File No. _____

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED

APPLICANT
(Appellant)

- and -

HYDRO-QUÉBEC

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL

(Article 40(1) of the *Supreme Court Act* and Rule 25 of the *Rules of the Supreme Court of Canada*)

Volume I, pages 1 – 255

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APPLICANT'S MEMORANDUM OF ARGUMENT

PART I – OVERVIEW AND FACTS

> **"**La négociation et la signature de cette importante convention ont fait naître entre la CFLCo et l'Hydro-Québec l'une des formes de collaboration les plus ouvertes et les plus utiles qui soient entre le secteur privé et le secteur public.**"**
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> - Hydro-Québec Annual Report, 1969, regarding the contract to build the Churchill Falls Generating Station, the largest power plant in North America at the time[1]

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A. Overview of Issues of Public Importance

1. At its simplest, this case raises the following questions: In the context of a long-term, collaborative contract can there be a duty to renegotiate in Québec civil law, and if so, when does it arise and what does it entail?

2. As the Court of Appeal's judgment makes clear, however, answering these questions is far from simple. The answers themselves raise fundamental questions about the role of courts, the nature of contracts, and the scope of good faith, equity and abuse of rights in Québec civil law.

3. The Court of Appeal rendered what is unquestionably a landmark judgment. On its own initiative, the Court empaneled a bench of five judges. It confronted a long-standing, fundamental doctrinal and jurisprudential debate about the existence of the doctrine of *imprévision* in Québec civil law, and held that a party could make a limited hardship-type claim on the basis of good faith and abuse of rights (paras. 124, 127, 155). This issue alone is worthy of this Court's attention.

4. But the judgment is even more significant for the doors that it closes than for the one that it opened. In its examination of the reform of the *Civil Code*, the Court writes a history of contract law dominated by exclusions, exceptions and limits (paras. 112-120): it concludes that while the reform updated specific rules, ultimately not much changed (para. 115). In the Court's view, the seemingly broad duty of good faith the legislator *did* adopt, must be reined in and confined to specific instances lest too much power devolve to judges to determine what is fair and just (paras. 134, 148). Equity, in this narrative, is essentially an afterthought (para. 158).

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[1] **Exhibit D-24.2.06/6,** HQ Annual Report, **Applicant's Schedules** ("**A.S.**"), **vol. III**, **p. 495**.

5. The judgment is a far cry from what Québec courts and doctrinal writers have consistently referred to as "*la nouvelle moralité contractuelle*"[2] ushered in by the adoption of articles 6, 7, and 1375 CCQ.

6. Indeed, the judgment signals a palpable break with this Court's decisions in *Soucisse* and *Houle* and with the Court of Appeal's own prior decisions which have unhesitatingly called good faith the "*métanorme du droit civil*" and quite comfortably accepted that "[*l*]*'obligation d'agir de bonne foi ne s'évalue pas dans l'abstrait mais plutôt* in concreto*, à la lumière des circonstances propres à chaque dossier*"[3].

7. The regime of exceptions is most conservatively applied to the duty to cooperate. Although the Court of Appeal recognized that the relationship between the parties reflected "*une certaine interdépendance*" (para. 74), it held – without any further explanation – that there was no basis for finding a "relational" component that would attract duties to cooperate of the type embodied in arts. 2149 CCQ (mandate) or 2186 CCQ (partnership) (para. 140). The duty to cooperate therefore went no further than not inducing the other party into error or impeding the other party in the performance of its obligations (para. 140). The Court of Appeal's own decisions in *Provigo* and most recently *Dunkin' Brands*[4], in which it took an expansive view of the duty to cooperate, are not even cited.

8. If the contract in the present case is not one that attracts heightened duties of cooperation, then clearly some guidance is required as to what is. Indeed, one week later, in separate litigation, the Superior Court characterized the same relationship between the same parties as a joint venture ("*aventure commune*") and referred to CFLCo as Hydro-Québec's partner.[5] This Court itself used the term "relational contract" in *Bhasin*, and stated that "good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange".[6] The question of when relational contracts arise, and what they entail, is therefore of interest to contracting parties across Québec and the rest of Canada.

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2 See *Provigo Distribution inc.* c. *Supermarché A.R.G. inc.*, AZ-98011010 (C.A.), 1997 CanLII 10209 (QC CA) ("***Provigo***"), para. 54 and the references at FN 17.
3 *Groupe Cliffton inc.* c. *Solutions réseau d'affaires Meta-4 inc.*, J.E. 2003-1954 (C.A.) ("***Cliffton***").
4 *Dunkin' Brands Canada Ltd.* c. *Bertico inc.*, 2015 QCCA 624 ("***Dunkin' Brands***"), paras. 66 ff..
5 *Hydro-Québec* c. *Churchill Falls (Labrador) Corporation Ltd.*, 2016 QCCS 3746, para. 903.
6 *Bhasin* v. *Hrynew*, 2014 SCC 7 ("***Bhasin***"), paras. 60, 69.

9. With respect to the potential duty to renegotiate that the Court of Appeal *does* recognize, its limited scope renders the possibility of relief illusory. First, the Court of Appeal adopts an approach to foreseeability (*i.e.* that the parties knew that the future was uncertain) that deprives the concept of any real meaning and is contrary to its own jurisprudence. Given that foreseeability runs through much of private law, this issue is also one of importance to the civil law as a whole. Second, the Court poses a requirement of financial ruin – whether through the lens of good faith and abuse of rights (para. 155) or in the sole paragraph on equity (para. 158) – that well exceeds recognized notions of "hardship" and that is at odds with equitable doctrines like unjust enrichment, recognized by this Court in *Viger*.[7] All of these issues have implications well beyond this case and merit this Court's consideration.

10. This Court has not rendered a major decision on good faith, equity or abuse of rights in Québec civil law since the foundational cases of *Soucisse* (1981)[8], *Kuet Leong* (1989)[9] *Houle* (1990)[10] and *Bail* (1992)[11], and indeed since the "new" *Civil Code of Québec* was promulgated in 1994, placing the duty of good faith and the doctrine of abuse of rights at the helm of civil law. Ironically, while in *Bhasin*, this Court looked to the civil law as an example to propel the common law forward, in the present case, the Court of Appeal looked to *Bhasin* as a reason to scale back good faith in the civil law (*e.g.* para. 134). The need for this Court's guidance is acute.

