, Document intitulé « Joint Statement by Brinco, Hydro-Québec and Con. Edison », Avril 29, 1963, A.F., vol. 17, p. 6354; Exhibit D-112, En liasse, lettre de M. Robert Winters, Chairman ... British Newfoundland Corporation Limited, adressée à M. Jean-Claude Lessard, président de la Commission hydroélectrique de Québec, November 25, 1963, A.F., vol. 23, p. 9093.

19 Exhibit D-121, Lettre de M. Jean-Claude Lessard, ..., adressée à M. Robert Winters, Chairman et Chief Executive Officer de British Newfoundland Corporation Limited, March 19, 1964, A.F., vol. 24, p. 9123.

20 Judgment in appeal, *supra*, note 1, para. 59; Exhibit D-139, Document intitulé « Déclaration du Premier Ministre concernant les Chutes Hamilton », July 8, 1964, A.F., vol. 24, p. 9210.

21 Exhibit D-139, Document intitulé « Déclaration du Premier Ministre concernant les Chutes Hamilton », July 8, 1964, A.F., vol. 24, p. 9210.

22 Judgment in appeal, *supra*, note 1, para. 60, and annex II, Revised Time Line, at "May 20, 1965" and "June 8, 1965".

23 Judgment in appeal, *supra*, note 1, para. 60; Exhibit D-24.2, En liasse, rapports annuels d'Hydro-Québec de 1964 à 1978: 1965, A.F., vol. 18, p. 6851.

[14] The parties reached an agreement in 1966. The letter of intent signed on October 13, 1966, expresses their intent to conclude a power contract.[24] Respondent undertook to purchase all the electricity generated (Section 1); Appellant would "retain" up to 300 megawatts of electricity (Section 10); the term of the contract would be two periods of 40 or 44 years with a right of renewal at Respondent's option (Section 11); Respondent undertook to pay for all the electricity made available to it in virtue of the "take or pay" clause[25] in Section 24 (Section 15); the price of the electricity was fixed and decreased every five years (Section 16); a price adjustment was foreseen as a function of capital cost (Section 17); the parties agreed to a "take or pay" clause in virtue of which for a period of 25 years commencing at the completion of the plant, Respondent would make sufficient payments to cover the annual costs of Appellant's debt service and other fixed costs (Section 24).

[15] A number of events occurred after the execution of the letter of intent. Firstly, substantial project cost overruns were incurred. Secondly, it was difficult to obtain financing. Consequently, Respondent agreed to assume certain additional liability and financial risk.[26]

[16] The minutes of a joint meeting of the executive committees of the Boards of Directors of Brinco and Appellant held on April 10, 1968,[27] record the aforementioned changes. The chairman, Mr. Donald Gordon, explains to the members of the executive committee that the negotiations with Respondent required that certain decisions be made. The purpose of the joint meeting was to inform the attendees of the status of discussions with Respondent and to obtain their instructions for the negotiating team as to positions to adopt regarding the negotiations.[28] The minutes of the meeting indicate that Respondent insisted on five points including an option in its favour to renew the power contract for an additional 25 years at a fixed rate of its 2 mills/kWh.[29] The purpose of this extension was to spread out the project costs over a longer period given the increase in the cost of the project. The minutes indicate that Respondent had clearly let it been known that should Appellant attempt to qualify the rate based on considerations extraneous to the contract, the purpose of the extension would be defeated.[30] Appellant's negotiating team was authorized to negotiate an extension of 25

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24 Exhibit D-16, Lettre d'intention - Base d'un contrat définitif d'énergie entre Churchill Falls (Labrador) Corporation Limited et la Commission hydroélectrique de Québec, October 13, 1966, A.F., vol. 17, p. 6452.

25 By virtue of the "take or pay" clause, the seller guarantees to provide electricity to the buyer who in return guarantees payment for a given amount of electricity regardless of the fact that the buyer may or may not receive that electricity.

26 Judgment in appeal, *supra*, note 1, paras. 68 and 69.

27 Exhibit D-33, Procès-verbal d'une réunion conjointe des comités exécutifs de British Newfoundland Corporation Limited et Churchill Falls (Labrador) Corporation Limited tenue le 10 avril 1968, A.F., vol. 21, p. 8135.

28 *Id*., p. 8136.

29 A *mill* is a thousandth of a dollar (or one-tenth of one percent).

30 Exhibit D-33, *supra*, note 27, p. 8139.

years at the rate of 2 mills/kWh on the condition that Respondent undertake to exercise the option no less than 10 years prior to the expiry of the contract:

> 1. Renewal of the contract
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> 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. 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 Churchil [sic] project was marginally more attractive then [sic] 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.[31]

[17] Throughout the period February to May 1968, the parties continued to negotiate principally on the renewal terms of the contract.[32] They finally agreed on an automatic renewal for a period of 25 years at the fixed rate of 2 mills/kWh[33] which was to Appellant's advantage since Respondent had sought a renewal at its option.

[18] It was provided that the project be funded by the issuance of mortgage bonds in the amount of $US 500 million and $Can 50 million.[34] The lenders required that Appellant self finance an additional amount equal to 1/3 of the foregoing sums.[35] To

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31 *Ibid*.
32 Judgment in appeal, *supra*, note 1, annex II, Revised Time Line, at "February - May, 1968".
33 Exhibit P-1, Power Contract, May 12, 1969, s. 3.2, A.F., vol. 2, p. 472; Judgment in appeal, *supra*, note 1, annex II, Revised Time Line, at "September 1, 2016".
34 Judgment in appeal, *supra*, note 1, para. 75.
35 *Ibid.*

help satisfy this requirement, Respondent agreed to inject $Can 115 million into the project.[36]

[19] The power contract was signed on May 12, 1969, slightly more than two and one half years after the letter of intent.

[20] The power contract provided that Appellant would sell virtually all of the electricity generated by the plant for a period of 40 years. It contains an automatic renewal clause for a period of 25 years (Section 2.1 and 3.2); the purchase price for the electricity is fixed and decreases three times every five years and once after the 15th year for a period of ten years after which it remains stable. The rates were fixed as a function of the final capital cost of the project and a mathematical formula determined the manner of adjusting the rates to take into account such costs (Section 8.2).

[21] The contract provides for the retention by Appellant of a defined quantity of electricity to supply its subsidiary, Twin Falls Power Corporation (Section 4.2.2). Appellant is also permitted to "recapture" up to 300 megawatts upon three years prior notice in order to meet the energy requirements of the Province of Newfoundland and Labrador (Section 6.6); each party was required to construct the transmission lines on its side of the Labrador Quebec boundary (Section 7.2); Respondent was granted the right to operate the plant in the event that Appellant would fail to do so (Section 4.2.5).

[22] Respondent undertook various obligations. It guaranteed the completion of the work. Thus, in addition to the $Can 700 million to be raised by Appellant, Respondent would fund the sums necessary to complete construction of the plant and to bring it into full operation. In such respect, it also undertook to provide the funds necessary to service the debt and cover operating costs prior to completion of the plant (Section 5.1).

[23] Respondent also undertook to advance the necessary funding to service the debt in the event of Appellant's default (Section 5.4) and to pay any interest due by Appellant in excess of 6% (Section 15.1). As well, in the event of a shortage of funds and as long as the financing was not repaid, Respondent undertook to advance to Appellant the funds necessary to make loan payments and to maintain and operate the plant (Section 12.1). Respondent would be required to make such advances even if the plant was damaged or destroyed, the whole with a view to servicing debt and to repair and restore the plant (Section 12.4). The power contract is not subject to termination in the event of *force majeure* (Section 17.1 and 17.2). Moreover, it was agreed that if Appellant was unable to complete the project so as to deliver electrical energy pursuant to the provisions of the contract, then Respondent could act in its stead (Section 21.1).

[24] We open parenthesis to summarize three Court cases which occurred following the opening of the power plant. The judgments were adduced in evidence to demonstrate the context of the parties' dealings.[37]

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[36] *Ibid.*

[25] **The Recall Case.** On August 6, 1976, the government of Newfoundland and Labrador required that Appellant supply it with 800 megawatts of power commencing October 1, 1983.[38] Appellant refused because to do so would be contrary to the power contract and to the provisions of the loan documents.[39]

[26] The Province of Newfoundland and Labrador and Respondent each instituted proceedings before the courts of their respective jurisdictions. Newfoundland and Labrador lost in first instance and the Newfoundland and Labrador Court of Appeal dismissed the appeal.[40] The same result was experienced in Quebec where the Superior Court declared that Appellant's default to sell to Respondent all energy produced by the plant subject to the permissible "recapture" would constitute a breach of contract. The Quebec Court of Appeal dismissed the appeal.[41] On June 9, 1988, the Supreme Court of Canada dismissed the appeal from the Newfoundland judgment[42] and declared moot that arising from the Quebec judgment.[43]

[27] ***The Reversion Act***. On December 17, 1998 the Province of Newfoundland and Labrador passed legislation to retrocede to the Province the rights granted under the legislated lease.[44] Following a reference by the government on February 10, 1981, the Court of Appeal of Newfoundland and Labrador confirmed the validity of the legislation.[45] The matter was appealed to and pleaded before the Supreme Court of Canada, but during the advisement the parties requested that the Supreme Court not render judgment as they wished to negotiate a settlement.[46] However, the parties failed to agree[47] and on May 3, 1984, the highest Court, rendered a judgment in *Reference re Upper Churchill Water Rights Reversion Act*.[48] The Supreme Court of Canada held that the pith and substance of the law was such as to interfere with the rights of Respondent outside the territorial jurisdiction of Newfoundland and Labrador and was thus *ultra vires* of the legislature of that province.

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37 *Id.*, para. 83.

38 Exhibit D-37, Arrêté en Conseil du gouvernement de Terre-Neuve-et-Labrador, August 6, 1976, A.F., vol. 21, p. 8215; Judgment in appeal, *supra*, note 1, para. 89.

39 Which would entitle First Mortgage Bond holders to demand immediate repayment of more than $500 million: Judgment in appeal, *supra*, note 1, para. 90; Exhibit D-38, Lettre de M. John W. Beaver, alors président de Churchill Falls (Labrador) Corporation Limited, adressée à l'honorable John C. Crosbie, ministre des Mines et de l'Énergie de Terre-Neuve-et-Labrador, August 31, 1976, A.F., vol. 21, p. 8220.

40 *Newfoundland (Attorney General) v. Churchill Falls (Labrador) Corp.*, [1985] 56 Nfld. & P.E.I.R. 91, (N.L.C.A.).

41 *Hydro-Québec c. Churchill Falls (Labrador) Corp*., J.E. 85-255, (C.A.).

42 *Newfoundland (Attorney General) v. Churchill Falls (Labrador) Corp.*, [1988] 1 S.C.R. 1085.

43 *Hydro-Québec v. Churchill Falls (Labrador) Corp.*, [1988] 1 S.C.R. 1087.

44 Judgment in appeal, *supra*, note 1, annex II, Revised Time Line, at "December 17, 1980".

45 *Id.*, at "February 10, 1981".

46 Judgment in appeal, *supra*, note 1, paras. 106 and 107.

47 *Id.*, paras. 111 and 112.

48 *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297.

[28] **The Final Capital Cost of the Plant.** The mill rate payable by Respondent under the terms of the power contract is a function of the final capital cost of the plant. Having failed to agree on such cost, the parties submitted the matter to arbitration. Dissatisfied with the arbitral decision, Appellant instituted proceedings before the Quebec Superior Court to determine the final capital cost. After judgment and pending appeal, the parties agreed and fixed the final capital cost of the plant at $Can 900 million.[49]

[29] Over the years, Appellant recaptured the megawatts reserved for it in virtue of the terms of the power contract. The electricity was sold to Newfoundland and Labrador Hydro who in turn resold it at a profit to Respondent.

[30] On June 18, 1999 the parties entered into the Guaranteed Winter Availability Contract (GWAC) with effect retroactive to November 1, 1998 and expiring in 2041.[50] Respondent agreed to pay more for energy made available to it beyond the volumes foreseen by the power contract. In exchange, Appellant renounced to its discretion to make such additional capacity available and granted to Respondent the right to require delivery of such additional power.

[31] At the special meeting of the Board of Directors of Appellant where the GWAC was approved, William Wells, then Chief Executive Officer (CEO) of Appellant and chairman of the meeting, stated that the agreement would assure Appellant's financial viability until 2041.[51] At trial, Victor Young who was a subsequent CEO of Appellant added that the GWAC enabled Appellant to pay dividends to its shareholders.[52]

3- THE TRIAL JUDGMENT

The admissible evidence

[32] After a review of the facts as set for in the preceding section of this judgment, the trial judge addressed issues of admissibility of evidence relating to various documents and certain expert evidence.

[33] The judge dismissed Appellant's application to adduce as evidence pursuant to article 2870 *Civil Code of Québec* ("*C.C.Q.*"), three documents originating with Respondent but for which the actual authors could not be identified.[53] He also refused

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49 Judgment in appeal, *supra*, note 1, paras. 122-124.

50 Judgment in appeal, *supra*, note 1, para. 159, and annex I, Glossary of Defined Terms – Lexique, at "GWAC"; Exhibit D-59, En liasse, « Churchill Falls Guaranteed Winter Availability Contract », November 1, 1998, amended on March 29, 2000, A.F., vol. 23, p. 8724.

51 Exhibit D-61, Procès-verbal de la 293e réunion du Conseil d'administration de Churchill Falls (Labrador) Corporation Limited tenue le 18 mai 1999, A.F., vol. 23, p. 8776; Judgment in appeal, *supra*, note 1, para. 185.

52 Judgment in appeal, *supra*, note 1, para. 190; Victor Young's testimony, September 12, 2013, A.F., vol. 55, p. 21986.

53 Judgment in appeal, *supra*, note 1, paras. 225-243. Those documents are: Exhibit P-25, Document entitled "Dossier Bas-Churchill" from *Secteur Énergie*, October 20, 1989, A.F., vol. 5, p. 1601; Exhibit

production into evidence of a document entitled "Statement of Intent Regarding Churchill Falls Negotiations" dated February 1, 1984,[54] because the document was subject to settlement privilege.[55]

[34] The judge also refused production of the report of one of Appellant's experts, Mr. David Massell, Doctor of History, entitled "Churchill Falls Narrative" dated November 30, 2011,[56] and to which report numerous documents were annexed.[57] This report summarizes the events leading up to the signature of the power contract in 1969.

[35] The judge remarks that the dispute revolves around events occurring subsequent to the execution of the contract, particularly the changes in the electricity market, and the effect of such changes on the obligations of good faith and cooperation and on Respondent's obligation to exercise its rights in a reasonable manner.[58] The judge opined that since Mr. Massell's report did not address these points, his chronology of events pre-dating the conclusion of the contract was not relevant.[59]

[36] The judge added that Mr. Massell's report was neither useful nor necessary because it presented the documentation related to the negotiation and signature of the power contract in an incomplete and biased fashion.[60] Moreover, the judge added that the report went well beyond Mr. Massell's field of expertise, as he had no particular knowledge of Respondent's business, the history of Quebec's "Quiet Revolution", negotiation of power contracts, finance or law.[61] The judge strongly rebukes Mr. Massell for his lack of objectivity.[62] The refusal to permit the production of the Massell report encompassed the numerous documents annexed thereto.[63] The judge also ruled that these documents were not to be considered as part of the record distinct from the report.[64]

P-26, Document entitled "L'électricité au Labrador" emanating from the *Direction de l'électricité, DGEA-secteur Énergie*, November 10, 1989, A.F., vol. 5, p. 1607; Exhibit P-29A, Document entitled "Négociation avec Newfoundland and Labrador Hydro concernant le contrat d'achat avec CF(L)Co" including annexes 1, 2, 3 and 4, as well as a document entitled "Revenue du dossier Churchill Falls", which were sent together as a single fax transmission on September 24, 1996, *en liasse*, A.F., vol. 5, p. 1673.

