



**SUPREME COURT OF CANADA**

**CITATION:** Churchill Falls (Labrador) Corp. v.  
Hydro-Québec, 2018 SCC 46

**APPEAL HEARD:** December 5, 2017  
**JUDGMENT RENDERED:** November 2, 2018  
**DOCKET:** 37238

**BETWEEN:**

**Churchill Falls (Labrador) Corporation Limited**  
Appellant

and

**Hydro-Québec**  
Respondent

**OFFICIAL ENGLISH TRANSLATION:** Reasons of Gascon J.

**CORAM:** McLachlin C.J.\* and Abella, Moldaver, Karakatsanis, Wagner, Gascon,  
Côté, Brown and Rowe JJ.

**REASONS FOR JUDGMENT:**  
(paras. 1 to 139)

Gascon J. (Abella, Moldaver, Karakatsanis, Wagner, Côté  
and Brown JJ. concurring)

**DISSENTING REASONS:**  
(paras. 140 to 190)

Rowe J.

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\* McLachlin C.J. took no part in the judgment.

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CHURCHILL FALLS (LABRADOR) CORP. v. HYDRO-QUÉBEC

**Churchill Falls (Labrador) Corporation Limited**

*Appellant*

v.

**Hydro-Québec**

*Respondent*

**Indexed as: Churchill Falls (Labrador) Corp. v. Hydro-Québec**

**2018 SCC 46**

File No.: 37238.

2017: December 5; 2018: November 2.

Present: McLachlin C.J.<sup>\*</sup> and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Contracts — Performance — Good faith and equity — Duty to renegotiate — Doctrine of unforeseeability — Contract between company and Hydro-Québec respecting construction and operation of hydroelectric plant — Take-or-pay undertaking by Hydro-Québec to buy fixed quantity of electricity produced by plant at*

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\* McLachlin C.J. took no part in the judgment.

*fixed prices for 65 years — Hydro-Québec reaping substantial profits from resale of electricity as result of changes in market — Company bringing action for order that Hydro-Québec renegotiate contract and agree to reallocation of benefits — Whether party to contract can require other party to renegotiate contract because of allegedly unforeseeable changes in market since it was signed — Civil Code of Québec, arts. 1375, 1431, 1434.*

In 1969, the Churchill Falls (Labrador) Corporation Limited and Hydro-Québec signed a contract that set out a legal and financial framework for the construction and operation of a hydroelectric plant on the Churchill River in Labrador. In the contract, Hydro-Québec undertook to purchase, over a 65-year period, most of the electricity produced by the plant, whether it needed it or not, which allowed Churchill Falls to use debt financing for the construction of the plant. In exchange, Hydro-Québec obtained the right to purchase electricity at fixed prices for the entire term of the contract. After the contract was signed, there were changes in the electricity market, and the purchase price for electricity set in the contract is now well below market prices. Hydro-Québec sells electricity from the plant to third parties at current prices, and this generates substantial profits for Hydro-Québec. In the circumstances, Churchill Falls is asking the courts to order that the contract be renegotiated and that its benefits be reallocated. Churchill Falls seeks to have the fixed rate being paid by Hydro-Québec replaced with a new rate so as to ensure that the contract reflects the equilibrium of the initial agreement and in order to enforce Hydro-Québec's alleged duty to cooperate with Churchill Falls on the basis of its

general duty of good faith. The Quebec Superior Court concluded that the intervention sought by Churchill Falls was not warranted, and the Court of Appeal dismissed Churchill Falls' appeal.

*Held* (Rowe J. dissenting): The appeal should be dismissed.

*Per* Abella, Moldaver, Karakatsanis, Wagner, **Gascon**, Côté and Brown JJ.: Given the nature of the contract and the duties of good faith and equity, Hydro-Québec did not have a duty to renegotiate the contract when the contract proved to be an unanticipated source of substantial profits for it. In Quebec civil law, there is no legal basis for Churchill Falls' claim. The Court cannot change the content of the contract, nor can it require the parties to renegotiate certain terms of the contract or to share the benefits otherwise than as provided for in the contract.

The interpretation and characterization of the contract in this case are questions of mixed fact and law. Because the trial judge's interpretation and characterization of the contract are based on a particular set of circumstances that are unlikely to have any precedential value, they may not be overturned absent a palpable and overriding error. No error that would justify overturning the trial judge's findings of fact concerning the paradigm, the characterization and the interpretation of the contract can be found.

The contract cannot be characterized as a joint venture contract or a relational contract. A joint venture contract is formed where businesses choose to

become partners and to cooperate in a project by each investing resources and by sharing any profits from the project. In this case, the evidence does not show that the parties intended to enter into a partnership or to jointly assume financial or logistical responsibility for the project beyond the simple cooperation required to perform their respective prestations. The parties' relationship thus lacks the characteristics generally associated with the joint venture contract. As for the relational contract, it sets out the rules for a close cooperation that the parties wish to maintain over the long term and puts an emphasis on the parties' relationship and on their ability to agree and cooperate. It does not define their respective prestations in much detail. As a result, it requires a cooperation that is, in the end, more active than the cooperation required by transaction-based contracts. The parties' contract sets out a series of defined and detailed prestations as opposed to providing for flexible economic coordination. Each party's participation is clearly quantified and defined, and no important prestations are left undefined. This shows that the parties intended the project to proceed according to the words of the contract, not on the basis of their ability to agree and cooperate from day to day to fill any gaps in the contract. The long-term, interdependent nature of the contract does not in itself imply that the contract is relational.

The contract does not contain implied clauses that impose on Hydro-Québec a duty to cooperate and to renegotiate the agreed-on prices. An implied duty may, within the meaning of art. 1434 of the *Civil Code of Québec*, be incident to a contract according to the nature of the contract if the duty is consistent

with the general scheme of the contract and if the contract's coherency seems to require such a duty. However, such an implied clause must not merely add duties to the contract that might enhance it, but must fill a gap. In this case, there is no gap or omission in the scheme of the contract that requires that an implied duty to cooperate and to renegotiate the agreed-on prices be read into the contract in order to make it coherent. There is nothing to suggest that the parties' prestations would be incomprehensible and would have no basis or meaningful effect in the absence of an implied duty according to which Hydro-Québec must either exceed the usual requirements of good faith in cooperating with Churchill Falls or redistribute windfall profits.

The doctrine of unforeseeability cannot serve as a basis for requiring Hydro-Québec to renegotiate the contract. This doctrine is a private law rule that is recognized in some civil law jurisdictions and the effect of which is that parties can be required to renegotiate a contract if, as a result of unforeseen events, performance of the obligations stipulated in the contract would be excessively onerous for one of them. However, unforeseeability cannot be relied on where it is clear that the party who was disadvantaged by the change in circumstances had accepted the risk that such changes would occur, and it applies only where the new situation makes the contract less beneficial for one of the parties, and not simply more beneficial for the other. It does not apply where the parties receive the prestations and benefits that are provided for or are allocated to them in the contract. But this doctrine is not recognized in Quebec civil law at this time. Any development of concepts analogous

to unforeseeability in Quebec civil law must take account of the legislature's choice not to turn this doctrine into a universal rule. Furthermore, even in jurisdictions where the doctrine of unforeseeability is recognized, it applies only in narrow circumstances that quite simply do not correspond to those of the parties in this case. The parties intentionally allocated the risk of electricity price fluctuations to Hydro-Québec, and the changes in the market did not have the effect of increasing the cost of performing Churchill Falls' prestations or diminishing the value of the prestations it received from Hydro-Québec. On the contrary, Churchill Falls has continued to receive exactly what it was owed under the contract, as well as the related benefits.

The principles of good faith and equity do not impose a duty to renegotiate on Hydro-Québec. The introduction of the duty of good faith into the *Civil Code of Québec* shows that the legislature intended to temper the principles of the binding force of contracts and autonomy of the will of the parties. Good faith confers a broad, flexible power to create law and serves as a basis for courts to intervene and to impose on contracting parties obligations based on a notion of contractual fairness. It also serves to protect the equilibrium of a contract. However, it cannot be used to violate that equilibrium and impose a new bargain on the parties to the contract. The courts cannot rely on it to order the sharing of profits that have in fact been honestly earned. Despite its potential scope and its capacity to change the civil law because of its flexible application, the concept of good faith cannot be expanded to include the possibility of penalizing a party whose conduct has not been unreasonable, or a duty to renegotiate the principal obligations of a contract in all

circumstances. The duty of good faith does not negate a party's right to rely on the words of the contract unless insistence on that right constitutes unreasonable conduct in the circumstances. The duty to cooperate, which flows from the requirements of good faith, can require a party to be proactive in accommodating the interests and legitimate expectations of his or her contracting partner. But for a party to consider only the words of the contract and to refuse to renegotiate a contract or to share profits is not necessarily contrary to the general duty of good faith. The duty to cooperate with the other contracting party does not mean that one's own interests must be sacrificed.

In this case, Hydro-Québec is entitled to insist on adhering to the words of the contract and maintaining the equilibrium of the prestations the contract establishes for the benefit of the parties, which bound themselves knowing full well what they were doing. Hydro-Québec is not breaching its duty of good faith in exercising its right to purchase electricity from Churchill Falls at fixed prices. Nor does its insistence on adhering to the contract despite the unforeseen change in circumstances constitute unreasonable conduct. Moreover, Hydro-Québec is considering Churchill Falls' legitimate contractual interests, given that it is not preventing Churchill Falls from receiving the benefits conferred on the latter under the contract. It has done nothing that threatens to disrupt the contractual equilibrium. Hydro-Québec therefore has no duty to cooperate with Churchill Falls to mitigate the effects of the contract. The magnitude of the profits it earns under the contract does not justify modifying the contract so as to deny it that benefit.



As to equity, it cannot be relied on in support of the relief being sought, since its effect would then be to indirectly introduce either lesion or unforeseeability into Quebec law in every case. To hold that a change in the circumstances of the parties to a contract will always justify its being renegotiated in the name of equity would conflict sharply with the legislature's intent. Equity is not so malleable that it can be detached from the will of the parties and their common intention. Nothing about the relationship between Churchill Falls and Hydro-Québec would justify such an intervention in the circumstances of this case. There is neither inequality nor vulnerability in their relationship. Both parties to the contract were experienced, and they negotiated its clauses at length.

The relief being sought cannot be granted. There is no legal basis on which a judge could impose a new bargain on Hydro-Québec to which it has not agreed. Allowing a contract to be modified by a judge at the request of a single party would conflict seriously with the principles of the binding force of contracts and freedom of contract that underlie Quebec civil law. In any event, Churchill Falls' action is prescribed. The situation in this case does not constitute a breach of an ongoing duty or a continuing fault that is not subject to prescription. On the contrary, the right of action that Churchill Falls seeks to exercise arises when the events that give rise to it occur. The most recent event to have disrupted the electricity market occurred in 1997 at the latest. It was at that time that Churchill Falls' right of action arose, and it has therefore been prescribed since the end of 2000 at the latest.

*Per Rowe J. (dissenting):* Properly characterized, the contract binding Churchill Falls and Hydro-Québec is relational in nature and both parties are subject to a duty of cooperation. Hydro-Québec breached this duty. Accordingly, the appeal should be allowed.

The object of contract characterization is to link the contract at issue to a legal category so as to impose on the parties the legal effects of the true nature of their agreement. The aim of this exercise is to identify the essential objective of the contract and to categorize the contract based on the elements that define its nature. The exercise of characterization is a question of law unless consideration of evidence extrinsic to the contract is necessary to identify the true intention of the parties. In this case, the trial judge did not indicate the necessity of considering elements extrinsic to the contract to establish the nature of its fundamental obligation. Accordingly, characterization in this instance remains a question of law, reviewable on a standard of correctness.

Relational contracts typically require successive performance, whereby the parties have obligations to perform on a continuing basis. This category of contracts should not be limited to those that leave certain obligations to be defined by the parties at a later date. Rather than being a necessary condition, undefined obligations are but one indicator of relational contracts. Other indicators include the duration of the contract and the creation of an ongoing economic relationship rather than a one-off transaction. In this case, the contract at issue is not a simple contract of

sale. It establishes a cooperative relationship between the parties and it is the framework for an interdependent and long-term relationship. This conclusion is reinforced by its language. First, the agreement makes clear that both parties saw the project as requiring ongoing interaction and collaboration. Second, the parties committed to offering each other assistance during the execution of the contract in order to ensure its success. Third, the parties explicitly contemplated the need for consultation, joint determination, discussion, and revision. When considering the overall framework of the parties' rights and obligations, the true nature of the contract becomes apparent: it is relational.

The characterization of a contract determines the legal consequences that attach to it, including certain implied obligations that are necessary complements to the contract and reflect the presumed intention of the parties. The inclusion of an implied obligation is warranted where a reasonable person in the same circumstances would see an important and intrinsic connection between the implied terms and the nature of the contract. A court does not have to find that a contract would be ambiguous, incomprehensible, without foundation or without useful effect before including an implied obligation. In relational contracts, both good faith and equity provide guidance to defining the scope and content of implied obligations, including the implied duty to cooperate. Good faith implies an attitude that maximizes, for each party, the advantages of the contract. In circumstances where the parties must work together to achieve the object of their agreement over a long period of time, the relational nature of the contract imposes a heightened duty of good faith. Likewise,

equity is a means to remedy the imperfections of a contract and re-establish an equilibrium where its division of burdens and benefits do not align with its intended scheme. While courts may not modify or revise contracts, they can enforce what appears to be equitable.

Based on the relational nature of the contract at issue and how it informs the requirements of good faith and equity, the parties had an implied obligation to cooperate in establishing a mechanism for the allocation of extraordinary profits. This obligation flows from the fact that a profit imbalance of this nature and magnitude is beyond what the parties intended when they concluded the agreement. The parties' choice not to include a price adjustment mechanism was premised on shared assumptions about the nature and value of hydroelectric power at the time of the formation of the contract. It cannot be seen as excluding an obligation to cooperate should these shared assumptions no longer reflect reality. As the contract contains no mechanism for the allocation of profits that are beyond what was envisioned, the parties have an implied obligation to cooperate in defining the terms of their allocation. Hydro-Québec has breached this duty by refusing to establish a price adjustment formula for these extraordinary profits by way of mutual agreement. Hydro-Québec must therefore be held to its obligation, and should be ordered to cooperate with Churchill Falls for this purpose.

Where a fault continues in time and causes continuing damages, prescription starts running anew each day. By persistently refusing to enter into

negotiations to establish a mechanism for allocating unforeseen profits, Hydro-Québec has been in continuous breach of its obligation to cooperate. As Churchill Falls' right of action is grounded in this continuous breach, its claim is not barred by prescription. On the question of remedy, while judges should refrain from ordering specific performance of obligations that require personal participation of the parties, the imposition of such an order here would not amount to an improper constraint on the parties' capacity to act.

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By Gascon J.

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*v. Canadian National Bank*, [1990] 3 S.C.R. 122; *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554; *Provenzano v. Babori*, [1991] R.D.I. 450; *T.L. v. Y.L.*, 2011 QCCA 1205; *SMC Pneumatiques (Canada) ltée v. Dicsa inc.*, 2000 CanLII 17881, rev'd 2003 CanLII 72264; *Entreprises MTY Tiki Ming inc. v. McDuff*, 2008 QCCS 4898; *Nagarajah v. Fotinopoulos Kalyvas*, 2003 CanLII 2834.

By Rowe J. (dissenting)

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*Code civil* (France), art. 1195.

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*Douglas Mitchell, Audrey Boctor, Daphné Wermenlinger and Patrick Girard*, for the appellant.

*Pierre Bienvenu, Andres C. Garin, Sophie Melchers, Horia Bundaru and*

*Lucie Lalonde*, for the respondent.

English version of the judgment of Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ. delivered by

GASCON J. —

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## I. Overview

[1] The Churchill River basin in Labrador is one of the areas with the greatest hydroelectric potential in the world. In 1969, following several years of negotiations, two sophisticated entities, the Quebec Hydro-Electric Commission (“Hydro-Québec”) and the Churchill Falls (Labrador) Corporation Limited (“CFLCo”), signed a contract (“Power Contract” or “Contract”) that set out a legal and financial framework for harnessing that potential by building a hydroelectric plant (“Plant”) on the river. It was a huge project involving a substantial amount of money. The parties chose to allocate the risks and benefits of the Contract over a 65-year period.