B. Facts

11. The context of the present application is familiar to many Canadians. In the 1960s, Churchill Falls (Labrador) Corporation Limited (CFLCo) and Hydro-Québec joined forces in an extraordinary project to build the largest power plant in North America on the Upper Churchill River in Labrador. In 1969, the parties concluded a 40-year Power Contract and a 25-year Renewal Contract (together, the "**Contract**")[12]. The parties would be long-term, interdependent partners until at least 2041, with Hydro-Québec becoming a 34.2% shareholder and committing to purchase in excess of 85% of the power produced by Churchill Falls.

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7 *Cie. Immobilière Viger* v. *L. Giguère inc.*, [1977] 2 S.C.R. 67 ("***Viger***").
8 *National Bank* v. *Soucisse et al.*, [1981] 2 S.C.R. 339 ("***Soucisse***").
9 *Bank of Montreal* v. *Kuet Leong Ng*, [1989] 2 S.C.R. 429 ("***Kuet Leong***").
10 *Houle* v. *Canadian National Bank*, [1990] 3 S.C.R. 122 ("***Houle***").
11 *Bank of Montreal* v. *Bail ltée*, [1992] 2 S.C.R. 554 ("***Bail***").
12 **Exhibit P-1**, The Power Contract and Renewal Contract, **A.S.**, **vol. II**, **pp. 340 to 398**.

12. The parties' needs and goals were inescapably aligned. CFLCo had the rights to develop a magnificent site capable of efficiently and inexpensively generating over 5000 megawatts of power. But the energy markets were vastly different then: unlike the supply-and-demand markets that prevail today, at the time energy was valued solely according to its cost of production. In order to obtain financing, CFLCo therefore needed a credit-worthy buyer who could commit to buying a substantial portion of the power from the generation facility. Since CFLCo could not directly access the U.S. markets, both in terms of capacity as a customer and geography, CFLCo's only realistic option was Hydro-Québec.

13. Hydro-Québec was itself a different animal at the time: its mandate was to supply power to Quebecers at the lowest possible cost and its ability to export was severely constrained.[13] It was not the profit-driven export market participant that it is today. By the mid-1960s, Québec was facing a major potential power shortage, and although projects were under consideration within the province, Hydro-Québec's highest level officials at the time confirmed that it was unable to finance them, and that no project with sufficient capacity would have been ready in time to address the looming shortage.[14] The power from Churchill Falls was therefore Hydro-Québec's only realistic option.

14. In fact, the partnership was well underway before the Contract was even signed. In 1966, the parties concluded a Letter of Intent that provided for a 40-year term, with an option in favour of Hydro-Québec to renew on terms then to be mutually agreed.[15] In order to meet Hydro-Québec's deadlines and Québec's rapidly growing power demands, CFLCo started building *15 days* after the Letter of Intent was signed. On the faith of the partnership and the Letter of Intent, CFLCo spent roughly $132M (more than $800M in today's dollars). In the fall of 1968, with the financing still pending, Hydro-Québec subscribed to $115M in shares and mortgage bonds of CFLCo.

15. In between the signing of the Letter of Intent and the finalization of the Power Contract in 1969, by no fault of either party, the project costs unexpectedly increased. Because the price –

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13 **Exhibit P-6**, Historical versions of Hydro-Québec Act s. 22, **A.S.**, **vol. II**, **pp. 415-416**.

14 **Exhibit D-165**, Hydro-Québec Letters regarding Québec's need for the power from Churchill Falls, en liasse, **A.S.**, **vol. III**, **pp. 511 to 531**; **Exhibit D-166**, Correspondence and memos from Hydro-Québec in the fall of 1966 regarding Québec's needs and state of other potential projects, en liasse, **A.S.**, **vol. III**, **pp. 532 to 546**; **Exhibit P-16**, Arrêté en Conseil dated October 6, 1966, **A.S.**, **vol. II**, **pp. 422 to 424**; **Exhibit P-17**, Order in Council dated July 10, 1968, **A.S.**, **vol. II**, **pp. 425 to 428**.

15 **Exhibit D-16**, Letter of Intent, October 13, 1966, **A.S.**, **vol. III**, **pp. 468 to 489**.

and value – of power was solely a function of its costs, this meant the average mill rate[16] payable by Hydro-Québec over the life of the Contract would also increase. As partners do, the parties therefore adjusted their base agreement to accommodate this change in circumstances.

16. To allow Hydro-Québec to project a lower mill rate over the life of the Contract in keeping with its mandate to provide power to Quebecers at the lowest possible cost, the parties added the 25-year Renewal Clause, at a fixed rate of 2 mills. It appears CFLCo favored some sort of escalator or provision for its tax position after 2016, but did not insist because Hydro-Québec wanted to be able to project a lower mill rate.[17] Clearly the parties did not contemplate that the operating costs of the plant might exceed its revenues, even after 40 or 50 years.

17. In the market paradigm of 1969, where the value of energy was solely a function of its cost to produce, a fixed, declining price for a hydro-electric project was both standard and reasonable. Particularly when the cost of production was expected to decrease because the debt would be repaid, the solution of fixing a 25-year Renewal Contract at a reduced price of 2 mills was a rational compromise. That the power would acquire a value based *other* than on cost was totally unforeseen. That the power would acquire an extraordinarily lucrative market value and that this market value would accrue solely to Hydro-Québec was unthinkable.

18. The Power Contract *on its face* reflects an equitable sharing of risks and benefits in the cost-based market paradigm and regulatory context in which it was signed. Even Hydro-Québec's expert, Mr. Lapuerta, agreed with this characterization.[18]

19. Contrary to the image that Hydro-Québec has created, Hydro-Québec did not assume all the project risks. Both parties took important risks and received corresponding benefits that seemed reasonable in the cost-based market paradigm of the time.

20. No windfalls were intended. The Base Rate was to be adjusted up or down, based on the actual final cost of the project (Article 8.2). In this manner, neither party would benefit or suffer from unexpected cost savings or overruns.

21. Both parties were prevented from obtaining any windfall associated with variations in exchange rates. Pursuant to article 11, any refinancing of CFLCo's debt obligations would require

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16 Definition: a thousandth of a unit. In the context of the present litigation, one mill refers to a thousandth of a dollar. 1 mill=1/10 of a cent or $0.001.

17 **Exhibit D-33**, Minutes of April 10, 1968, **A.S.**, **vol. III**, **pp. 496 to 504**.

18 Testimony of C. Lapuerta, November 13, 2013, pp. 42-43, **A.S.**, **vol. III**, **pp. 562-563**.

the prior approval of both parties and all costs and benefits of such a refinancing were to be shared equally.

22. In addition, the parties shared the risk of loss due to exchange rate variations on the purchase of US funds necessary to service the debt (Article 14.1).