54 Exhibit P-9, Statement of Intent regarding Churchill Falls Negotiations, February 1, 1984, A.F., vol. 4, p. 1081.

55 Judgment in appeal, *supra*, note 1, paras. 244-272.

56 Exhibit P-39, "Churchill Falls Narrative", David Massell, Associate Professor of History, University of Vermont, together with Dr. Massell's curriculum vitae, November 30, 2011, A.F., vol. 6, p. 1850.

57 Filed under P-39.1 to P-39.161, A.F., vol. 6-14, pp. 1952-5332.

58 Judgment in appeal, *supra*, note 1, para. 318.

59 *Id*., paras. 319-322.

60 *Id*., paras. 326-328 and 336-341.

61 *Id*., paras. 344 and 345.

62 *Id*., paras. 346-348.

63 *Id*., para. 350.

64 *Id*., paras. 351 and 352. Note that eleven previously introduced and filed documents are not covered by this decision.

[37] Given his decision not to allow the production into evidence of the Massell report, the judge ruled that he need not consider the report of Mr. Savard, the expert witness called by Respondent to rebut the evidence of Mr. Massell.[65]

[38] Appellant also filed an expert report of Mr. John Dalton, dated October 8, 2010 analysing the power contract and entitled "Evaluation of the Power Purchased Contract for the Churchill Falls Project when Negotiated and under Current Market Conditions".[66]

[39] The judge remarks that there are a number of points of agreement between Mr. Dalton and the Respondent's expert, Mr. Carlos Lapuerta, principally:

a) the contract was a reasonable one for its time;

b) the full potential of Churchill Falls had to be developed for the project to be cost effective;

c) because of the distance factor, the cost of transmission had to be amortized over the largest amount of power possible;

d) hydroelectric facilities are relatively immune to inflation because once capital has been committed, operating costs are small;

e) the contract allocated risk efficiently from Appellant's perspective and that of the lenders;

f) Respondent assumed many of those risks;

g) the fixed price allowed Appellant to finance the project;

h) Appellant got to build the project and to largely achieve its return objectives;

i) there had to be a purchaser or purchasers prepared to commit to all of the power;

j) as a result, Appellant and Brinco encouraged Respondent to enter into the contract on the basis that Churchill Falls power would be cheaper than Respondent's alternatives, and the latter made its choice on that basis;

k) protection from inflation was one of the benefits Respondent got under the contract;

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65 *Id*., paras. 394-405.

66 Exhibit P-40A, Coloured copy of the expert report entitled *Evaluation of the Power Purchase Contract for the Churchill Falls Project when Negociated and under Current Market Conditions*, prepared by John Dalton, October 8, 2010, A.F., vol. 14, p. 5370.

l) the contract gave Respondent a higher degree of inflation protection than would pursuing its own projects.[67]

[40] Mr. Dalton acknowledged that the pricing provided in the power contract reflected the capital cost of the project and the cost of financing it.[68] The pricing was reasonable given the market for electricity in 1969 when the contract was signed.[69] However, the electricity market has significantly evolved since 1969 such that the value of the power sold pursuant to the contract has increased considerably.

[41] In Mr. Dalton's opinion, the Respondent has benefitted from the increased value of the electricity resulting from the unforeseen changes in the market whereas Appellant continues to be bound by a price structure which is out-of-date.[70] Mr. Dalton specified the changes which have occurred in the market for electric power since 1969:

a) significant increases in oil prices due to "oil price shocks", particularly in 1971-1973 and 1979-1980;

b) an era of high inflation;

c) reduced public confidence in nuclear energy;

d) increased exports by Respondent at profitable rates to New England and New York State;

e) statutory changes to Respondent's mandate permitting "... a more aggressive pursuit of export market opportunities";

f) the emergence of broader wholesale markets in the United States due to the adoption of "Open Access" regulations by the United States Federal Energy Commission (FERC) and to the construction of enhanced transmission interconnection facilities;

g) the structural and administrative changes adopted by Respondent to take advantage of the newly available expanded wholesale electricity markets in the United States.[71]

[42] While recognizing Mr. Dalton's expertise, the judge questioned his objectivity as well as his analysis of certain salient facts and thus doubted the credibility, reliability and probative value of the opinions expressed in the Dalton report.[72] The judge emphasized

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67 Judgment in appeal, *supra*, note 1, para. 371.
68 *Id*., paras. 364-367.
69 *Id*., paras. 362 and 363.
70 *Id*., para. 372.
71 *Id*., paras. 373 and 503.
72 *Id*., para. 385.

Mr. Dalton's failure to consider the joint meeting of the Boards of Directors of Brinco and Appellant held on April 10, 1968 wherein were expressed the significant stakes underlying the power contract and the reasons which led the parties to conclude the pricing structure.[73]

[43] The judge's concerns over the probative value of the Dalton report lead him to conclude that the report did not support the relief sought by Appellant.[74]

[44] On the other hand, the judge accepted the expert report dated May 28, 2012 of Mr. Lapuerta filed by Respondent and entitled "An Economic and Financial Analysis of the Contract Between Hydro-Québec and Churchill Falls (Labrador) Corporation Limited".[75] He concluded that this report was credible, reliable and convincing.[76] Accordingly, the judge relied heavily on this report citing long extracts.

[45] According to Mr. Lapuerta the power contract of 1969 reflects the following paradigm which the judge adopts:

> 20. To summarize, the parties chose the following contractual paradigm: Hydro-Québec accepted significant risks, but enjoyed cost certainly and protection against inflation, while CFLCo secured the ability to raise large amounts of debt and to earn a relatively secure return on investment, and Brinco retained a majority equity position.77

[46] Even though the electricity market has evolved since 1969, Mr. Lapuerta expressed the opinion that the parties to the contract were not unaware that the price of electricity could vary considerably by way of increase or decrease during the long life of the contract. Contrary to Appellant's expert Mr. Dalton, Mr. Lapuerta believed that the uncertainty of change in the future price of electricity was known to the parties ("known unknowns") and it was precisely to guard against such uncertainty that the parties agreed to the fixed price schedule in the contract.[78]

[47] According to the judge, Appellant does not contest the fairness of the power contract at the time of its execution on May 12, 1969.[79] Rather, it questions Respondent's refusal to renegotiate the pricing terms in order to take into account subsequent significant changes in the Quebec and North American energy markets. These changes have enabled Respondent to profit enormously from the contract in a

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73 *Id*., paras. 386-390.
74 *Id*., para. 392.
75 Exhibit D-270, Rapport de l'expert Carlos Lapuerta de The Brattle Group intitulé « An Economic and Financial Analysis of the Contract between Hydro-Québec and Churchill Falls (Labrador) Corporation Limited » …, May 28, 2012, A.F., vol. 39, p. 15558.
76 Judgment in appeal, *supra*, note 1, paras. 418-422.
77 *Id*., para. 412.
78 *Id*., paras. 412, 413 and 415.
79 *Id*., para. 210.

manner not contemplated by the parties at the time it was signed. Given the principles of good faith, the obligation to cooperate and the duty to exercise contractual rights reasonably, Respondent is bound to renegotiate the price with particular regard for the relationship between the parties and the significant changes in the market since 1969.[80]

[48] Appellant argues that the duty of good faith and the doctrine of abuse of rights set forth in articles 6, 7, 1375 and 1432 *C.C.Q.* confirm the intent of the legislator to introduce the notion of contractual equity into the *Civil Code of Québec*.[81] This is not the doctrine of *imprévision*, but rather, a duty to act in a manner which reflects the relationship binding the parties and their reciprocal expectations with a view to maintaining the equilibrium of the contract.[82] Once this equilibrium is disrupted, the Court can intervene to re-establish it, according to Appellant's submissions.[83]

[49] Respondent maintains that Appellant's position is not based on any recognized legal principle. Moreover the facts of the case do not support the relief sought since the pricing in the contract reflected the risks assumed by Respondent which allowed the project to come to fruition. The power station will have enormous value upon the expiry of the power contract. The contract was an equitable and reasonable bargain when it was struck in 1969 and remains so today.[84]

[50] Respondent adds a reference to article 1439 *C.C.Q.* which states that a contract may not be "resolved, resiliated, modified or revoked" except on grounds recognized by law or by agreement of the parties.[85] Appellant's position closely resembles the doctrine of *imprévision* rejected by the Quebec legislator and which is not otherwise recognized in Quebec.[86] Respondent adds that the duty of good faith relates to the behaviour and conduct of parties, not to unforeseen or unpredicted circumstances in their relationship.[87]

[51] The judge thus enunciated the issues in the case, as follows:

> (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?*

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80 *Id*., paras. 208, 209, 436 and 437.
81 *Id*., paras. 424-429.
82 *Id*., paras. 430-434.
83 *Id*., para. 435.
84 *Id*., para. 211.
85 *Id*., para. 439.
86 *Id*., paras. 440-446.
87 *Id*., paras. 447-449.

(2) *In the affirmative, can the Court intervene in order to grant what it considers appropriate equitable relief?*

(3) *In the affirmative, what is the appropriate relief?*

(4) *Under reserve of the forgoing, is CFLCo's claim prescribed or otherwise barred by waiver, ratification, fin de non-recevoir or other similar doctrine?* [88]

THE FIRST TWO GROUNDS: Has Respondent breached its duties of good faith and cooperation and its obligation to exercise its contractual rights in a reasonable manner?

[52] The judge was of the view that the relationship between the parties and their respective expectations should be gleaned from the contract.[89]

[53] In the letter of intent of October 13, 1966,[90] the parties agreed to an option to renew at an undetermined price. However, this approach was quickly abandoned for financial considerations. These concerns are set forth in the minutes of the joint meeting of the Boards of Directors of Brinco and Appellant held on April 10, 1968. The increased constructions costs for the project made the contract far less viable economically for Respondent looking 40 years forward. The judge cites large portions of these minutes which have been quoted above in this judgment.[91]

[54] The judge concludes that the absence of a price indexation clause in the contract was the result of a negotiation and the price as indicated reflects the intention of the parties at the time the contract was signed.[92] The judge states that the contract was freely negotiated.[93] He particularly found that the evidence in no way supported Appellant's contention that it was in a disadvantaged negotiating position.[94]

[55] The judge analyzed the sharing of risk under the contract. He concluded that most of the risks relating to financing and construction costs of the project were assumed by Respondent despite the fact that Appellant remained the project manager and owner. In return, Respondent obtained protection against the increase of electrical prices throughout the duration of the contract, including the 25 year renewal term. The

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88 *Id*., para. 273.
89 *Id*., paras. 450-458.
90 Exhibit D-16, Lettre d'intention – Base d'un contrat définitif d'énergie entre Churchill Falls (Labrador) Corporation Limited et la Commission hydroélectrique de Québec, October 13, 1966, s. 11.1, A.F., vol. 17, p. 6460.
91 Judgment in appeal, *supra*, note 1, para. 460.
92 *Id*., paras. 461-467.
93 *Id*., paras. 468 and 469.
94 *Id*., paras. 470-485.

judge characterizes this as a reasonable consideration given the significant risks assumed by Respondent.[95]

[56] The judge acknowledged numerous changes in the electrical market since the signature of the contract in 1969 but he refuted Appellant's contention that these changes were unforeseeable. In such regard he adopted the conclusions of Respondent's expert, Mr. Lapuerta and his notion of "known unknowns".[96] Thus, the judge concluded that the parties to the contract knew that the future was uncertain and that the price of electricity was subject to fluctuation; it was a known unknown.

[57] Appellant obtained what it sought – a long term contract obliging Respondent to purchase all the energy produced by the Churchill Falls project, irrespective of Respondent's requirements (take or pay) at a price which guaranteed to Appellant, almost risk free, the financing and construction of the project as well as a reasonable return on investment.[97] Respondent obtained a supply of electricity at a price comparable to its own hydroelectric projects together with a comparable stability of that price and protection against inflation.[98]

[58] The judge refuted Appellant's argument based on changes in the market for electricity:

> [517] To accept CFLCo's restrictive assertions regarding the limited nature of what Hydro-Québec bargained for and "got", requires the Court to ascribe an intention, on the part of Hydro-Québec, as to its objectives in negotiating the Power Contract not reasonably supported by the evidence. Moreover, it requires an inappropriate and restrictive interpretation of the *Hydro-Québec Act* regarding the allegedly limited scope of the mandate of Hydro-Québec, as it existed from time to time and at all times relevant to the present proceedings.
>
> [518] It is not relevant whether the amendments to the *Hydro-Québec Act* had or had not changed its mandate as it relates to the matters in issue in these proceedings and, accordingly, whether there may be *"...something different that [its] getting today*". These changes, if they did occur, were not intended to nor did they adversely affect the interests of CFLCo. It does not follow, seeing the nature of this relationship described above that, **for this reason alone**, it "*... should share the [allegedly] unexpected benefits*".
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> [519] In this context, the only question to be asked and answered is whether, as CFLCo contends, by reason of these amendments to the *Hydro-Québec Act*, the contractual obligation of good faith and cooperation and the duty to exercise its

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95 *Id*., paras. 486-501.
96 *Id*., paras. 502-508.
97 *Id*., paras. 509-513.
98 *Id*., paras. 515 and 516.

> rights in a reasonable manner require Hydro-Québec to: "*...share the [allegedly] unexpected benefits*" in the manner sought in these proceedings.
>
> [520] Seeing the eidence [sic] as to the nature of the relationship between the parties and of the contractual equilibrium agreed to under the Power Contract, the Court would conclude there is no such justification in fact or in law to support this contention.[99]

[59] Moreover, the judge underlined that the action continued a juridical saga commenced by the Province of Newfoundland and Labrador with a view to challenging the contract.[100] He added that the Province encouraged Appellant to institute proceedings and assumed the cost thereof.[101] The foundation for the recourse is substantially similar to that of the previous proceedings.[102] After analyzing the various law suits between the Province and the Respondent, the judge concluded that the instant recourse is without merit.[103]

[60] He noted that Appellant's submission based on good faith and abuse of rights resembles the doctrine of *imprévision*.[104] Even if Appellant's expanded view of the duty to act in good faith was correct, the obligation could not be successfully invoked in this case because the contractual equilibrium agreed upon by the parties was not changed.[105] The judge was of the view that Appellant is not seeking to re-establish a contractual equilibrium that had been lost but rather, is seeking a new contract under terms more favourable to it.[106]

[61] The judge also based his findings on the principle of the stability of contracts found primarily in article 1439 *C.C.Q.* He added that the notion of contractual good faith as set forth in articles 6, 7, and 1375 *C.C.Q.* governs the conduct of the parties and does not enunciate a broad principle of equity in contracts.[107]

[62] He concluded that since Respondent is exercising its rights reasonably and in conformity with the parties' intent so that there arises no obligation to renegotiate the contract.[108]

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99 *Id*., paras. 517-520.
100 *Id*., para. 521.
101 *Id*., paras. 522-533.
102 *Id*., paras. 534-538.
103 *Id*., paras. 539-541.
104 *Id*., paras. 542-547.
105 *Id*., paras. 548-557.
106 *Id*., paras. 558, 568 and 569.
107 *Id*., paras. 559-561.
108 *Id*., paras. 562-567.

THE THIRD GROUND: If the two foregoing questions are answered in the affirmative, what is the appropriate relief?

[63] Appellant seeks principally to replace the pricing provisions in the contract with new terms reflecting the current price for electricity obtained by Respondent in the export and Quebec domestic markets.[109] Failing this, Appellant seeks the cancellation of the power contract.

[64] Respondent contests the proposed pricing schedule raising several problems with the methodology of the calculation.[110] It also contends that cancellation of the contract would cause an interruption of the supply of electricity with dire consequences.[111]

[65] The judge agreed with Respondent that Appellant's methodology is problematic, particularly with regard to costs of transmission and distribution of electricity as well as the capital cost of new hydroelectric power plants built by Respondent after signature of the contract.[112] He concluded that the proposed pricing schedule is inappropriate and that the proof in the record does not support an alternative which would take account of the problems in methodology raised by Respondent.[113]

THE FOURTH GROUND: Is Appellant's claim prescribed or otherwise barred by waiver, ratification, fin de non-recevoir, or other similar doctrine?