[2] The Power Contract signed by the parties made the project viable and attractive for each of them. On the one hand, Hydro-Québec undertook to purchase most of the electricity produced by the Plant, whether it needed it or not, and to protect CFLCo from any cost overruns incurred in the construction of the Plant. This assured CFLCo of a stable return on its investment and allowed it to use debt financing for the construction of the Plant, which is now estimated to be worth

\$20 billion. On the other hand, Hydro-Québec sought and obtained the right to purchase electricity at fixed prices for the entire term of the Contract. This protected it from inflation and assured it that it would benefit from low prices in the event of an increase in market prices for electricity.

[3] Nearly 50 years after the Contract was signed, there have been changes in the electricity market whose effect is that the purchase price for electricity set in the Contract is well below market prices. As a result, Hydro-Québec sells electricity to third parties at current prices while continuing to pay CFLCo the price agreed on in the Contract in 1969. This generates substantial profits for Hydro-Québec.

[4] CFLCo argues that given this reality, which in its view was unforeseen, Hydro-Québec can no longer avail itself of the benefits conferred on it by the words of the Contract. In CFLCo's opinion, these circumstances, which it characterizes as new and unforeseeable, mean that for Hydro-Québec to do so is contrary to the equilibrium established by the initial agreement and to the principle of good faith in contracting. CFLCo argues that, because the possibility that Hydro-Québec would within the space of a few years find itself in so advantageous a position for the sale of electricity at very high prices was unthinkable in the late 1960s, the Contract as initially contemplated cannot be found to apply in such circumstances. CFLCo submits that because the parties' agreement dealt first and foremost with the creation of a cooperative, sharing relationship, the words of the Contract do not reflect that primary intention of the parties and the application of the Contract now creates a

situation that bears no resemblance to the contractual relationship contemplated in 1969.

[5] In the circumstances, CFLCo is asking the courts to order that the Contract be renegotiated and that its benefits be reallocated. Specifically, CFLCo seeks to have the fixed rate per kilowatt hour paid to it by Hydro-Québec replaced with a new and more advantageous rate. It submits that this change is necessary for two reasons: first, to ensure that the Contract reflects the initial equilibrium it is relying on and, second, to enforce Hydro-Québec's alleged duty to cooperate with its long-time partner on the basis of its general duty of good faith.

[6] The Quebec Superior Court and Court of Appeal both ruled against CFLCo. I agree with their conclusion. In Quebec civil law, there is no legal basis for CFLCo's claim. This Court cannot change the content of the Contract, nor can it require the parties to renegotiate certain terms of the Contract or to share the benefits otherwise than as provided for in the Contract. All of CFLCo's arguments, which are based on the nature of the Contract and its implied duties, the general duty of good faith, or a variation on the doctrine of unforeseeability (*imprévision*), must fail. Moreover, all of them require questioning the trial judge's determinative findings of fact, which are tainted by no palpable and overriding error. I would therefore dismiss the appeal.

## II. Background

[7] To clarify what is in issue, it is important to clearly determine what the parties intended and expected at the time they entered into the Contract and how their relationship has evolved since then. This review of the factual background is based essentially on the trial judge's reasons. Since the courts below have already reviewed the relevant evidence thoroughly and in detail, I will limit myself to the salient aspects of that evidence that are determinative of the appeal.

A. *Origin of the Development Project*

[8] In 1961, the Government of Newfoundland and Labrador<sup>1</sup> signed a lease with the Hamilton Falls Power Corporation Limited (which later changed its name and became CFLCo), a subsidiary of the British Newfoundland Corporation Limited ("Brinco"). Brinco was a consortium of industrial, banking and mining companies whose directors were, according to the trial judge, elite titans of industry at the time. The lease conferred on CFLCo the right to make use of the watershed of the Churchill Falls site to produce hydroelectric power. The lease, which was for a fixed rent, had a term of 99 years, renewable for a further 99 years. It provided that royalties were to be paid to the Government of Newfoundland and Labrador, but prohibited the province from raising taxes or increasing the amount of the royalties.

[9] At the time, Brinco wanted to exploit the watershed and build a hydroelectric plant there, but it was apparently unwilling either to finance the plant by

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<sup>1</sup> Although it was only in December 2001 that the province of Newfoundland officially became Newfoundland and Labrador, the name "Newfoundland and Labrador" will be used throughout these reasons.

issuing shares in CFLCo or to commit its own funds. Instead, it tried to secure debt financing for the construction of the Plant. For that purpose, CFLCo, its subsidiary that was to develop the project, sought customers that could guarantee that they would purchase large quantities of electricity on a long-term basis, in part to assure its future creditors that the project was financially viable. The customers it sought would also need to have the technology required to transmit the electricity produced by the Plant to consumers. In the trial judge's opinion, there was nothing to suggest that, at the time, CFLCo was in any way dealing with an urgent situation that forced it to undertake the project in such circumstances.

[10] Hydro-Québec, a state-owned enterprise created in 1944 that has had a monopoly on electricity in Quebec since 1963, met these criteria. Furthermore, it was at that time facing an increase in the demand for electricity in Quebec. This did not make it the perfect partner, however, as it was capable of developing its own hydroelectric projects. Hydro-Québec therefore had to be convinced that it would be worth its while to participate in the construction of plants owned by third parties and to purchase their electricity rather than producing its own.

B. *Negotiations, Letter of Intent and Power Contract*

[11] CFLCo approached Hydro-Québec immediately after the 1961 lease was signed, but Hydro-Québec rejected its initial offers. It was not until 1966 that the parties agreed on a development project. At that time, they signed a Letter of Intent setting out the terms of the project, although those terms required the approval of the



governments of Quebec and Newfoundland and Labrador. Article 2.0 of the Letter of Intent stipulated that a final contract remained to be signed. The Letter of Intent stated that CFLCo would be responsible for building the Plant, and Hydro-Québec for building the transmission lines to Quebec. The parties expected Hydro-Québec to purchase a fixed quantity of electricity from the Plant for 40 years at fixed prices that would decrease every 5 or 10 years and would be based on the cost of building the Plant. That purchase guarantee took the form of a “take-or-pay” undertaking that would require Hydro-Québec to buy and pay for a fixed quantity of electricity whether it needed it or not. The Letter of Intent also provided that CFLCo would have the right to receive 300 megawatts of electricity on request: this was the right of “recapture”. The parties also agreed that Hydro-Québec would guarantee up to \$100 or \$109 million in construction cost overruns.

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

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

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

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

[16] In these proceedings, CFLCo is challenging that paradigm.

*C. Situation of the Parties After They Entered Into the Contract*

[17] CFLCo argues that this challenge is justified because of some fundamental and unforeseeable changes that have occurred in the electricity market. After the Contract was signed, the price of electricity in fact rose significantly, in part because of the oil price shocks of the 1970s and the decline in public confidence in nuclear power due to an accident in a plant that happened in 1979. The relative market positions of CFLCo and Hydro-Québec are alleged to have changed as well. Technologies for transporting and distributing electricity are more efficient. Furthermore, since 1996, the United States Federal Energy Regulatory Commission has required any company that sells electricity in that country, including Hydro-Québec, to give any interested third party access to its transmissions systems.

[18] In CFLCo's view, these changes have essentially disrupted the equilibrium of the Contract. The prestations owed to Hydro-Québec now have a much greater value than the parties could have foreseen when they entered into the Contract. CFLCo argues that this disproportion between the parties' prestations cannot be tolerated. Hydro-Québec should be required to renegotiate the Contract, and more specifically the sale price for electricity, so that the substantial profits generated by the resale of the electricity produced by the Plant are shared more equitably.

[19] That being said, there were other changes in the circumstances of the parties subsequent to the conclusion of the Contract that must also be considered here. First, in 1974 and 1975, Newfoundland and Labrador Hydro ("NLH"), a Crown corporation, acquired Brinco's shares and the shares of another minority shareholder of CFLCo, but not those of Hydro-Québec. What the Government of Newfoundland and Labrador hoped to gain with respect to the Churchill Falls project then quickly became apparent. In 1976, it tried to force CFLCo to "recapture" more electricity than CFLCo was entitled to under the Contract. CFLCo responded that the inevitable result of doing so would be a failure to perform the prestations it owed Hydro-Québec, and it declined to comply, which led to the dispute being brought before the courts of both provinces. This Court heard and summarily dismissed appeals from the two series of decisions that had followed, in which the lower courts had agreed with Hydro-Québec on all points: *Newfoundland (Attorney General) v.*

*Churchill Falls (Labrador) Corp.*, [1988] 1 S.C.R. 1085; *Hydro-Québec v. Churchill Falls (Labrador) Corp.*, [1988] 1 S.C.R. 1087.

[20] Second, in 1980, the province's legislature enacted a statute that provided for reversion to the government of the rights that had been assigned to CFLCo in 1961. Another court challenge ensued. The Newfoundland and Labrador Court of Appeal declared the legislation to be valid, but this Court unanimously held that it was *ultra vires* the province, because its pith and substance was to interfere with rights that, under the Contract, were situate in Quebec, that is, the place where a party could bring an action for the enjoyment of those rights: *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297.

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

[22] Thus, in 1991, Hydro-Québec undertook to purchase the balance of the Plant's production capacity for a limited time. In 1998, the parties changed the conditions for the exercise of CFLCo's "recapture" right by agreeing that, for a period of time, CFLCo would sell the electricity in question to NLH, which would resell it at a profit to Hydro-Québec under terms that were kept confidential. Since 2009, the electricity to which the conditions respecting the recapture right apply has been resold in other markets and exported through Hydro-Québec's transmission lines. Finally, in

1999, the parties signed the Guaranteed Winter Availability Contract, under which Hydro-Québec received the assurance that the Plant's production capacity would be available during the winter months in exchange for substantial additional revenue for CFLCo. Significantly, these last two contracts will expire at the same time as the Power Contract, in 2041.

[23] Despite all these changes, the performance of the prestations provided for in the Contract was generally problem-free. There is no mention in the record of any default by the parties or any disagreement over the interpretation or application of the words of the Contract. The trial judge's understanding was that CFLCo had received what it asked for at the time of the negotiations. The development strategy it had at the time was implemented smoothly: Brinco was able to complete the Plant without having to invest its own funds and also remained CFLCo's majority shareholder, a strategy of which NLH is today the beneficiary, and CFLCo received the return it anticipated and expected on its investment as well as the other benefits conferred on it by the Contract.

[24] The foregoing is the backdrop to the proceedings now before the courts. This appeal is in fact the third one that has come before this Court with respect to the scope of the Power Contract. In this regard, the trial judge noted that the Government of Newfoundland and Labrador had undertaken to pay all costs of the litigation, and that the proceedings had been commenced shortly before CFLCo had repaid in full the debt that had until then been guaranteed in part by Hydro-Québec for the Plant's

construction costs. In his view, these proceedings were ultimately another unjustified attempt by the province to escape its contractual obligations and to deprive Hydro-Québec of the benefits to which it was entitled under the Contract.

### III. Judicial History

#### A. *Quebec Superior Court, 2014 QCCS 3590*

[25] On the basis of CFLCo’s arguments, Silcoff J. identified four issues. He dealt with the first two issues together, framing them as follows: In the circumstances of the negotiation and signature of the Power Contract and in light of subsequent events, was Hydro-Québec, in refusing to renegotiate the price for electricity, in breach of its duties of cooperation and good faith? If so, was it open to the court to intervene?

[26] After canvassing the textbooks that review the [TRANSLATION] “new contractual morality” that flows from the application of the *Civil Code of Québec* (“C.C.Q.” or “Code”) and from the obligations associated with the general duty of good faith, Silcoff J. made note of Hydro-Québec’s objections that the binding force of contracts remains a central principle of Quebec law and that the duty of good faith cannot give rise to an obligation to share a profit that has been received legitimately. He expressed the view that, to answer the first two questions, he had to define the nature of the parties’ relationship as well as their legitimate expectations, and to consider the possibility that those expectations had not been met.

[27] Silcoff J. found that CFLCo had not discharged its burden of proof in this regard. In his opinion, neither the Contract itself nor the circumstances in which it was signed indicated that the parties' relationship was based on an equitable sharing of risks and benefits and required a tremendous level of cooperation, trust and compromise. Although the parties' attitude was one of cooperation after they signed the Letter of Intent, their final bargain was crystallized in the Contract, not in the Letter of Intent. In Silcoff J.'s view, the will of the parties was to fix electricity prices without permitting any renegotiation or adjustment of prestations in the future based on unexpected events that might occur in the course of the project. The fixed nature of the prices was precisely the benefit that Hydro-Québec derived from the Contract and that it legitimately expected to receive. CFLCo could not therefore ask a court to deprive Hydro-Québec of that benefit now. Hydro-Québec had acted in good faith and in a spirit of fair play in complying with the Contract, and there was no justification for reading in an implied duty to renegotiate and for disregarding the will of the parties. Silcoff J. concluded from this that the intervention sought by CFLCo was not warranted.

[28] Having so decided, Silcoff J. turned to the remedies being sought by CFLCo, including an order that the Contract quite simply be resiliated, a declaration that Hydro-Québec had a duty to renegotiate the Contract or an order revising the Contract to include in it an indexing formula for electricity prices suggested by CFLCo. He found that, in light of his conclusions on the first two issues, CFLCo was entitled to none of the remedies it was seeking. He also observed that it would have



been necessary to reject the proposed indexing formula at any rate because of methodological deficiencies and inconsistencies.

[29] Finally, Silcoff J. found that, in any event, CFLCo's action was prescribed. He rejected CFLCo's argument that Hydro-Québec's refusal to renegotiate the Contract was a continuing fault. Because CFLCo was asserting a personal right that allegedly arose out of changes in the electricity market, the most recent of which had occurred at the latest in 1997, the action had been prescribed since 2000.

B. *Quebec Court of Appeal, 2016 QCCA 1229*

[30] A panel of five judges of the Quebec Court of Appeal unanimously dismissed CFLCo's appeal.

[31] The Court of Appeal began by finding that Silcoff J. had made no palpable and overriding error in assessing the evidence. It rejected CFLCo's argument that the expectations of parties to a long-term contract must be established in light of what is foreseeable. In this case, the evidence showed that the parties had set electricity prices on the basis not of the electricity market and the foreseeability of long-term trends in that market, but of other factors. These factors included the cost of construction of the Plant, the fact that production costs for hydroelectricity are low and stable once a plant has been built, which Hydro-Québec wanted to be reflected in

the prices it would pay, and CFLCo's need for a substantial inflow of money at the beginning of the Contract.

[32] The Court of Appeal added that the trial judge's findings that the parties had decided to have Hydro-Québec bear the risks related to fluctuations in electricity prices and had intentionally chosen not to include a price adjustment clause in the Contract were firmly supported by the evidence. It accordingly rejected the argument that the equilibrium of the Contract had been disrupted by unforeseeable changes in the market: the parties' prestations were not defined by reference to market conditions, and the Contract clearly allocated the risks associated with possible changes in those conditions. In short, the Court of Appeal found that the alleged unforeseeability was not relevant to the case and had not in fact been established.

[33] Next, the Court of Appeal pointed out that the two parties had articulated the central question of law in the case in very different ways. CFLCo argued that good faith tempers the principle of the binding force of contracts and that the parties to a relational contract have a duty to cooperate, which may, in certain circumstances, give rise to a duty to modify the contract. Hydro-Québec contended that CFLCo was in reality relying on the doctrine of unforeseeability. That doctrine, according to which a party can be required to renegotiate a contract should a sudden change in circumstances make the contract too onerous for the other party, is not recognized in Quebec civil law.

[34] On this subject, the Court of Appeal reviewed the debates that had led up to the enactment of the *Code*. It noted that the Civil Code Revision Office had suggested introducing the doctrine of unforeseeability as part of a series of recommendations made to the legislature that were intended to make contract law fairer and more equitable, but that this suggestion had not been accepted. The doctrine is accordingly not provided for in the *Code*. However, the Court of Appeal found that there is nothing to prevent the development of judge-made law on unforeseeability in specific cases where the legislature has left the door open for a court to intervene to deal with abuse or unreasonable conduct.

[35] With this in mind, the Court of Appeal, noting that CFLCo was arguing that good faith sometimes requires one contracting party to help the other party remedy his or her problems, recognized that there may occasionally be situations, hypothetical at least, in which good faith and unforeseeability overlap. In the instant case, however, the court found that Hydro-Québec had met the obligations flowing from its general duty of good faith. There was no indication that it had acted in bad faith. Looking out for the interests of the other contracting party does not require a party to sacrifice his or her own interests. Because Hydro-Québec had not derived an unfair advantage and had not committed an abuse of right by insisting on adhering to the words of the Contract, the Court of Appeal found that it could not intervene.

