Case Name:

ATTORNEY GENERAL OF NEWFOUNDLAND v. CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED, QUEBEC HYDRO-ELECTRIC COMMISSION, ROYAL TRUST COMPANY and GENERAL TRUST OF CANADA

[1983] N.J. No. 142

49 Nfld. & P.E.I.R. 181

145 A.P.R. 181*

21 A.C.W.S. (2d) 326

Newfoundland Supreme Court Trial Division

Goodridge, J.

June 13, 1983

(1280 paras.)

CASES NOTICED:

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Department of Justice Act, R.S.N. 1970, c. 85, s. 10 [para. 618].
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This case was heard in 1981 and 1982 before Goodridge, J., of the Newfoundland Supreme Court, Trial Division, who delivered the following judgment on June 13, 1983:

[*page192] A. Introduction

Part 1: The Churchill Falls

1 Goodridge, J.: Sometime in the month of August 1839 John McLean, a Scot who had been employed for 25 years with the Hudson's Bay Company, was paddling along what is now known as the Churchill River. He and others had embarked upon a mission for their employer to develop a fur trade in the unexplored interior of Labrador.

2 The course of his exploration brought him to the Churchill River and that in turn carried him to what is now known as the Churchill Falls. It is believed that he was the first non-native person to set eye on the falls.

3 At that time the generation of electricity by the use of water power was a concept not then developed. In fact, it was only seven years earlier that Michael Faraday had developed the first electric generator.

4 In 1929 the falls represented little more than a barrier for those bound by canoes on a course through the interior of Labrador.

5 The falls remained as a restless giant for 125 years.

Part 2: Statutory history

6 It was in 1952 that Joseph R. Smallwood, the then Premier of the Province, began stirring the imaginations of British investors to the development of water and other resources in Labrador. Winston Churchill, the then Prime Minister of England, is reported

to have said that it was high time that the Hamilton Falls had a bridle.

7 (The river was originally known as Grand River and the falls as Grand Falls. They were later renamed Hamilton River and Hamilton Falls after Sir Charles Hamilton, a onetime Governor of Newfoundland. Following the death [*page193] of Sir Winston Churchill in 1965 the province, upon the suggestion of Mr. Smallwood, changed the name of the river and falls to Churchill River and Churchill Falls. A distinction is now made between that portion of the river which lies above the falls which is known as the Upper Churchill and that portion which lies below the falls which is known as the Lower Churchill.)

8 At that time the British investors formed a company known as the British Newfoundland Corporation ("Brinco").

9 The first act relating to the Upper Churchill is an act cited as the Government-British Newfoundland Corporation Limited-N.M. Rothschild & Sons (Confirmation of Agreement) Act 1953 (the "Brinco Act"). This act, as its name implies, approved the execution and delivery of an agreement (the "Brinco Agreement") between the Lieutenant-Governor in Council (the "Government") and N.M. Rothschild & Sons, who had brought about the incorporation of Brinco.

10 The Brinco Agreement gave Brinco an option exercisable at any time within 20 years from May 21, 1953, to take an exclusive right and concession to harness and make use of all of the rivers and watersheds in Newfoundland and Labrador including the Churchill River and to be vested with all hydro-electric and hydraulic rights to the same.

11 The Brinco Agreement was basically an exploration agreement and the provision for an option was a necessary part of it. Clause 9(5) of the agreement is interesting in the light of the dispute that subsequently arose and which is the subject matter of this action. It reads as follows:

"(5) In the event of the exercise of the water power rights hereby granted, the Corporation shall not export any electric power from Newfoundland or Labrador without the previous consent of the Government, which consent shall not be unreasonably withheld, having regard to the most economical and efficient means of utilizing such electric power and to the requirements of consumers or potential consumers within Newfoundland and Labrador."

12 Brinco created a subsidiary originally called Hamilton Falls Power Corporation Limited, but whose name was later changed to Churchill Falls (Labrador) Corporation Limited ("CFLCo").

13 On June 30, 1958, there was a memorandum of agreement between Brinco and CFLCo. It referred to the Brinco Act and recited that some $ 5,500,000.00 had been spent in the development of the water power potential of the Upper Churchill River.