[66] The judge remarked that Appellant's case rests primarily on changes in the electric market which benefitted Appellant and which would impose on Respondent a duty to renegotiate the contract. These changes occurred between 1970 and 1977. The new market for electricity would have, in essence, crystallized upon the adoption by FERC, in 1996 of a new policy regarding the regulation of the American market ("Open Access"). Thus, the judge concluded that Appellant's recourse is prescribed.[114]

[67] However, the judge was of the opinion that Appellant never renounced to its recourse based on the unfairness it perceives in the contract. Accordingly, he did not consider the doctrines of waiver, ratification, *fin de non-recevoir* or other similar doctrine as impediments to the relief sought.[115]

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109 *Id*., paras. 571-577.
110 *Id*., paras. 578 and 579.
111 *Id*., para. 580.
112 *Id*., paras. 581-597.
113 *Id*., paras. 598 and 599.
114 *Id*., paras. 608-618.
115 *Id*., paras. 619-624.

[68] Finally, the judge dismissed the Appellant's action with costs including the costs of Respondent's experts and also awarded a special fee of $250,000.00 to Respondent's attorneys.

4- THE ISSUES

[69] The parties' submissions address Appellant's contestation of certain factual conclusions drawn by the judge (Section 5.1 below) and the conclusions of law (Section 5.2 below) regarding the requirements of contractual good faith, prescription and the admissibility into evidence of certain documents.

5- THE ANALYSIS

5.1 The contestation of factual conclusions

[70] Appellant disputes various factual conclusions arrived at by the judge. It submits that the approach favoured by the judge in virtue of which "a contract is a contract" as well as his emphasis on previous litigation, impeded him from appreciating the complexicity of the fundamental bargain struck by the parties and from concluding that the relationship was based on an equitable division of risk and benefit. The occurrence of unforeseen circumstances in the world of energy gave rise to substantial profits which Respondent should now share given its duty to act in good faith.

[71] Appellant is emphatic that the interdependence of the parties, the mutual confidence which characterized all their dealings, the signature of the letter of intent and the execution of the multi-year power contract, leads to one conclusion: the bargain struck is based on an equitable sharing of risk and benefit. More particularly, Appellant argues that the long term contract conferred benefits on both parties and reflected a certain interdependence. Respondent had put on hold the development of its own hydroelectric projects, and the contract assured it access to the sources of energy required to satisfy the needs of Quebecers. The contract also allowed Appellant to obtain the financing it required to build the plant. The start of construction prior to the signature of the contract on May 12, 1969 attests to the high level of confidence existing between the parties; the wording of the contract requires their mutual cooperation. The occurrence of an unforeseen situation after the signature of the contract should lead to a renegotiation so that the equilibrium desired by the parties not be disrupted.

[72] Appellant further submits in this regard that the high level of confidence and interdependence between the parties gave rise to a high level of flexibility between them so that when circumstances evolved between the time of the signing of the letter of intent and the contract, the parties adapted. This spirit of cooperation should give rise now, to an obligation to renegotiate the price schedule of the power contract because of the unforeseen changes in the energy market.

[73] Appellant's argument is three pronged; 1) it contends that the equilibrium of the contract at the outset was equitable; 2) this equilibrium has been upset by unforeseen events which transformed the energy market and 3) the cooperation characterizing the relationship between the parties obliges Respondent to renegotiate the price schedule to re-establish the equilibrium intended by the parties at the outset.

[74] Regarding the first point, we recognize that the relationship between the parties reflects a certain interdependence. Thus, since 1965, Respondent put many of its own construction projects on hold such that at the time the power contract was signed, Respondent needed the energy to be produced by Appellant. The facts also bear out that the parties trusted each other: on the faith of the letter of intent, Appellant invested $Can 132 million and Respondent invested $Can 115 million. The equilibrium between the risks and benefits flowing from the contract was considered fair by the parties when the contract was signed. Both parties and their experts agreed with this proposition.

[75] However, Appellant differs with the judge's conclusion on each of the second and third propositions stated above.

[76] Appellant argues that unforeseen events shattered the initial contractual equilibrium. It contests the judge's conclusion that the parties knew that energy prices were subject to fluctuation when they fixed the price so that this element was a "known unknown", as articulated by the expert Mr. Lapuerta.[116] Appellant distinguishes the forseeability of the possibility of the occurrence of an event on the one hand from the expectations of the parties to a long term contract faced with an unforeseeable event. In this case, nobody foresaw the radical transformation of the North American energy market.

[77] Appellant is in sound financial health and should remain so based on reasonable forecasts. Nonetheless, it argues that the striking difference between the price of energy foreseen in the contract and its present market value renders the contract unfair and had the parties known, they would never have agreed to such an unfair sharing of the benefits.

[78] The Court believes that Appellant is attempting to redefine the initial equilibrium agreed to by the parties. It is appropriate to re-examine the parties' circumstances when they signed the contract. The uncontradicted evidence establishes that they knew that the price of hydroelectric power was subject to fluctuation but they voluntarily agreed to fix the price.

[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 Respondent accepted to assume the majority of the financial risks which allowed

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[116] *Id*., para. 508.

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 Vandall –[117] whose long life expectancy[118] 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.

[80] The judge's conclusions that the parties' choice to not index the price of the energy was made in a free and voluntary fashion and that Respondent obtained protection against inflation of operating costs are firmly supported by the evidence.

[81] The letter of intent set out in clear terms that the agreed price for the sale of the electricity is based on the cost of construction of the plant and not the market price for the energy. The notion of price indexation as a function of external elements (i.e. the market) is completely foreign to the parties' intent demonstrated by the documents. To be convinced of this, one need only read clauses 16 and 17 of the letter of intent and clause 8.2 of the power contract.

[82] Secondly, the minutes of the meeting of April 10, 1968, demonstrate the parties' position and confirm that including a price adjustment clause in the contract was considered but rejected. The reason was explained by several witnesses. Particularly, Thierry Vandall stated that in the 1960's, Quebec's hydroelectric potential was huge.[119] Respondent elaborated its development programs as a function of construction cost without consideration for the value of the energy in the market place. To entice Respondent to purchase the energy produced by the Churchill Falls plant rather than build its own facility, Appellant needed to offer to Respondent the same benefits that Respondent could derive from its own projects – including protection against inflation – but at a better price, because, upon the termination of the contract, the plant would not belong to Respondent.[120]

[83] Thirdly, Mr. Ed Martin, President and CEO of Appellant, acknowledged during his testimony that the parties considered adding indexation clauses to the contract but deliberately chose not to.[121]

[84] It was this free and voluntary choice not to index the energy price which enabled Appellant to obtain the financing required for the construction of the plant.

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117 Thierry Vandal's testimony, October 21, 2013, A.F., vol. 59, p. 23454. Mr. Thierry Vandal was CEO of Respondent from 2005 to 2015: *Id*., pp. 23390 and 23391.

118 *Id*., pp. 23425, 23445 and 23446.

119 *Id*., p. 23972.

120 *Id*., pp. 23424 and 23572-23574.

121 Judgment in appeal, *supra*, note 1, para. 462; Ed Martin's testimony, September 11, 2013, A.F., vol. 55, p. 21771.

[85] Respondent's expert, Mr. Lapuerta,[122] whose opinion was accepted by the judge,[123] explained why the parties agreed to a fixed, decreasing price. This pricing was totally unrelated to the cost or value of alternate sources of energy. Mr. Lapuerta specifically makes the point that financing was made possible by the price schedule in the contract:

> **V. Conclusions**
>
> 149. In 1969 the parties agreed to a fixed, declining price schedule that was not anticipated to track the costs of alternative forms of power generation over time. Such a declining price schedule is common practice in long-term power sales contracts, and along with other Contract terms, it has played a key role in permitting the project to raise and pay off vast amounts of debt, while permitting Brinco to retain a majority equity interest despite contributing a small portion of the total funds. The pre-determined price schedule has also offered Hydro-Québec a high degree of certainty concerning the generation costs for a substantial portion of its portfolio, protecting Hydro-Québec against inflation in the costs of generating electricity.
>
> 150. The future level of oil prices was a “known unknown” in 1969, and the Contract allocated the risks of subsequent developments in oil prices in a reasonable way. The Contract insulated CFLCo from the risks that oil-fired generation or some other type of generation might become economically more attractive than the Churchill Falls project, and in exchange CFLCo gave away the upside associated with the possibility that oil prices might increase and make the project quite attractive during the term of the Contract. This was the contractual paradigm agreed to by the parties, and it has worked in practice. More than four decades have passed, and the project is still on track to earn a return in line with its initial target, considering the cash flows to date and reasonable expectations for the future.
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> 151. The requested relief would undermine the contractual paradigm, rewarding CFLCo with the benefit of hindsight for the favorable resolution of risks that CFLCo never incurred, and taking away the cost certainty and the inflation protection that Hydro-Québec stood to obtain if the Contract price proved less expensive than alternatives. The requested relief would undermine the ability to enforce the efficient allocation of risk in long-term contracts.[124]

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[122] Mr. Lapuerta was accepted as an economic and financial expert in the energy sector in general and in the economic and financial analysis of long-term energy contracts in particular. Judgment in appeal, *supra*, note 1, para. 406.

[123] It is summarized by the judge: *Id.*, paras. 406-416.

[124] Exhibit D-270, Rapport de l’expert Carlos Lapuerta de The Brattle Group intitulé « An Economic and Financial Analysis of the Contract Between Hydro-Québec and Churchill Falls (Labrador) Corporation Limited », A.F., vol. 39, p. 15612.

[86] Mr. Lapuerta also explained the effect of the price schedule as between the parties to the contract. The choice of a price decreasing over time was made for a particular purpose. It allowed Appellant to receive more funds at the beginning of the term of the contract in order to satisfy its debt obligations which were more onerous at that time:

> 44. It would be a mistake to believe that the price schedule in the Contract reflected any projections concerning the likely future value of the power. Instead, a key objective of the price schedule was to follow the schedule of anticipated CFLCo interest expenses and debt repayments. Figure I below shows that. The Contract price permitted the project to earn higher cash flows at the beginning when the interest and debt repayment obligations were highest, in exchange for lower cash flows later on when the interest and debt repayments were lower.
>
> 45. Anyone lending money to this project would have relied heavily on the broadly parallel schedule between the Contract price and the interest and debt repayments. The parallel schedule reduced the risks to lenders in the early years when the interest and debt repayments were higher. Higher prices in the early years strengthened the cash flow position of the company, and permitted CfLCo to start paying back the loans more quickly.
>
> 46. Had the price schedule instead contemplated higher prices as the years went by, then Hydro-Québec would have logically insisted on Iower prices in the early years to compensate. The result would have been lower expected operating cash flows for the entire project until the lower prices in the early years were finally overtaken by subsequent price increases. Lower prices in the early years would have implied less of a margin between the revenues and debt payment obligations, increasing the risk of default to bondholders. Had the price been anticipated to rise in line with an index parameter, such as an inflation index or oil price index, then uncertainty in the future performance of the indexation parameter would have magnified the risks to bondholders. Investors would have responded by reducing the amount of debt they were willing to lend to the project. The only alternative would be to raise more equity, which as I explain below, if even possible, would have reduced Brinco's equity share.
>
> 47. The price schedule in the Contract reflects common practice in the design of long-term agreements concerning the sale of power. When an investor contemplates building a power station that will sell substantially all its power to one large customer, the investor will naturally seek a Iong-term contract before initiating construction. Many investors seek to finance construction with substantial amounts of debt, and they appreciate that lenders typically seek debt repayment schedules that involve higher payments in the early years of the project. The investors therefore ask the purchaser of the power to agree to price schedules that start out relatively high, and decline over time in line with the

> decline in interest expenses and debt repayments. Analysts call this pattern "front-end loaded", as the project can anticipate higher prices at the front end of the contract with lower prices towards the end. I have seen examples of front-end loaded long-term power contracts in several different countries, and the technique is mentioned in several different reports on the financing of power projects.
>
> […]
>
> 58. In summary, a major objective of the price schedule was to follow the interest and debt repayment obligations, enabling the project to raise large amounts of debt financing. Had the parties agreed to index the price to inflation or to oil, then the possibility of higher future prices would have implied lower prices near the date of Contract signature, which would have introduced a high risk of default, incompatible with an investment grade loan. Investors would have responded by lending less to the project, or not lending at all.[125]
>
> [References omitted]

[87] Mr. Lapuerta explained that the lower price fixed for the renewal term of the contract was important for Respondent since it provided protection against the uncertainty of inflation in costs:

> 26. While the higher prices at the beginning of the Contract were attractive to CFLCo, the lower prices at the end of the Contract were attractive to Hydro-Québec, particularly because they offered protection against the uncertainties of inflation in the costs of generating electricity. By requesting a 25-year extension, Hydro-Québec showed that it attributed value to the lower fixed prices in the later years of the Contract. While CFLCo did not want to grant a unilateral extension option, the parties agreed on an automatic extension at a fixed price. Hydro-Québec knew that the total costs of purchasing power under the Contract would fall within a relatively narrow range compared to the construction of a power station that used fossil fuels instead of water.[126]

[88] The expert illustrated his position with the help of a table reproduced as Annex I to this judgment. Mr. Lapuerta's opinion on this matter was accepted by the judge.

[89] The judge did not accept the opinion of Appellant's expert, Mr. Dalton, because even though he recognized the importance of the protection against inflation (para. [369] of the judgment) he failed to include it amongst the benefits that Respondent derived from the contract. Also, he failed to consider a number of crucial exhibits (para.

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[125] *Id*., pp. 15573 and following.
[126] *Id*., p. 15567.

[386] of the judgment).[127] Thus, the judge rejected Mr. Dalton's thesis for reasons of credibility, reliability and probative value. This Court may not intervene into such conclusion.

[90] The parties' decision to not index the price for electricity was also the result of their choice that Respondent would bear the risk of any variation in the value of energy in the future, a risk which Appellant was not in a position to assume.

[91] Appellant has not succeeded in challenging one of the judge's most significant factual conclusions – i.e. that in the context of the initial 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.

[93] It is not contested that Appellant did not have the financial strength to undertake the project without long term financing. On the final reckoning, Appellant invested $Can 150 million out of a total cost $Can 950 million.[128] The price schedule, based on construction cost, was meant to secure the lenders. The loan risk was minimal precisely because the power contract provided the certainty that the electricity would be sold at a price sufficient to repay the debt irrespective of any fluctuation in the market price.

[94] By accepting to pay a fixed price for energy over a long term contract, Respondent assumed a real risk given the possibility of a substantial decline in the price of nuclear or oil generated electricity:

> 80. The Contract’s fixed price schedule had a third main implication for Hydro-Québec, forcing it to incur substantial risks. If oil prices fell and made oil-fired power generation relatively cheap, or if nuclear power became extremely cheap as some contemporary economists thought might occur, then Hydro-

[127] The judgment in appeal deals with the report and the testimony of the expert Dalton: Judgment in appeal, *supra*, note 1, paras. 354-392. However, the judge noted in paragraph 371 that some facts were admitted by both experts.

[128] John Dalton’s testimony, September 30, 2013, A.F., vol, 57, p. 22764.

> Québec stood to suffer by paying a higher price for power from Churchill Falls compared to the costs of alternative forms of generation.[129]

[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 such risk.