[36] Finally, as a matter of doctrinal interest, the Court of Appeal considered the characteristics of the doctrine of unforeseeability as it exists in other civil law

jurisdictions. But the court pointed out that, in any event, the doctrine would not apply in this case without an increase in CFLCo's costs of performance or a decrease in the value of the counterprestation it received. In the final analysis, the Court of Appeal found that CFLCo was essentially arguing that the Contract was lesionary on the basis that it resulted in an excessive benefit for Hydro-Québec. There is quite simply no support for that argument in Quebec civil law, as lesion is generally available only to minors and protected persons of full age.

#### IV. Issues

[37] The appeal ultimately raises one central question: Can CFLCo require Hydro-Québec to renegotiate the Power Contract because of “unforeseeable” changes in the electricity market since the Contract was signed? On this point, CFLCo argues that the trial judge erred in characterizing and interpreting the parties' contractual relationship and in assessing the role of good faith in contractual matters.

[38] If this principal question is answered in the affirmative, two subsidiary questions arise: Can this Court grant the relief sought by CFLCo? If so, is CFLCo's action nonetheless prescribed?

[39] In my opinion, CFLCo's arguments with respect to both the basis for its claims and the relief it seeks find no support either in the evidence the trial judge considered and accepted or in Quebec civil law. I am also of the view that CFLCo's

action in this case is prescribed. In short, the appeal must be dismissed no matter what approach is taken to it.

## V. Analysis

### A. *Claim for Renegotiation of the Contract*

[40] CFLCo argues that, given the nature of the Contract and the parties' duties of good faith and equity, Hydro-Québec had a duty to renegotiate the Contract when the Contract proved to be an unanticipated source of substantial profits for it. CFLCo adds that the Contract must be renegotiated so as to allocate the profits more equitably between the parties. It therefore seeks an order that, at a minimum, the Contract be renegotiated and modified on the basis of a price adjustment formula it itself has devised in order to force Hydro-Québec to share part of the profits Hydro-Québec earns in reselling the electricity purchased under the Contract or, in the alternative, that the Contract be resiliated.

[41] In support of its position, CFLCo begins by raising factual arguments relating to the characterization, the content and the interpretation of the Contract. It submits that the Contract is a relational contract akin to a joint venture. In its opinion, the parties always intended to prioritize cooperation and the equitable sharing of the risks and benefits associated with the project, but a number of unforeseen events fundamentally altered the nature of the electricity market and, as a result, the equilibrium of the parties' prestations. CFLCo adds that the Contract cannot be

considered to have dealt with the risk of electricity price fluctuations as radical as the ones that have occurred since the 1980s: such fluctuations were impossible to foresee in 1969.

[42] As will be shown below, however, this characterization conflicts with the words of the Contract and disregards some crucial facts relating to the intention of the parties at the time they entered into it. The evidence does not show that the parties intended to jointly assume responsibility for the project or to create a flexible legal relationship; rather, it shows that they intended to agree on specific prestations. The evidence also shows that the parties clearly intended Hydro-Québec to bear most of the risks associated with the development of the Plant, including the risk of electricity price fluctuations, however large they might be. On this point, as the Court of Appeal correctly noted, the trial judge made no palpable and overriding error that might warrant intervention. His determinative finding concerning the paradigm of the Contract, namely that its fixed prices and long term were precisely the benefits Hydro-Québec was seeking in 1969, is strongly supported by the evidence he considered.

[43] Next, CFLCo submits that, as a matter of law, Hydro-Québec cannot receive such profits without being required to distribute part of them to the other contracting party, relying in support of this argument sometimes on the general duty of good faith that is recognized in Quebec civil law and sometimes on implied duties under the Contract based on equity. CFLCo maintains that there is a general duty to

cooperate recognized by commentators and by the courts that gives rise to a duty to renegotiate the Contract and, by extension, a duty for Hydro-Québec to share the profits it makes under the Contract. But as Hydro-Québec rightly notes, CFLCo is thus essentially asserting a right to require the renegotiation of a contract on the basis of unforeseeability. With respect, none of CFLCo's legal arguments on this point withstand scrutiny or are persuasive, and none of them can refute the inescapable conclusion that the Contract entitles Hydro-Québec to insist on adhering to the words of the Contract and maintaining the equilibrium of the prestations it establishes for the benefit of the parties, which bound themselves knowing full well what they were doing. To accept CFLCo's argument would be to deprive Hydro-Québec of the principal benefits it derives from the Contract.

[44] Before I discuss this central question in the appeal any further, there is a comment about the applicable law that must be made. The Power Contract, which provides for its automatic renewal 40 years after the Plant has been installed and is in service at full capacity, was entered into in 1969. At issue, therefore, is a contractual situation that existed at the time of the coming into force of the *Code* in 1994: s. 4 of the *Act respecting the implementation of the reform of the Civil Code* ("AIRCC"). This means that the Contract is not governed entirely by the "new legislation". Among other things, the supplementary rules that serve to determine the scope of the parties' obligations — including arts. 1431 and 1434 *C.C.Q.*, on which CFLCo relies to guide the interpretation of the Contract — do not apply: s. 4 para. 1 *AIRCC*. However, those two articles are substantially similar to the antecedent articles of the

*Civil Code of Lower Canada*, arts. 1020 and 1024. The analysis of the parties' legal situation is therefore the same under the former Code as under the current one. Because the parties agree on this point, I will refer only to the articles of the *Code* in this regard. The provisions of the *Code* governing the exercise of rights and the performance of obligations do apply to the Contract, however: s. 4 para. 2 *AIRCC*. These include the articles that provide for the duty of a party to act in good faith in exercising rights and performing contractual obligations.

(1) The Contract: Paradigm, Characterization and Content

[45] Where the factual analysis is concerned, CFLCo's arguments are predicated on the importance — which in its view has been underestimated — of the circumstances in which the parties entered into the Contract. CFLCo submits that the difference between the electricity market of the late 1960s and the electricity market of today is so significant and so radical that it is appropriate to describe the transition from one to the other as a true paradigm shift. The entirety of its reasoning revolves around this, the key point in its case. CFLCo argues that this paradigm, which it describes as a regulatory and market paradigm, meant that Quebec was in the late 1960s the only electricity market to which Newfoundland and Labrador had access, that electricity was seen as a public good rather than a source of profits and that, given the low cost of energy in the marketplace, a substantial increase in the price of electricity was not really conceivable for the parties. Also, it would have been



difficult for the parties to the Contract to imagine a different regulatory and market paradigm.

[46] In CFLCo's view, this reality dictated the project's financing structure and the model for allocating the risks and benefits contemplated in the Contract. The parties really intended to create a relational joint venture contract. They agreed on a Contract that would have given each party a fair share of the value of the hydroelectric power produced at Churchill Falls had the circumstances not changed so radically. CFLCo argues that it is only because of the radical shift in the market paradigm that the true nature of the Contract is now obscured and that its words seem to allocate the risks and benefits as determined by Silcoff J. If Silcoff J. had characterized the Contract in light of the regulatory context and market conditions, he would have recognized that the parties had entered into a relational joint venture contract. Given the very nature of such contracts and the resulting implied duties under the Power Contract, CFLCo believes that Hydro-Québec had a duty to renegotiate the Contract and to agree to a redistribution of the profits it earns under it.

[47] This reasoning leads CFLCo to argue that, because a paradigm shift in the electricity market could not have been imagined at the time the Contract was signed, Silcoff J. also erred in finding that the parties might even have formed a common intention that their Contract would govern the sale of electricity produced at Churchill Falls in this new context. By failing to draw the proper inferences from these key facts, Silcoff J. once again erred in interpreting the Contract.

[48] I wish to mention, first of all, that neither party is alleging any defect in the formation of the Contract. And CFLCo acknowledges that it is not pleading lesion, given that the parties' respective prestations were in equilibrium at the time they entered into the Contract. Indeed, raising lesion would serve no purpose, as the *Code*, like its predecessor I might add, clearly provides that lesion generally vitiates consent only with respect to minors and protected persons of full age. Moreover, the fact that the Contract is clearly a contract by mutual agreement means that CFLCo cannot argue that the Contract contains abusive clauses or require that the Contract be interpreted in its favour.

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

[50] My colleague maintains that this is not so. In his opinion, the characterization of the Contract having regard to a relational component is in this case a pure question of law. On this basis, he substitutes his own interpretation of the

parties' intention for that of the trial judge, even assessing the evidence himself. In so doing, my colleague ultimately rejects Silcoff J.'s assessment of the documentary, testimonial and expert evidence on which the latter relied in defining the central paradigm of the Contract, which in Silcoff J.'s view, repudiates the existence of this relational component alleged by CFLCo.

[51] I disagree with the underlying premise of my colleague's analysis. In this Court's recent decision in *Uniprix*, the majority reviewed the principles applicable to the characterization of a contract in Quebec civil law. For the purposes of this appeal, it will suffice to consider the following points:

- (1) "it is [the] classification of the contract — based on the rules that apply to it, the conditions that apply to its formation, its object and how it is performed — that makes it possible to define the nature of the contract and thereby determine how it should be characterized" (para. 27);
- (2) "it is . . . inappropriate to view this characterization of the contract as a purely objective exercise[, as t]his [TRANSLATION] 'crucial operation for the judge' can . . . be accomplished only by 'seek[ing] to identify the parties' true intention in this regard'" (para. 28);
- (3) "[t]o characterize a contract, the court must thus consider not only [TRANSLATION] 'the obligations and other effects of the contract that

[the parties] have stipulated’, but also ‘in some cases the circumstances of its formation and how they have applied it’” (para. 29); and

- (4) “. . . the characterization of a contract can depend on evidence of the parties’ common intention as regards its nature and its content[, and w]hen it is necessary to consider evidence of that intention, the Quebec Court of Appeal rightly recognizes that, in such cases, the characterization of the contract is a question of mixed fact and law” (para. 42).

[52] This is the very type of thorough exercise that the trial judge carried out in the instant case and that the Court of Appeal reviewed in detail in its decision. To say that the courts below did not consider the evidence — whether intrinsic or extrinsic to the Contract — in order to define the nature of the parties’ contractual relationship on the basis of their common intention would be to disregard dozens of paragraphs of the reasons of the Superior Court and the Court of Appeal. I will merely observe that Silcoff J.’s contextual analysis runs from para. 450 to para. 541 of his reasons, and it served as the basis for his subsequent discussion on the nature of the parties’ contractual relationship: paras. 542-69. The conclusions he drew from it, including those set out in paras. 553 and 556, were largely based on the whole of that evidence.

[53] In my view, CFLCo's various arguments relating to the context of the Contract do not reveal any error on Silcoff J.'s part that would justify overturning his findings of fact concerning the paradigm, the characterization and the interpretation of the Contract. The same can be said, contrary to CFLCo's contention, with respect to the trial judge's conclusion, on assessing the evidence, that the alleged unforeseeable changes had not taken place. Regardless of whether one accepts that the changes in question were radical, CFLCo's arguments are inconsistent with Silcoff J.'s findings of fact on the issue of the choices made by the parties to manage the risks and uncertainties associated with the project. It follows that the first, factual aspect of CFLCo's position on the central question in the appeal must fail.

(a) *Paradigm of the Contract*

[54] On completing his review of the content and the clauses of the Contract, the trial judge concluded that the Contract specifically allocated the risks and benefits of the project. After considering all the relevant facts, he quoted a passage from the report of an expert, Mr. Lapuerta, to describe the contractual paradigm, the central vision of the transaction model, as follows: “. . . Hydro-Québec accepted significant risks, but enjoyed cost certainty 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” (para. 488 (CanLII) (emphasis deleted)).

[55] In short, Silcoff J. found as follows on the fundamental obligations that characterize this innominate contract, which includes Hydro-Québec's right to fixed costs. Hydro-Québec agreed to assume the risks associated with the project so that Brinco could finance the Plant by raising debt rather than issuing shares and CFLCo could obtain long-term revenue security to reassure its creditors. In agreeing to provide financing to CFLCo in the event of cost overruns and to purchase electricity whether it needed it or not, Hydro-Québec afforded CFLCo the possibility of being relatively well protected against the risk of lower returns on its investment and lower electricity prices. In exchange for the risks it assumed, Hydro-Québec obtained prices that were lower on average than the prices it would have had to pay had it had to pursue other projects. Hydro-Québec would receive that benefit at the end of the Contract in particular, as the prices were higher at the beginning to satisfy CFLCo's need for cash at that time, but this decreasing price structure suited Hydro-Québec, which in this way obtained a long-term guarantee of fixed prices. The clear result was therefore that Hydro-Québec would bear any losses or receive any profits flowing from fluctuations in electricity prices.

[56] CFLCo in fact argued at trial, and argues again in this Court, that the meaning of the clause of the Contract that fixes electricity prices is unclear, which would mean that the Contract is essentially ambiguous. Silcoff J. resolved this alleged ambiguity by considering, in particular, the evidence presented by the two parties on the circumstances in which the Contract was concluded. His interpretation rested on a determinative finding of fact, namely that the parties had intentionally chosen not to

include a price adjustment formula in the Contract. That finding was based in part on the minutes of the joint meeting of the executive committees of the boards of directors of Brinco and CFLCo, at which Hydro-Québec's request that the Contract be renewed for 25 years was discussed. Those minutes indicate that the members of the two committees believed that it would be impossible for CFLCo to try to limit the scope of the renewal by suggesting that the price of electricity be adjusted by way of indexation without depriving the extension of any meaningful effect for Hydro-Québec. Silcoff J. also found that there was no evidence to support the opposite position — advanced by CFLCo — that the absence of such a formula had instead resulted from the parties' failure to consider the possibility of a change in the market.

[57] The choice to fix electricity prices and to have Hydro-Québec assume the risk that those prices would after some time be higher or lower than market prices helped to shape a final agreement that, as the parties saw it, properly allocated the risks and benefits associated with the project. Silcoff J. noted that the evidence, which was not in fact seriously contested by CFLCo, led to the conclusion that the terms fixing the prices to be paid for electricity reflected the risks assumed by Hydro-Québec under the Contract. One of CFLCo's experts even described this allocation of risks and benefits as reasonable, and Silcoff J. found, "based upon the uncontradicted credible evidence", that the parties had agreed to this allocation, believing it to be mutually beneficial: para. 469.

[58] Given the absence of any palpable and overriding error by the trial judge on this key point, the fundamental premise for CFLCo's position with regard to the nature of the Contract cannot be accepted. To accept CFLCo's view that the words of the Contract are based on the regulatory and market considerations it has identified and do not reflect the parties' intention outside those specific circumstances would be inconsistent with the trial judge's interpretation of the evidence in determining his understanding of the Contract. Yet the trial judge's understanding of the Contract, which the Court of Appeal accepted, is what must guide the analysis.

(b) *Characterization of the Contract*

[59] In this Court, CFLCo argues, as it did in the Court of Appeal, that the Contract is a relational contract. It also submits that the parties' agreement created a common project, which is characteristic of a joint venture. I do not accept these submissions. They are not supported by the evidence, nor do they overcome Silcoff J.'s findings of fact concerning the paradigm of the Power Contract.

(i) The Contract Is Not a Joint Venture

[60] CFLCo argues that, because the parties intended to combine their resources to carry out a major project and intended to share the benefits of the venture equitably, they entered into a contract akin to a joint venture. In Quebec civil law, the joint venture, which is a common law concept, is sometimes referred to in French using the term "*coentreprise*", "*groupement momentané d'entreprises*" or



“consortium” of businesses: B. Larochelle and C. Bouchard, *Contrat de société et d’association* (3rd ed. 2012), at p. 100; see also V. Karim, *Le consortium d’entreprises, joint venture: nature et structure juridique, rapports contractuels, partage des responsabilités, modes alternatifs de règlement des différends: médiation et arbitrage* (2016), at para. 23. However, this concept does not necessarily reflect a particular legal form. Swan, Bala and Adamski define a joint venture as “a business relation which may take a variety of legal forms or structures”: A. Swan, N. C. Bala and J. Adamski, *Contracts: Cases, Notes & Materials* (9th ed. 2015), at § 7.243; see also C. Bouchard, “Les rapprochements entre la société de personnes et le *partnership*: une étude de droit comparé canadien” (2001), 42 *C. de D.* 155, at p. 184. According to some, a joint venture in the common law context is in fact merely a partnership — an entity that resembles the civil law partnership — that is limited in time to a single project: R. Flannigan, “The Legal Status of the Joint Venture” (2009), 46 *Alta. L. Rev.* 713, at pp. 715 and 720.