14 The agreement assigned to CFLCo all the water power rights and options granted to Brinco under the Brinco Agreement.

15 On May 13, 1961, the Hamilton Falls Power Corporation Limited (Lease) Act (the "Lease Act") was passed. This authorized the execution and delivery of a statutory lease (the "Lease") to CFLCo.

16 (The name of the Lease Act was changed on April 25, 1967, to the Churchill Falls (Labrador) Corporation Limited (Lease) Act.)

17 The initial function of the Lease Act was to authorize the execution and delivery of the Lease between the Government and CFLCo.

18 According to Sections 3 and 4 of the Lease Act the provisions of the Lease had the force and effect of law as if expressly enacted in the Lease Act notwithstanding any other law or statute. These sections read as follows:

> "3. [Emphasis start]The Lease authorized to be executed and delivered under Section 2 shall, upon its execution and delivery, be valid and binding upon the parties thereto, and all and singular the provisions thereof shall have the force and effect of law for [*page194] all purposes as if expressly enacted in this Act,[Emphasis end] and the lessor and lessee named in the Lease, as well as all others claiming directly or indirectly under the lessor or the lessee including without limiting the generality of the foregoing Twin Falls Power Corporation Limited if it is a sublessee, licensee or permittee of the lessee and the trustee for the holders of any bonds issued by Twin Falls Power Corporation Limited or the assignees of such trustee and any of them have, each of them according to his right, title or interest, full power and authority from time to time to do or perform or omit to do or perform all and singular the several acts, matters and things in and by the Lease provided to be done or not to be done, as the case may be, in the manner and with the effect and under the conditions stipulated and provided in the Lease.
>
> "4. Section 3 of this [Emphasis start]Act[Emphasis end] shall have full effect notwithstanding anything to the contrary contained in The Crown Lands Act, chapter 174 of the Revised Statutes of Newfoundland, 1952, or in any other statute or law."

(Emphasis added).

19 The Lease is for a term of 99 years. It granted to CFLCo the full right and liberty to use exclusively all usable waters of the Upper Churchill and its catchment area with the right to flood.

20 It granted also the exclusive right to harness and use the Upper Churchill, all hydro-electric and hydraulic power rights in respect of the Upper Churchill, the exclusive right to utilize the Upper Churchill in dams, tunnels, canals, diversions, power houses and other works necessary for the development of hydro-electric and hydraulic power, the exclusive right to store so much of the Upper Churchill as might be economic and beneficial for the purposes of development and to regulate its flow, the right to flood lands in the development area and the rights contained in Clause 2(e) ("Clause 2(e)") of Part 1,

which reads as follows:

> "2. Subject to the provisions, terms, conditions, exceptions and reservations of this Lease, the lease and demise of the Upper Hamilton created hereby includes the grant to the lessee during the term created by this Lease of
> (e) the right to transmit throughout the province any electric power generated as the result of the harnessing of the whole or any part of the Upper Hamilton and to export from the province such power: Provided that upon the request of the Government consumers of electricity in the province shall be given priority where it is feasible and economic to do so; and"

21 A distinction is to be noted in the language of Clause 2(e) of the Lease and the language of Clause 9(5) of the Brinco Agreement.

22 The latter prohibited the export of power without the consent of the Government. The former gave the right to transmit and export power without the qualification of consent, but subject to a proviso that Newfoundland consumers would be given priority upon the request of the Government.

23 In the Brinco Agreement the consent was not to be unreasonably withheld having regard to the most economical and efficient means of utilizing such economic power and to the requirements of the Newfoundland consumer.