[96] In his report, Mr. Lapuerta explains the consequences of a fixed price schedule for energy as follows:

> 89. In contrast, the fixed price schedule insulated CFLCo from the risks that the power from Churchill Falls might prove less attractive than alternatives. Since the Contract protected CFLCo from the associated risks, it also prevented CFLCo from receiving any benefits during the life of the Contract if the power proved more attractive than alternatives. CFLCo's position would then change at the end of the Contract. At that point CFLCo would bear the risks that the facility might have no substantial value compared to alternatives, and would retain all the benefits if generating power from Churchill Falls was less expensive than alternatives.[130]

[97] Appellant's proposition that Respondent was dependent on it for its energy supply must be put in context. Of course, Respondent needed the energy to be produced by Appellant, but not under any conditions. Respondent's refusal to contract in 1961 and 1964, and the requirements it expressed in the minutes of the 1968 meeting, demonstrate that Respondent could have decided to pursue its own infrastructure projects rather than to opt for the purchase of Churchill Falls electricity.

[98] In purchasing energy rather than constructing its own plant, Respondent obtained the benefit of a fixed price calculated as a function of construction cost and it obtained the additional advantage of protection against the inflation of operating costs which are absorbed by the plant's owner. The uncontradicted evidence demonstrates that Respondent would only purchase energy from Appellant, instead of producing its own, if the advantages were the same but the price cheaper since Respondent would not own the plant once the contract expired.

[99] For these reasons, Appellant has not succeeded in demonstrating reviewable error in the findings of the trial judge who concluded that:

1. Respondent's expectations were legitimate at the time the contract was signed and remain so today;[131]

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129 Exhibit D-270, *supra*, note 124, p. 15590.
130 *Id*., p. 15593.
131 Judgment in appeal, *supra*, note 1, para. 499.

2. the parties decided not to include any provision in the contract allowing for the review or indexation of the price of the energy; and[132]

3. the relief sought by Appellant would distort the contract by depriving Respondent of the advantages it obtained in exchange for the risks it assumed.[133]

5.2 The contestation of legal conclusions

[100] Not surprisingly the parties reiterate in appeal their submissions made in first instance.

[101] The thrust of the argument developed in Appellant's brief is threefold. The second argument addresses the remedies available to Appellant and the third concerns the possible effect of prescription on these remedies. The first branch of the submission is the most important since it contains the essence of the argument based on good faith. Appellant articulates the central issue in appeal as follows: "Does Hydro-Québec have a duty, based on good faith, cooperation and reasonable exercise of rights, to renegotiate the Power Contract and Renewal Contract".

[102] As often occurs when an appeal raises multifaceted questions which can be analyzed in different ways, each party has articulated and subdivided the first issue on its own terms. In such regard, Respondent answers the proposition underlying Appellant's first ground as follows: [TRANSLATION] "In Quebec civil law the courts cannot modify contracts where an unforeseen change in circumstances has occurred". In joining issue, the parties speak neither in the same terms nor of the same things.

[103] Accordingly in this part of the judgment, the parties' arguments will be summarized without reference to the abundant case law, doctrine and comparative law sources cited in their briefs. We then propose to address the arguments bundled under common headings.

A. The parties' contentions

[104] Based on the notions of good faith and abuse of rights (Articles 6, 7, 1375 and 1434 *C.C.Q.*), Appellant submits that the judge relied too strongly on two principles which must be moderated, namely the binding force of contracts and the autonomy of the will of contracting parties. Appellant continues that relational contracts of long duration, as opposed to transactional contracts, give rise to a duty for the parties to cooperate with each other. Their obligation to act in good faith may, in appropriate circumstances, require them to modify the terms of their contract. This duty to cooperate and even modify a contract, is codified in certain instances (see Articles 2941 and 2186 *C.C.Q.*) and is now recognized in decided cases. It is not part of the theory of

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[132] *Id*., paras. 500 and 501.
[133] *Id*., paras. 566 and 567.

imprévision which the Quebec legislator chose not to include in the *C.C.Q.* This duty to cooperate would apply to a contract which has become grossly inequitable or in respect of which the initial equilibrium has been broken because of new circumstances not anticipated by the parties. Appellant submits that these conditions are met in the present case so that the Court should grant the relief sought and declare that Respondent is obliged to negotiate with Appellant to modify the contract in order to provide for the payment of an equitable price to Appellant.

[105] Respondent's submissions approach the issue from a different angle. The theory of *imprévision* is a variation of the binding force of contracts (Article 1439 *C.C.Q.*) which the Quebec legislator intentionally rejected in 1994. Furthermore, the theory applies only where certain strict conditions are met which is not the case here. The Respondent's obligation to act in good faith cannot be transformed into an underlying obligation to share the benefits derived from a contract freely negotiated and agreed to, which is Appellant's true purpose. Even if the obligation to exercise contractual rights in good faith was recognized in the case law prior to the 1994 codification, its content has not been altered by that codification: it sanctions the conduct of a contracting party particularly where such parties' behaviour results in a rupture of the contractual equilibrium initially negotiated by the parties. However, this obligation does not constitute a legal basis for judicial revision of contracts where circumstances have changed. In the present case, Respondent's behaviour is beyond reproach and if the price adjustment that Appellant seeks today had been put on the table in 1969, the negotiations would have ceased and the project would never have been built for want of financing.

B. The link between *imprévision* and good faith

[106] While Appellant guards against pleading the theory of *imprévision* in its brief, Respondent accuses it of attempting to introduce a doctrine resembling *imprévision* under the cloak of good faith or equity. In fact, the similarity between *imprévision* and the concept of good faith described in Appellant's brief is sufficiently striking to merit examination of the legislative work preceding the adoption of the *C.C.Q.* Each party addresses this issue in its own way and at odds with the other. Thus, understandably, a certain confusion clouds this issue.

[107] In this vein, towards the end of its principle argument, after having commented several judgments of the Quebec courts, Appellant writes: "In that light, the few cases that have stated that *imprévision* does not apply in Quebec law were not wrongly decided. Those cases dealt with situations that are not even commensurate with the present case and in any event, in each case, even the criteria for *imprévision* were not met". Substantially, Appellant's submits that the decided cases in Quebec correctly observe that the legislator excluded form the *C.C.Q.* one type of *imprévision*. However, that exclusion has nothing to do with the particular situation that has come to pass between Appellant and Respondent. It is this situation which should now give rise in

Quebec law, under the guise of the obligation of good faith, to a duty for Respondent to reopen certain aspects of the power contract. In other words, the instant particular situation is fundamentally different from the kind of *imprévision* which, according to the courts, was excluded by the Quebec legislator in 1991. Moreover, it is not because this situation may resemble one form or another of *imprévision* that a remedy based on the recognized obligation to act in good faith should be denied, the whole according to Appellant.

[108] Respondent, for its part is insistent when it reiterates that the theory of *imprévision* is not recognized in Quebec law. Respondent goes still further: [TRANSLATION] "Invoking the power of the courts to develop the civil law, Appellant invites the Court, under the cloak of good faith, to do indirectly, that which the legislator purposely excluded. The judge in first instance was correct in refusing to follow Appellant's reasoning because: 1) the legislator rejected the theory of *imprévision* but even if it had not, the theory does not apply on the facts of this case and; 2) good faith cannot be used for this purpose". However, if the theory of *imprévision* would not apply to the facts of this case, why insist that the Quebec legislator rejected it in 1991?

[109] Perhaps there is another way to address the issue which will put to rest any doubt on the matter. One may wonder if the legislator, in rejecting the doctrine of *imprévision* during the preparatory work on the *C.C.Q.*, did not, explicitly or implicitly, dismiss Appellant's central argument before it was even articulated. There are two aspects to this question: 1) what might be the effect of rejecting *imprévision*, on the scope of the obligation to act in good faith taken *in abstracto*? 2) if the exclusion is not an obstacle to Appellant's good faith argument in the situation it currently finds itself, does it mean that looked at *in concreto*, Appellant should succeed in its case?

(i) The current provisions of the *Civil Code of Québec*

[110] Throughout their submissions, Appellant and Respondent refer to a number of articles of the *C.C.Q.* in support of their respective contentions regarding good faith, equity in contractual interpretation, abuse of rights, *imprévision*, binding force and inviolability of contracts. Still other articles of the *C.C.Q.* are helpful to clarify or nuance the possible answers to the parties' contentions. Given the numerous references to these provisions and their importance to a consideration of the issues, it is convenient to cite them at length in the Annex to this judgment. Thus, in the following passages reference will be made only to the number of the *C.C.Q.* articles. As needed, the relevant extracts from texts other than the *C.C.Q.* will be reproduced in the body of this judgment.

(ii) The legislative choices of 1991

[111] One must begin a reflection on the *C.C.Q.* with the work of the Civil Code Revision Office (“CCRO”) and the outcome of the CCRO proposals. These

recommendations cast a helpful light on the possible relationship between the theory of *imprévision* and the requirements of good faith.

[112] In its final report in 1978, the CCRO expounded a new equilibrium in contractual relations in order to [TRANSLATION] "establish better justice and equity".[134] The revision was also a reform process and as such succeeded in proposing several new provisions of law. Such provisions sharply departed from the then existing law as demonstrated by Articles 37, 38, 75 and 76 of the draft Fifth Book (Obligations):

> 37. Lesion vitiates consent when it results from the exploitation of one of the parties by the other, and brings about a serious disproportion between the prestations of the contract.
>
> Serious disproportion creates a presumption of exploitation.
>
> 38. A victim of a defect of consent may apply for the nullity of the contract or, if the circumstances so warrant, the reduction of his obligations.
>
> Where the defect of consent is imputable to the other contracting party, the victim may also sue in damages or join both recourses.
>
> 75. If unforeseeable circumstances render execution of the contract more onerous, the debtor is not freed from his obligation.
>
> In exceptional circumstances, and notwithstanding any agreement to the contrary, the court may resolve, resiliate or revise a contract the execution of which would entail excessive damage to one of the parties as a result of unforeseeable circumstances not imputable to him.
>
> 76. An abusive clause in a contract may be annulled or reduced.[135]
>
> [References omitted]

[113] These provisions inspired the following observations found in the General Introduction to Book V and in the comments to each article. The lengthy extracts which follow help to explain the purpose which motivated the legislator in subsequently choosing to retain some of these proposals but to discard others:

> Moreover, given the importance today of contracts with a predetermined content and of contracts of adhesion, and in the face of governmental concern for the protection of weak and disadvantaged persons in contractual relationships, it was thought advisable to include a series of measures intended to re-institute some

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[134] Civil Code Revision Office, *Report on the Québec Civil Code*, vol. 2, t. 2, Quebec, Éditeur officiel du Québec, 1977, p. 614. [Civil Code Revision Office].

[135] *Id.*, vol. 1, pp. 337-338 and 343.

> measures of social justice in these relationships. As a first step, it was sought to revive a long-standing civilian tradition by re-introducing into Québec law the concept of lesion between persons of major age; it would now result from a serious imbalance in the obligations due to the exploitation of one of the parties by the other.
>
> In keeping with this general policy, the courts have also been granted a certain power of review regarding contracts. According to Article 75, the courts would henceforth have the right, in exceptional circumstances, to review any contract whose execution would cause undue prejudice to one of the parties as a result of unforeseen events that could not be attributed to that party. Here again, this power applies only in exceptional cases and is limited by strict conditions.[136]

And later, in explaining each section individually the CCRO continues:

> **37**
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> It has become common, in modern society. for certain contracts to be used by one party as a means of actually exploiting the other, taking advantage of an unfavourable position (poor economic condition. inexperience, senility, and so on). This is often the case with standard contracts and with contracts of adhesion. to mention but two examples.
>
> In the face of such flagrant abuses at a time when governments are increasingly concerned with consumer protection. it was thought essential to reverse the decision made by the Commissioners in 1866 to exclude lesion between persons of major age, since social and economic conditions have changed. But a legislative policy still had to be devised which would reconcile protection of citizens' contractual rights with legal stability of contracts. It was therefore thought preferable to allow lesion between persons of major age, but only in certain circumstances, so as to avoid unduly impairing contractual stability.
>
> This article is thus limited in scope, since lesion results not only from disproportion between the prestations (an objective concept), but also from one party's exploitation of the other (a subjective concept). To invoke lesion, a contracting party must in fact show that there is a serious disproportion between the prestations under the agreement. Once that is established, in order to avoid placing an impossible burden of proof on the plaintiff, a presumption would arise to the effect that such dispropor lion results from exploitation by the other contracting party of the plaintiff's condition or of circumstances. Proof to the contrary can be made, of course. as the other party may show that no

[136] *Id.*, vol. 2, t. 2., p. 553.

exploitation exists. Thus only in these precise circumstances, to be assessed by the courts. can lesion vitiate consent.

So. the concept of lesion as adopted here is one based on the presumed weakness of the consent of the injured party. and is not an objective concept as in French law (153).

Recognition of lesion is part of a tendency in modern legislation to protect one party against exploitation by the other (154). In view of the consistent violation of the principle in Article 1012 C.C.. it has become necessary to bring the law into line with present conditions as other statutes have already done (155).

Finally, the proposed Draft is preferred to that of Section 118 of the *Consumer Protection Act* (156) because the Draft's broad terms make it applicable to the whole field of contracts.

[…]

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The first paragraph of this article reaffirms the principle of the binding effect of contracts and maintains the present rule of Québec law (200), according to which the debtor is not freed merely because execution of the contract has been rendered more difficult or more onerous; if the debtor is to be freed because execution is impossible, such impossibility must truly be the result of a fortuitous event.

The second paragraph is new law. It consecrates in the Draft the possibility of judicial review where there has been *imprévision*. namely, in circumstances which do not constitute a truly fortuitous event because they do not make it absolutely impossible but merely more difficult to execute the commitment. A few comments must be made on this subject.

In the first place, the words "exceptional circumstances" are at the beginning of the text to stress that the rule must only be used in truly extraordinary situations. The use of the expressions "excessive prejudice" and "unforeseeable circumstances" reinforce this idea and limit judicial discretion.

In the second place, this rule is seen as representing, in effect, the complement of a general legislative policy, which is intended to establish better justice and equity in contractual relations. The provisions relating to lesion protect at the time the contract is formed; those of *imprévision* protect at the time the obligation is executed.

> Finally, as a result of legislative evolution in recent years. for example in consumer protection and in the lease of things (201), where the courts may review an agreement because of lesion, adoption of such a rule of principle seems more acceptable to Québec law.
>
> **76**
>
> This article is based on certain modern legislation intended to counter exploitation of parties to the contract (202). It allows the court to penalize abusive contractual clauses by annulling or reducing the obligations so assumed. Nullity of the clause is governed by Article 51.[137]
>
> [References omitted]

[114] The commentary on Article 37 of the CCRO draft refers to Article 1012 of the *Civil Code of Lower Canada* ("*C.C.L.C.*"). This article was unchanged from 1866 to 1994 and read as follows:

1012. Persons of the age of majority are not entitled to relief from their contracts for cause of lesion only.	**1012.** Les majeurs ne peuvent être restitués contre leurs contrats pour cause de lésion seulement.

The CCRO proposed to abolish this old rule. However, in adopting Article 1405 of the *C.C.Q.*, the legislator reconfirmed the old rule though with variation. In the new *Code*, lesion vitiates consent in three instances: for a minor, for an adult subject to a protective order and thirdly, in cases where specifically provided by a provision of law such as Articles 1609 and 2332 of the *C.C.Q.*, by way of example. As will be examined below, such trend is indicative of a legislative policy underpinning the *C.C.Q.*, which differentiates it from the CCRO draft.

[115] Articles 38, 74 and 76 of the CCRO draft provided that the Court would weigh, in each case, the impact of the notions of unequal consideration, exploitation of a party, undue hardship and unforseeability: once the situation is analyzed upon application of these notions, the Court would rule on cancelling or reducing the obligations. In prescribing these norms – i.e. one general rule, interpreted by the Courts according to the circumstances – the CCRO was inspired by various specific legislative provisions set out in the footnotes to the draft *Code*.[138] It characterized such approach as symptomatic of a modern legislative movement to remedy the exploitation of contracting parties.[139] However, rather than follow suit with a rule generally applicable to the law of

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137 *Id.*, pp. 614-615 and 624-625.