[61] As some authors explain, the Quebec courts therefore tend to liken a joint venture contract to a contract of undeclared partnership: see Bouchard, at pp. 188-89; M. Guénette, *Les différentes formes d’entreprises au Canada* (2015), at p. 233. But the *Code* provides that the essential elements of a contract of partnership are the combining of resources to carry on an activity and the sharing of any resulting profits: art. 2186 para. 1. A joint venture is thus formed where businesses choose to become partners and to cooperate in a project by each investing resources and by sharing any profits from the project. A separate partnership is then created until, among other

possibilities, the project is completed, and the partners can be held liable for one another's undertakings and debts: arts. 2253 to 2255 *C.C.Q.*

[62] That being the case, the absence of facts indicating that the parties intended to enter into a partnership is fatal to CFLCo's argument that equates the Contract with a contractual relationship of that nature. Moreover, although CFLCo and Hydro-Québec each invested resources in the project, the evidence does not show that they transferred the ownership or enjoyment of those resources to anyone or that the resources were placed at the complete disposal of the other party to the Contract: arts. 2199 and 2251 *C.C.Q.*

[63] It is true that some authors support the existence of a *sui generis* contract of joint venture in Quebec law. For example, Professor Karim states that a contract in which an intention to enter into a partnership is not expressed but that otherwise signals an intention to combine resources and share responsibility for a project is precisely what defines a joint venture: see Karim (2016), at paras. 41, 46 and 47; see also Larochelle and Bouchard, at p. 102. However, he notes that care must be taken to distinguish this *sui generis* contract from other types of contracts, such as the subcontract:

[TRANSLATION] The fact that each of two or more businesses takes on part of the work for a specified price while cooperating as needed to carry out the various parts of the project will not suffice to justify a finding that they have agreed to a joint venture. It is an intention to jointly assume the responsibility involved in carrying out the proposed project that is the determining factor in establishing that such an agreement exists. [Emphasis added; para. 47.]

[64] This other definition of the joint venture concept is of no assistance to CFLCo in this case, given that the evidence also does not really show that the parties intended to jointly assume financial or logistical responsibility for the project beyond the simple cooperation required to perform their respective prestations. In this regard, Silcoff J. determined that the parties had entered into a contract that transferred to Hydro-Québec the financial risks that would ordinarily have been borne by CFLCo and that they had done so after carefully analyzing the risks they were assuming and the benefits they could obtain by way of an agreement. One purpose of the Contract was to shelter CFLCo almost entirely from possible negative consequences. This clearly does not indicate any intention to share responsibility for the project; quite the contrary. In addition, while it is true that the Contract provided for some cooperation between the parties, for example with respect to the management and operation of the Plant and to financing, the terms of that cooperation were predefined, and what the parties were responsible for in each part of the project was predetermined.

[65] I therefore find, without taking a position on the precise legal nature of what is known as a joint venture contract in Quebec civil law, that the parties' relationship lacks the characteristics generally associated with that form of arrangement. There is no indication that the risks were allocated equally and that the parties therefore intended to jointly assume full responsibility for the project. The Contract clearly defines their respective obligations and the specific risks to be assumed by each of them. Silcoff J. cannot be faulted for not considering the words of the Contract in light of the circumstances of the electricity market of the 1960s, which

would have supported CFLCo's argument regarding the existence of a context of cooperation and equitable sharing. It was entirely open to him to interpret the words of the Contract and the events surrounding its negotiation at face value.

(ii) The Contract Is Not a Relational Contract

[66] From the same perspective, CFLCo also argues that the Court of Appeal erred in not finding that the Contract has the distinctive characteristics of a relational contract. This argument is similar to the one based on the existence of a joint venture and is to some extent a variation on the same theme. CFLCo relies on the relational nature of its contract with Hydro-Québec to support its argument that the parties owe each other the highest duties of cooperation and good faith. On this point, it submits not that the parties always intended to share the profits, but that they always had a duty to do so because of the nature of their relationship. As this Court noted in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 60, the cooperation required by relational contracts is, in the end, more active than the cooperation required by transaction-based contracts: see also J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 78.

[67] Professor Belley defines the relational contract as follows: [TRANSLATION] “To begin, a relational contract can roughly be defined as a contract that sets out the rules for a close cooperation that the parties wish to maintain over the long term” (J.-G. Belley, “Théories et pratiques du contrat relationnel: les obligations de collaboration et d’harmonisation normative”, in Meredith Lectures 1998-1999, *The*

*Continued Relevance of the Law of Obligations: retour aux sources* (2000), 137, at p. 139). For example, a master agreement, which defers the negotiation of certain prestations, is a contract whose main purpose is to establish and affirm the existence of a relationship and the parties' undertaking to expand on it and set out its details in the future: Baudouin, Jobin and Vézina, at No. 78; C. LeBrun, *Le devoir de coopération durant l'exécution du contrat* (2013), at paras. 97 et seq. Contracts of employment, subcontracts and franchise agreements are also referred to as examples of relational contracts: Belley, at p. 140.

[68] Professor Belley is of the view that, in essence, relational contracts provide for economic coordination as opposed to setting out a series of defined prestations. It is a corollary to the emphasis on the parties' relationship that their respective prestations are not defined in much detail. Professor Rolland discusses the role the courts were required to play in order to ensure that master agreements that, to give one example, did not contain a sale price were not considered incomplete and therefore null: L. Rolland, "Les figures contemporaines du contrat et le *Code civil du Québec*" (1999), 44 *McGill L.J.* 903, at pp. 934-35. Along the same lines, in *Dunkin' Brands Canada Ltd. v. Bertico Inc.*, 2015 QCCA 624, 41 B.L.R. (5th) 1, the Quebec Court of Appeal stated that the relational nature of a franchise agreement was apparent from the fact that its terms were not stipulated:

Indeed, it is only when one recognizes the incomplete account of the parties' rights and obligations given by the explicit terms of the contracts that the true nature of the arrangement — an innominate contract of franchise based on a relationship of long-term collaboration between

independent businesses — becomes apparent. [Emphasis added; footnote omitted; para. 59.]

[69] CFLCo proposes its own definition of a relational contract, the characteristics of which can in its opinion be seen in the Power Contract: a long-term contract between interdependent parties that requires a high degree of trust and cooperation. With respect, this definition seems misleading to me and in fact serves to sidestep the essential point. As the Court of Appeal noted, although the parties' relationship reflects a certain interdependence and the Contract is of long duration, these facts alone do not indicate that their agreement has a relational element that would justify imposing heightened duties of good faith on them. The Power Contract does indeed have a very long term, but the various prestations owed for the whole of that term have been defined with precision since day one. It is a synallagmatic contract (art. 1380 *C.C.Q.*), which is a *de facto* sign that the prestations and thus the parties are interdependent, but the parties chose to structure that dependence carefully and to define its limits. Each signatory's participation in the Churchill Falls project was clearly quantified and defined, and no important prestations were left undefined. This shows that the parties intended the project to proceed according to the words of the Contract, not on the basis of their ability to agree and cooperate from day to day to fill any gaps in the Contract.

[70] CFLCo nonetheless suggests that account should be taken of the limits on the human ability to foresee the very diverse circumstances in which a contract may come to apply, which may be even more diverse in the case of a long-term contract. I

do not find this argument convincing. Such limits are undeniable. It is true that they may sometimes motivate people or businesses to include review or renegotiation clauses in their contracts. However, it is just as possible and just as legitimate for parties to a long-term contract to favour certainty over flexibility. As Lluelles and Moore observe, it is plausible to assume that parties who enter into a long-term contract have chosen to do so specifically to give their project stability and predictability should unforeseen events occur: D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at No. 2249. I would add that this is particularly true of sophisticated parties, like the ones in this case.

[71] In short, the long-term, interdependent nature of the contractual relationship does not in itself imply that the basic principle of the Contract, the one that structures and underlies its main prestations, is that of a relationship of cooperation between the parties. The Power Contract sets out a series of defined and detailed prestations as opposed to providing for flexible economic coordination. It is not therefore a relational contract. Once again, this conclusion does not depend on the characteristics of the electricity market at the time the Contract was entered into. The argument that the context of that market was different does not suffice to justify overruling Silcoff J.'s analysis of the paradigm of the Contract and his finding that the parties had intended Hydro-Québec to bear the risk of price fluctuations.

(iii) An Implied Renegotiation Clause in the Contract

[72] CFLCo also relies on its arguments about the nature of the Power Contract to support a contention that the Contract contains “implied” clauses that impose on Hydro-Québec a duty to cooperate and to renegotiate the agreed-on prices. In this regard, CFLCo cites art. 1434 *C.C.Q.*, which reads as follows:

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.

[73] On this basis, CFLCo urges this Court to hold that it is necessary, in light of the structure and the logic of the Power Contract, that the Contract require the parties to renegotiate it or to share the profits they receive in certain circumstances. Given that I do not accept CFLCo’s arguments concerning the characterization of the Contract, there is clearly no need to determine whether the Contract implicitly contains a clause imposing such duties. Such a clause cannot be implied from the nature of the Contract as described by the trial judge.

[74] Moreover, the following observations with respect to the implied duties reinforce the conclusion that CFLCo’s arguments concerning the nature of the Contract must fail and that the trial judge did not err in declining to characterize the Contract as a joint venture contract or a relational contract. An implied duty may, within the meaning of art. 1434 *C.C.Q.*, be incident to a contract according to the nature of the contract if the contract’s coherency seems to require such a duty and if the duty is consistent with the general scheme of the contract. An implied clause providing for such a duty must not merely add duties to the contract that might



enhance it, but must fill a gap in the terms of the contract: Lluelles and Moore, at No. 1542; see also Baudouin, Jobin and Vézina, at No. 431; J. Pineau, D. Burman and S. Gaudet, *Théorie des obligations* (4th ed. 2001), by J. Pineau and S. Gaudet, at No. 235. In such a case, it can be presumed that the clause reflects the parties' intention, which is inferred from their choice to enter into a given type of contract: *Dunkin' Brands*, at para. 65; Lluelles and Moore, at No. 1544; Baudouin, Jobin and Vézina, at No. 427. As Baudouin, Jobin and Vézina state on the subject of the implied duty, [TRANSLATION] “[c]ontractual fairness must be achieved neither to the detriment of predictability in the law nor by means of artificial solutions”: No. 431.

[75] In the case at bar, there is nothing to suggest that the parties' prestations would be incomprehensible and would have no basis or meaningful effect in the absence of an implied duty according to which Hydro-Québec must either exceed the usual requirements of good faith in cooperating with CFLCo or redistribute windfall profits. The Contract governs the financing of the Plant and the sale of electricity produced there, and also strictly regulates the quantity of electricity to be provided by CFLCo and the price to be paid by Hydro-Québec. The meaningful effect of the sale for the parties is clearly identifiable: Hydro-Québec obtains electricity, while CFLCo receives the price paid for it. The fact that the price might not be in line with market prices does not destroy the very logic behind the sale or deprive it of any meaningful effect. Furthermore, the benefits each party derives from the sale are related to the other prestations associated with the construction of the Plant. There is no gap or

omission in the scheme of the Contract that requires this Court to read an implied duty into the Contract in order to make it coherent.

[76] The trial judge defined the paradigm of the Contract. His articulation of that paradigm is consistent with the words of the Contract and with his assessment of the relevant evidence. Moreover, the paradigm as articulated reflects the equilibrium being sought by the parties from the outset. CFLCo's arguments that the judge mischaracterized the Contract and that there are implied duties under it are contrary to these findings of fact. The omission alleged against the trial judge, that of failing to view the Contract in light of the circumstances of the electricity market of the 1960s, has no impact on the analysis, given that the evidence concerning the negotiations that led to the Contract and the words of the Contract itself provides no support for interpreting it as a joint venture contract or a relational contract. The conflicting interpretations proposed by CFLCo cannot override the judge's findings on the allocation of risks between the parties as stipulated in the Contract and on the benefits flowing from it, particularly for Hydro-Québec. I would note that my colleague's application of his conception of the relational nature of the Contract (at paras. 180-83) actually amounts to a summary reassessment of what the parties intended the central paradigm of the Contract to be that is based on an interpretation of the evidence, both intrinsic and extrinsic, that the trial judge in fact did not accept.

(c) *Unforeseeability of the Changes in the Electricity Market*

[77] The alleged unforeseeability of the changes in the electricity market also underpins the other branch of CFLCo's factual argument. CFLCo submits that the trial judge was wrong to find that the risk associated with fluctuations in electricity prices was intended to be borne by Hydro-Québec, arguing that that finding of fact is incompatible with the regulatory and market paradigm CFLCo proposes as the initial context for the Contract. Because it was impossible in 1969 for the parties to foresee the changes that were soon to occur in this market, it was impossible for the Contract to deal with that new reality. Therefore, in CFLCo's view, although the Contract does seem to fix electricity prices on a continuing basis until 2041, its clauses could allocate only certain specific risks, that is, those that could be anticipated in the late 1960s. Those terms were never intended to apply to the parties' conduct in circumstances in which one of them benefits from the Contract by reaping substantial profits as a result of it. Silcoff J. therefore erred in finding that the parties had formed an agreement of wills concerning a situation they could not have foreseen at the time they entered into the Contract.

[78] In support of its argument, CFLCo relies on art. 1431 *C.C.Q.*, which, it submits, Silcoff J. failed to consider:

The clauses of a contract cover only what it appears that the parties intended to include, however general the terms used.

Thus, because the parties would presumably not have proposed to enter into a contract in relation to a fact situation they could not foresee, the clauses of the

Contract, despite the generality of the language that was used, cannot extend to or be understood as relating to that fact situation.

[79] I do not agree with this argument. First of all, CFLCo cannot rely on the article in question, which relates to contractual interpretation, unless the Contract is ambiguous: *Uniprix inc.*, at paras. 35-36. But that is not the case. Section 8.1 of the Contract and s. 7.1 of Schedule III to the Contract (Renewed Power Contract) provide that Hydro-Québec was to pay for electricity at a fixed price for a specified period of time. Once that period had elapsed, it was to pay a new fixed price for a new specified period of time, and so on. A cursory review of the Contract's clauses and of their context is enough to justify a conclusion that the parties intended to fix the price of electricity for the entire term of the Contract. Despite the changes in market circumstances, the Contract's clauses have a precise, identifiable meaning. The lack of ambiguity means that art. 1431 *C.C.Q.* cannot be applied in this case.

[80] Next, and more importantly, the trial judge found from the evidence that the parties intended to allocate the risk of price fluctuations and that there was an agreement of wills on this point. Silcoff J. accepted the opinion of an expert, Mr. Lapuerta, on the question whether the changes in the electricity market had been foreseeable. He agreed that “[p]articipants in the debate explicitly recognized uncertainty” and that “the parties knew that the future was uncertain and that future prices were a ‘known unknown’”: paras. 507-8. In short, the judge's understanding of the evidence was that the parties had considered this risk and that one of the

objectives of the Contract was to allocate the risk. CFLCo argues that the risk materialized as a result of extraordinary events and that the price fluctuations were larger than what the parties had expected at the time they negotiated the Contract. That is not determinative, however. The risk of price fluctuations, a known variable, was allocated by the Contract. Everyone agreed that it was a variable whose value was, by definition, unknown. The timing, direction and magnitude of the fluctuations were “known unknowns”, variables that were known but indeterminate. The parties were fully aware of this reality, but they nonetheless made a firm commitment without including a price adjustment clause, which confirms that the Contract was to apply regardless of the magnitude of the fluctuations.

[81] There is no palpable and overriding error in the trial judge’s finding on this point. Silcoff J. correctly noted that the parties had expressed the intention that the Contract govern their relationship in the event that electricity prices fluctuated. Furthermore, it is paradoxical that CFLCo focuses on the fluctuations being so extreme as to cause a serious disruption of and imbalance in the contractual relationship. By insisting that this justifies ordering the parties to renegotiate the Contract, CFLCo is in reality basing its position on the doctrine of unforeseeability. And that is in fact the essence of Hydro-Québec’s argument regarding the legal basis for CFLCo’s approach, to which I will turn in the paragraphs below.

(d) *Conclusion on the Factual Analysis*

[82] In sum, the errors CFLCo argues that Silcoff J. made in defining the paradigm of the Contract, characterizing the Contract and assessing the alleged unforeseeable changes have not been established. The parties did not intend to jointly assume responsibility in relation to the project. They did not intend to create a legal relationship whose specific elements would be defined sometime later. They did not agree that Hydro-Québec would bear the risk of price fluctuations only to a certain extent. On the contrary, their undertaking was definite and firm, and was for the long term. All of these findings of fact are strongly supported by the evidence; they are in no way altered if the words of the Contract are considered in light of the regulatory and market context in which it was concluded. Silcoff J.'s conclusion with respect to the paradigm of the Contract accurately reflects both the parties' intention and the equilibrium that was initially sought, was subsequently attained and maintained, and was never disturbed.