24 The Lease provided that the priority would only be given where it was feasible and economic to do so.

25 There is a subtle change in emphasis here which may have some bearing on the interpretation of Clause 2 (e).

26 There were subsequent amendments to the Brinco Act and Brinco Agreement as well as to the Lease Act and the Lease.

[*page195] [27] In relation to the financing of the project and the sale of the product there were:

> (a) The Churchill Falls (Labrador) Corporation Limited (Financing) Act, 1969 (the Financing Act);
> (b) The financial agreement made pursuant thereto (the "Financial Agreement");
> (c) The deed of trust and mortgage from CFLCo to the Royal Trust Company (the "Royal Trust") (the "First Mortgage Trust Deed");
> (d) The deed of trust and mortgage from CFLCo to General Trust of Canada ("General Trust") (the "General Mortgage Trust Deed");
> (e) The intervention of the Government in the First Mortgage Trust Deed (the "Government Intervention") pursuant to authority contained in the Financing Act; and
> (f) The indenture from CFLCo to General Trust (the "Debenture Indenture").

28 In 1979 the Lower Churchill Development Act was passed.

29 The purpose of this was to create the Lower Churchill Development Corporation Limited, owned by Canada and the province, with the primary objective of establishing a basis for the development of all or part of the hydro-electric potential of the Lower Churchill. The status of this agreement is not material to this action. The evidence indicates, however, that the development is not feasible and economic. If it is to be developed for the supply of power to the province alone, the power generated by any such project not used in the province would have to be disposed of by what has been called "sales west", that is to say sales to the Quebec Hydro-Electric Commission ("Hydro Quebec") or to a consumer beyond the borders of Quebec.

30 Six years after the Lease Act was passed, construction of the gigantic reservoir and generating station (the "Plant") on the Upper Churchill and at Churchill Falls was commenced. Another two years was to elapse before an agreement was to be signed with a customer for the energy generated.

31 That customer was Hydro Quebec. A contract (the "Power Contract") was entered into between CFLCo and Hydro-Quebec on May 12, 1969, under the terms of which Hydro Quebec would purchase all of the electrical power generated at Churchill Falls with certain specified exceptions.

32 CFLCo had in 1967 commenced full scale construction activities on the Upper Churchill River. The first power was delivered to Hydro Quebec in 1971. The completed development consists of 11 generating units, each with a capacity of 475 MW, making a total of 5,225 MW. In recent years, the generating plant at Churchill Falls has been capable of delivering power in excess of 5,700 MW.

Part 3: Electrical development in the province from 1952

33 During the period from 1952, there were other developments in the generation, transmission and distribution of electrical energy in Newfoundland. This was summarized in a brief submitted by the Government and a large portion of the following paragraphs is taken almost verbatim from that brief.

34 The Newfoundland Power Commission ("Newfoundland Hydro") was established by the legislature of the province in 1954 and was given the primary responsibility of installing diesel generation and local distribution systems in rural areas of the province.

35 In 1965, the legislature enacted the Newfoundland and Labrador Power Commission Act, which

[*page196] (a) changed the name of the Newfoundland Power Commission to Newfoundland and Labrador Power Commission;

(b) reconstituted Newfoundland Hydro; and
(c) subject to rights existing prior to the passing of the act, charged Newfoundland

Hydro with the future development of all new hydro-electric sites on the Island of Newfoundland.

36 (In 1975 the Newfoundland and Labrador Power Commissions which had become the Newfoundland and Labrador Power Corporation in 1974, was reborn as the Newfoundland and Labrador Power Commission while the Newfoundland and Labrador Power Corporation was continued as a corporation under the same of Newfoundland and Labrador Hydro-Electric Corporation. The term "Newfoundland Hydro" used for convenience herein really refers to three entities - the Newfoundland Power Commission to 1965, the Newfoundland and Labrador Power Commission to 1974, the Newfoundland and Labrador Power Corporation (subsequently the Newfoundland and Labrador Hydro Electric Corporation) from 1974.)

37 Prior to 1965, power generation and transmission facilities had been developed in the province in local blocks and there was no interconnection among the various areas. Sixty percent of the Island's total generation capability was at a frequency of 50 cycles. This standard European frequency resulted from the two paper mills established by British firms at Grand Falls, Newfoundland, in 1908, and at Corner Brook, Newfoundland, in 1923. The remaining generation on the Island was at a frequency of 60 cycyles, which was distributed in the six electrically isolated areas, namely:

(a) the Avalon Peninsula;
(b) the Bonavista Peninsula;
(c) the Grand Falls-Gander-Bonavista North area;
(d) the Burin Peninsula;
(e) the Stephenville-Port-au-Port area; and
(f) the Port aux Basques area.