23. CFLCo was the borrower. It raised the capital and carried the entire debt on its balance sheet. It also contributed significant capital of its own. CFLCo was also the *donneur d'ouvrage* for the project. It alone was liable under all the contracts with employees, suppliers, independent contractors, professionals – essentially all the contracts necessary to build a project of this magnitude.

24. CFLCo's principal benefits were that it was able to build and finance the project and secure what all parties expected would be a reasonable rate of return, in line with the 1969 cost-based market paradigm.

25. As for Hydro-Québec, it committed to buy in excess of 85% of the 5,400 MW of power available from the Churchill Falls site, so as to guarantee a revenue stream that could service the debt (Article 8.4). In exchange, it secured access to this significant block of power at a favourable price, which it anticipated needing in its entirety in order to meet the growing demands of Quebecers and fulfill its mandate.

26. During the Renewal Contract, which is now in force, Hydro-Québec of course bears no financing risks.

27. By the time Churchill Falls was producing to its full capacity, the energy world fundamentally changed. The oil price shocks in 1973 and 1979 unleashed an era of dramatic inflation; the cost-based pricing paradigm gave way to competitive markets; in 1997, the U.S. Federal Energy Regulatory Commission (FERC) mandated competitive wholesale electricity markets and open transmission access in the U.S. markets, which provided access to these markets for Canadian electricity exports; and the net result is that the power produced by Churchill Falls acquired a windfall value that is both quantitatively *and* qualitatively incommensurate with anything the parties could have expected or anticipated when all the known risks and benefits were allocated under the Contract.[19]

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[19] See **Exhibit P-9**, Statement of Intent regarding Churchill Falls Negotiations, dated February 1, 1984, Preamble, ss. 2.1, 2.3, 2.4., **A.S.**, **vol. II**, **pp. 418-419**, where the parties recognized "the need to adapt the terms of existing arrangements to the new reality which has arisen since the original arrangements

28. By 1989, Hydro-Québec estimated that for the **$5.8B** that it would pay for energy over the life of the Contract, it would obtain a value of **$250B** (in 1989 dollars).[20]

29. Such a stark disparity between partners cannot possibly have been foreseen, and was certainly not intended.

30. Hydro-Québec's mandate was soon changed so that it could take full advantage of the new reality. By 1983, Hydro-Québec had gone from a hydroelectric commission whose value resided with the ratepayers to a share capital company belonging to the province whose value resided with the shareholder. Now a company with a mandate to simply "pursue endeavours in […] any field connected with or related to power or energy", it became a full market participant in the new reality.[21]

31. Hydro-Québec's contractual paradigm with *other* parties soon realigned itself with the new market paradigm. In the late 1970s and early 1980s, Hydro-Québec began building facilities and exporting its surplus power to maximize its value. It no longer considered long-term contracts at fixed prices, as it had in 1966 with Con-Ed. Instead, it concluded short and medium term contracts based on the purchaser's avoided costs and on an average fossil fuel price.[22]

32. CFLCo, meanwhile, was headed for bankruptcy by the mid-1990s.[23] The parties concluded the Guaranteed Winter Availability Contract ("**GWAC**"), a commercial agreement that provided Hydro-Québec with a new product that it needed, on commercial terms. The parties expressly stipulated that the GWAC did not alter the Contract.[24] The GWAC, and the revenue generated from CFLCo's sale of the Twinco block of power (225 MW), enable CFLCo's financial viability. But ultimately, these contracts only mask the fact that the Contract itself would have driven CFLCo into bankruptcy.[25]

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were entered into"; the need for "a compromise approach to a more equitable return" to the resource owner and the need for "an acceptable return on the shareholders equity in CFLCo".

20 **Exhibit P-28**, "Rapport d'étape Québec/Terre-Neuve: discussions relatives à l'achat d'énergie", dated January 9, 1989, p. 22 of 35, **A.S.**, **vol. III**, **p. 451**.

21 **Exhibit P-6**, Historical versions of *Hydro-Québec Act*, s. 22, **A.S.**, **vol. II**, **pp. 415-416**.

22 **Exhibit D-369/11**, Energy contract between Hydro-Québec and NEPOOL, March 21, 1983, Article VIII, **A.S.**, **vol. III**, **p. 549**.

23 **Exhibit P-28**, "Rapport d'étape Québec/Terre-Neuve: discussions relatives à l'achat d'énergie", dated January 9, 1989, p. 35 of 35, **A.S.**, **vol. III**, **p. 464**.

24 **Exhibit D-53**, Correspondence between W. Wells and T. Vandal, March 9, 1998, at p. D-53/9, **A.S.**, **vol. III**, **p. 509**.

25 Testimony of C. Lapuerta, November 13, 2013, p. 108, **A.S.**, **vol. III**, **p. 566**.

33. It bears repeating: Hydro-Québec is a 34.2% shareholder of CFLCo. It moreover has guaranteed seats on CFLCo's Board of Directors, and through its board nominees, Hydro-Québec has a veto with respect to all of CFLCo's major financial decisions. The directors participate together on joint committees and all owe a fiduciary duty to act in the best interests of CFLCo.

34. At the time the relationship was formed, Hydro-Québec was counting on CFLCo to fulfill **50%** of Québec's power needs. Still today, CFLCo supplies 15% of Québec's needs, and without the power from Churchill Falls, Hydro-Québec could not participate in the highly lucrative export markets.[26]

35. Repeatedly, and for years, Hydro-Québec has referred to CFLCo as its partner.[27]

36. Hydro-Québec, its expert, and the courts below have all insisted on the economic rationale of the Contract. CFLCo does not dispute that the Contract had *a* rationale *at the time, and in the context* in which it was concluded. That context has fundamentally changed: instead of producing a cost-based resource for one principal customer, CFLCo now produces a supply-and-demand market commodity that can be sold in FERC-mandated competitive wholesale electricity markets across the northeastern United States; instead of having to supply power to Quebecers at the lowest possible price, Hydro-Québec is now a for-profit corporation that would *still* stand to make billions of dollars from Churchill Falls power, even if it were to pay a higher price, or a variable price.

37. To say that Hydro-Québec would never have accepted different terms *at the time* completely misses the point. The issue is whether in a long-term, equitable partnership, where strict application of the Contract terms is producing a result that the parties neither foresaw nor intended, and that is incompatible with the nature of their relationship, there is a duty to adapt to the circumstances, *as they are.*

38. CLFCo will argue that in these circumstances, Hydro-Québec has a good faith duty, based on the nature of the agreement, equity and the duty to exercise rights reasonably, to renegotiate.