(2) Unforeseeability and Good Faith

[83] As for the legal analysis, independently of the lack of any factual basis for a duty to renegotiate the Power Contract or to redefine how the benefits each party derives from it are shared, CFLCo argues that Hydro-Québec is in any event legally required to renegotiate the Contract. According to this argument, Hydro Québec's duty to do so is rooted in the concepts of good faith and equity, which, in Quebec civil law, condition the exercise of the rights created by any type of contract. These concepts thus prevent Hydro-Québec from relying on the words of the Contract,

because to do so in circumstances in which the Contract effectively provides for disproportionate prestations would be contrary to its duty to act in good faith and in accordance with equity. And given that the prestations owed by the parties have been disproportionate since the changes in the market occurred, Hydro-Québec has been violating its duties related to good faith since then by refusing to renegotiate the Contract.

[84] In this regard, CFLCo insists that it is not pleading the doctrine of unforeseeability. But it is clear that CFLCo's submissions in this Court closely resemble that doctrine and that they all echo its central theme: although the Contract was originally fair and reflected the parties' intention, it no longer reflects that original intention and has not done so since major unforeseen changes occurred in the electricity market. This unexpected change in circumstances that disrupted the contractual equilibrium is central to CFLCo's argument, no matter what form it takes. Yet a change in circumstances that disrupts the contractual equilibrium is precisely what would justify requiring the renegotiation of a contract if the doctrine of unforeseeability were applied.

[85] Be that as it may, CFLCo claims to have avoided relying on that doctrine, submitting that its argument is based instead on the concepts of good faith and equity that govern the performance of contractual obligations in our law. Hydro-Québec argues that all of these inevitably lead to the same result. Regardless of whether CFLCo is relying indirectly on the doctrine known as unforeseeability or on the

general concepts of good faith and equity, there is no legal basis for its arguments concerning the Power Contract between the parties. I agree. To assess whether there is a valid legal basis for CFLCo's submissions on this point, I will begin by outlining the scope of the civil law doctrine of unforeseeability, its place, if any, in Quebec civil law, and the conditions, if any, under which it applies, before turning to the scope of good faith and equity in relation to the duty to renegotiate the Contract and reallocate its benefits that CFLCo claims.

(a) *Doctrine of Unforeseeability*

[86] The doctrine of unforeseeability is a private law rule that is recognized in some civil law jurisdictions and the effect of which is that parties can be required to renegotiate a contract if, as a result of unforeseen events, performance of the obligations stipulated in the contract would be excessively onerous for one of them. This rule has been adopted in the domestic law of several European civilian countries, recently including France. On the face of it, the rule corresponds to a key aspect of CFLCo's concerns, as it applies specifically in situations in which changes that are beyond the control of and unforeseen by the contracting partners result in a significant disequilibrium in their respective prestations. This rule thus tempers the principle of the binding force of contracts where changes in market conditions alter the nature of a contract.

[87] The French legislature's choice in 2016 to include the doctrine of unforeseeability in French civil law provides one example of this. In the new



art. 1195 of the French *Code civil*, it has adopted the rule that flows from that doctrine in the following words:

[TRANSLATION] If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation.

In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement ask the court to set about its adaptation. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine.

[88] The doctrine of unforeseeability is also included in the *Unidroit Principles of International Commercial Contracts* (4th ed. 2016), a set of contract law rules published by the International Institute for the Unification of Private Law: É. Charpentier, “L’émergence d’un ordre public... privé: une présentation des Principes d’Unidroit”, in *Les Journées Maximilien-Caron 2001, Les principes d’Unidroit et les contrats internationaux: aspects pratiques* (2003), 19, at pp. 21 and 24. The Unidroit Principles, which were developed by jurists from a number of countries for the purpose of creating a truly international body of law, are not binding. However, their drafters invite parties to a contract to designate these principles as the rules that will govern their agreement, and hope that they will influence national lawmakers in their legislative choices: P.-A. Crépeau, with É. M. Charpentier, *The Unidroit Principles and the Civil Code of Québec: Shared Values?* (1998), at p. xxix; Charpentier, at pp. 21-22. Article 6.2.1 of the Unidroit Principles states the principle

that contracts are binding absent an unforeseeable event. In it, the concept of unforeseeability is referred to using the word “hardship”, which is defined as follows in art. 6.2.2:

### **Article 6.2.2**

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.

[89] As is clear from the words of these provisions, this rule is subject to two core conditions in particular. First, unforeseeability cannot be relied on where it is clear that the party who was disadvantaged by the change in circumstances had accepted the risk that such changes would occur. Second, it applies only where the new situation makes the contract less beneficial for one of the parties, and not simply more beneficial for the other. It does not apply where the parties receive the prestations and benefits that are provided for or are allocated to them in the contract.

[90] The Court of Appeal relied in its reasons on the Unidroit Principles to find that there are only two situations in which the “hardship” test can be met: either “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” (para. 152 (CanLII)). The idea that unforeseeability might be relied on to redress a disequilibrium that harms no one but seems to unduly benefit one party is in fact sufficiently foreign to this doctrine for Professor Jutras to refer to it as [TRANSLATION] “positive unforeseeability”: D. Jutras, “La bonne foi, l’imprévision, et le rapport entre le général et le particulier”, in “Obligations et contrats spéciaux: Obligations en général” (2017), 1 *R.T.D. civ.* 118, by H. Barbier, 138, at p. 139. In his view, even art. 1195 of the French *Code civil*, given its wording, could not in itself justify ordering the renegotiation of a contract in such a situation: pp. 138-39.

[91] Furthermore, under the French *Code civil*, for example, the performance of a contract must become not merely less beneficial, but [TRANSLATION] “excessively onerous”. The term “hardship” favoured by the drafters of the Unidroit Principles clearly illustrates the nature of this requirement. Quebec authors who have written on this topic have had no hesitation in referring to a requirement of [TRANSLATION] “true financial peril”: M. A. Grégoire, *Liberté, responsabilité et utilité: la bonne foi comme instrument de justice* (2010), at p. 237; see also Rolland (1999), at p. 937. Baudouin, Jobin and Vézina are of the view that if the courts had the power to intervene in cases of unforeseeability, they should do so only to [TRANSLATION] “avert the ruin of a party”: No. 446.

[92] In the instant case, however, the evocation of this doctrine comes up against obstacles that are fatal to CFLCo’s argument. First, and fundamentally, the doctrine of unforeseeability is not recognized in Quebec civil law at this time.

Second, even in jurisdictions where the doctrine is recognized, it applies only in narrow circumstances that quite simply do not correspond to those of CFLCo.

(b) *Unforeseeability in Quebec Civil Law*

[93] In Quebec, the commentators are unanimous. Quebec civil law does not recognize the general doctrine of unforeseeability: Baudouin, Jobin and Vézina, at No. 445; Lluelles and Moore, at Nos. 2231 and 2233; Pineau, Burman and Gaudet, at No. 285; V. Karim, *Les obligations* (4th ed. 2015), vol. 1, at paras. 3266-67; M. Tancelin, *Des obligations en droit mixte du Québec* (7th ed. 2009), at No. 352. The reason for this is simple. The legislature made a conscious choice not to include it in our law. The *Code* contains no article providing for such a rule. Nor was there any provision to that effect in the *Civil Code of Lower Canada*, the predecessor of the *Code*.

[94] As the Court of Appeal noted, the Civil Code Revision Office had initially suggested in its draft of the new code that judges be given the power to review contracts for unforeseeability: Civil Code Revision Office, *Report on the Québec Civil Code, Draft Civil Code*, vol. I, at p. 343, and *Commentaries*, vol. II, at p. 614 (1978). The proposed new article would have changed the law, as the courts at the time had not developed this doctrine in the absence of legislation providing for it: Lluelles and Moore, at No. 2232. The Civil Code Revision Office explained that the draft article on unforeseeability and two others on lesion would in combination

protect any party to a contract in the name of justice and equity: *Commentaries*, vol. II, at p. 614.

[95] However, the suggestion of the Civil Code Revision Office was not accepted: Crépeau and Charpentier, at pp. 33 and 35. As was explained in the National Assembly shortly before the enactment of the new *Code*, the provisions of Book Five that were included in the final draft were intended [TRANSLATION] “to achieve a better balance between the parties to contractual relationships by promoting greater fairness but also by preserving the stability of such relationships”: *La réforme du Code civil: Quelques éléments du projet de loi 125 présenté à l’Assemblée nationale le 18 décembre 1990* (1991), at p. 16. The articles on unforeseeability and lesion that were originally contemplated were no doubt incompatible with the concern to preserve contractual stability, especially given that, in addition, the new *Code* assigned a sensitive and essential role to the concepts of good faith and equity, including in contractual matters.

[96] As a result, the *Code* contains no rule on unforeseeability as that concept is understood and recognized in civil law jurisdictions elsewhere in the world. That being the case, the Quebec courts have been reluctant to develop their own law on unforeseeability. This is explained by, among other things, the political and social nature of the considerations underlying the choice to incorporate into the general law a rule that requires the renegotiation of a contract following an unforeseeable event.

[97] In this regard, I note that in a report on the general reform of the civil law of contracts, the French Ministère de la Justice notes that the doctrine of unforeseeability was adopted to address social policy considerations: *Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, February 11, 2016 (online), Chapter IV, Section 1, Subsection 1. Moreover, several of the European countries that have adopted the doctrine of unforeseeability have done so in response to major political or economic crises: J. M. Perillo, “Force Majeure and Hardship Under the Unidroit Principles of International Commercial Contracts” (1997), 5 *Tul. J. Int’l & Comp. L.* 5; S. Litvinoff, “Force Majeure, Failure of Cause and Théorie De L’Imprévision: Louisiana Law and Beyond” (1985), 46 *La. L. Rev.* 1. Thus, it can be seen that a decision to subordinate one or more contractual relationships to the doctrine of unforeseeability usually depends on the express will of parties who choose to be governed by, for example, the Unidroit Principles, or on the will of national governments or legislatures that require it.

[98] I would add that the concepts — good faith and equity — favoured by the Quebec legislature to ensure contractual fairness are incompatible with a rule that would depend on external circumstances rather than on the conduct and the situation of the parties.

[99] In any event, there is another obstacle that makes any approach suggested by CFLCo in reliance on the doctrine of unforeseeability clearly inapplicable in the case at bar. Despite what CFLCo says, the strict conditions for application of the doctrine are not met in this case. As the Court of Appeal found, not only did the trial judge make no palpable and overriding error with respect to the fact that the parties had intentionally allocated to Hydro-Québec the risk of electricity price fluctuations however large they might be, but “hardship” as understood in all the recognized forms of the doctrine of unforeseeability has simply not been established in this case.

[100] It should be noted that the disruptive event relied on by CFLCo did not have the effect of increasing the cost of performing its prestations or diminishing the value of the prestations it received from Hydro-Québec. On the contrary, at the risk of repeating myself, CFLCo has continued to receive exactly what it was owed under the Contract, as well as the related benefits, of course. Those benefits continue for the future, including, it must be remembered, the no less substantial ones that will fall to CFLCo at the end of the Contract. As the Court of Appeal put it, “not only is [CFLCo] viable and prosperous but at a future, fixed date, its obligations to [Hydro-Québec] will end and it alone will have full control over a very valuable power plant endowed with considerable potential”: para. 156.

[101] As a result, CFLCo’s arguments regarding the duties Hydro-Québec nonetheless has, in its opinion, in respect of good faith and equity are of no assistance to it in this case.

(c) *Good Faith and Equity*

[102] The result of the choices made by the legislature in the course of the revision is that, under the law of contracts in Quebec civil law, restrictions on consensualism generally take the form of exceptions and specific rules: D. Lluelles, “La révision du contrat en droit québécois” (2006), 36 *R.G.D.* 25; P.-G. Jobin, “L’équité en droit des contrats”, in P.-C. Lafond, ed., *Mélanges Claude Masse: En quête de justice et d’équité* (2003), 471; L. Rolland, “La bonne foi dans le *Code civil du Québec*: du général au particulier” (1996), 26 *R.D.U.S.* 377. The binding force of contracts, which is provided for in art. 1434 *C.C.Q.*, is the rule; the exceptions relate, for example, to the status of a minor or a protected person of full age — which makes it possible to raise lesion — or to the particular nature of consumer contracts or contracts of adhesion — which justifies the nullity of certain clauses.

[103] The general duty of good faith also serves as a basis for courts to intervene and to impose on contracting parties obligations based on a notion of contractual fairness. But while good faith can temper formalistic interpretations of the words of certain contracts, it also serves to maximize the meaningful effect of a contract and of the prestations that are for the parties the object of the contract.

[104] Good faith confers a broad, flexible power to create law: Grégoire, at p. 173; Rolland (1996). The concept of good faith has been codified since 1994 in arts. 6 and 7 *C.C.Q.* These articles and their location in the *Code* suggest that the courts should infuse this concept into the whole of Quebec civil law. The commentary



of the Minister of Justice on art. 1375 *C.C.Q.* leaves no doubt as to its potential scope and its capacity to change the civil law over time: [TRANSLATION] “The legal equivalent of the moral concept of goodwill, and closely related to the application of equity, good faith is a concept that serves to connect legal principles with fundamental concepts of fairness” (Ministère de la Justice, *Commentaires du ministre de la Justice*, vol. I, *Le Code civil du Québec — Un mouvement de société* (1993), at p. 832). Understood in this way, good faith is more than a series of distinct obligations; it is instead a broad principle that should be applied flexibly having regard to the particular circumstances of each case: Baudouin, Jobin and Vézina, at No. 127; Grégoire, at p. 175.

[105] It is on good faith that CFLCo would like to draw as the basis for the right it claims, that is, a right to impose the renegotiation of the Contract and a reallocation of the benefits that flow from it, following an approach that would be similar to that of the doctrine of unforeseeability but would extend its limits. In support of its argument, CFLCo cites certain authors who urge the courts to develop rules on unforeseeability that would be based on good faith and would be similar to what was considered by the Court of Appeal in this case: see, for example, P.-G. Jobin, “L’imprévision dans la réforme du Code civil et aujourd’hui”, in B. Moore, ed., *Mélanges Jean-Louis Baudouin* (2012), 375; Baudouin, Jobin and Vézina, at No. 446; see also Karim (2015), at paras. 3270-71; Grégoire, at pp. 243 et seq.; Tancelin, at No. 352; S. Martin, “Pour une réception de la théorie de l’imprévision en droit positif québécois” (1993), 34 *C. de D.* 599, at pp. 620 et seq. It may be tempting

to do this, but any development of concepts analogous to unforeseeability in Quebec civil law must take account of the legislature's choice not to turn this doctrine into a universal rule.

[106] Moreover, it does not seem to make sense that, when all is said and done, CFLCo is seeking to use the concepts of good faith and equity in a manner that actually goes beyond the limits of the doctrine of unforeseeability even though the Quebec legislature has refused to incorporate that doctrine into the province's civil law. If unforeseeability itself has been rejected, a protection analogous to it that would be linked only to changes in circumstances without regard for the core conditions of the doctrine as recognized in other civil law jurisdictions could not become the rule in Quebec law. The Court of Appeal found that the principles underlying good faith, or even equity, cannot be extended that far. I agree.

[107] As Hydro-Québec points out, because good faith serves to protect the equilibrium of a contract, it cannot be used to violate that equilibrium and impose a new bargain on the parties. Moreover, because good faith is not synonymous with either charity or distributive justice, the courts cannot rely on it to order the sharing of profits that have in fact been honestly earned. The Superior Court accepted Hydro-Québec's first argument and ruled in its favour at trial. The Court of Appeal also ruled in its favour, but preferred the logic of its second argument.

[108] CFLCo submits that the Court of Appeal erred in treating good faith as a mere collection of specific duties, thereby limiting its scope and its potential. What I

understand from this is that, in CFLCo's view, the Court of Appeal should instead have taken the opportunity to ground a duty to renegotiate following an unforeseeable event in the duty of equity the legislature has, by way of art. 1434 *C.C.Q.*, introduced into all contracts to which Quebec law applies.