38 To complicate matters further, some five companies generated practically all of the Island's electrical energy requirements. They were:

(a) Newfoundland Light and Power Company Limited ("Newlight"), which operated in St. John's, Corner Brook, and from 1956 central Newfoundland, including Gander and communities in Notre Dame Bay and Bonavista Bay;
(b) The United Towns Electric Company Limited, whose franchise area included most of the Avalon Peninsula outside of St. John's, the Burin Peninsula, Bell Island and through a subsidiary, the Stephenville-Port-au-Port and Port aux Basques areas;
(c) The Union Electric Light and Power Company Limited, which served the Bonavista Peninsula and the Clarenville areas as far south as Placentia Bay;
(d) Bowater Power Company Limited, a subsidiary of what is now known as Bowater Newfoundland Limited, which supplied power and energy to
(i) the Bowater mill in Corner Brook
(ii) North Star Cement Company Limited and Atlantic Gypsum Company Limited in Corner Brook;
(iii) from 1963, Baie Verte to serve Advocate Mines Limited and the Baie Verte Town Site; and

[*page197] (iv) from 1965, Springdale to serve Whalesback Mine and the Springdale Town Site;

(e) Anglo Newfoundland Development Company Limited (now Abitibi Price Inc.) which from 1956 supplied power exclusively for its own consumption in its Grand Falls mill and the auxillary operations thereof.

39 In 1964 Newfoundland Hydro determined that existing generation facilities were at their limit and that the Island would soon be short of power.

40 The power system on the Island was characterized by:

(a) a series of non-integrated generating and transmission systems;
(b) different frequencies; and
(c) an imminent power and energy shortage in all areas of the Island.

41 During the period 1954 to 1964, there were two power developments in Labrador. The first was established at Lake Menihek, which was for the purpose of supplying electrical energy to the mining facilities of Iron Ore Company of Canada located at Schefferville, Quebec, and to that town site. The second was a power generating station established by Twin Falls Development Corporation Limited ("Twinco") on Unknown River, for the purpose of supplying electrical energy to the mining facilities established at Wabush Lake and Labrador City and to those two town sites.

42 CFLCo was, during much of this period, endeavouring to develop the power potential of the Upper Churchill.

43 In order to cope with the situation, and to provide for the energy requirements necessary to support industrial, commercial and domestic growth, the Government in 1965 authorized Newfoundland Hydro to construct Stage 1 of the hydro-electric site at Bay d'Espoir. This included the diversion of Salmon River and Grey River and the installation of three 75 MW units. When the three units became operational in October 1967, the energy capability of the Island was twice what it had been in 1964.

44 To off-set the interim power shortage which would have occurred in the fall of 1966 and for most of 1967, Newfoundland Hydro installed a 15 MW gas turbine near St. John's, which is now used for peaking purposes.

45 Because of the industrialization program of the Government it became apparent in 1966 that all of the energy from Stage 1 of the Bay d'Espoir development would be fully used by 1969. Therefore, the Government authorized Newfoundland Hydro in May of 1966 to proceed with Stage 2 of that development. Stage 2 included the diversions of the White Bear and Victoria Rivers eastward into the Salmon and Grey River watershed and the installation of three 75 MW units increasing the installed capacity of the Bay d'Espoir power house to 450 MW. Construction of Stage 2 began in the summer of 1966 and was completed in April 1970.

46 Because demand on the Island continued to exceed the original forecast, it became evident that future industrial expansion would require new sources of generation in 1971. The low cost of crude oil and the high cost of financing then prevailing made the more capital intensive hydro-electric generation less attractive. The Government therefore authorized Newfoundland Hydro in April 1968 to proceed immediately with the construction of a 300 MW oil-fired thermal generating station at Holyrood. This development consisted of two 150 MW units, which were completed in March 1971. In 1976 a third 150 MW unit was added, bringing the total capacity at this facility to 450 MW.