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[26] Testimony of E. Maillé, October 31, 2013, pp. 84-85, **A.S.**, **vol. III**, **pp. 556-557**.

[27] **Exhibit P-1.7**, Extract of Hydro-Québec's 1998-2002 Strategic Plan, p. 6, **A.S.**, **vol. II**, **p. 400**; **Exhibit P-1.8**, Extract of Hydro-Québec's 2000-2004 Strategic Plan, p. 12, **A.S.**, **vol. II**, **p. 405**; **Exhibit P-1.9**, Extract of Hydro-Québec's 2002-2006 Strategic Plan, p. 16, **A.S.**, **vol. II**, **p. 414**; **Exhibit P-21**, Draft press release from Hydro-Québec dated May 17, 1984, p. 1, **A.S.**, **vol. III**, **p. 429**; **Exhibit P-31**, Press release from Hydro-Québec dated October 15, 1996 together with a document entitled "Churchill Falls : La santé financière de CF(L)Co", en liasse, p. 2, **A.S.**, **vol. III**, **p. 466**.

PART II – QUESTIONS IN ISSUE

39. The question on this leave application is whether the proposed appeal raises issues of public importance that ought to be addressed by this Court, in particular:

i. What are the characteristics of relational contracts, and can the heightened duties of cooperation that they entail include a duty to renegotiate or adjust the contract's terms?

ii. What is the impact of unforeseen changed circumstances and what standard should apply to the concept of foreseeability?

iii. Must a party be in financial distress in order to invoke the duty to renegotiate?

iv. If a party breaches its duty to renegotiate, what is the appropriate remedy?

40. Hydro-Québec also argued in the courts below that CFLCo's claim was prescribed. Given that the Court of Appeal did not address this issue at all – indeed, it seems highly unlikely that it would sit five judges to decide a prescribed claim – for the purposes of this leave application, CFLCo simply refers the Court to the clear line of authorities that establish that where a fault continues in time and causes continuing damages, prescription also runs continuously.[28]

PARTI III – ARGUMENT

i. The heightened duty to cooperate in long-term, interdependent "relational" contracts

41. Contract theory has evolved considerably over the last decades. Doctrinal writers,[29] courts,[30] and the legislator[31] alike have recognized that the classic theory of the "autonomy of the will" is insufficient to ground a modern conception of contract law.[32]

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28 *St. Lawrence Cement* v. *Barrette*, [2008] 3 S.C.R, paras. 105-106; Art. 2931 CCQ. Likewise, the Québec Court of Appeal has held that an abuse of right cannot be eternalized by the passage of time: "*le droit de faire cesser l'abus n'est pas prescrit, mais les dommages qui en résultent le sont au fur et à mesure de l'écoulement du temps.*" : *Gourdeau* v. *Letellier de St-Just*, REJB 2002-31468 (C.A.), paras. 53-54.

29 See e.g. L. Rolland, "Les figures contemporaines du contrat et le *Code civil du Québec*" (1998-1999) 44 *McGill L. J.* 903, p. 911 ("L'absolutisme du principe de l'autonomie de la volonté et de la doctrine économique libérale a été battu en brèche tout au long du XXe siècle"); P.-G. Jobin and N. Vézina in Baudouin and Jobin, *Les obligations*, 7th ed. (Cowansville (Québec): Yvon Blais, 2013), nº 80, pp. 132-135; C. LeBrun, Le devoir de coopération durant l'exécution du contrat (Montréal: LexisNexis, 2013), pp. 24-31.

30 See e.g. *Provigo*, *supra* note 2, paras. 49, 54, 55.

31 See e.g. the Minister's comments to Art. 1434 CCQ in Québec (Province), *Commentaires du ministre de la Justice, le Code civil du Québec: un mouvement de société*, t. 1 (Québec: Publications du Québec, 1993), art. 1434, pp. 869-870.

32 See e.g. P.-G. Jobin and N. Vézina in Baudouin and Jobin, *Les obligations*, *supra* note 29, pp. 132-135.

42. As Louise Rolland explains in her oft-cited article, *Les figures contemporaines du contrat*[33], the classic theory views the contract as instantaneous exchange of consent which sets the obligational content of the contract in stone:

> La théorie classique, il est vrai, donne une image exiguë du phénomène contractuel. Sans doute par souci d'assurer la plus grande sécurité des rapports, elle se concentre sur l'objet – l'échange économique – plutôt que sur les sujets, elle soutient la clôture environnementale, elle assure l'immédiateté de l'exécution après avoir supporté la fixation définitive du contenu obligationnel. Ces moyens sont devenus des règles générales qui tolèrent, à titre exceptionnel, certaines transgressions. Or les études empiriques faites aux États-Unis, en France et au Québec, qu'elles soient à saveur sociologique, économique, psychologique ou historique, démontrent que ces paramètres ne correspondent plus à la réalité. […]
>
> […]
>
> La théorie classique associe étroitement la sécurité juridique à l'immutabilité des contrats. Le droit devient l'instrument qui fait du contrat une source d'obligations juridiquement contraignantes par la force étatique. Qu'elles lient les parties, qu'elles soient opposables aux tiers, qu'elles soient irrévocables et en principe non modifiables, tout concourt à les mettre à l'abri des fluctuations événementielles.
>
> […]
>
> Selon la théorie classique, la détermination précise de l'objet du contrat et des obligations qu'il génère est lié au principe de l'autonomie de la volonté. Le contrat reposant sur le moment magique de l'échange de consentements, les futures parties doivent savoir avec exactitude à quoi elles s'engagent. (Emphasis added; internal citations omitted)

43. It has been decades since scholars like Macneil and Jean-Guy Belley have demonstrated that indeed, "*ces paramètres ne correspondent plus à la réalité"*.[34]

44. Modern contract theory accepts that there is a subset of contracts – long-term, interdependent, often called "relational" contracts – that are not just a moment in time. Parties who engage for the long term form a relationship for their sustained mutual benefit and not simply a discreet economic exchange. Because parties who engage for such a long term cannot possibly foresee everything, the precise terms of the contract are subject to change over time.[35]

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33 L. Rolland, *supra* note 29, pp. 921, 933.

34 I.R. Macneil, "The Many Futures of Contracts" (1974) 47 S. Cal. L. Rev. 691; J.-G. Belley, *Le contrat entre droit, économie et société : Étude sociojuridique des achats d'Alcan au Saguenay-Lac-St-Jean* (Cowansville (Québec): Yvon Blais, 1998).