[109] I will begin by rejecting the latter argument. Equity cannot be relied on in these circumstances, as its effect would then be to indirectly introduce either lesion or unforeseeability into our law in every case. As Baudouin, Jobin and Vézina note, art. 1434 *C.C.Q.* clearly gives judges considerable latitude:

[TRANSLATION] What the judge must do is, in essence, to determine whether, in the circumstances of the case and in the absence of an express rule established by law or by the agreement, a duty should be imposed on a party in light of the spirit of the law or the scheme of the agreement as well as a shared sense of fairness, that is to say, equity. Playing a creative role, the judge then becomes an “instrument of equity”, although this does not authorize him or her to disregard an intention that has been clearly expressed by the parties. [Emphasis added; footnotes omitted; No. 434.]

But while it is true that art. 1434 *C.C.Q.* can occasionally serve as a basis for the courts to intervene in order to remedy unfair situations (*Dunkin' Brands*, at para. 71; *Lluelles and Moore*, at No. 1551), nothing about the relationship between CFLCo and Hydro-Québec would justify such an intervention in the circumstances of the case at bar. There is neither inequality nor vulnerability in their relationship. Both parties to the Contract were experienced, and they negotiated its clauses at length. They bound themselves knowing full well what they were doing, and their conduct shows that they intended one of them to bear the risk of fluctuations in electricity prices. To rely

on equity in this context is essentially to argue that fairness requires a principle in Quebec law to the effect that a change in the circumstances of the parties to a contract will always justify its being renegotiated, which would conflict sharply with the legislature's intent. In Quebec civil law, equity is not so malleable that it can be detached from the will of the parties and their common intention as revealed in and established by a thorough analysis of the whole of the relevant evidence.

[110] Therefore, if a protection analogous to that of the doctrine of unforeseeability can emerge in this case, it is limited to what is authorized by good faith. On this point, I agree with the Court of Appeal: it cannot be argued that a party to a contract who refuses to make major changes to the contract where there is no "hardship" within the meaning of the Unidroit Principles, or where no objectively reasonable solution is available to that party, is by refusing to do so breaching the general duty to exercise his or her rights in good faith. The unforeseen change in circumstances and the disadvantage suffered by the contracting party who requests that the contract be renegotiated do not in themselves justify a court in requiring the requested renegotiation. The concept of good faith has its own boundaries and its own logic, and its scope cannot be expanded to include the possibility of penalizing a party whose conduct has not been unreasonable, or a duty to renegotiate the principal obligations of a contract in all circumstances.

[111] The fundamental role played by good faith in Quebec civil law is now well established. This Court recognized the importance of good faith in *National*

*Bank of Canada (Canadian National Bank) v. Soucisse*, [1981] 2 S.C.R. 339. Over time, it defined the scope of the concept in specific contexts: *Bank of Montreal v. Kuet Leong Ng*, [1989] 2 S.C.R. 429; *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122; *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554. The Quebec legislature codified the principles of good faith in 1994 using language that is flexible, broad and conducive to evolution.

[112] In the context of Book Five of the *Code*, in art. 1375, good faith takes the form of an objective standard of conduct:

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

As Lluelles and Moore note, good faith gives rise to a requirement of [TRANSLATION] “ethical conduct in the performance of the contract” (No. 1971 (emphasis deleted)), of a “general attitude” or even of “a state of being” (No. 1977 (emphasis deleted)). The codified concept is similar to the one that was developed by this Court to the effect that good faith is an obligation that requires parties to exercise their contractual rights in accordance with the rules of fair play and equity: *Houle*, at p. 155. Baudouin, Jobin and Vézina write that [TRANSLATION] “[g]ood faith has . . . become the behavioural ethic required in contractual matters”: No. 132. The form this standard takes therefore necessarily depends on the clauses and the nature of the contract at issue.

[113] But because good faith is a standard associated with the parties' conduct, it cannot be used to impose obligations that are completely unrelated to their conduct. What constitutes unreasonable conduct contrary to the duty of good faith must be determined on a case-by-case basis. For example, in a situation of "hardship" that corresponds to the description of that concept set out in the Unidroit Principles, the conduct of the contracting party who benefits from the change in circumstances cannot be disregarded and must be assessed.

[114] CFLCo argues that, by failing to cooperate with it to help it overcome its financial problems and enable it to benefit from the Churchill Falls project, Hydro-Québec is acting contrary to the requirements of good faith. What this means in real terms is that Hydro-Québec would have to confer with CFLCo in order to come to some arrangement or compromise with respect to the words of the Contract and would also have to ensure that the legitimate expectation raised by CFLCo, that is, that the other contracting party will help it benefit fully from the positive effects of the project, is met.

[115] The authors recognize the existence of a duty to cooperate that flows from the requirements of good faith. This duty is sometimes described as a "positive" obligation that requires a party to be proactive in accommodating the interests and legitimate expectations of his or her contracting partner, as opposed to the "negative" obligations imposed by the duty of good faith, which require a party to refrain from doing certain things that would harm the other party: Lluelles and Moore, at

Nos. 1979 and 1999-2000; LeBrun, at paras. 33 et seq.; Baudouin, Jobin and Vézina, at No. 162. The duty to cooperate means, for example, that one party must look out for the other party's interests by acting in a reasonably conciliatory and proactive manner when receiving and performing prestations under the contract: *ibid.*

[116] That being said, a review of the case law shows that this duty to cooperate has only quite rarely led a court to find that an obligation to amend a contract applied, and that no court has yet found that an obligation to redistribute profits earned under a contract did. Although CFLCo can argue that for a party to consider only the words of the contract without taking the other party's situation into account can become wrongful conduct, it is wrong to rely on this to argue that a refusal to renegotiate a contract or share profits is contrary to the general duty of good faith. One does not necessarily entail the other.

[117] This conclusion follows from two fundamental principles of Quebec civil law that cannot be disregarded in any analysis of good faith in the circumstances of a given case. The first is that good faith is presumed, and a party must, in meeting the requirements of good faith, also be able to satisfy his or her own interests. As this Court pointed out in *Bhasin*,

[w]hile “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. [para. 65]

This statement applies equally to the duty of good faith in Quebec civil law.

[118] Thus, the duty of good faith does not negate a party's right to rely on the words of the contract unless insistence on that right is unreasonable in the circumstances. The examples given by authors involve situations in which, exceptionally, such a stance would threaten the contractual relationship or the harmony of the contract without regard for the contracting partner's legitimate expectations; those in which it would allow one party to derive an *unwarranted* advantage from his or her situation — [TRANSLATION] “[b]ut this fault presupposes conduct that truly deviates from that of an honest, prudent contracting party”; and, finally, those in which the party who insists on adhering to the words of the contract is inflexible or is gratuitously impatient or intransigent: Lluelles and Moore, at Nos. 1984-96.

[119] In the instant case, Hydro-Québec's refusal to forego the advantages flowing from the Contract is not a departure from the standard of reasonable conduct that could rebut the presumption that a party is acting in good faith. Nor does its insistence on adhering to the Contract despite the alleged unforeseen change in circumstances constitute unreasonable conduct in the absence of other breaches of the duty of fair play or that of collaboration or cooperation. This position taken by Hydro-Québec does not show any intransigence or impatience on its part. Hydro-Québec is not deviating from the standard of a reasonable contracting party, and it is considering CFLCo's legitimate contractual interests, given that it is not preventing CFLCo from receiving the benefits conferred on the latter under the Contract.



[120] The second fundamental principle is that [TRANSLATION] “[g]ood faith requires consideration of the spirit of the law or the agreement”: Baudouin, Jobin and Vézina, at No. 127. The purpose of the duty to cooperate is thus to give the contract, as it exists, the broadest scope possible: LeBrun, at para. 190. In a sense, this duty can be seen as a simple implementation of Pothier’s maxim that [TRANSLATION] “obligating oneself to do something means obligating oneself to do it effectively” (*ibid.*, at para. 37). The many expressions of the duty of good faith therefore serve to maintain the relevance of the prestations that form the basis of the contract for the two parties even if the words of the contract do not specifically prohibit the parties from doing something that would impede its fulfilment. Because good faith takes its form from the terms of the contract, it cannot serve to undermine the contract’s paradigm. But in the view of the Superior Court and the Court of Appeal, that is exactly what CFLCo is arguing for in this case: CFLCo is demanding that Hydro-Québec renounce its access to a source of electricity production at a stable cost, that is, to the principal benefit it derives from the Contract.

[121] It is true that the Quebec courts have sometimes required contracting partners to make slight changes to their contracts. For example, they have required a party to tolerate certain breaches by the other party or to refrain from asserting rights in certain circumstances: *Provenzano v. Babori*, [1991] R.D.I. 450 (C.A.); *T.L. v. Y.L.*, 2011 QCCA 1205; *SMC Pneumatiques (Canada) ltée v. Dicsa inc.*, 2000 CanLII 17881 (Sup. Ct.), reversed on appeal, but not on this point, 2003 CanLII 72264 (C.A.). As well, they have sometimes imposed what are known as duties of

conciliation by requiring one party to help the other find solutions for the other party's problems or to accept a new offer that essentially satisfies his or her own needs, provided in all cases that the circumstances show that it would be unreasonable not to do so: *Entreprises MTY Tiki Ming inc. v. McDuff*, 2008 QCCS 4898; *Nagarajah v. Fotinopoulos Kalyvas*, 2003 CanLII 2834 (Sup. Ct.); see also LeBrun, at paras. 178-80. But no court has ever forced a party to renegotiate the prestations on which the commutative nature of the contract was based. In my view, this is justified by the very logic behind the duty of good faith: if the main prestations of a contract are renegotiated and modified, they will rarely remain relevant.

[122] CFLCo nonetheless argues that in certain circumstances, renegotiation will serve to maintain a contract's relevance. In support of this argument, it cites *Provigo Distribution inc. v. Supermarché A.R.G. inc.*, 1997 CanLII 10209, in which the Court of Appeal held that a franchisor had breached its duty of fair play by failing to provide its franchisees with tools they needed in order to prevent, or at least minimize, economic losses. However, the circumstances in *Provigo* were very different. The franchisor had taken the initiative of changing the marketing structures for its products; this was not contrary to its contracts with its franchisees, but was detrimental to their interests. The Court of Appeal found that Provigo therefore had a duty to cooperate with its franchisees in order to help them maintain the contract's relevance, which was jeopardized by the changes. One of the options suggested to the court, which stated, however, that it was not for it [TRANSLATION] "to say what a prudent and diligent franchisor, acting in good faith, could or should have done", was

to amend the franchise contracts: p. 25. Thus, the reason why *Provigo* had to cooperate to such an extent with its contracting partners was that its duty of fair play required it to avoid disrupting the contractual equilibrium when it made other business decisions that might directly affect that equilibrium. In other words, *Provigo* is fundamentally different from the instant case, given that the franchisor's fault in that case lay in its choice to act without minimizing the impact of its (otherwise legitimate) actions on the other contracting parties.

[123] In the case at bar, Hydro-Québec has done nothing that threatens to disrupt the contractual equilibrium; it therefore has no duty to cooperate with CFLCo to mitigate the effects of the Contract. Moreover, the circumstances CFLCo relies on are, according to its argument, external to the parties, so much so that they were unforeseeable. I would add that the franchise contract at issue in *Provigo* was a relational contract. Given the trial judge's findings of fact on this point, CFLCo cannot maintain that its contract with Hydro-Québec can be so characterized. In any event, while there have been cases — although limited in scope and, what is more, quite rare — in which an exceptional duty to make slight changes to a contract has been held to exist, no court has endorsed the existence of a duty to share previously allocated profits in the name of good faith or fair play; yet that is the essence of what CFLCo is seeking.

[124] It follows that neither good faith nor equity gives CFLCo a legal basis for requiring that the initial equilibrium of the Power Contract be modified. The evidence

does not show that Hydro-Québec is acting in bad faith or refusing to accommodate CFLCo's situation. It is refusing only to give the other party the benefits it itself derives from the Contract, which is not a breach of the requirement that it conduct itself reasonably and in accordance with fair play. Hydro-Québec does indeed benefit from the Contract insofar as it is able to earn a profit as a result of its having participated in this project rather than undertaking a similar project in Quebec in the 1960s. But it obtained, in exchange for making substantial investments and assuming significant risks, the right to full enjoyment of the benefits of the Plant and of the Plant's capacity to produce electricity at a stable price over a long period of time regardless of any fluctuations in market prices. As for CFLCo, it has, as the courts below noted, received what it expected to receive under the Power Contract, namely the ability to use debt financing for the Plant, and a return on its investment that it considered reasonable at the time of the signing of the Contract.

[125] As helpful and fundamental as the concepts of good faith and equity are in protecting the contractual equilibrium in Quebec, it would be inappropriate to apply them, as CFLCo asks us to do, to transform the objectives of corrective justice they are intended to protect into a mechanism of distributive justice that would be unpredictable and contrary to contractual stability.

### (3) Conclusion on the Principal Question

[126] CFLCo's arguments on the principal question in the appeal, both those based on the facts and those based on the law, must fail.

[127] First, the trial judge correctly defined the parties' intention and the nature of the Power Contract. The parties entered into a Contract that allocated the risks and benefits associated with the project between them. Regardless of whether the 1960s market context is considered, this suffices for us to reject CFLCo's argument that the object of the Contract is instead the equitable sharing of the risks and profits of the undertaking or the creation of a relationship of long-term cooperation and economic coordination. What is more, the Contract expressly allocated the risk related to electricity price fluctuations, whatever their source might be, to Hydro-Québec.

[128] Second, CFLCo's arguments to the effect that a duty to renegotiate the Contract can be found in provisions of the *Code* must fail in the circumstances. CFLCo cannot rely on the doctrine of unforeseeability, since that doctrine is not part of Quebec civil law and it has not been established that CFLCo was actually in a situation of "hardship" at any point during the life of the Contract. The evidence in the record and the trial judge's inferences of fact do not establish this. Moreover, the renegotiation of the Contract is not justified on the basis of either equity or good faith. The duty to cooperate with the other contracting party does not mean that one's own interests must be sacrificed. Given that Hydro-Québec is not being unreasonable in insisting on adhering to the words of the Power Contract, the fact that it is limiting itself to complying with the Contract does not give rise to any rights for CFLCo. In the instant case, there is no justification for requiring that the Contract be modified.

B. *Relief Sought and Prescription*

[129] Since the central question in the appeal must be answered in the negative, I will deal only briefly with the subsidiary questions.

[130] In this Court, CFLCo insists that the appropriate relief would, first and foremost, be an order that Hydro-Québec comply with the 2009 demand notice in which CFLCo called upon it to renegotiate the Power Contract. Yet the principal conclusion CFLCo sought in its motion to institute proceedings was an order modifying the Contract by incorporating a formula for adjusting the prices payable that CFLCo had itself devised. According to CFLCo, if this Court has the power to order the parties to renegotiate the Contract, it must also have the power to set the terms of the new contract itself.

[131] The Court of Appeal did not deal with this question, whereas the trial judge had focused on the shortcomings of the price adjustment formula CFLCo was asking it to add to the Contract. Because CFLCo has not identified any palpable and overriding error in the trial judge's analysis on this point, there is no basis for intervening in this regard. Moreover, I am unable to identify a legal principle on the basis of which a judge could impose a new bargain on Hydro-Québec to which it has not agreed. As Hydro-Québec points out, allowing a contract to be modified by a judge at the request of a single party would conflict seriously with the principles of the binding force of contracts and freedom of contract that underlie Quebec civil law. I would add that Professor Jobin opposes this solution even though he is in favour of introducing the doctrine of unforeseeability into Quebec civil law:

[TRANSLATION] A court cannot have the power to redraft the agreement, to itself adapt the agreement to the circumstances; as an outsider to the negotiations and to the specific context of the parties, it could well impose inappropriate terms if it were to modify the agreement itself. [Footnote omitted.]

(Jobin (2012), at p. 387)

[132] As for CFLCo's request for an order to renegotiate the Contract, in my view, it reflects a misunderstanding of the scope of the legal principles on which CFLCo relies, the requirements of which it does not meet. The unprecedented remedy my colleague proposes is along the same lines: requiring that the Contract be renegotiated such that the parties agree on a price adjustment formula for allocating the unforeseen profits or, failing an agreement in this regard, authorizing the court to establish such a formula and impose it. In my opinion, no support for such a remedy can be found in either the academic literature or the case law on Quebec civil law.

[133] Furthermore, I agree with the trial judge that, in any event, CFLCo's action is prescribed. By virtue of its argument, CFLCo is seeking specific performance of an implied conditional obligation to renegotiate the Contract in the event of a sudden change in market circumstances: arts. 1497 and 1601 *C.C.Q.* The breach it alleges is thus the non-performance of a contractual prestation that is exigible from the occurrence of a specific event: art. 1507 *C.C.Q.* It follows that the right of action that, in CFLCo's view, allows it to compel performance of the obligation or to obtain damages for the injury caused by non-performance arose at the latest when it became aware that the obligation had not been performed even though the specified condition had been fulfilled.