[*page198] [47] As stated, prior to 1965 the power generation on the Island was spread over six electrically isolated areas. As part of the development of both the hydro resource at Bay d'Espoir and the Holyrood thermal generating station, Newfoundland Hydro constructed a transmission network consisting of a 230 KV "back bone" running east to west with 138 KV and 69 KV extensions to various locations such as the Burin Peninsula, Gander, Grand Falls, and Baie Verte Peninsula.

48 In this fashion, by 1971 a power grid system had been established for the Island, and capacity had been installed to cover the load growth projected to 1975-76.

49 As noted, by 1964 there were two power developments in Labrador, one at Menihek and the other on Unknown River. In actual fact, the development of potential hydro-electric resources in Labrador had been under active consideration since 1953, when the Government, pursuant to the Brinco Act entered into the Brinco Agreement with Brinco whereby Brinco was given certain exclusive rights to investigate and determine the feasibility of developing such hydro-electric resources. The principal source of power was Churchill River. There was a potential development on the Upper Churchill with a capacity of 5200 MW. In addition, there were, and still are, two potential developments on the Lower Churchill at Gull Island and Muskrat Falls - with a total capacity of 2300 MW. In 1958, as mentioned in Part 2, Brinco created a subsidiary, CFLCo, to which Brinco assigned its rights under its agreement with the Government with respect to the development of the Upper Churchill.

Part 4: The beginning of the controversy

50 The problem of energy for the Island was not solved by the construction of the Plant by CFLCo. Newfoundland Hydro had considered thermal plants, but always concluded that energy from Labrador would be cheaper.

51 Clause 2(e) purportedly made provision for the recapture of energy generated at the plant. Although the Power Contract had not been negotiated at the time of the Lease (which contained Clause 2(e)), it was generally understood that most if not all of the generation of the plant would be sold west.

52 Clause 6.6 ("Clause 6.6") of the Power Contract provided for the recapture of 300 MW. Clause 6.6 makes no reference to Clause 2(e), the Lease, the Government or consumers of electricity in Newfoundland (the "Newfoundland consumer").

53 It provides merely for the right of CFLCo to withhold 300 MW and provides certain terms associated therewith.

54 Consideration was also given to generating facilities on the Lower Churchill at Gull Island and Muskrat Falls.

55 In the spring of 1974 the Government acquired all of Brinco's shares in CFLCo. At that time Hydro Quebec owned approximately one-third of the shares of CFLCo. The result of the acquisition by the Government was that CFLCo was owned two-thirds by Newfoundland Hydro, which held the Government's shares, and one-third by Hydro Quebec.

56 Brinco had formed another subsidiary known as Gull Island Power Company Limited for the purpose of developing a hydro-electric site on the Lower Churchill River. The shares of Gull Island Power Company Limited were also taken over by the province and assigned to Newfoundland Hydro.

57 Studies were done on the development of hydro-electric power at Gull Island and the transmission of the generated power to the Island.

58 This proposed development turned in part on the sale of surplus energy to Hydro Quebec. No agreement could be concluded and the Gull Island proposal was abandoned for the time being.

[*page199] [59] In the view of Newfoundland Hydro the load forecasts for the Island indicated a pressing need. In the circumstances the Government by Order-in-Council dated August 6, 1976, (the "Order-in-Council" or the "request") requested pursuant to Clause 2(e) the supply to Newfoundland Hydro of 800 MW of electrical power generated from the Upper Churchill watershed at a 90% load factor commencing on October 1, 1983. That Order-in-Council was transmitted to CFLCo on the same day. A copy of the Order-in-Council is attached as Appendix A to this judgment. A copy of the letter by which it was transmitted (the "Transmittal Letter") is attached as Appendix B. Clause 2(e) is set out in Part 2.

60 The Government rests its case in this matter upon the concluding wording (the "proviso") of Clause 2(e) which reads as follows:

"Provided that upon the request of the Government consumers of electricity in the province shall be given priority where it is feasible and economic to do so, and . . ."