35 D. Campbell, "Good Faith and the Ubiquity of the 'Relational' Contract" (2014), 77 *Mod. L. Rev.* 475, p. 480; L. Rolland, *supra* note 29, pp. 926 ff..

45. Flexibility and adaptation to changing circumstances are essential to the relationship. Stability is still the goal, but stability as immutability is replaced by stability as cooperation and compromise with a view to preserving and perpetuating the relationship.

46. In a 2002 article, Justice LeBel (as he then was) explained:

> Souvent, la conclusion du contrat exprimerait davantage la volonté d'établir une relation que de définir son contenu de façon exhaustive et intangible. La naissance d'une difficulté déclencherait alors une période de discussion conduisant à des ajustements qui modifieraient l'engagement, tout en assurant sa continuation. Un praticien de droit de quelques années d'expérience le reconnaitrait volontiers. Les méthodes contractuelles d'une grande entreprise étudiées par J.G. Belley suggèrent que l'hypothèse correspond au moins en partie à la réalité. Le contrat sera ainsi compris, de plus en plus, comme un instrument de coopération continue.[36] (Emphasis added)

47. This Court recognized the existence of relational contracts in *Bhasin* but did not elaborate as to their characteristics, referencing only the hallmarks of "long-term" and "mutual cooperation". In *Dunkin' Brands*, the Court of Appeal used the term repeatedly, noting, for example, that "[t]he agreement was a "relational" one which, as is often the case in such long-term arrangements, did not spell out all of its terms" (para. 62). It cited, in the footnotes, the definitions of Professor Jean-Guy Belley ("*celui qui établit les normes d'une collaboration étroite que les parties souhaitent maintenir à long terme*") and Shannon Kathleen O'Byrne ("The relational contract is one where the parties have obligations over time and are thereby linked by the norms of reciprocity, flexibility, contractual solidarity, restraint of power and propriety of means.").[37]

48. In the present case, the Court of Appeal, without any analysis, stated that the Contract had ***no*** "*composante relationelle*". Given the importance of this concept in conditioning the obligations of the parties – in common law and civil law – the issue merits this Court's attention.

49. Indeed, in Québec civil law, *legal obligations flow from the nature of the contract*:

1434. Le contrat valablement formé oblige ceux qui l'ont conclu non seulement pour ce qu'ils y ont exprimé, mais aussi pour tout ce qui en découle d'après sa **nature** et suivant les usages, l'équité ou la loi.	**1434**. A contract validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its **nature** and in conformity with usage, equity or law. (Emphasis added)

[36] L. LeBel, « Incertitudes contractuelles – incertitudes judiciaires », in C. Fabien et B. Moore, *Les conférences Albert-Mayrand 1997-2011* (Montréal, Éditions Thémis), 2012, p. 112.

[37] *Dunkin' Brands*, *supra* note 4, para. 62, FN 8 and 9.

50. In this manner, the law is able to adapt to ensure that the obligational content of the contract reflects the nature of the parties' relationship. And it has: in Québec civil law, the duty to cooperate is the jurisprudential response to the relational contract. As Jobin and Vézina explain:

> 162 - **Obligation de coopération** - L'obligation de coopération repose sur une nouvelle conception du contrat : souvent, il n'est plus « le choc frontal de deux intérêts individuels et antagonistes, momentanément compatibles lors de l'échange des consentements », mais il apparaît comme « la rencontre, inscrite dans le temps, de deux aspirations convergentes à collaborer », à l'atteinte d'un résultat. À la limite, on pourrait dire que la collaboration appelle « un comportement altruiste minimum qui doit épouser les attentes légitimes de son partenaire ». En quelque sorte, elle est plus exigeante que la loyauté en ce qu'elle commande un comportement positif, plutôt qu'une simple abstention. Il n'est donc pas étonnant que, en vertu de la philosophie très libérale du droit du *Code civil du Bas Canada*, on l'ait très peu considérée par le passé. Mais, depuis l'affirmation du principe de la bonne foi lors de la réforme du *Code civil*, il est devenu nécessaire d'admettre que, dans certaines circonstances et sans tomber dans l'angélisme, une partie doit collaborer avec l'autre pour permettre au contrat de produire son plein effet, et à cette autre partie d'atteindre ses objectifs légitimes et raisonnables.
>
> […]
>
> On exige aussi d'une partie qu'elle exécute sa prestation de manière réellement utile à l'autre.[38] (Emphasis added; internal citations omitted)

51. Though the duty to cooperate is only written in specific articles – art. 2149 CCQ (mandate) and art. 2186 CCQ (partnership), this has not impeded Québec courts from expanding it jurisprudentially in others.

52. The Court of Appeal first expanded upon the doctrine in *Provigo* in the context of a franchise contract. As it explained:

> Toutefois, les obligations découlant d'un contrat ne sont évidemment pas limitées à celles expressément prévues par les parties. Elles s'étendent aussi à celles qui en découlent d'après la nature du contrat, l'équité, l'usage ou la loi.
>
> C'est donc, à la violation de ces obligations implicites, faisant partie du cercle contractuel élargi, représentatives du contenu obligationnel du contrat, qu'il convient de se référer, en l'absence de stipulation expresse, pour déterminer l'existence d'une éventuelle responsabilité civile. (paras. 49-50, emphasis added; internal citations omitted)

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38 Jobin and Vézina, *Les obligations*, 7th ed., *supra* note 29, pp. 270-271, no. 162. See also D. Lluelles and B. Moore, *Droit des obligations*, 2nd ed., pp. 1134-1137; M.A. Grégoire, *Liberté, responsabilité et utilité : la bonne foi comme instrument de justice* (Cowansville (Québec) : Yvon Blais, 2010), pp. 192-193; 211-212; P. Le Tourneau, *Droit de la responsabilité et des contrats*, 9th ed. (Paris: Dalloz, 2012), no. 3676. See also F. Diesse, "Le devoir de coopération comme principe directeur du contrat" (1999) 43 *Arch. phil. droit* 259.