[134] What can be seen from the evidence is that the most recent event to have disrupted the market on which CFLCo relies, namely the action taken by the United States Federal Energy Regulatory Commission to effectively require that the market be opened to all producers, occurred in 1997 at the latest. It was therefore at that time that CFLCo's right of action arose within the meaning of art. 2880 para. 2 *C.C.Q.* As the trial judge correctly found, prescription began to run on the day CFLCo learned of that change in circumstances in the electricity market. Because an action to enforce a personal contractual right is prescribed by three years, CFLCo's right of action has been prescribed since the end of 2000 at the latest: art. 2925 *C.C.Q.* The demand notice it sent in 2009 and the institution of the action in this case in February 2010 were clearly late.

[135] CFLCo's argument that Hydro-Québec's breach of its duty of good faith is a continuing fault that is, in practice, not subject to prescription must fail. It is true that the authors acknowledge that a fault can be committed repeatedly and that each new fault then leads to a new injury: J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile* (8th ed. 2014), at No. 1-1324; J. McCann, *Prescriptions extinctives et fins de non-recevoir* (2011), at pp. 133-34. In such cases, there is said to be continuing fault or damage. Examples that are cited include the fault committed by a polluter or by a person who harasses another. In *Dunkin' Brands*, the Court of Appeal also found that a breach of an ongoing duty of assistance provided for in a contract was a continuing fault: para. 143. However, the situation in the case at bar is entirely different. CFLCo seeks a sanction for the breach of a duty to renegotiate that,



it alleges, flowed from discrete external events that had disrupted the agreed contractual equilibrium. In such a case, the right of action in question arises when the events that give rise to it occur, that is, when they crystallize.

## VI. Conclusion

[136] In the final analysis, CFLCo has not provided any compelling factual or legal basis for the courts to reshape the contractual relationship it has had with Hydro-Québec for the last 50 years. The trial judge properly defined the nature of this relationship and the paradigm of the Contract, and also explained why Hydro-Québec is not breaching its duty of good faith in exercising its right to purchase electricity from CFLCo at fixed prices. The parties never intended to allocate the project's risks and benefits equally. On the contrary, the original intention was that Hydro-Québec would assume most of the risks associated with the construction of a plant owned by another company. At the time the Contract was entered into, the benefit that CFLCo now characterizes as disproportionate, namely the guarantee of fixed prices for the purchase of electricity, was seen as a way to have Hydro-Québec assume a risk that CFLCo did not want to assume. In return, Hydro-Québec was to obtain low fixed prices and a long-term contract, two benefits on which it insisted in 1969 in exchange for increasing its contribution to the project. It is true that it now, in good faith, earns substantial profits as a result. However, the magnitude of those profits does not justify modifying the Contract so as to deny it that benefit.

[137] The fact that the electricity market has changed significantly since the parties entered into the Contract does not on its own justify disregarding the terms of the Contract and its nature. While it is true that the introduction of the duty of good faith into the *Code* shows that the legislature intended to temper the principles of the binding force of contracts and autonomy of the will, this does not justify making inordinate use of that duty in order to override the terms of an agreement that adequately reflects the initial equilibrium envisaged by the parties. In reality, CFLCo is not asking the Court to help it give the Contract the broadest scope possible; rather, it is asking the Court to limit the Contract's temporal scope so that it can more quickly enjoy the benefits it will eventually receive at the end of the Contract in 2041. Those benefits, which will in fact fall to CFLCo as a result of the paradigm of the Contract, are substantial for it as well: a Plant estimated to be worth more than \$20 billion that it will be able to operate for its own benefit, starting in September 2041, for another 118 years until its lease expires.

[138] When all is said and done, CFLCo is seeking not to protect the equilibrium of the Power Contract, but to replace the Contract with a new agreement by undoing certain aspects of the Contract while keeping the ones that suit it. CFLCo is thus asking for more than accommodations or compromise; it is asking its contracting partner to give up the benefits it obtained in exchange for the sacrifices it made during the first few years of the project, a situation from which CFLCo has been benefiting since 1969 and continues to benefit today. Neither good faith nor equity justifies granting these requests.

[139] I would dismiss the appeal with costs.

The following are the reasons delivered by

ROWE J. —

I. Introduction

[140] My reasons in this appeal and those of my colleague, Justice Gascon, present contrasting visions of how the jurisprudence regarding contract characterization has developed under Quebec law. My conclusion on the question of characterization leads me to a result different from that reached by Justice Gascon. I would allow the appeal.

[141] The appellant, the Churchill Falls (Labrador) Corporation Limited (“CFLCo”), claims that it is entitled to participate in profits that its contract with the respondent, Hydro-Québec, which sets out a framework for harnessing the hydroelectric potential of the Churchill River basin in Labrador (“Power Contract”), does not meaningfully allocate. This entitlement, the appellant argues, flows from the relational nature of the contract and the heightened duty of good faith this imposes on the respondent. This argument focuses on the failure of the trial judge to properly characterize the contract and his failure to recognize the important legal consequences that follow from its proper characterization.

[142] The main issue in this appeal is therefore whether the trial judge erred in his characterization of the contract binding CFLCo and Hydro-Québec. I would answer this question in the affirmative given the failure of the trial judge to characterize the contract as relational rather than transactional. The Power Contract establishes a long-term relationship between the parties premised on cooperation and the promise of mutual benefit. Rather than define the parties' obligations in rigid detail, it assumes that the parties would work together to fulfill the aims of their contractual relationship. Properly characterized, it is the *epitome* of a relational contract.

[143] A number of conclusions follow from this correct characterization. The first is that, given the nature of their contractual relationship, both parties have implied obligations and are subject to a heightened duty of good faith and cooperation. This duty flows from the operation of arts. 6, 7 and 1375, as well as art. 1434 of the *Civil Code of Québec* ("C.C.Q."). The second is that the contractual relationship between the parties includes an implied obligation to reach an agreement about the allocation of unforeseeable and extraordinary profits arising from the operation of the Power Contract. This in turn leads to the conclusion that Hydro-Québec, by unreasonably withholding its agreement to negotiate with CFLCo about the allocation of these profits, has been in continuous breach of this obligation. The appellant's claim against Hydro-Québec consequently cannot be prescribed by the operation of art. 2925 of the C.C.Q.

## II. Analysis

[144] My analysis is premised on an approach to contract characterization that differs from that adopted by my colleague. Whereas Justice Gascon states that contract characterization is a question of mixed fact and law to be reviewed on the standard of overriding and palpable error (para. 49), my view is that characterization, in this case, is a question of law reviewable on the standard of correctness. Given the errors committed by the trial judge in carrying out this characterization, this Court must conduct the analysis anew.

[145] In what follows, I set out my reasons for concluding that, properly characterized, the Power Contract binding the parties is relational in nature. Parties to a relational contract are typically presumed to have bound themselves to a higher standard of good faith. This allows the parties to rely on a heightened duty of cooperation in fulfilling the goals of their contractual relationship. As the Power Contract contains no mechanism for the allocation of profits that are beyond what was envisioned at the time of the agreement, the parties have an implied obligation to cooperate in defining the terms of their allocation. Hydro-Québec has breached this duty by refusing to establish by way of mutual agreement a price adjustment formula for these extraordinary profits.

### A. *The Proper Approach to Contract Characterization*

[146] The object of contract characterization is to link the contract at issue to a legal category so as to impose on the parties the legal effects of the true nature of their agreement (D. Lluellas and B. Moore, *Droit des obligations* (2nd ed. 2012), at Nos. 1727 and 1729; J. Ghestin, C. Jamin and M. Billiau, *Les effets du contrat* (3rd ed. 2001), at p. 77; F. Gendron, *L'interprétation des contrats* (2nd ed. 2016), at p. 19). In characterizing the contract, the judge must be attentive to all the obligations and their interrelations so as to reveal their hierarchical positions (P. Fréchette, “La qualification des contrats: aspects théoriques” (2010), 51 *C. de D.* 117, at pp. 136-37). The aim of this exercise is to identify the essential objective of the contract — its *raison d'être* — and to categorize the contract based on the elements that define its nature (P. Delebecque and F.-J. Pansier, *Droit des obligations: Contrat et quasi-contrat* (7th ed. 2016), at pp. 240-41). This conclusion must arise from structured syllogism, and not from intuition, instinct, or any individualistic sense of what seems fair in a particular situation (Fréchette, at pp. 127-28; O. Cayla, “Ouverture: La qualification, ou la vérité du droit” (1993), 18 *Droits: Revue française de théorie juridique* 3, at p. 9).

[147] The unqualified assertion by my colleague that contract characterization is a question of mixed fact and law departs from settled jurisprudence (majority reasons, at para. 49). In *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59, a majority of this Court drew a distinction between the interpretation of a contract and the characterization of a contract. On the one hand, contractual *interpretation* often involves questions of mixed fact and law, notably

when courts must consider both the intrinsic and extrinsic context of the contract, including “the factual circumstances in which it was formed, how the parties have interpreted it, and usage” (*Uniprix*, at para. 37, citing art. 1426 of the C.C.Q.; see also J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 418; Lluelles and Moore, at Nos. 1600, 1603 and 1607; V. Caron, *Jalons pour une théorie pragmatique de l’interprétation du contrat: du temple de la volonté à la pyramide de sens* (2016), at pp. 87-93).

[148] The types of questions raised by contract *characterization*, on the other hand, depend on whether it is necessary to consider extrinsic evidence to establish the parties’ intent as to the fundamental obligation of the contract. On this point, Justice Wagner and Justice Gascon write in *Uniprix*:

The characterization of a contract can also be considered to be a question of mixed fact and law in certain circumstances. Although certain authors see it as a pure question of law (Gendron, at pp. 16-17; Lluelles and Moore, at No. 1738), the fact remains that the characterization of a contract can depend on evidence of the parties’ common intention as regards its nature and its content. When it is necessary to consider evidence of that intention, the Quebec Court of Appeal rightly recognizes that, in such cases, the characterization of the contract is a question of mixed fact and law (*MMA*, at para. 20; *Banville-Joncas*, at paras. 63-64; *Cie canadienne d’assurances générales Lombard v. Promutuel Portneuf-Champlain, société mutuelle d’assurances générales*, 2016 QCCA 1903, at para. 17 (CanLII)). [Emphasis added; para. 42.]

[149] I do not dispute that contract characterization becomes a question of mixed fact and law where consideration of evidence extrinsic to the contract is necessary to identify the true intention of the parties. In certain circumstances, the

identification of this shared intention will require the judge to look beyond the words of the contract itself. In such cases, the characterization of the contract is no longer an objective exercise because it requires the court to consider subjective indicators of the parties' intent, such as those gleaned from the circumstances surrounding the formation of the contract and its performance. Such was the case in *Montréal, Maine & Atlantique Canada Cie (Montreal, Maine & Atlantic Canada Co.) (MMA), Re*, 2014 QCCA 2072, 49 R.P.R. (5th) 210, at para. 20, and *Station Mont-Tremblant v. Banville-Joncas*, 2017 QCCA 939, at paras. 63-66 (CanLII). In these cases, the Quebec Court of Appeal indicated that, while characterization is generally a question of law, it *can* be a question of mixed fact and law when testimonial evidence is necessary to establish the nature of the contract. In these cases, testimonial and other extrinsic evidence was considered to determine the parties' true intention and the nature of the contract.

[150] In cases “where the purpose of [characterization] is only to define the specific legal scheme of the contract without resorting to any evidence”, the exercise of characterization remains a question of law (*Uniprix*, at para. 43). This distinction is recognized by a number of authors and decisions (Ghestin, Jamin and Billiau, at p. 117; Gendron, at pp. 16-17; Lluelles and Moore, at Nos. 1726 and 1738; S. Grammond, A.-F. Debruche and Y. Campagnolo, *Quebec Contract Law* (2nd ed. 2016), at para. 319; M. Tancelin, *Des obligations en droit mixte du Québec* (7th ed. 2009), at No. 325; *Montreal, Maine & Atlantic Canada Co.*, at para. 20; *Station*



*Mont-Tremblant*, at paras. 63-66; *Paquin-Charbonneau v. Société des casinos du Québec*, 2017 QCCA 1728, at paras. 13-15 (CanLII).

[151] In the case at hand, the trial judge, Silcoff J., noted that, in the absence of ambiguity, the court must direct its attention solely to the Power Contract in order to identify the true nature and equilibrium of the relationship, the risks and benefits assumed thereunder and the rights and obligations of the parties (2014 QCCS 3590, at para. 556 (CanLII)). The trial judge did not point to any ambiguity in the provisions of the agreement or to any relevant contradictory extrinsic evidence. Rather, he stated that the “Power Contract is the contractual genesis of the relationship between the parties. It documents and defines, in a clear and concise manner, the nature of the relationship to which the parties agreed to be bound and the scope of their respective rights and obligations thereunder” (para. 453). As the trial judge did not indicate the *necessity* of considering elements extrinsic to the contract to establish the nature of its fundamental obligation, characterization — in this instance — remains a question of law.

[152] To be clear, though Silcoff J. considered extrinsic evidence in qualifying the contract, this was only after having concluded that the Power Contract “documents and defines, in a clear and concise manner, the nature of the relationship to which the parties agreed to be bound” (para. 453). I adopt, rather than take issue with, his finding that one can characterize a contract by reference to its terms when

this contract is clear. It is at the next step, the proper characterization of the contract, that he and I differ.

[153] The standard of review on a question of law is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8; *Station Mont-Tremblant*, at para. 64). Thus, with respect to the review of a trial judge's findings on a question of law, an appellate court can replace the opinion of the trial judge with its own. Since the trial judge's conclusions regarding characterization do not warrant deference on appeal, I would correct his findings as to the characterization of the contract.

B. *The Relational Nature of the Power Contract*

[154] The fundamental aim of the Power Contract — its *raison d'être* — is the long-term hydroelectric development of the Churchill River for the mutual benefit of the parties. In my view, the Power Contract creates obligations that go beyond the mere exchange of financing and debt security for guaranteed power at a low price. Rather, it establishes a long-term cooperative relationship whereby both parties expected to gain. This relationship assumes a high degree of trust and collaboration between the parties. The Power Contract is, by its nature, a relational contract.

[155] In this case, the trial judge erred when he concluded that the clear language and binding force of the Power Contract as negotiated between the parties by their own free will did not support the conclusion that the parties had entered into an agreement of a *relational* nature (para. 553). Similarly, the Court of Appeal held

that the Power Contract had no “relational element” that would justify heightened duties of collaboration. The rationale for this conclusion was that the parties were sophisticated, the negotiations lengthy, the financial implications significant, and the contract complex (2016 QCCA 1229, at para. 140 (CanLII)).

[156] My colleague adopts this view of the Power Contract and concludes that it is not relational in nature, in that it regulates all the obligations of the parties with precision (para. 69). According to Justice Gascon, none of the obligations in the Power Contract were left undefined. This indicates the parties’ intention that the project proceed according to the explicit terms of the Power Contract, and not according to their ability and, indeed, obligation to agree and cooperate to deal with contractual gaps (paras. 69-71). This implies that my colleague characterizes the contract as transactional, rather than relational.

[157] My view is premised on a different understanding of the nature of contractual relationships. On one hand, transactional contracts — i.e. generally contracts of instantaneous execution — do not create a relationship between the parties in any meaningful sense. They impose precise obligations to be performed at a specified time without the need for further cooperation (Baudouin, Jobin and Vézina, at No. 76). Relational contracts, on the other hand, typically require successive performance, whereby the parties have obligations to perform on a continuing basis (*ibid.*). This presupposes the existence of a deeper relationship based on trust between

the parties and requires that each party have an interest in maintaining the relationship for the long term.

[158] With respect, I do not share the view that relational contracts should be limited to those that leave certain obligations to be defined by the parties at a later date. Rather than being the necessary condition of relational contracts, undefined obligations are but one indicator of a broader category of relational contracts. Other indicators include the duration of the contract and the creation of an ongoing economic relationship rather than a one-off transaction (Baudouin, Jobin and Vézina, No. 78).

[159] In this case, the Power Contract establishes a cooperative relationship between the parties for a period of 65 years. Unlike many energy arrangements, the Power Contract is not limited to a simple contract of sale between an electricity generator and a power purchaser. It is the framework for an interdependent and long-term relationship between the parties. This was acknowledged in the *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at pp. 305-06 (cited with approval by the trial judge, at para. 77), where this Court noted that “[t]he importance of the relationship between CFLCo and Hydro-Quebec to the success of the Churchill Falls development is made evident by a reading of the Power Contract.”