61 In view of its commitment to Hydro Quebec under the Power Contract CFLCo resisted the request of the Government and advised that it could not make a commitment for the supply of power from the then installed capacity in the amount requested in the Order-in-Council. The reply (the "CFLCo Reply") is dated August 31, 1976, and is set forth in full in Appendix C.

62 The Order-in-Council and the CFLCo Reply are the basis for the controversy which is

now before the court.

63 The request contained in the Order-in-Council is in the view of the Government authorized by Clause 2(e).

64 The Lease is for the term of 99 years from 1961. Under it are demised the full right and liberty to use exclusively all useable waters on Upper Churchill River together with certain other rights.

B. The Issues

Part 5: General

65 The action was commenced on September 13, 1976. There were three interlocutory applications made and appealed. The last of these matters was not disposed of until early in 1980.

66 There were other procedures between counsel during the ensuing months, such as discovery of documents. A motion for trial was heard in January 1981 and the trial was set to commence on May 25 of that year. It continued with several interruptions for a total of 99 days until July 9, 1982.

67 During the period of the trial there were a total of 12,240 pages of testimony and another 1,730 pages of argument.

68 In addition to that trial briefs were submitted consisting of another approximately 800 pages.

69 The documentary evidence was voluminous. It consisted largely of technical reports, but also contained copies of documents and correspondence pertinent to the matter.

70 The transcript, argument, trial briefs and documentary evidence consisted of an estimated 40,000 pages.

71 There was a total of 67 witnesses. Most of the witnesses were called upon to give technical evidence relating to engineering and geology; others gave evidence of related matters, such as the reliability of the proposed transmission system and the financibility of the project; four testified about Quebec law.

72 All of the witnesses were of high calibre, were competent to give opinion evidence and did so.

73 No specific ruling was made in respect of any witness that he or she was an expert. A blanket ruling is now [*page200] made that all of the witnesses who testified and gave opinion evidence were qualified to do so and for the purposes of the trial are declared to be expert.

74 At the conclusion of the trial there was a motion to take a view of the proposed

transmission line from Soldier's Pond to Churchill Falls, the Plant and the transmission line from Churchill Falls to Montreal. The taking of a view commenced on July 12, 1982. A helicopter containing myself and two counsel representing the Government and CFLCo, the principal contenders in this matter, set out from St. John's and followed the transmission line from Soldier's Pond through the central part of the Island, then northward to the Long Range Mountains, across the mountains and northward again to the Strait of Belle Isle and across the Strait to the community of L'Anse au Clair. There the mission had to be abandoned after a two-day wait when a heavy fog set in which showed no immediate sign of remission.

75 Much of the evidence during the trial occupied the problems of bringing cables across the Strait of Belle Isle and conductors over the Long Range Mountains.

76 On the placid and sunny July day on which the view was taken, it was difficult to countenance the horrendous problems described during the trial in relation to these two areas.

77 The Long Range Mountains are subject to high and variable winds in winter with substantial ice accumulations on the conductors.

78 Small test towers had been erected at various points over the mountains. The helicopter stopped periodically so that these might be examined.

79 A view of the surface of the mountain range gave some meaning and insight into the problems described by some of the witnesses in relation to the anchoring of towers along the transmission route set in the muskeg and wet soil. It was less easy perhaps to visualize the winter winds and icy conditions that would attack the transmission system in the winter months.

80 There were alternate routes across the Long Range Mountains. One led across the mountains a distance of about seven kilometres to Parson's Pond and continued along the foothills to Yankee Point.

81 The other route across the mountains led to Inner Pond, where it joined up with Parson's Pond route between Inner Pond and Portland Creek.

82 The Inner Pond route is longer than the Parson's Pond route.

83 The idea of alternate routes across the mountains is to provide an added degree of protection. If one route succumbs to the weather conditions, the other may survive to carry the load while the first is being repaired.

84 From the northern junction of the two routes between Inner Pond and Portland Creek to Yankee Point there are no particular hazards to be noted.