138 These are Articles 1040*c*, 1056*b* and 1664*h* *C.C.L.C.*; *Consumer Protection Act*, L.Q., c. 74, s. 118; *Minimum Wage Act*, S.R.Q. 1964, c. 144, ss. 13 and 14; *Public Service Board Act,* S.R.Q. 1964, c. 229, ss. 17 and 18; *Securitiers Act*, S.R.Q. 1964, c. 274, s. 60. The Civil Code Revision Office also refers to an Ontario statute: *The Unconscionable Transactions Relief Act*, R.S.O. 1970, c. 472, s. 2, which is similar to 1040*c* *C.C.L.C.*

139 Civil Code Revision Office, *supra*, note 134, p. 625.

obligations in the first Title of Book V of the *C.C.Q.*, the legislator preferred to keep an updated version of the old rules.[140] Viewed in such manner, these rules are peculiar in the new *Code*.

[116] Of course, nothing excludes a judge-made protection against changes in circumstances where the legislation is expressed in terms sufficiently general so as to leave to the Courts a large residual discretion to determine that which is unreasonable or abusive. Article 1664*h) C.C.L.C.*,[141] promulgated in 1974, succeeded in 1980 by Article 1664.11 *C.C.L.C.*[142] in turn, replaced in 1994 by Article 1901 *C.C.Q.* is an example of such a provision applicable to residential leases. It is an example, as one author aptly wrote, of a case where [TRANSLATION] "the legislator avoided the trap of trying unsuccessfully to delineate all possible examples of abuse"[143]. However, and wisely perhaps, the legislator did not completely abandon to the Courts the entire task of "delineating all possible examples of abuse" once a party declares itself a victim of abuse or bad faith by its co-contracting party, inequitable circumstances or unforeseen hardship and irrespective of whether the situation involves persons of full age or minors, individuals or corporations, or other contextual circumstances. Rather, the legislator has selected the contexts where unreasonable or abusive conduct may be corrected by the Courts. In certain instances, the context chosen can apply to a multitude of situations as is the case with Article 1437 *C.C.Q.* However, even here, the legislator has deliberately particularized the rule. No one would contend that the case before us involves, in the terms of Article 1437 *C.C.Q.*, a consumer contract or a contract of adhesion.

[117] From a different point of view, Article 1621 *C.C.Q.* provides another example of the legislator refusing, in the 1994 reform, to yield freedom of action to the judges to [TRANSLATION] "establish better justice or equity"[144] in the law of obligations. Here, the CCRO was in favour of a general provision to be applied by the Courts in their discretion concerning the granting of punitive damages[145] but the legislator insisted in Article 1621 *C.C.Q.* on an express and specific enactment as a pre-condition to such relief.

[118] Thus, upon analysis of the differences between the draft CCRO *Code* and the *C.C.Q.*, we see a clear diversion of legislative policy. When the CCRO was in favour of open rules granting the courts a large degree of flexibility to [TRANSLATION] "establish better justice and equity" the legislator opted otherwise. It preferred to specifically

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140 Thus Articles 1609 and 2332 *C.C.Q.* succeeded, respectively, to Articles 1056*b* and 1040*c C.C.L.C.*

141 **1664*h*** The following may be annulled or reduced :
1. every penal clause in which the amount provided for exceeds the damage actually sustained by the lessor;
2. every clause which, in the circumstances, is harsh, excessive or unconscionable.

142 **1664.11** Every clause which, in the circumstances, is unreasonable, may be annulled or reduced.

143 Pierre-Gabriel Jobin, *Le louage de choses*, Cowansville, Yvon Blais, 1989, p. 416.

144 Civil Code Revision Office, *supra*, note 134.

145 Article 290 of the Draft Civil Code: “However, in cases of intentional fault or gross fault, the court may also award punitive damages.”

circumscribe areas or exceptional situations where the courts would have discretion to provide relief contrary to contractual provisions', but as for the rest, the legislator adhered to a classical approach of the supremacy of the parties' common intention. It thus could be said that the legislator demonstrated more confidence in the parties than in the courts to innovate and solve problems in contractual relationships. One must not forget, as some authors have emphasized, that the [TRANSLATION] "vast majority of contracts are adhesion or consumer contracts"[146] governed by Article 1437 *C.C.Q.* However, many more contracts of significant impact given their economic magnitude do not fall within these categories and are freely negotiated between experienced parties fully capable of defending their own interests without risk of exploitation by the other party.

[119] In Article 1405 *C.C.Q.*, the legislator limited considerably the applicability of lesion between persons of full age. For *imprévision* the solution is still more restrictive as there is no article analogous to Article 1405 *C.C.Q.*: in fact no provision sets forth the possibility that specific legislation could address a particular situation where the theory of *imprévision* could apply.[147] Rather, the legislator chose to reaffirm in Articles 1439 and 1458 *C.C.Q.* the principle of the binding effect of contracts which runs contrary to the theory of *imprévision*. Otherwise, the legislator enacted a few specific rules in Articles 771, 1294 and 1834 *C.C.Q.* introducing a notion of unforseeability from the theory of *imprévision*,[148] but only one of which operates contrary to the binding effect of contracts. *Imprévision* can hardly be said to have been introduced into Book V (Obligations), Title I (Obligations in general).

[120] It is essential to consider this legislative trend in deciding the first question expressed above in paragraph [109].

[121] However, the law has evolved since the reform of the *C.C.Q.* and despite the exclusion of *imprévision* from the *Code*, this evolution must be considered before coming to any conclusion on whether or not Appellant can rely on good faith to remedy that which might be resolved in other legal systems by the application of *imprévision*.

(iii) The developments after the legislative policy choices of 1991

[122] After the coming into force of the *C.C.Q.* on January 1, 1994, it was soon recognized in the jurisprudence that good faith was a cornerstone of Quebec civil law as underscored by Articles 6, 7 and 1375 *C.C.Q.* The Supreme Court of Canada wrote in 2004 that the requirement of good faith "… is a general principle clearly recognized and

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146 Pierre-Gabriel Jobin and Nathalie Vézina, *Les obligations*, 7th ed., Cowansville, Yvon Blais, 2013, p. 136.

147 It is true that, by necessary implication from the wording, Article 1405 *C.C.Q.* also excludes any plea of lesion by unprotected persons of full age. While nothing in the Code explicitly rejects the theory of *imprévision*, such rejection is implied in Articles 1434, 1437, 1439 and 1458, *C.C.Q.*

148 Professor Maurice Tancelin adds Article 2094 *C.C.Q.*: *Des obligations en droit mixte du Québec*, 7th ed., Montreal, Wilson & Lafleur, 2008, p. 247.

given express sanction by the introductory provisions of the *Civil Code*".[149] The decided cases had already situated good faith amongst the general principles of civil law (particularly in *Houle v. Canadian National Bank*[150]) even though the *C.C.L.C.*, unlike Article 1135 of the *French Civil Code* does not explicitly state that contracts must be "performed in good faith". This position is now well accepted as underpinning the introductory provision of the *C.C.Q.* as was elegantly set out by Professor John E.C. Brierly in an article published several years earlier.[151]

[123] *Imprévision* or rather its absence from the new *Code*, also quickly gave rise to comment. In *Québec (Procureur général)* c. *Kabakian-Kechichian*,[152] the Court was tasked to determine whether certain clauses in a contract to sponsor immigrants in Quebec were abusive. The contract contained a stipulation for another[153] which, according to the classical framework of stipulation/promisor/beneficiary, the stipulator (i.e. the Government) obtained from the promisor (i.e. the guarantor-sponsor of an immigrant applicant) the promise to subsidize during a stipulated period of time the basic needs of the beneficiary (the sponsored immigrant). The contract also contained an undertaking to reimburse to the Government any social welfare benefits paid to the immigrant during the stipulated period. It was admitted that the contract was one of adhesion. The Court refused to declare abusive the contractual provisions in question. Justice Jean-Louis Baudouin with the concurrence of two colleagues, expressed the following opinion:

> [59] Enfin, l'ensemble du processus est ouvert et transparent et je vois mal en quoi le résultat de celui-ci serait contraire aux exigences de la bonne foi. Le contrat ne comporte pas, au sens de l'article 1437 C.c.Q., de désavantage pour l'adhérent à moins de considérer que toute obligation en est un en soi. Les inconvénients économiques qu'il peut subir doivent s'apprécier par rapport au bénéfice que lui rapporte l'entreprise, soit la venue de personnes chères qui autrement n'auraient pas pu émigrer. Le gouvernement, en imposant les conditions prévues au Règlement, ne poursuit donc pas un avantage indu en cherchant à profiter de son cocontractant ou à l'exploiter, mais au contraire favorise une exception aux règles normales de l'immigration pour des raisons humanitaires.
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> [60] Bien plus, si par la suite la disproportion, non pas entre les deux prestations au contrat, mais cette fois entre l'engagement du parrain et ses ressources financières survient, celle-ci résulte nécessairement d'événements

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149 *Banque nationale de Paris (Canada) v. 165836 Canada Inc.*, 2004 SCC 37, para. 69 [*Banque nationale de Paris (Canada)*].

150 [1990] 3 S.C.R. 122, pp. 156-158.

151 "Quebec's Common Law : how many are there?", in Ernest Caparros (ed.), *Mélanges Louis-Philippe Pigeon*, Montreal, Wilson & Lafleur,1989, p. 111.

152 [2000] R.J.Q. 1730 (C.A.).

153 *Id.*, para. 22.

> indépendants de la volonté des parties. Or, en matière de clauses abusives, on doit évaluer principalement celles-ci au moment de la conclusion de l'engagement. Revoir le contrat au moment de son exécution et réduire l'obligation du parrain en tenant compte de sa capacité de payer me paraît alors n'être rien d'autre qu'une révision de la convention par le juge pour imprévision, notion qui n'est pas acceptée dans notre droit comme principe général (art. 1439 C.c.Q.), mais simplement dans certains cas particuliers (art. 771, 1294, 1834 C.c.Q.).

Thus, a unanimous judgment answers the question as we have done in paragraph [119] above. This does not completely resolve the issue since the case only addresses the typical case of *imprévision*: that is where good faith is not in issue as Justice Baudouin indicated in his reasons. The case before us presents for consideration a situation where good faith and *imprévision* may both be applicable. It is not difficult to imagine a fact pattern where the constitutive elements of *imprévision* – i.e. the occurrence of an unforeseen event giving rise to drastic consequences for one party – trigger the requirement of good faith to oblige the other party to act to remedy such consequences.

[124] As illustrated by the authors quoted by the parties, the doctrine is divided as to whether under current Quebec law it is open to a party in Appellant's circumstances to invoke the duty of good faith to remedy the situation which another legal system deals with under the doctrine of *imprévision*.

[125] Professors Lluelles and Moore citing authority, write that prior to the adoption of the *C.C.Q.*, [TRANSLATION] "the few decided cases, steadfastly with support of the doctrine, were against any idea of revision".[154] They observe the persistence of this refusal in the cases decided after the *C.C.Q.*, but note that by means of contractual interpretation or resorting to *force majeure* the courts have tempered the severity of this exclusion.[155] However, there is no question of *imprévision* as a basis in their extensive writings for the proposition that obligations be performed in good faith.[156]

[126] In fact, the majority of Quebec authors writing prior to the *C.C.Q.* rejected *imprévision* as forming part of the law of obligations because it was deemed to be founded on equity.[157] This is surprising since Article 1024 *C.C.L.C.* states clearly that equity was considered a source of contractual obligations.[158] In any event, matters have evolved and certain scathing critics of the legislator's choice in 1991 have emerged in

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154 Didier Lluelles and Benoît Moore, *Droit des obligations*, 2nd ed., Montreal, Thémis, 2012, p. 1287.

155 *Id.*, p. 1290.

156 *Id.*, pp. 1113-1165.

157 Jean-Louis Baudouin, *Les obligations*, Cowansville, Yvon Blais, 1983, pp. 223-225; Jean Pineau and Danielle Burman, *Théorie des obligations*, Montreal, Thémis, 1988, pp. 281-282.

158 **1024.** The obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature.

the literature since the promulgation of the new *Code*.[159] Recent publications, some referred to in the notes below, see in the principle of good faith as supported by Article 6, 7 and 1375 *C.C.Q.*, the basis upon which the courts can possibly recognize the theory of *imprévision*.[160] Professor Marie Annik Grégoire states the matter succinctly as follows: [TRANSLATION] "In combining the absence of an express exclusion of *imprévision* in the *Civil Code of Québec* and the importance of good faith, it is not unreasonable to think that the courts could, as have the Swiss and German courts, recognize *imprévision* as a function of good faith".[161] She thus confirms the thoughts of Professor Jobin who wrote: [TRANSLATION] "To solve the problem, the courts can easily base themselves on good faith or more specifically, the duty to cooperate".[162]

[127] Respondent and various older publications state that since the rejection of the CCRO's recommendations on *imprévision*, much ink has been dedicated in Quebec law to unforeseen situations beyond the parties' control arising during the term of a contract which seriously upset the contractual equilibrium. Respondent concludes that Quebec law is not prepared to adopt *imprévision* and has evolved otherwise in the face of jurisdictions which have embraced the doctrine.[163] Perhaps the last word on the subject has not been spoken, even in Quebec law, so that the broad principles codified in 1994 should be left with creative litigants to explore whether relief such as that sought by Appellant is possible. Thus, we prefer to answer the first question articulated in paragraph [109] as follows: the silence of the legislator on the subject of *imprévision* in the *C.C.Q.* is not an impediment to pleading that the duty to act in good faith can be invoked to remedy a disruptive contractual equilibrium in circumstances which could give rise to the application of the theory of *imprévision* in jurisdictions where such theory is specifically recognized by legislation.

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159 Commenting on the evolution of Quebec law, Professor Tancelin, *supra*, note 149, p. 247, writes, before mentioning the *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297: "Donc, en droit commun des actes à titre onéreux, l'exclusion de l'imprévision demeure totale. C'est pousser loin le conservatisme libéral que de garder obstinément les yeux fixés sur les exigences monétaires du monde des affaires, qui ne devraient pourtant pas affliger les relations juridiques en droit civil, c'est-à-dire dans une société civilisée." For Professor Pierre-Gabriel Jobin, "L'imprévision dans la réforme du Code civil et aujourd'hui", Benoît Moore (ed.), *Mélanges Jean-Louis Baudouin*, Cowansville, Yvon Blais, 2012, pp. 381 and 383: [TRANSLATION] "the legislature's ultra conservative choice … is far from being enlightened".

160 Voir P.-G. Jobin, *supra*, note 159, pp. 384 and following; P.-G. Jobin and N. Vézina, *supra*, note 146, pp. 535-544; Marie Annik Grégoire, *Liberté, responsabilité et utilité : la bonne foi comme instrument de justice*, Cowansville, Yvon Blais, 2010, pp. 236 and following.

161 M. A. Grégoire, *supra*, note 160, pp. 245-246.

162 *Id.*, p. 384.

163 Among other countries where the theory of *imprévision* is recognized, Professor Grégoire, *id.*, p. 238, mentions Germany, Austria, Switzerland, Spain, Portugal, the Netherlands, Egypt, Brazil, Italy, Greece, Hungary, Poland, Tunisia, Turkey, Morocco, and Argentina. We must now add to this list France, since the legislature introduced the theory of *imprévisibilité* by adopting a new version of Article 1195 *C.c.* which came into force on October 1st, 2016, in virtue of *Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*.

C. The effect of the requirement of good faith on Appellant's circumstances

[128] We firstly describe the notion of good faith existing currently in the Quebec law of obligations. It is then proposed to examine the circumstances in which Appellant finds itself and the extent to which the requirements of good faith may be applicable to that situation.