53. In that case, Provigo – which was permitted under the contract to compete with its franchisee – developed a new market strategy that put some of its own stores in direct competition with its franchisee. Contractually bound to buy 90% of its inventory from Provigo, the franchisee could not adapt to the new reality (para. 66). The Court held that Provigo had a good faith duty to cooperate and assist its franchisee in adapting to the new market by, *inter alia* renegotiating, or offering the franchisees a share in the discount stores :

> Le Code civil, à l'article 1376 C.c., [*sic*] codifie une règle jurisprudentielle acquise sous le régime du Code civil du Bas-Canada: tout contrat doit être non seulement négocié, éventuellement éteint, mais encore exécuté de bonne foi. La bonne foi (art. 6 C.c.) est d'ailleurs à la base même de ce que l'on a intitulé la nouvelle moralité contractuelle. (para 54)
>
> […]
>
> Il n'est pas du ressort de notre Cour de dire ce qu'un franchiseur de bonne foi, prudent et diligent, aurait pu ou dû faire. Diverses suggestions ont cependant été proposées, soit par les intimées, soit par les témoins-experts, et se trouvent au dossier, notamment: l'accès aux livraisons directes; l'instauration immédiate d'une nouvelle politique de prix ("Every Day Low Price"); les modifications du contrat et des ententes; l'offre d'une participation dans les magasins à escompte; le rachat des affiliés; l'offre d'une compensation; les restrictions à la publicité des magasins à escompte; le couponnage; la reconsidération de la segmentation des marchés; etc... (para. 65, emphasis added; internal citations omitted).

54. *Provigo* affirms that the duty of good faith may require the parties to adjust the terms of their relationship to adapt to changing circumstances. As Marie Annick Grégoire notes:

> Ainsi il est clair que, pour la Cour d'appel, le franchiseur ne pouvait se contenter de ne pas nuire passivement à son cocontractant. Il avait l'obligation active d'ajuster les termes de sa relation avec son franchisé afin de maintenir la pertinence de la relation contractuelle, ou autrement dit, l'intérêt du cocontractant. […]
>
> La notion de la bonne foi permet donc l'imposition d'obligations actives, non pas en fonction d'un comportement fautif d'un cocontractant, mais en fonction de circonstances provoquant une inégalité préjudiciable dans la relation des parties.[39] (Emphasis added)

55. As Jobin and Vézina explain, "[*l*]e *coup d'envoi fut ainsi donné. On relève maintenant de nombreuses autres applications dans divers domaines* […]."[40]

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39 M.A. Grégoire, *Liberté, responsabilité et utilité : la bonne foi comme instrument de justice*, p. 282.
40 Jobin and Vézina, *Les obligations*, 7th ed., *supra* note 29, p. 272, no. 163.

56. Recently in *Dunkin' Brands*, the Court of Appeal explained that the duty to cooperate has two distinct normative sources that stem from art. 1434 CCQ: (i) the implied duty of good faith based on the nature of the contract and the presumed intentions of the parties and (ii) equity:

> In the present case, the nature of the agreement, on the one hand, and equity, on the other, provide two distinct normative justifications for this implied obligation of good faith under article 1434 C.C.Q. Where the nature of the agreement justifies the inference, the implied obligation is best viewed as a reflection of the presumed intention of the parties. Parties to a long-term franchise agreement like the ones in the case at bar can typically be presumed to have intended reasonable standards of cooperation based on the relational nature of the arrangement. Equity does not depend on presumed intention, but is more closely connected to the law's concerns for fairness in contract. Here, equity mandates the Franchisor's due regard for the Franchisees' interests […] (Emphasis added; internal citations ommitted)

57. The Court defined the duty to cooperate in the franchise context as a duty to "protect and enhance the brand", without placing limits around what that obligation might entail.

58. Jobin and Vézina view a duty to renegotiate as an application of the duty to cooperate, based on the same normative sources:

> Le contrat frappé d'un changement de circonstances présente un cas d'application de l'obligation de coopération. Sans tomber dans l'angélisme, elle vise à ce que chaque partie réalise ses objectifs légitimes de façon raisonnable et, en même temps, à ce que l'exécution du contrat permette d'atteindre le résultat recherché à l'origine. Un contractant ne saurait, sans violer ce devoir, rendre l'exécution du contrat extrêmement difficile, excessivement onéreuse ou déficitaire pour son cocontractant afin de satisfaire ses propres intérêts; à notre avis, le devoir de coopération oblige alors les parties à renégocier de bonne foi la convention, afin de la rééquilibrer, voire la résilier de consentement mutuel s'il est impossible de faire autrement**. L'article 1434 du Code civil sur les obligations implicites découlant de « l'équité » est l'assise appropriée pour imposer un devoir de renégocier un contrat devenu grossièrement inéquitable.**[41] (Emphasis added; internal citations omitted)

59. In *Novacarb*, invoking the duty to cooperate, the French Court of Appeal of Nancy, Commercial Division, ordered two parties in a joint venture to produce water vapour to come to an equitable solution to share the windfall value that had been generated by the creation of a market for emission reduction credits pursuant to the European Union's adoption of the Kyoto Protocol.

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41 Jobin and Vézina, *Les obligations*, 7th ed., *supra* note 29, pp. 538 ff., no. 446. See also P.-G. Jobin, "L'imprévision dans la réforme du Code civil et aujourd'hui" in *Mélanges Jean-Louis Baudouin*, Benoît Moore, ed. (Cowansville (Québec): Yvon Blais, 2012), pp. 375-391; C. LeBrun, *Le devoir de coopération durant l'exécution du contrat*, *supra* note 29, p. 103.

Unforeseen by the parties, the credits were lawfully allocated to only one of them. The Court noted that this one-sided allocation had created "*un déséquilibre significatif dans les résultats comparés des sociétés, déséquilibre qui n'a pas pu être prévu et encore moins voulu au moment du contrat*".[42]

60. The Court of Appeal's approach to the nature of the relationship and the duty to cooperate in the present case is irreconcilable with its approach in *Dunkin' Brands*.

61. Moreover, its reductionist approach to good faith more generally signals a clear change in course from the path set down by this Court in cases like *Bail* and *Kuet Long*. In *Bail*, this Court founded a general duty to inform on the duty of good faith, despite the fact that the *Civil Code* only recognizes it in specific instances (Arts. 1469 CCQ (manufacturers), 2345 CCQ (creditor-surety)); in *Kuet Long*, this Court recognized a duty of loyalty, although that duty is likewise only found in specific relationships in the *Civil Code* (Arts. 322 CCQ (directors), 2088 CCQ (employees)). In *Cliffton*, the Court of Appeal held that the duty to mitigate one's damages was a general obligation stemming from the duty of good faith, despite the fact that it is only found in the extra-contractual realm (Art. 1479 CCQ).

62. In the present case, while recognizing that "*on peut penser que tout n'a pas encore été dit*" (para. 127) the Court of Appeal nonetheless treats each application of good faith as a limited exception confined to the circumstances in which it has previously been recognized. The duty to cooperate is reduced to a duty to not induce into error or impede the other party's performance (para. 140); *Kuet Long* is confined to its facts (paras. 145-148) and any potential duty to renegotiate is confined to situations of financial distress, whether through the lens of good faith or equity (paras. 155, 158). Equity as a source of contractual obligations is barely acknowledged.