[160] This conclusion is reinforced by the language of the Power Contract (reproduced in A.R., vol. III, at pp. 461-519). First, its terms show that the enduring operation and continued success of the project was of cardinal importance to both

parties. To this end, they bound themselves to take an active hand in the arrangement throughout the course of its operation. Taken as a whole, the agreement makes clear that both parties saw the project as requiring ongoing interaction and collaboration. This is reflected in the duty of full cooperation included in ss. 4.2.1, 4.3, 5.4, 20.3 and 21.1 of the Power Contract.

[161] The language of cooperation appears throughout the Power Contract. For example, in s. 4.2.1, “CFLCo agrees to . . . co-operate fully with Hydro-Quebec in the forecasting of energy which can be made available”. In s. 4.3, it is provided that “Hydro-Quebec will cooperate in estimating, to the best of its knowledge, what might be the most suitable time for CFLCo to [take out of service units] in order to reduce or eliminate the penalty which CFLCo might incur for failure to provide Firm Capacity”.

[162] Section 21.1 provides yet another example. In the event that CFLCo might be unable to complete the project, the Power Contract states that “Hydro-Quebec shall have the right to require CFLCo to cooperate with Hydro-Quebec with the view of permitting Hydro-Quebec to implement the Project on behalf of CFLCo, provided however that Hydro-Quebec may not avail itself of such right if CFLCo’s inability to implement the Project as aforesaid shall be due to Hydro-Quebec having failed to act with due diligence in the carrying out of its undertaking hereunder or having unreasonably withheld its consent, agreement or approval of any request by CFLCo contemplated by this Power Contract”.

[163] Second, the parties committed to offering each other assistance during the execution of the contract in order to ensure its success. Such a commitment, in my view, is antithetical to the type of arm's length dealing typical of transactional contracts. For example, the parties included an obligation to keep each other mutually informed of any changes in circumstances or of any progress under s. 5.1 of the Power Contract. In certain situations, they also provided for equal sharing of benefits, costs, and expenses over the life of the agreement (see e.g. ss. 11.2, 13.3 and 14.1 of the Power Contract). In s. 11.2, for instance, the parties agreed that “[a]ll costs and any benefits of any refinancing of any of CFLCo’s Debt Obligations in respect of which Hydro-Quebec had been making interest charge payments under Article XV shall be shared equally by the parties hereto.”

[164] Third, the parties explicitly contemplated the need for consultation, joint determination, discussion, and revision in a number of instances (see e.g. ss. 4.5, 4.6, 6.7, 13.2 and 22.1 of the Power Contract). In s. 4.5, for example, the parties agreed that “[s]hould any meter . . . break down or be found not to have required accuracy, CFLCo and Hydro-Quebec shall determine . . . the amount of power and energy supplied during the period of failure or inaccuracy and the duration of such period.” Except in the case of appointment of independent auditors (s. 13.2), the parties did not provide for an alternative in the event they would fail to agree, which suggests that, in the vast majority of situations, they did not contemplate the possibility that a mutual agreement could not be reached. This reinforces the relational nature of their contract.

[165] Ultimately, even if we adopt the narrow view of relational contracts proposed by Justice Gascon, the contract at issue must still be characterized as relational. This is because the parties agreed to define the details of certain obligations relating to the execution of the contract at a later stage in their relationship. For instance, in the interest of overall system compatibility, the parties agreed that “[c]omponents of the Plant which may affect the economy or reliability of Hydro-Quebec’s transmission facilities shall have characteristics mutually agreed after joint consultation” (s. 4.1). The parties also agreed that they “shall, by mutual agreement, establish, revise and maintain up to date in the light of the experience gained in operating the Plant a detailed operating manual” (s. 4.2.8). Envisioning that there may be changes regarding the delivery dates, the parties stipulated that Delivery Dates may be advanced by mutual agreement (s. 6.3). They also provided that further adjustments to the Delivery Point may be made by mutual consent (s. 7.1). Regarding the refinancing of CFLCo’s Debt Obligations, the parties stipulated that revisions of existing Debt Obligation agreements shall be subject to the prior approval of both parties (s. 11.1).

[166] I add that none of the factors identified by the Court of Appeal — the sophistication of the parties, the length of negotiations, the financial implications, and the complexity of the contract — compromise the characterization of the contract as relational. Emblematic relational contracts such as joint ventures, partnerships, and franchise agreements are often complex and they are entered into by sophisticated parties after lengthy negotiations (J.-G. Belley, “Théories et pratiques du contrat

relationnel: les obligations de collaboration et d'harmonisation normative”, in Meredith Lectures 1998-1999, *The Continued Relevance of the Law of Obligations: retour aux sources* (2000), 137, at pp. 139-40).

[167] In the end, it is only when one considers the overall framework of the parties' rights and obligations set out in the terms of the Power Contract that the true nature of the arrangement becomes apparent. In my view, the true nature of the Power Contract is relational rather than transactional. I would consequently correct the conclusion of the trial judge on this issue.

### C. *The Implications of Proper Characterization*

[168] The characterization of a contract determines the juridical category into which it falls and the legal consequences that attach to it as a result (Lluelles and Moore, at No. 1729). Depending on how it is characterized, a contract may contain certain implied obligations.

[169] Article 1434 of the C.C.Q. codifies the source of implied obligations and establishes the binding force of contracts. It states that “[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.” The nature of the contract informs how to engage with usage, equity, or law to determine the scope of implied obligations (J. Pineau, D. Burman



and S. Gaudet, *Théorie des obligations* (4th ed. 2001), by J. Pineau and S. Gaudet, at No. 230; see also Baudouin, Jobin and Vézina, at No. 432).

[170] I share the view expressed by my colleague that an implied obligation is best viewed as a reflection of the presumed intention of the parties to implicitly include certain obligations that are necessary complements to the contract (para. 74; see also Baudouin, Jobin and Vézina, at No. 427; Lluelles and Moore, at No. 1544; *Dunkin' Brands Canada Ltd. v. Bertico Inc.*, 2015 QCCA 624, 41 B.L.R. (5th) 1, at paras. 65 and 71).

[171] I do not, however, agree that a court must find that the contract would be ambiguous, incomprehensible, without foundation or without useful effect before including an implied obligation (Lluelles and Moore, at Nos. 1489 and 1549). Rather, the inclusion of an implied obligation is warranted where a reasonable person, placed in the same particular circumstances, would see an important and intrinsic connection between the implied terms and the nature of the contract (Baudouin, Jobin and Vézina, at Nos. 431 and 434; Pineau, Burman and Gaudet, at No. 235).

[172] In the present case, the trial judge mischaracterized the Power Contract and consequently did not appreciate the necessary complements to its explicit terms. For this reason, he failed to identify implied obligations flowing from the relational nature of the Power Contract.

[173] In relational contracts, both good faith — as required by arts. 6, 7 and 1375 of the C.C.Q. — and equity provide guidance to defining the scope and content of implied obligations. In my analysis of the parties’ implied duty to cooperate, I consider how both grounds — good faith and equity — inform the scope and content of this obligation.

(1) Good Faith

[174] The requirement of good faith is a fundamental — and unavoidable — part of the civil law of Quebec. Its obligatory force is highlighted by art. 6 of the C.C.Q., which states that “[e]very person is bound to exercise his civil rights in accordance with the requirements of good faith.” In the context of the law of obligations, the requirement of good faith is reinforced by art. 1375, which states that “[t]he parties shall conduct themselves in good faith both at the time the obligation arises and at the time it is performed or extinguished.”

[175] The obligation to act in good faith implies an attitude that maximizes, for each party, the advantages of the contract (Lluelles and Moore, at No. 1978; see also *Banque Toronto-Dominion v. Brunelle*, 2014 QCCA 1584, at para. 94 (CanLII)). To uphold their duty of good faith, parties must act in a manner that respects the contractual balance established by their contract (Lluelles and Moore, at Nos. 1984-86).

[176] The practical requirements of good faith vary in intensity according to the nature of the contractual relationship at issue. In circumstances where the parties must work together to achieve the object of their agreement over a long period of time, the relational nature of the contract imposes a heightened duty of good faith on the parties (*Dunkin' Brands*, at para. 71; see also Baudouin, Jobin and Vézina, at No. 162).

[177] This in turn entails a heightened duty of loyalty and cooperation to fulfill the obligations of the contract, whether they be explicit or implied. The duty of loyalty imposes a negative obligation to abstain from acting in a manner that would be disadvantageous to the other contracting party. The duty to cooperate, by contrast, imposes a positive obligation that requires proactive steps to accommodate the interests and fair expectations of the other contracting party (*Hydro-Québec v. Construction Kiewit cie*, 2014 QCCA 947, at paras. 90-92 (CanLII); *Warner Chappell Music France v. Beaulne*, 2015 QCCS 1562, at paras. 87-102 (CanLII); *Société d'énergie Foster Wheeler ltée v. Montréal (Ville de)*, 2008 QCCS 4670, at para. 547 (CanLII); *Éco-Graffiti inc. v. Francescangeli*, 2016 QCCS 6242, at paras. 43-44 (CanLII); Lluelles and Moore, at No. 1978; L. Rolland, "Les figures contemporaines du contrat et le *Code civil du Québec*" (1999), 44 *McGill L.J.* 903, at p. 927; B. Lefebvre, "Bonne foi: principe et application", in *JurisClasseur Québec — Collection droit civil — Obligations et responsabilité civile* (loose-leaf), vol.1, by P.-C. Lafond, ed., fasc. 5, at para. 36).

(2) Equity

[178] Courts have used equity as the basis for the obligations of good faith, loyalty, and collaboration in relational contracts (Pineau, Burman and Gaudet, at No. 235; *Dunkin' Brands*, at para. 71). In my view, equity is broader than good faith and the duties of loyalty and collaboration under arts. 6, 7 and 1375 of the C.C.Q. It does not depend on the presumed intention of the parties; rather, it is premised on the law's concern for fairness in contracts (Lluelles and Moore, at Nos. 1550-52; *Dunkin' Brands*, at para. 71). While art. 1434 of the C.C.Q. does not allow courts to modify or revise contracts, it gives courts the power to enforce what appears to be equitable in a particular set of circumstances (Pineau, Burman and Gaudet, at No. 235).

[179] Equity is a means to remedy the imperfections of a contract so as to balance the interests of the parties (Lluelles and Moore, at No. 1550). It can be used to re-establish an equilibrium where the division of burdens and benefits issuing from the execution of the contract do not align with its intended scheme (Lluelles and Moore, at No. 1556; *Miller v. Syndicat des copropriétaires de "Les résidences Sébastopole centre"*, 1996 CanLII 4663 (Que. Sup. Ct.), at para. 19). It is a malleable concept that must be employed judiciously and with restraint. That said, equity is always relevant when considering contracts that involve a relationship of trust, such as the relational contract at issue (Lluelles and Moore, at No. 1553).

### (3) Application

[180] Based on the relational nature of the agreement and how it informs the requirements of good faith and equity, I conclude that the parties had an implied

obligation to cooperate in establishing a mechanism for the allocation of extraordinary profits under the Power Contract. This obligation flows not from the fact that any profit imbalance between the parties was unforeseen. Rather, it is premised on the fact that an imbalance of this nature and magnitude is beyond what the parties intended when they concluded their agreement. On this point, I agree with the appellant: energy was a public good with no real market value in 1969. It is for this reason that the pricing formula in the Power Contract was designed to reflect the declining costs of financing and operating the Churchill Falls project — and *not* to reflect the possibility of never-before-seen profits derived from the sale of surplus energy.

[181] Given the fundamental transformation of hydroelectric power from public good to private commodity, I cannot conclude that the parties intended the pricing formula in the Power Contract to operate under any and all circumstances, come hell or high water. Such a reading belies the relational nature of the Power Contract and, indeed, the relationship of trust and cooperation upon which it was founded.

[182] The parties chose not to include a price adjustment mechanism in the Power Contract. This choice was premised on shared assumptions about the nature and value of hydroelectric power that prevailed in 1969. Given the relational nature of their contract, however, this choice cannot be seen as excluding an obligation to cooperate should these shared assumptions no longer reflect reality. In other words, the silence of the Power Contract regarding the allocation of extraordinary profits

cannot be viewed as excluding the parties' intention to define the parameters of their allocation at a later date. The parties cannot be expected to have included all possible scenarios in the Power Contract. The contractual framework established by the parties depends largely on their ongoing cooperation over a long period of time. This gives rise to their obligation to agree on how to allocate the extraordinary profits under the Power Contract.

[183] The binding force of contracts and the considerations of good faith and equity that inform the application of the Power Contract by virtue of its relational nature confirm that the respondent must be held to this obligation. Good faith and equity in these circumstances require that the parties cooperate in reaffirming the intended balance of their relationship. The recognition of this obligation does not amount to a revision, a modification, the imposition of an unintended equilibrium on the parties, or a forced renegotiation of the Power Contract. It simply recognizes the existence of an implied obligation to cooperate that arises from the relational nature of the Power Contract itself.

#### D. *Prescription*

[184] My colleague concludes that the claim brought by the appellant is prescribed by the operation of art. 2925 of the C.C.Q., which limits the time within which parties may bring an action for the enforcement of personal rights to three years after the right of action arises. Justice Gascon reaches this conclusion on the basis that the appellant raises the duty to cooperate in relation to changing

circumstances. As the last major change in circumstances — namely, the United States opening its energy markets to foreign producers — occurred in 1997, any claim against the respondent for its failure to cooperate would be prescribed as of 2000 at the latest.

[185] I reach a different conclusion based on the fact that the parties were bound by an ongoing duty to cooperate. By persistently refusing to enter into negotiations with the appellant to establish a mechanism for allocating the unforeseen profits, the respondent has been in continuous breach of its obligation to cooperate with the appellant. Where a fault continues in time and causes continuing damages, prescription [TRANSLATION] “starts running each day” (*St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at para. 105, quoting J. L. Baudouin and P. Deslauriers, *La responsabilité civile* (7th ed. 2007), vol. I, at p. 1201; see also *Dunkin’ Brands*, at paras. 141-44; *Gourdeau v. Letellier-de St-Just*, [2002] R.J.Q. 1195 (C.A.), at paras. 53-54; *Rabin v. Syndicat des copropriétaires Somerset 2060*, 2012 QCCS 4431, [2012] R.L. 548, at paras. 22-29). As the appellant’s right of action is grounded in this continuous breach, its claim is not barred by prescription.

#### E. *The Appropriate Remedy*

[186] In light of my conclusion that the respondent breached its obligation to cooperate with the appellant in establishing a mechanism to allocate the unforeseeable profits generated by the Power Contract, I turn to the question of remedy.

[187] Specific performance is an available remedy for the breach of contractual obligations per art. 1590 of the C.C.Q. Given the nature of the parties in this appeal, the principle that no person may be forced to perform a specific act — *nemo potest praecise cogi ad factum* — does not apply. While judges should refrain from ordering specific performance of obligations that require the *personal* participation of the parties, the object of the obligation at issue and the nature and size of the parties that would be required to perform it may justify an order of specific performance (Luelles and Moore, at Nos. 2887 and 2891). Such is the case here. As both parties are legal persons of considerable size and resources, there is no reason to conclude that the imposition of such an order would amount to an improper constraint on their capacity to act.

[188] I would consequently order Hydro-Québec to cooperate with CFLCo in establishing a price adjustment formula for the extraordinary profits that the Power Contract fails to allocate meaningfully. A court order for the parties to resolve an issue is uncommon, but not unknown (see *White Birch Paper Holding Company (Arrangement relatif à)*, 2015 QCCS 701, at para. 53 (CanLII), leave to appeal refused, 2015 QCCA 752; *Laberge v. Villeneuve*, 2003 CanLII 16498 (Que. Sup. Ct.), at para. 65; *Picard v. Picard*, 2015 QCCS 5096, at para. 109 (CanLII)). In the absence of mutual agreement in the six months following this order, I would order that a price adjustment formula be established by a Justice of the Superior Court of Quebec upon submissions by the parties.



### III. Conclusion

[189] The relationship of trust and cooperation created by the Power Contract has been disavowed by Hydro-Québec. To justify this disavowal, Hydro-Québec denies the nature of the contract. In so doing, it has transformed its relational contract with CFLCo into one of unilateral exploitation. This is unwarranted under the civil law of Quebec.

[190] I would allow the appeal with costs throughout.

*Appeal dismissed with costs, ROWE J. dissenting.*

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Cellucci Ganesan Fraser, Montréal.*