(i) The content of the notion of good faith

[129] Whilst a member of this Court, Justice Jean-Louis Baudouin remarked in a collection of essays to honour Professor Jacques Ghestin: [TRANSLATION] "a multifaceted notion, good faith cannot be rationalized".[164] However vast in its potential application, it is nonetheless vague such that it is [TRANSLATION] "… judicial comment and application which defines it, case by case".[165] Because it is vague, the notion is far reaching and applicable to many situations, as a French legal author wrote: [TRANSLATION] "… neither party desires to be bound by a contract surpassed by economic circumstances. To insist on this performance is to be in bad faith".[166] Thus, one might fear that by successive application, the notion will become too far reaching as indicated by this last quotation taken at face value. This is demonstrated by other writings, vague in their own right, tending towards virtuous slogans, which are sufficiently indeterminate to permit a judge to exercise moral control over the performance of a contract[167] to the point of adding an element of distributive justice into contractual relationships. It is inconceivable that in adopting Articles 6, 7 and 1375 *C.C.Q.* the Quebec legislator intended such an expansion of the notion – lack of definition does not imply lack of meaning.

[130] It is appropriate to closely consider the recent decision of *Bhasin v. Hrynew*[168] where the Supreme Court of Canada, for the reasons of Justice Cromwell, unanimously confirmed that there exists in the Canadian common law the principle of good faith in

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164 "Justice et équilibre : la nouvelle moralité contractuelle du droit civil québécois", in Gilles Goubeau *et al*. (eds.), *Études offertes à Jacques Ghestin – Le contrat au début du XXI^e siècle*, Paris, Librairie générale de droit et de jurisprudence, 2001, 9, p. 33.

165 M. A. Grégoire, *supra*, note 160, p. 77.

166 Laurent Aynès, "Le devoir de renégocier", (1999) 18 *Revue de jurisprudence commerciale* 17. If, all interested parties, considered the contract "unsuitable to economic circumstances" (whatever the meaning of the paraphrase), what interest would one of them have to enforce it? If one of them required its enforcement, is it not rather because the party wanted, through this contract, to protect itself from changing circumstances that could be disadvantageous?

167 For example, François Diesse, "Le devoir de coopération comme principe directeur du contrat" (1999) 43 *Archives de philosophie du droit* 259, p. 282: « Un comportement conséquent doit donc accompagner l'intention positive de chaque contractant. Tel qu'il résulte de la tendance jurisprudentielle actuelle, ce comportement bienveillant suppose à l'égard de ce dernier, d'une part, une obligation négative de ne pas nuire au cocontractant et, d'autre part, une obligation positive d'aider le cocontractant ou d'agir dans un sens favorable aux intérêts de ce dernier ».

168 2014 SCC 71.

contracts. This is judicial innovation described in the judgment as an incremental change (translated in the French version as « progressive »[169], «graduelle »[170] and « évolutive »[171] change). Justice Cromwell considered that the advance was necessary for three reasons: "… the current law is out of step with the reasonable expectations of commercial parties, particularly those of at least two major trading partners of common law Canada – Quebec and the United States".[172] Following this analysis, Justice Cromwell summarized as follows the gist of his reasons:

> [93] A summary of the principle is in order:
>
> (1) There is a general organizing principle of good faith that underlies many facets of contract law.
>
> (2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.
>
> (3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

Clearly, the common law method applied in Canada explains the reasoning of the Court in this important case. This is evidently so in the manner that Justice Cromwell links the underlying organizing principle[173] and the rules that can be drawn from decided cases.[174]

[131] From this organizing principle (of performing contracts in good faith) Justice Cromwell identifies a previously non existent or, at least, unrecognized obligation but which arises from and is appropriate to the circumstances of the case and descriptive of the abstract idea of good faith:

> [70] […] The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or “palm tree justice. In particular, the

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169 *Id.*, paras. 33, 34, 40, 73 and 92.
170 *Id.*, paras. 59 and 66.
171 *Id.*, paras. 89.
172 *Id.*, para. 41.
173 *Id.*, para. 63: "… an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance".
174 *Id.*, para. 64: "… an organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations…”

> organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.
>
> [72] […] The key question before the Court, therefore, is whether we ought to create a new common law duty under the broad umbrella of the organizing principle of good faith performance of contracts.
>
> [73] In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance.

Presented in this manner, the specific requirement which flows from good faith ("… the parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract" allowed Justice Cromwell to avoid the criticism often voiced by common law authors of the notion of good faith. According to this line of thought, "good faith is an inherently unclear concept that will permit *ad hoc* judicial moralism to undermine the certainty of commercial transactions".[175] Justice Cromwell was obviously referring to such critique in paragraph [70] of his reasons but he considers it superfluous to opine on the criticism in paragraph [79] because it misses the point.

[132] The rule which Justice Cromwell draws from the organizing principle of good faith includes the prohibition against "knowingly misleading the other party on matters directly linked to the performance of the contract". Albeit that the conceptual approach is different, one can identify an analogy with *Bank of Montreal v. Bail Ltée*[176]. In this judgment rendered previous to the *C.C.Q.*, but a precursor to the recognition of the notion of good faith, the liability of the principle defendant, the Quebec Hydroelectric Commission arose from a "conspiracy of silence and deceit" in a significant contractual dealing (as characterized by the trial judge and approved by the Supreme Court).[177]

[133] The reasons in *Bhasin v. Hrynew* indicate that the Supreme Court of Canada was fully cognizant of Quebec law and the organizing principle highlighted by Article 6

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175 *Id.*, para. 79.

176 [1992] 2 S.C.R. 554. Of course, insofar as it establishes that (i) a party to a contract must behave reasonably and with the same good faith towards third parties as towards the parties to the contract, and that (ii) a breach to a contractual obligation may constitute a cause of action in delict for a third party against the contractual party in default, *Bail* touches on issues not addressed in *Bhasin c. Hrynew*.

177 *Id.*, p. 570.

C.C.Q. as well as the decision in *Banque nationale de Paris (Canada)*[178] Justice Cromwell states:

> [85] Experience in Quebec and the United States shows that even very broad conceptions of the duty of good faith have not impeded contractual activity or contractual stability: see, e.g., J. Pineau, "La discrétion judiciaire a-t-elle fait des ravages en matière contractuelle?", in *La réforme du Code civil, cinq ans plus tard* (1998), 141. It is also worth noting that in both the United States and Quebec, judicial developments preceded legislative action in codifying good faith. In the United States, courts had recognized the existence of a general duty of good faith before the promulgation of the U.C.C.: see, e.g., *Kirke La Shelle Co. v. Armstrong Co.*, 263 N.Y. 79 (1933). Similarly, though there was no express provision of "good faith" in the *Civil Code of Lower Canada*, the Court implied such a general duty from more specific provisions of the *Code*: see *National Bank of Canada v. Soucisse*, [1981] 2 S.C.R. 339; *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122; *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554. The duty of good faith was subsequently included in the revisions leading to the enactment of the *Civil Code of Québec*.

[134] *Bhasin v. Hrynew* is a salutary example of the application of the specific requirement of good faith. Just as do the courts of common law jurisdictions, the Quebec courts are required to define specific rules of conduct from general principles such as Articles 6, 7 and 1375 *C.C.Q. C*ommon law authorities have criticized the notion of good faith for its ambiguity, even its elasticity, so as to give rise to incoherence in its judicial application. In Quebec civil law however, the principle is recognized by the legislator to soften the impact of the notions of binding force and certainty of contracts which is also recognized by the *C.C.Q.* Nonetheless, and however far reaching the obligation to act in good faith expressed in Articles 6, 7 and 1375 *C.C.Q.*, the courts should not construct an abstract system based on some vague notion. As Justice Beetz reminded us in *Compagnie Immobilière Viger Ltée v. Lauréat Giguère Inc.*: "The judge is bound by the issues before him, and does not extend his ruling beyond what is necessary to settle them".[179]

[135] Given this, how should the requirement of good faith be applied in this case?

[136] Professors Lluelles and Moore in the most recent edition of their treatise provide an extensive review[180] supported by abundant jurisprudential and doctrinal sources from

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178 *Banque nationale de Paris (Canada)*, s*upra*, note 149.

179 [1977] 2 S.C.R. 67, p. 77.

180 D. Lluelles and B. Moore, *supra*, note 154, pp. 1120-1147. Other taxonomies of the obligation of good faith are obviously possible, as evidenced by Professor Grégoire's more theoretical ones, *supra*, note 160, p. 195-247. Professors Lluelles and Moore, whose work refers to that of Professor Grégoire, presents an analytical scheme quite adequate for the purposes of this judgment. See also Paul-André Crépeau (with the collaboration of Élise M. Charpentier), *The UNIDROIT Principles and the Civil Code of Québec: Shared Values?* (Bilingual edition), Scarborough, Carswell, 1998, pp. 54-76.

which can be drawn ample material to better define the second question set forth in paragraph [109] above. These authors see two separate duties arising from the notion of good faith – a duty of loyalty and a duty of cooperation. Borrowing from their analysis, various obligations to do and not to do can be inferred from these duties. Many of these obligations clearly find no application in this case: Respondent has not compromised its contractual relationship with Appellant,[181] nor has it increased Appellant's obligations or prejudiced it by useless, bothersome or excessive conduct. It is also clear from the record that Respondent has never lied to Appellant nor knowingly mislead it on "matters directly linked to the performance of the contract". This is not argued by Appellant such that the specific *ratio* of each of the *Bail* and *Bhasin* judgments does not provide a solution to the problem at hand. Rather, the question (borrowing from the Professors) is whether Respondent failed to be responsive to the interests of its co-contracting party. Did it take advantage of the situation to obtain an undue benefit and thus act in an excessive and unreasonable fashion?

(ii) The conduct of Respondent regarding good faith

[137] The last two issues should be addressed in order and with particular regard for the facts of the case.

[138] We will first consider the respective interest of the parties.

[139] Looking out for the interests of a co-contracting party means that one does all which one is reasonably able to do in order that the other party can perform its obligations and receive its due. However, does this extend to sacrificing in whole or in part one's own interests (in terms of receiving one's due from the performance of the contract) to better serve those of the other party? Is one obliged to impoverish oneself so as to enrich the other party? Even if there exists theoretically (which is doubtful), in the modern law, a positive obligation of reciprocal kindness as addressed above,[182] the law in force in Quebec does not recognize it. On this point, the analysis of Professor Grégoire renders an accurate account of the state of the doctrine and jurisprudence:[183]

> … nous croyons que la bonne foi ne peut aller jusqu'à une obligation de conférer un avantage en parfaite « fraternité » à autrui pour des raisons de cohérence. Si la légitimité de la relation contractuelle est fondée sur les principes de liberté, responsabilité et justice commutative et que de ceux-ci découle une commutativité objective favorisant la coexistence paisible des droits et des intérêts, il nous faut conclure qu'une telle idée de fraternité nuirait autant à cette commutativité que celle de l'acceptation de l'exploitation de son cocontractant. Dans le continuum de la commutativité, les notions d'exploitation et de fraternité

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[181] Faced with reality, ambiguous words can acquire a clear and unalterable meaning when related to proven facts; as mentioned above, in paragraph [116] *in fine*.

[182] F. Diesse, *supra*, note 167.

[183] M. A. Grégoire, *supra*, note 160, pp. 186-187.

> se trouvent aux deux extrémités et sont tout autant éloignées l'une que l'autre de la position centrale d'équilibre, et cela même si, nous le concédons, il peut paraître moralement plus noble d'accepter qu'une relation contractuelle soit basée sur un principe de solidarité plutôt que d'exploitation.
>
> Une exigence de bonne foi imposant un devoir de solidarité ou de loyauté suppose une certaine abnégation de ses propres intérêts afin de se consacrer aux intérêts d'autrui. Elle implique qu'il serait « fraternellement » malhonnête d'agir en fonction de ses intérêts plutôt qu'en fonction de ceux de son cocontractant et cela même, par exemple, en présence de circonstances où l'avantage qu'aurait le premier contractant découlerait non pas d'une inégalité circonstancielle mais de la négligence du cocontractant à bien veiller à ses intérêts. Nous pourrions citer le cas classique de l'œuvre d'art d'un grand maître de la peinture qu'une partie achète à petit prix dans une vente-débarras. L'acheteur devrait-il révéler au vendeur la valeur réelle du bien vendu même si ce dernier avait la possibilité de s'en enquérir lui-même? Dans une telle situation, il apparaît clair que l'ignorance du vendeur est la résultante de sa négligence à veiller à la sauvegarde de ses intérêts en s'informant valablement sur la valeur réelle du tableau vendu qui était jusqu'alors en son entière possession. Or, si nous adoptons le discours des tenants de la théorie de la bonne foi fraternelle, il semblerait qu'un contractant répondant aux exigences d'une telle bonne foi devrait fournir à son cocontractant les informations relatives à sa propre prestation.
>
> À notre avis, un tel raisonnement contrevient aux préceptes de liberté et de responsabilité individuelles dans la sauvegarde de ses intérêts. D'ailleurs, dans un tel cas, comment pourrions-nous concilier une telle obligation avec le principe de l'erreur inexcusable? Rappelons par ailleurs que dans l'arrêt *Bail*, le juge Gonthier mettait clairement en garde ceux qui seraient tentés de donner à l'exigence de la bonne foi, illustrés dans cette affaire comme l'obligation de renseignement, une interprétation qui « écarterait l'obligation fondamentale qui est faite à chacun de se renseigner et de veiller prudemment à la conduite de ses affaires ». En d'autres termes, si nous désirons assurer la sauvegarde de nos intérêts, il faut commencer par le faire soi-même.[184]

Without accepting this analysis, nor generalizing on the particular example given – since one would need to know whether the purchaser intended to take advantage of the vendor – we can certainly imagine numerous situations where the analysis would apply and follow from the requirement of good faith.

[140] The foregoing analysis dovetails with the words of Justice Cromwell in *Bhasin v. Hrynew* when he wrote:

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[184] M.A. Grégoire, *supra*, note 160, pp. 186-187.

> [65] The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While “appropriate regard” for the other party’s interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.[185]

Yet, despite the very long duration of the power contract, there appears no relational element that would justify the formal introduction of an obligation to cooperate of the kind mentioned in Articles 2149 or 2186 *C.C.Q.*, and that would require Respondent to impoverish itself in order to enrich Appellant. Good faith does not require Respondent to cooperate in this sense. It must not mislead Appellant nor cause it harm in performing its obligations, but it is not bound to exhibit benevolence nor to negotiate in such vein. Moreover, there is nothing in the contractual relationship between the parties which justifies imposing the equivalent of the "much higher obligations of a fiduciary" referred to by Justice Cromwell.[186] Such obligations exist in common law, or more precisely in equity, based on its own reasoning having nothing to do with the current discussion. However, concerning a contractual relationship between seasoned, well informed parties negotiating a complex contract head to head, over many months, with considerable financial applications, there is nothing in Quebec civil law obliging a party to "give priority to the interests of the other party". A contract such as the power contract is not a marriage, not even a marriage of convenience. Any such near absolute "contractual solidarity" goes far beyond the requirements of good faith to which the parties are bound.[187]

[141] We have already examined how, in the present case, the conditions to obtain financing for Appellant's project imposed a specific pricing scheme without which the project would not have seen the light of day. These conditions, highlighted in the letter of intent, were reflected in the contract by specific provisions from which were purposely excluded, after negotiation, any notion of price indexation as a function of market fluctuation. Following are the entire relevant sections from the documents. The letter of intent provides:

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185 *Bhasin v. Hrynew*, *supra*, note 168, para 65.

186 It is true that Justice Gonthier wrote in, *Bank of Montreal v. Kuet Leong Ng*, [1989] 2 S.C.R. 429, p. 443: “The fiduciary obligation recognized in these circumstances in the common law translates in the civil law into terms of good faith and loyalty of the employee to the employer and the avoidance of conflict of interest including seeking an advantage which is incompatible with the terms of employment. Such incompatibility and conflict must be measured by the terms of the employment or other relationship between the parties.