63. The Court of Appeal looks to *Bhasin* as a salutary example of how to render good faith more specific (para. 134). But good faith in the civil law is more than just an organizing principle: it is a general legal obligation in its own right. This aspect is lost in the Court of Appeal's judgment.

64. Respectfully, the duties of good faith and cooperation are far more expansive than the Court of Appeal's definitions. They are also much broader than a limited duty to make a concession that is "*objectivement raisonnable et non préjudiciable*", and only when the other party is in financial distress (para. 155).

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[42] *CA Nancy* nº 06-02221, JurisData nº 2007-350306, September 26, 2007 (*S.A.S. Novacarb* c. *S.N.C. Socoma*) ("***Novacarb***"), p. 16.

65. This Court has never considered the nature and implications of relational contracts and the scope of the duty to cooperate, and it has not issued a major decision on the proper approach to good faith in the civil law in almost 25 years. These issues warrant this Court's attention.

ii. Unforeseen changed circumstances and the standard of foreseeability

66. Unforeseen changed circumstances also pose an important challenge to classic contract theory. In general, parties cannot meaningfully be said to have intended or assumed the risk for that which they did not foresee. Particularly in long-term contracts, parties simply cannot foresee everything, nor do they necessarily intend to, no matter how all-encompassing the wording of their agreement.

67. The Civil Code recognizes this at Art. 1431 CCQ:

1431. Les clauses d'un contrat, même si elles sont énoncées en termes généraux, comprennent seulement ce sur quoi il paraît que les parties se sont proposé de contracter.	**1431.** The clauses of a contract cover only what it appears that the parties intended to include, however general the terms used.

68. In *Sodexho*, the Court of Appeal expressly recognized the relationship between changed circumstances and intent:

> Baudouin et Jobin notent qu'en cas de changements de circonstances en cours de contrat, des éléments extrinsèques doivent être examinés :
>
> > Il peut arriver, par exemple, qu'un terme de la convention englobe désormais une réalité nouvelle qui n'existait pas au moment de la formation du contrat; c'est en se référant aux divers facteurs d'interprétation et notamment à la matière sur laquelle porte le contrat que l'on parviendra à déterminer s'il était dans l'intention des parties d'être liées à l'égard de cette nouvelle réalité.
>
> La recherche de l'intention des parties doit, là encore, nous guider. [43]

69. In *Tricil*[44], one of a number of cases dealing with liability for taxes when the new Goods and Service Tax ("GST") came into effect, the Court of Appeal explained that even seemingly clear terms are limited by what the parties could reasonably have foreseen:

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[43] *Compagnie de chemin de fer du littoral nord de Québec et du Labrador inc.* c. *Sodexho Québec ltée*, 2010 QCCA 2408, paras. 101-102 (internal citations omitted). See also *Viau* v. *Procureur Général du Québec*, 1978, SOQUIJ AZ-78011092 (C.A.), reasons of Mayrand, J.A., p. 3.

[44] *Tricil ltée* c. *Gatineau (Ville)*, 2000 CanLII 7173 (QC CA) ("***Tricil***").

> [42] Even with the broad wording of "*toutes les taxes requises*…" provided in the contract, I cannot imagine that the parties contemplated that the contractor would include in its price future taxes which had never been introduced before, much less adopted by the Legislatures, and the terms and conditions of which were unknown.
>
> [43] While it may be true that the imposition of new taxes and the changes in rates of existing taxes should not come as a surprise to anyone, the interpretation of contractual obligations for the assumption of these taxes is quite another matter. We all know, through general experience, that new and increased taxes may come in the future. The issue here, however, is whether the parties to the contract in this case would have intended that the contractor assume responsibility for the payment of the new taxes in this case, which came into force more than 2 years after the call for tenders.
>
> [44] In my opinion, the contract, however broad its wording, did not contemplate this obligation. (Emphasis added)

70. Referring extensively to Hydro-Québec's expert, Carlos Lapuerta, both the Trial Judge and the Court of Appeal found that because the parties "knew the future was uncertain" and that energy prices could "fluctuate", the transformation of the energy markets and the dramatic increase in the value of energy were not unforeseeable because they were "known unknowns" (QCCA, *e.g.* para. 78; QCSC, paras. 507-508).

71. This is inconsistent with *Tricil* and a departure from accepted standards of foreseeability in virtually every other area of private law.

72. Indeed, foreseeability is a thread running through many areas of private law: for example, in the realm of contracts, in order to avoid the unjust enrichment of the creditor, damages for breach of contract are generally limited to those that were foreseen or foreseeable at the time the contract was formed;[45] in the realm of extra-contractual obligations, the notion of fault is limited by what a prudent and diligent person could reasonably foresee.[46]

73. "Known unknowns", "uncertainty", or "possibility" is not the standard for foreseeability in *any* of these areas. As the Court of Appeal stated in *Five Star Jewelry:*

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45 Art. 1613 CCQ. Foreseeability is measured at the time the contract was formed. It is based on what a reasonably prudent and diligent person would have foreseen in the circumstances, depending on the nature of the contract. See e.g. *Karbasfroushan* v. *Chapleau*, EYB 1991-57902 (C.A.); Baudouin, Deslauriers and Moore, *La responsabilité civile*, 8th ed., pp. 406-408, no. 1-368; P.-G. Jobin and N. Vézina in *Baudouin* and *Jobin*, *Les obligations*, *supra* note 29, pp. 931-933, no. 773.

46 See e.g. *Ouellet* v. *Cloutier*, [1947] S.C.R. 521: "…prétendre que l'homme prudent doive prévoir toute possibilité, quelque vague qu'elle puisse être, rendrait impossible toute activité pratique." (p. 526); Baudouin, Deslauriers and Moore, *La responsabilité civile*, 8th ed., *supra* note 45, pp. 190-192, no. 195.

