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BY E-MAIL

Mr. Roger Bilodeau, Q.C.
The Registrar
SUPREME COURT OF CANADA
301 Wellington Street
Ottawa, Ontario K1A 0J1

Re: Applicant's Reply in Churchill Falls (Labrador) Corporation Limited ("**CFLCo**") v. Hydro-Québec (SCC No. 37328)

Dear Mr. Registrar:

At every level, Hydro-Québec has attempted to portray this as a purely factual case to be determined by rigid legal principles frozen in time. It is not. This case is about the impact of the facts on the duty of good faith, the extent at law of this duty, and, more specifically, whether in some circumstances, the duty to cooperate can give rise to a more specific duty to renegotiate a long-term collaborative contract in the face of unforeseen events.

The importance of the legal issues at stake is evident: the Court of Appeal, on its own initiative, empaneled a bench of five judges and wrote what it considered to be the history - and to a large extent the future - of good faith and abuse of rights in Quebec civil law. Hydro-Québec argued in the courts below that because the legislator had failed to adopt a specific provision codifying the doctrine of *imprévision* during the reform of the *Civil Code*, the concepts of good faith and abuse of rights could never evolve to require a party to renegotiate in the face of changing circumstances. The Court of Appeal took an important step forward and accepted that the concepts *could* in fact evolve to recognize a limited version of *imprévision* – marking a turning point in decades of doctrinal controversy – but then leapt backwards in holding that such a duty could only arise in cases of financial distress, with a standard of foreseeability that is contrary to its own jurisprudence, and without any regard as to how the duty must be conditioned by the nature of the contract at issue.

Most strikingly, the Court of Appeal stated simply that the contract at issue had no "relational component" and proceeded on the basis that this 65-year relationship, pursuant to which the parties jointly built and continue to cooperate in the operation of one of the largest power plants in the world to meet Hydro-Québec's needs and under which Hydro-Québec purchases approximately 85% of that plant's output, was not a contract that attracted heightened duties of cooperation. Exactly one week later, the Superior Court, in separate litigation, determined that the same contract between the same parties was a joint venture (*Hydro-Québec c. Churchill Falls (Labrador) Corporation Ltd.*, 2016 QCCS 3746, para. 903).

Hydro-Québec argues that the questions as to what constitutes a relational contract, and the consequences that flow from that characterization, are "abstract" (para. 48). The issue could hardly be more concrete: legal duties flow from the nature of a contract (Art. 1434 CCQ). In *Dunkin' Brands*, the Court of Appeal recognized that long-term, relational contracts often "[do] not spell out all of [their] terms" (*Dunkin' Brands Canada Ltd. c. Bertico inc.*, 2015 QCCA 624, para. 62). It accepted definitions of the relational contract that include notions of "contractual solidarity" that the Court of Appeal in the present case outright rejects. Given this Court's reference to relational contracts in *Bhasin*, and the importance of the relationship in this case, the issue is clearly one that merits this Court's attention.

The issue of foreseeability is an inextricable part of the analysis and not a subsidiary question as Hydro-Québec states (para. 74). In long-term contracts, parties simply cannot foresee everything. The mere fact the parties considered the inclusion of a price escalator in one particular context is in no way dispositive of the issue. In relational contracts in particular, parties do not even *intend* to foresee everything. In this contract, none of the parties, their sophisticated advisors or the financiers foresaw the dramatic transformation of the electricity markets and the resultant disparity in the distribution of benefits from the contract. The adaptation required in the face of unforeseen circumstances is directly tied to the expectations of parties in relational contracts; that long-term stability requires adaptation rather than rigidity.

In this light, it is the nature of the relationship – and not financial distress – that triggers the duty to renegotiate in the face of changing circumstances. That one party is in financial distress may be an indication of inequity, but the two concepts are not synonymous as Hydro-Québec suggests (para. 60). What is equitable in the context of one relationship may not be in another; what is a hardship in the context of one contract may not be in another. A proper analysis of relational contracts is key. In the specific circumstances of the long-term, collaborative partnership between CFLCo and Hydro-Québec, it is the ongoing disparity resulting from the Power Contract and Renewal Contract that is at issue, and there can be no debate that if it were not for other contracts, the Power Contract would have caused the bankruptcy of CFLCo many years ago.

Try as it might, Hydro-Québec cannot bury the fundamental issues raised by this case under a mountain of facts. Even a cursory reading of the Court of Appeal's judgment makes clear how important this case is.

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for Douglas C. Mitchell

DM/ms

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