187 D. Lluelles and B. Moore, *supra*, note 154, p. 1147.

16.0 Price of Energy sold on Schedule A

For energy produced by CFLCo commencing in September 1972 and made available prior to completion of ten units, or January 1, 1978, whichever is earlier, Hydro-Quebec will pay a price of 2.72 mills per kwh for 90 % of the kilowatt-hours delivered or made available for delivery but in no case for more than the amounts shown in Column 5 of the Table Article 14.0 and 1.0 mill per kwh for the balance.

For continuous energy thereafter Hydro-Quebec will pay as follows:

During the first	5 years,	2.67 mills per kilowatt-hour
During the second	5 years,	2.61 mills per kilowatt-hour
During the third	5 years,	2.56 mills per kilowatt-hour
During the next	10 years,	2.45 mills per kilowatt-hour
Thereafter		2.29 mills per kilowatt-hour

For excess energy. Hydro-Quebec will pay 1.0 mill per kilowatt-hour.

17. Price of Energy Sold on Schedule B

For energy produced by CFLCo commencing in September 1970 and made available prior to completion of ten units, or January 1, 1976, whichever is earlier, Hydro-Quebec will pay a price of 2.50 mills per kwh for 90 % of the kilowatt-hours delivered or made available for delivery but in no case for more than the amounts shown in Column 5 of the Table Article 14.0 and 1.0 mill per kwh for the balance.

For continuous energy thereafter Hydro-Quebec will pay as follows:

During the first	5 years,	2.45 mills per kilowatt-hour
During the second	5 years,	2.40 mills per kilowatt-hour
During the third	5 years,	2.35 mills per kilowatt-hour
During the next	10 years,	2.25 mills per kilowatt-hour
Thereafter		2.10 mills per kilowatt-hour

For excess energy. Hydro-Quebec will pay 1.0 mill per kilowatt-hour.

As for the power contract, it states as follows:

8.2 Applicable Rates

The Base Rate shall be subject to adjustments as follows:

> If the Final Capital Cost of the Plant is l*ess* than $728,000,000 each Base Rate shall be reduced by one-half of the same fraction thereof as is, of $728,000,000, the difference between $728,000,000 and the Final Capital Cost of the Plant.
>
> If the Final Capital Cost of the Plant is more than $791,000,000 each *Base* Rate shall be increased by one-half of the same fraction thereof as is, of $791,000,000, the difference between $791,000,000 and the lesser of the Final Capital Cost of the Plant or $900,000,000.
>
> For the purpose of any such adjustment, CFLCo shall furnish to Hydro-Quebec, not later than the first Delivery Date hereunder CFLCo' s reasonable estimate of what the Final Capital Cost of the Plant is likely to be and such estimate shall be the basis of adjustment until full determination of the Final Capital Cost of the Plant whereupon the Applicable Rates shall be recalculated as a final adjustment under Section 8.2. Any overpayment or underpayment resulting from a difference between the Applicable Rates based on such estimate and the Applicable Rates based on the Final Capital Cost of the Plant shall be promptly provided for with interest to the date of adjustment at 7% per annum by, as the case may be, a refund by CFLCo to Hydro-Quebec or a supplementary payment by Hydro-Quebec to CFLCo.

The obligation to give appropriate regard to the interests of one's co-contracting party is first and foremost a function of the duty to inform and the duty to advise. No issue appears here as the parties knew what they were doing and good faith did not oblige Respondent to renounce to the benefit it derives from unambiguous contractual provisions voluntarily negotiated.

[142] Dealing now with the second aspect, has Respondent derived an unfair advantage from the situation so that its conduct can be characterized as excessive or unreasonable?

[143] It should be noted immediately that this formulation requires definition of the terms "unfair, excessive, unreasonable" in order to be precise and useful. Such definition must be made in context since the findings of fact and their analysis are essential to establish the breadth of the rule. Clearly, this is what should be understood from the foregoing statements in virtue of which judicial intervention and interpretation lends precision in each case to vague notions.[188]

[144] One might well posit that the prohibition to act excessively or unreasonably in deriving unfair advantage from a situation, results from an obligation to act in good faith. In support of such a proposition the authors quoted above cite abundant case law but

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[188] *Supra*, para.[129].

which arises from a few particular types of situation. An example is *Houle v. Canadian National Bank*[189] concerning the conduct of a bank towards its debtors.[190] Other examples arise from the cancellation, untimely or not, of long term contracts.[191] Often, such cases pit employee against employer when the latter terminates the employment[192] alleging unfair competition[193] or one of the parties alleges some type of illegal conduct either from the employee[194] or the employer[195]. There is no analogy or closely comparable situation to the case at hand to be found in this body of case law. There is thus, nothing useful to be drawn from this jurisprudence.

[145] *Bank of Montreal v. Kuet Leong Ng*[196] remains the leading case establishing that taking unfair advantage of a situation is contrary to the requirements of good faith. This case was decided prior to the promulgation of the *C.C.Q.* The facts are important. The respondent *Kuet Leong Ng,* chief currency trader of the appellant for the Province of Quebec, personally profited from speculative currency trading without his employer's knowledge to the tune of $660,134.82 using either appellant's funds or those of clients who shared part of the profits with him. The Bank, which admitted having suffered no loss, claimed the profit, pleading Article 1713 *C.C.L.C.*[197] and subsidiarly, respondent's obligations *qua* employee. The Bank lost in first instance and in appeal, both judgments focusing on respondent's position. The Court of Appeal found that he was not a mandatary and that though his behaviour merited dismissal from employment, he was not required to turn over the profits to his employer. The Supreme Court speaking through Justice Gonthier, overruled the Court of Appeal and condemned appellant to reimburse the profits he made while in the employ of the appellant Bank.

[146] The order to reimburse the funds was based in part on Article 411 *C.C.L.C.* which provided that a possessor may only retain profits when his possession was in good faith. This part of the *Kuet Leong Ng* judgment is not of significance for present purposes. Turning to respondent's status as a mandatary or employee, Justice Gonthier

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189 *Houle v. Canadian National Bank*, s*upra*, note 150.

190 See *Paris c. Banque Nationale du Canada*, [2003] R.R.A. 29 (C.A.).

191 See *E. & S. Salsberg c. Dylex Ltd.*, [1992] R.J.Q. 2445 (C.A.); *Audet c. Jetté*, J.E. 98-2097 (C.S.); *Joe Dubreuil & Fils ltée c. Ford New Holland Canada Ltée*, B.E. 2000BE-486 (C.A.).

192 See *Sofati ltée c. Laporte*, [1992] R.J.Q. 321 (C.A.); *Hyundai Auto Canada inc. c. Laporte*, J.E. 94-1801 (C.A.).

193 See *Ref-Com Commercial Inc. c. Holcomb*, J.E. 91-1363 (C.S.); *Di Stilio Fuel Oil Inc. c. Colavincenzo*, [1992] R.J.Q. 1941 (C.S.).

194 See *Sinclair c. General Electric Capital Canada Inc.*, J.E. 2001-1242 (C.S.); *Émond c. Société des casinos du Québec inc.*, [2003] R.J.Q. 870.

195 See *Procureur général du Québec c. Brunet*, [1994] R.J.Q. 337 (C.A.).

196 *Supra*, note 185.

197 **1713.** The mandatary is bound to render an account of his administration, and to deliver and pay over all that he has received under the authority of the mandate, even if it were not due; subject nevertheless to his right to deduct therefrom the amount of his disbursements and charges in the execution of the mandate.

If he has received a determinate thing he is entitled to retain it until such disbursements and charges are paid.

firstly pointed out that: "The consequences of the obligation of good faith in contracts of employment as such have not been, to my knowledge, examined by either the courts or academics in Quebec".[198] But, "whether the respondent's relationship with the appellant be characterized purely as one of lease and hire of services … or one of mandate",[199] the principle set out in Article 1713 *C.C.L.C.* "gives effect to a much broader policy of the civil law for the protection of honesty and good faith in the execution of contracts".[200]

[147] Continuing his analysis, Justice Gonthier writes:

> To admit that the law of Quebec allows the respondent in the case at bar to retain the $660,135.82 he obtained through the breach of his contractual obligations to the appellant would go contrary to the principle that no one should profit from his own wrongdoing.[201]

At a later point, he details the basis of the obligation to reimburse:

> The principle appears elsewhere in the *Civil Code*: it is, after all, a fundamental moral precept. Thus, for example, the heir who has been convicted of killing or attempting to kill the deceased is excluded from the succession (art. 610); the possessor in bad faith of property must give the produce as well as the thing itself to the true owner (art. 411); the person who receives what is not due is bound to restore the thing received with the interest and profits it ought to have produced (art. 1049). Indeed, the *Civil Code* looks with disfavour upon situations inducive to persons turning to personal benefit activities which are to be carried out for the benefit of others. Articles 1484 and 1485 *C.C.L.C.* go so far as making administrators, agents and other persons under a duty to the owner of a property incapable of becoming buyers of such property either by themselves or by persons interposed. A similar prohibition is found in art. 1706. Likewise, a double mandate is held to be contrary to public policy unless it is disclosed to both parties or is implied in the duties of the mandatary, as in the case of brokers, factors and other commercial agents.[202]

To conclude, Justice Gonthier adds:

> The principle underlying both arts. 411 and 1713 of the *Civil Code* which are but an expression of the common saying "ill-gotten goods seldom prosper" ("*bien mal acquis ne profite pas*") is applicable and must be given effect to. With respect, I conclude that the lower courts misdirected themselves in law and, for this reason, I would allow the appeal.

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198 *Bank of Montreal v. Kuet Leong Ng*, *supra*, note 185, p. 437.
199 *Id.*, p. 436.
200 *Id.*
201 *Id.*, p. 439.
202 *Id.*, pp. 441-442.

[148] There are many ways to articulate the contents of the obligation of good faith. As between general expressions open to all kinds of interpretation and rules drawn from specific experience (such as *Bhasin v. Hrynew*:[203] "The parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract", the court should prefer the latter in order to establish a judge-made rule based on the *C.C.Q.* and general legal principles. There is nothing in the judgment of *Kuet Leong Ng* which literally or by analogy is comparable to the conduct of Respondent, which is free of any dishonesty, trickery or duplicity. Such behaviour is present in most cases where the good faith obligation is invoked to sanction a party's conduct and correct any anomaly in the contractual relationship. When such conduct is not present, as in the cases contemplated by Articles 1484 and 1485 *C.C.L.C.*, mentioned by Justice Gonthier, the good faith principle serves to prevent dishonesty by eliminating certain conflict of interest situations which might unduly benefit a party owing a duty of good faith.

[149] It is nevertheless true that the requirement of good faith, seeks to prevent the "unreasonable" exercise of a contractual right which includes deriving unfair advantage from a situation. This is a related notion in respect of which Professors Lluelles and Moore observed: [TRANSLATION] "Abuse of contractual rights is a non exclusive ingredient of good faith".[204] Similarly, this inquiry leads toward *imprévision*. In reaping all the benefit of the market increase in the price of electricity did Respondent appropriate an unfair advantage by an unreasonable exercise of its contractual rights?

[150] The legislation of several civilian legal systems now recognize the theory of *imprévision*. Respondent vigorously maintained in its brief and at the hearing that these provisions simply do not apply here. Appellant pleaded the opposite with equal conviction. Without a more complete record regarding such legislation (including sources, doctrinal and jurisprudential application and interpretation) we cannot opine on the applicability of this body of law. However, the relevance is at best peripheral since our case is domestic. On the other hand, the work of *Unidroit*[205] referred to by Lluelles and Moore is interesting because of the comparative law summary providing an indication of a path for the case law to follow in civil law jurisdictions such as Quebec.

[151] Following are the relevant passages (without explanatory notes) from the *Principes d'Unidroit*:

> ARTICLE 6.2.1 (CONTRACT TO BE OBSERVED)

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203 *Supra*, para. [131]

204 D. Lluelles and B. Moore, *supra*, note 154, p. 1126.

205 International Institute for the Unification of Private Law (UNIDROIT), *UNIDROIT Principles of International Commercial Contracts*, Rome, 2010 (update December 5, 2013) [*UNIDROIT Principles*], online : http://www.unidroit.org/fr/publications/publications-unidroit.

> Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.
>
> ARTICLE 6.2.2 (DEFINITION OF HARDSHIP)
>
> There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and
>
> (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
>
> (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
>
> (c) the events are beyond the control of the disadvantaged party; and
>
> (d) the risk of the events was not assumed by the disadvantaged party.
>
> ARTICLE 6.2.3 (EFFECTS OF HARDSHIP)
>
> (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
>
> (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
>
> (3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
>
> (4) If the court finds hardship it may, if reasonable,
>
> (a) terminate the contract at a date and on terms to be fixed; or
>
> (b) adapt the contract with a view to restoring its equilibrium.

In addition to marginal notes, the authors of the *UNIDROIT Principles* provide hypothetical examples of situations where the principles might apply. The only such case potentially relevant to the one at bar is that which illustrates the application of 6.2.2 b) as follows:

> 2. A accepte de fournir à B du pétrole brut du pays X à un prix fixe pendant les cinq prochaines années malgré les fortes tensions politiques dans la région.

> Deux ans après la conclusion du contrat une guerre survient entre factions en conflit dans les pays limitrophes. La guerre entraîne une crise énergétique mondiale et le prix du pétrole brut augmente fortement. A ne peut pas invoquer le hardship parce qu'une telle hausse du prix du pétrole brut n'était pas imprévisible.

[152] This treatment of *imprévision*, inspired by the hardship clauses common in international contracts, defines with precision the prejudice resulting from the unforeseen circumstance susceptible of justifying the renegotiation of the contract – i.e. the cost of performing the obligation has increased or the value of the consideration has decreased. In other words, the cost-benefit relationship becomes negative in two ways: the cost of performance rises but the consideration received remains the same or, the cost of performance remains unchanged but the consideration received is of lesser value. This is not Respondent's case. It continues to profit from the 1969 power contract albeit that it does not share in a more significant gain. As well, Appellant's solvency is not at risk and it continues to be able to pay what is owed pursuant to the *Hamilton Falls Power Corporation Limited (Lease) Act, 1961*.

[153] Where serious and unforeseen problems of performance arise, it is not uncommon in the industrial and business worlds that the dynamics of the economic relationship between the parties leads them to renegotiate their contract. All kinds of valid reasons motivate them to find common ground. Of significance is the desire to avoid the failure of a joint undertaking. The contractual relationship existing between the parties may be sufficiently valued in itself so that rather than invoke default, a party grants additional time or agrees to modify an obligation in order to safeguard that relationship. Irrespective of the terms of the contract, the benefit received, before or after renegotiation of the contract, may be unavailable elsewhere or not obtainable under the same conditions. In such circumstances why would one party not show flexibility to the other party suffering unforeseen difficulty? Seeking legal redress against the defaulting party not only takes time and money but is inconvenient and can be unpredictable, factors which any rational litigant balances against the benefit of a compromise solution.

[154] Similarly, provoking the bankruptcy of a cocontractant may be advantageous to some creditors, but not to others. Thus, we often see creditors willing to compromise and make concessions to keep their debtor in business and allow it to re-establish itself. Where parties cannot come to terms on their own, the legal system makes available various mechanisms to facilitate if not force a negotiated solution – for example, this is the thinking underpinning legislation such as the *Companies' Creditors Arrangement Act*[206]. Should the law do more? In other words, where default in either the timely or substantive performance of a contract results from adverse circumstances, not caused by the intentional fault of the defaulting party, many are the examples where common

[206] L.R.C. (1985), c. C-36.

interest will lead to a provisional forbearance, a negotiated solution and a continuation of the contractual relationship subject to terms which differ from those originally agreed upon. The solution will be consensual. The respect of the letter of the contract may be a preoccupation of lawyers but rarely is it a preoccupation of the parties. They seek something else. They want to receive under the best possible conditions, and if necessary under changed contractual terms, the goods, services, material advantages or funds constituting the benefit they bargained for.