> Une distinction s'impose entre la possibilité d'un événement et son caractère de prévisibilité. Tout, dans la vie, peut être dit possible, qu'il s'agisse d'un tremblement de terre, d'une explosion, d'un incendie, d'un vol, etc. Il faut distinguer entre la possibilité et la prévisibilité d'un événement. Cette imprévisibilité comporte un caractère objectif. Comme le soulignent les frères Mazeaud (Leçons de droit civil, 3e éd., tome 2, 538):
>
> > Il n'est pas nécessaire, pour qu'il y ait imprévisibilité, qu'on soit en face d'un événement qui ne s'est jamais encore produit. Sans doute, la réalisation de tout événement qui n'est pas nouveau peut être prévue; mais il ne s'agit pas de cette prévisibilité générale et abstraite. Un événement est imprévisible, du moment qu'il n'y avait aucune raison particulière de penser que cet événement se produirait.[47]

74. The evidence in its entirety confirms that not one of the highly sophisticated parties involved in the project – including Morgan Stanley, Ebasco, Brinco, Hydro-Québec and the Québec government – even remotely foresaw the radical transformation of the energy markets and regulatory regime that took place in North America. Applying the proper legal standard, it is not because the parties rejected "escalators" based on cost – during a period of the utmost trust and cooperation – that they meaningfully intended to exclude the possibility of any adjustment to the terms of the contract forevermore, no matter how dramatically the circumstances might change.

75. There is a clear conflict between the approach taken in the courts below and the Court of Appeal's approach to foreseeability in *Tricil*, and elsewhere in the law of contractual and extra-contractual obligations that merits this Court's attention.

iii. Rupture of the contractual equilibrium is not limited to financial difficulty or distress

76. In the limited duty to renegotiate the Court of Appeal was prepared to recognize, it insisted, whether through the lens of good faith or equity, that such a duty would only arise in situations of financial distress, where *"[l]a santé ou la survie d'une partie au contrat s'en trouve alors menacée*" (para. 155).

77. Seen through the lens of the duty to cooperate as discussed above, the duty to renegotiate should not be limited to such situations.

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47 *Five Star Jewelry* v. *Horowitz*, [1991] R.J.Q. 993 (C.A.), p. 997, cited with approval in *Paquet* v. *Longpré*, 2009 QCCA 1378, para. 74. See also *Nexans Canada inc.* v. *Papineau International, s.e.c.*, 2010 QCCA 1682, para. 7; *Manac inc./Nortex* v. *Boiler Inspection and Insurance Company of Canada*, 2006 QCCA 1395, para. 155; D. Lluelles and B. Moore, *Droit des obligations*, *supra* note 38, p. 1660, no. 2733; J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile, vol. 1 – Principes généraux*, 8th ed. (Cowansville (Québec): Yvon Blais, 2014), no. 1-732.

78. Professors Jobin and Vézina, cited by the Court of Appeal as proponents of adopting some form of *imprévision* through the doctrine of good faith (para. 126), likewise do not limit relief to financial distress:

> Refuser l'imprévision amène parfois l'enrichissement injustifiable d'une partie (par exemple, acquérir un produit à un prix largement inférieur à sa valeur au marché), qui ne peut toutefois être corrigé par le mécanisme de l'enrichissement injustifié, inapplicable dans ce contexte.[48]

79. The equitable doctrine of unjust enrichment, recognized by this Court in *Viger*, itself does not contain such a requirement: Viger was unjustly enriched because the contract at issue did not have the benefit he obtained as its object.[49]

80. To the extent that a "hardship" is required the contract itself, and not the party's overall financial health, should be the proper barometer.

81. The Court of Appeal repeats throughout the judgment that the Power Contract is profitable for CFLCo (see *e.g.* paras. 152, 159). This is simply wrong. As stated above, *the Contract itself would have already driven CFLCo into bankruptcy*. CFLCo is financially viable because of the GWAC, a commercial arrangement that Hydro-Québec needed, and the sale of the Twinco block of power. Thus, while CFLCo is not facing financial ruin, the Contract itself *is* a hardship.

iv. A breach of the duty of good faith gives rise to the full range of remedies for breach of contract

82. In the courts below, CFLCo sought: (i) declaratory relief – *i.e.* a declaration that good faith requires modification of the Contract price for the future; (ii) a revised pricing formula; or (iii) resiliation of the Contract with effect six months from the date of judgment.

83. Hydro-Québec both criticized CFLCo's proposed terms and took the position that courts did not have the power to set new terms. The Trial Judge rejected CFLCo's proposed terms but did not address the legal question nor did he address declaratory relief or resiliation. Given its conclusion on the merits, the Court of Appeal likewise did not address the remedy.

84. If granted leave, CFLCo will argue that all three remedies are available. Recently, in *Péladeau*, though pursuant to an express contractual clause, the Court of Appeal ordered the parties to renegotiate in good faith, which is the equivalent of the declaratory relief CFLCo requested.[50]

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48 Jobin and Vézina, in Baudouin and Jobin, *Les obligations*, *supra* note 29, p. 539.
49 *Viger*, *supra* note 7, pp. 68-69.
50 *Péladeau* c. *Placements Péladeau inc.*, 2015 QCCA 1724, para. 69.

85. The Court also has the power to set new terms. The most obvious example is the court's power to reduce one party's obligation in the case of a breach of a contractual obligation by the other party, pursuant to Arts. 1590 and 1604 CCQ. Under the CCLC, this remedy was only permitted in certain circumstances. Under the CCQ, the legislator extended it as a general remedy. As Jobin and Vézina explain:

> En permettant la réduction des obligations comme remède général, à l'inexécution contractuelle fautive, à certains vices de consentement et à certaines incapacités, le législateur, comme on l'a vu, confère au juge le pouvoir de réviser, refaire ou remodeler la convention d'origine.[51]

86. Finally, resiliation, the classic remedy for breach of contract is clearly available. CFLCo did not propose it as its primary remedy because the ongoing relationship for the supply of power, far more than the pricing terms, is the true essence of the bargain.

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87. This case raises questions about the nature and implications of relational contracts; the function of good faith and the scope of the duty to cooperate; and the role of foreseeability in contractual interpretation that each, on its own, is worthy of this Court's attention. The context – a long-term, collaborative partnership between what are now two provincial Crown corporations to harness one province's natural resources to meet the needs of another – makes both the Contract and the questions of unmistakable public importance.

PARTS IV & V – COSTS AND ORDER SOUGHT

88. CFLCo seeks an order granting it leave to appeal, with costs to follow.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Montréal, September 30, 2016

M^e Doug Mitchell	**M^e Patrick Girard**
M^e Kurt A. Johnson	**Stikeman Elliott LLP**
M^e Audrey Boctor	
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51 P.-G. Jobin and N. Vézina in *Baudouin* and *Jobin*, *Les obligations*, 7th ed. (Cowansville (Québec): Yvon Blais, 2013), n^o 449, p. 544.

PART VI –TABLE OF AUTHORITIES

Jurisprudence ***(cont'd)*** **Paragraph(s)**

Doctrine

Doctrine ***(cont'd)*** **Paragraph(s)**