[155] All of the foregoing presupposes as a common denominator, a serious unforeseen problem in one form or another during the performance of a contract. Probably, amongst those situations are examples of real cases of hardship as articulated in the *UNIDROIT Principles* where the financial health and survival of a contracting party is in jeopardy. In such circumstances, a party who is refused forbearance, a diminishing of its obligations, a re-ordering of the contract or such other concession objectively reasonable and unharmful to the other party, could plead before a court that its cocontractant is not acting in good faith; it is acting irrationally and inexplicably or in a word, unreasonably. Such a failure to act in good faith and abuse in the exercise of a contractual right are notionally related and perhaps in certain cases, identical. In such vein, the response set forth at the end of paragraph [127] above, remains applicable.

[156] However, the facts of this case do not give rise to a situation as described above. On the contrary, not only is Appellant viable and prosperous but at a future, fixed date, its obligations to Respondent will end and it alone will have full control over a very valuable power plant endowed with considerable potential. As mentioned above in paragraphs [44] to [47] and [56] of this judgment, the trial judge emphasized an essential point from the report of the expert Mr. Lapuerta: the plant would never have seen the light of day had it not been for the price schedule freely and knowingly negotiated by the parties between 1966 and 1969. Appellant is now claiming that Respondent should share profits with Appellant to which Respondent has a right under the power contract and which profits are greater than that which the parties foresaw but which are the fair return for the risks assumed by Respondent in 1969.

[157] Moreover, at several instances during the term of the contract, Respondent demonstrated its willingness to negotiate and conclude parallel agreements with Appellant which, though mutually advantageous to both parties, included real concessions to the benefit of Appellant and its shareholders. The judge refers to these negotiations and resulting agreements in paragraphs [176] to [194] of his judgment. Thus, the proof in the record does not indicate bad faith on the part of Respondent but merely an allegation of such by Appellant which does not meet the threshold set forth in paragraph [155] above.

[158] Another aspect of Appellant's thesis provides that equity as mentioned in Article 1434 *C.C.Q.* justifies court intervention where the equilibrium of the contract has been

altered during its performance. Equity, another [TRANSLATION] "… vague notion difficult to delineate with precision and still more difficult to define",[207] is the underlying principle of an argument related to *imprévision*. Even accepting Appellant's position for discussion purposes, equity could only be relevant to two types of situations described in paragraph [155] above. Once again, to apply this notion in the manner suggested by Appellant would be to recognize a form of distributive justice in contracts. This is not a role which the legislator has conferred on the courts.

* * * * *

[159] A broader conclusion flows from the foregoing analysis which may clarify the apparent relationship in Quebec law between the requirements of good faith and situations more or less resembling instances of *imprévision*. Aside from occurrences of real hardship, a notion examined in paragraphs [152] to [155] above, the general principle of good faith enunciated in Articles 6, 7 and 1375 *C.C.Q.* is of no assistance to a party in Appellant's situation. Appellant is really complaining of gross disparity – i.e. the energy market has evolved such that in the framework of a contract otherwise advantageous for Appellant and Respondent, the latter is collecting profits disproportionate to those earned by Appellant in selling its electricity to Respondent. Nothing stops the legislator from intervening to correct such disparity. This is what the French did by legislation in 1804. Article 1674 of the French *Civil Code* which is still in force today, provides that the seller of immoveable property may seek cancellation of the sale if he [TRANSLATION] "suffers a loss of seven twelfths of the purchase price". As a doctrinal source pointed out in 1998: “[t]he problem of gross disparity–or, in civil law terms, of lesion–poses the classical question of a just equilibrium between the contractual prestations at the moment of formation of a contract. Dean Ripert saw here "une éternelle revendication de l’équité blessée" (an eternal claim of wounded equity)”.[208] This issue of excessive benefit can arise at the time the contract is entered into but also during performance in the event of a significant change in circumstances. With certain exceptions, the Quebec legislator chose not to allow lesion between persons of the age of majority (there being no equivalent in the *C.C.Q.* to Article 1674 of the *French Civil Code*); it did not adopt the theory of *imprévision* recommended by the CCRO and it affirmed in the *C.C.Q.* that good faith is a general principle that permeates the civil law as a whole. To allow Appellant's thesis of good faith to succeed in the absence of hardship would be to grant relief because of lesion arising from Respondent's excessive benefit. The proposition does not stand up to scrutiny given the current state of Quebec civil law.

[160] Given such conclusion, it is unnecessary to address the other legal issues raised in first instance.[209]

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[207] J.-L. Baudouin, *supra*, note 164, p. 39.

[208] P.-A. Crépeau, *supra*, note 180, p. 78.

[209] The appellant admitted that some interlocutory judgments on the admissibility of various items of evidence, initially contested in on appeal, cannot have any impact on the result of the case.

FOR THE FOREGOING REASONS, THE COURT:

[161] **DISMISSES** the appeal with legal costs.

FRANCE THIBAULT, J.A.

YVES-MARIE MORISSETTE, J.A.

MARIE ST-PIERRE, J.A.

MARK SCHRAGER, J.A.

ROBERT M. MAINVILLE, J.A.

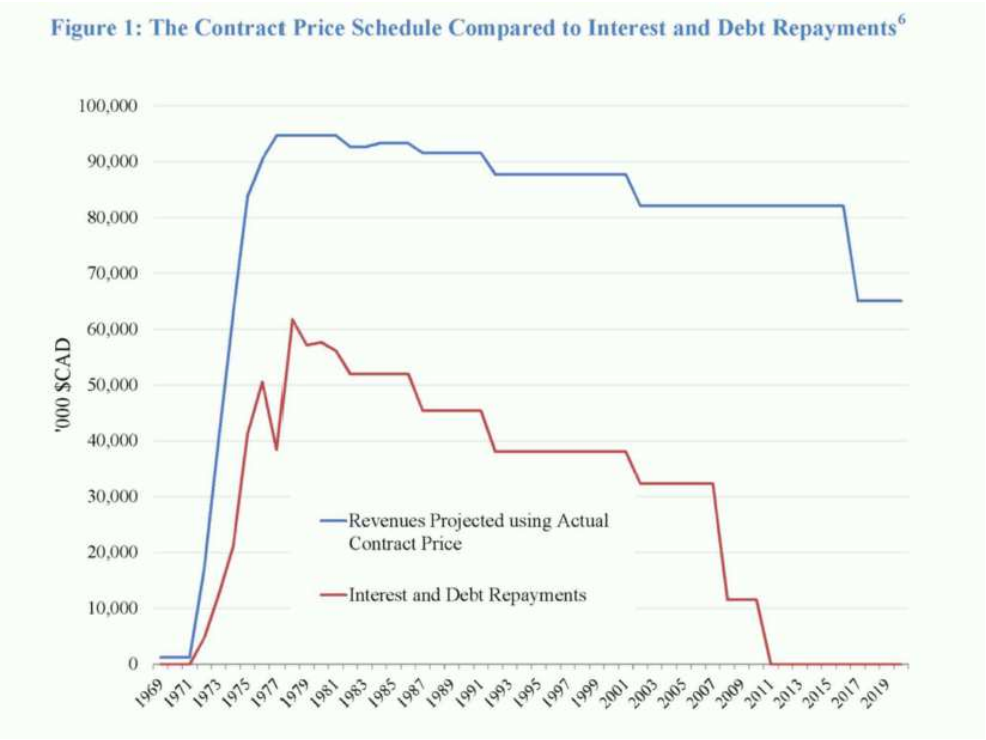
Mtre Douglas Mitchell
Mtre Kurt A. Johnson
Mtre Audrey Boctor
Irving Mitchell Kalichman
and
Mtre Daphné Wermenlinger
Los Angeles (United States)
and
Mtre Patrick Girard
Stikeman Elliott
For Appellant

Mtre Pierre Bienvenu
Mtre Sophie Melchers
Mtre Horia Bundaru
Mtre Andres Garin
Norton Rose Fulbright Canada
and

Mtre Lucie Lalonde
Cellucci Fréchette
For Respondent

Date of hearing: April 25, 2016

ANNEXE I



Key:

The lower line reprensents *Interest and Debt Repayments*.

The upper line represents *Revenues Projected using Actual Contract Price*.

ANNEXE II

BOOK ONE : PERSONS	LIVRE PREMIER : DES PERSONNES
6. Every person is bound to exercise his civil rights in good faith.	**6.** Toute personne est tenue d'exercer ses droits civils selon les exigences de la bonne foi.
7. No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith.	**7.** Aucun droit ne peut être exercé en vue de nuire à autrui ou d'une manière excessive et déraisonnable, allant ainsi à l'encontre des exigences de la bonne foi.
BOOK THREE: SUCCESSIONS	**LIVRE TROISIÈME: DES SUCCESSIONS**
771. If, owing to circumstances unforeseeable at the time of the acceptance of the legacy, the execution of a charge becomes impossible or too burdensome for the heir or the legatee by particular title, the court, after hearing the interested persons, may revoke it or change it, taking account of the value of the legacy, the intention of the testator and the circumstances.	**771.** Si, en raison de circonstances imprévisibles lors de l'acceptation du legs, l'exécution d'une charge devient impossible ou trop onéreuse pour l'héritier ou le légataire particulier, le tribunal peut, après avoir entendu les intéressés, la révoquer ou la modifier, compte tenu de la valeur du legs, de l'intention du testateur et des circonstances.
BOOK FOUR: PROPERTY	**LIVRE QUATRIÈME: DES BIENS**
1294. Where a trust has ceased to meet the original intent of the settlor, particularly as a result of circumstances unknown to him or unforeseeable and which make the pursuit of the purpose of the trust impossible or too onerous, the court may, on the application of an interested person, terminate the trust; the court may also, in the case of a social trust, substitute another closely related purpose for the original purpose of the trust.	**1294.** Lorsqu'une fiducie a cessé de répondre à la volonté première du constituant, notamment par suite de circonstances inconnues de lui ou imprévisibles qui rendent impossible ou trop onéreuse la poursuite du but de la fiducie, le tribunal peut, à la demande d'un intéressé, mettre fin à la fiducie; il peut aussi, dans le cas d'une fiducie d'utilité sociale, lui substituer un but qui se rapproche le plus possible du but original.
Where the trust continues to meet the intent of the settlor but new measures would allow a more	Si la fiducie répond toujours à la volonté du constituant, mais que de nouvelles mesures permettraient de

faithful compliance with his intent or facilitate the fulfilment of the trust, the court may amend the provisions of the constituting act.

mieux respecter sa volonté ou favoriseraient l'accomplissement de la fiducie, le tribunal peut modifier les dispositions de l'acte constitutif.

BOOK FIVE: OBLIGATIONS

LIVRE CINQUIÈME : DES OBLIGATIONS

1375. The parties shall conduct themselves in good faith both at the time the obligation arises and at the time it is performed or extinguished.

1375. La bonne foi doit gouverner la conduite des parties, tant au moment de la naissance de l'obligation qu'à celui de son exécution ou de son extinction.

1405. Except in the cases expressly provided by law, lesion vitiates consent only with respect to minors and persons of full age under protective supervision.

1405. Outre les cas expressément prévus par la loi, la lésion ne vicie le consentement qu'à l'égard des mineurs et des majeurs protégés.

1434. A contract validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law.

1434. Le contrat valablement formé oblige ceux qui l'ont conclu non seulement pour ce qu'ils y ont exprimé, mais aussi pour tout ce qui en découle d'après sa nature et suivant les usages, l'équité ou la loi.

1437. An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced.

1437. La clause abusive d'un contrat de consommation ou d'adhésion est nulle ou l'obligation qui en découle, réductible.

An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause.

Est abusive toute clause qui désavantage le consommateur ou l'adhérent d'une manière excessive et déraisonnable, allant ainsi à l'encontre de ce qu'exige la bonne foi; est abusive, notamment, la clause si éloignée des obligations essentielles qui découlent des règles gouvernant habituellement le contrat qu'elle dénature celui-ci.

1439. A contract may not be resolved, resiliated, modified or revoked except on grounds recognized by law or by agreement of the parties.

1439. Le contrat ne peut être résolu, résilié, modifié ou révoqué que pour les causes reconnues par la loi ou de l'accord des parties.

1458. Every person has a duty to honour his contractual undertakings.

Where he fails in this duty, he is liable for any bodily, moral or material injury he causes to the other contracting party and is bound to make reparation for the injury; neither he nor the other party may in such a case avoid the rules governing contractual liability by opting for rules that would be more favourable to them.

1458. Toute personne a le devoir d'honorer les engagements qu'elle a contractés.

Elle est, lorsqu'elle manque à ce devoir, responsable du préjudice, corporel, moral ou matériel, qu'elle cause à son cocontractant et tenue de réparer ce préjudice; ni elle ni le cocontractant ne peuvent alors se soustraire à l'application des règles du régime contractuel de responsabilité pour opter en faveur de règles qui leur seraient plus profitables.

1609. An acquittance, transaction or statement obtained from the creditor in connection with bodily or moral injury he has sustained, obtained by the debtor, an insurer or their representatives within 30 days of the act which caused the injury, is without effect if it is damaging to the creditor.

1609. Les quittances, transactions ou déclarations obtenues du créancier par le débiteur, un assureur ou leurs représentants, lorsqu'elles sont liées au préjudice corporel ou moral subi par le créancier, sont sans effet si elles ont été obtenues dans les 30 jours du fait dommageable et sont préjudiciables au créancier.

1621. Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfill their preventive purpose.

1621. Lorsque la loi prévoit l'attribution de dommages-intérêts punitifs, ceux-ci ne peuvent excéder, en valeur, ce qui est suffisant pour assurer leur fonction préventive.

[…]

[…]

1834. A charge which, owing to circumstances unforeseeable at the time of the acceptance of the gift, becomes impossible or too burdensome for the donee may be varied or revoked by the court, taking account of the value of the gift, the intention of the donor and the circumstances.

1834. La charge qui, en raison de circonstances imprévisibles lors de l'acceptation de la donation, devient impossible ou trop onéreuse pour le donataire, peut être modifiée ou révoquée par le tribunal, compte tenu de la valeur de la donation, de l'intention du donateur et des circonstances.

1901. A clause stipulating a penalty of an amount exceeding the value of the injury actually suffered by the lessor, or imposing an obligation on

1901. Est abusive la clause qui stipule une peine dont le montant excède la valeur du préjudice réellement subi par le locateur, ainsi

the lessee which is unreasonable in the circumstances, is an abusive clause.	que celle qui impose au locataire une obligation qui est, en tenant compte des circonstances, déraisonnable.
Such a clause is null or any obligation arising from it may be reduced.	Cette clause est nulle ou l'obligation qui en découle, réductible.
2149. The mandator is bound to cooperate with the mandatary to facilitate the fulfilment of the mandate.	**2149.** Le mandant est tenu de coopérer avec le mandataire de manière à favoriser l'accomplissement du mandat.
2186. A contract of partnership is a contract by which the parties, in a spirit of cooperation, agree to carry on an activity, including the operation of an enterprise, to contribute thereto by combining property, knowledge or activities and to share among themselves any resulting pecuniary profits.	**2186.** Le contrat de société est celui par lequel les parties conviennent, dans un esprit de collaboration, d'exercer une activité, incluant celle d'exploiter une entreprise, d'y contribuer par la mise en commun de biens, de connaissances ou d'activités et de partager entre elles les bénéfices pécuniaires qui en résultent.
[…]	[…]
2332. In the case of a loan of a sum of money, the court may pronounce the nullity of the contract, order the reduction of the obligations arising from the contract or revise the terms and conditions of the performance of the obligations to the extent that it finds that, having regard to the risk and to all the circumstances, one of the parties has suffered lesion.	**2332.** Lorsque le prêt porte sur une somme d'argent, le tribunal peut prononcer la nullité du contrat, ordonner la réduction des obligations qui en découlent ou, encore, réviser les modalités de leur exécution dans la mesure où il juge, eu égard au risque et à toutes les circonstances, qu'il y a eu lésion à l'égard de l'une des parties.