85 Yankee Point is on the Island side of the Strait of Belle Isle. Point Amour is on the Labrador side of the Strait of Belle Isle. It is between those two points that a submarine

cable is planned. In fact, several years ago shafts were commenced at these points and the housing over these shafts is still visible on both sides of the Strait.

86 There were two proposals for bringing cables across the Strait of Belle Isle. The first was to lay them in a trench to be excavated along the sea bottom. The second was to lay them in a tunnel cut well beneath the sea bottom. Access to the tunnel would be by means of vertical shafts which, as noted above, had already been commenced.

87 Crossing the Strait by air took but a few minutes. The visibility was good. No icebergs were to be seen in any direction.

[*page201] [88] When the fog resulted in the taking of a view being scrubbed, the return passage across the Strait was made by ferry. For most of this crossing the fog was densely thick.

89 Icebergs and fog were two of the problems cited in relation to the installation and maintenance of cables laid in a trench.

90 The view taking was resumed on September 29, Counsel and myself met at Wabush and travelled by helicopter along the transmission line to Churchill Falls. A view was taken of the Plant from the huge Smallwood reservoir to the tailrace tunnels where the turbulent waters set free from the generating process continue their journey down Lower Churchill River.

91 A tour of the main part of the Plant was conducted and the switching yard was shown where the electrical energy emerges from its birth place far below the surface of the ground and is fed into transmission lines leading to Wabush, Happy Valley and Montreal.

92 It had been proposed to follow the 735 KV transmission lines into Montreal but once again fog intervened. The taking of a view was abandoned at Churchill Falls and the parties involved returned to their respective homes. It had been hoped to view the Pinware Valley in which the transmission line slopes upwards from the Strait of Belle Isle to a plain leading to Gull Island and Muskrat Falls, not far from Happy Valley and to follow the Lower Churchill from this area to Churchill Falls. It was hoped also on the Hydro Quebec side of the plant to view the area where the tower supporting a transmission line had fallen in cascading fashion a number of years ago as the result of heavy icing conditions.

93 The taking a view of these proved to be impossible in view of the fog conditions that delayed and finally resulted in aborting the mission to view.

94 Apart from the technical evidence relating to the question of whether or not the transmission of the energy was feasible and economic, there were numerous questions of law most of which revolved around the question of the interpretation of the proviso in Clause 2(e) set forth above. There were other questions which arose which need not be mentioned in this introduction.

95 This judgment will outline the issues raised in the pleadings. It will deal with the

interpretation of the proviso and the consideration of certain peripheral matters. Consideration of the question of whether the project is feasible and economic, with two exceptions, is deferred as a finding on this matter will prove to be inconsequential in view of other findings herein. Further, it is felt, in the light of time already passed, expeditious not to consider the technical evidence at this time, or at all, unless this judgment is overruled on a point of law and the matter sent back for determination of the facts.

96 Except in relation to the question of feasible and economic, the facts, for the most part, were not in dispute. Findings of fact relating to areas not concerned with the question of feasible and economic will not be dealt with separately from the questions of law that they involve, but rather the two will be dealt with simultaneously in respect of each area where there is contention.

97 At the conclusion of the judgment but forming part thereof there will be several appendices. Three of these have already been mentioned in this introduction. The others will contain definitions of terms, identification of witnesses, and a list of exhibits.

98 These are identified in the index and no further explanation is required.

Part 6: The parties

99 The plaintiff in this action is Her Majesty's Attorney General of Newfoundland. Some issue is taken in the pleadings as to whether the Attorney [*page202] General could bring this action. This was dealt with briefly in the argument and a brief decision on the point will be made in Part 23 of this judgment.

100 For the sake of convenience the plaintiff will be referred to simply as the "Government" which term shall also extend to include the Government of the province and the Lieutenant-Governor in Council. If it becomes necessary to distinguish between the three, that distinction will be made.

101 The first defendant is Churchill Falls (Labrador) Corporation Limited, which will be referred to as CFLCo. This is a Dominion company having its head office at St. John's in the province. It is owned one-third by Hydro Quebec and two-thirds by the Government.

102 It owns and operates the hydro-electric generating facility at Churchill Falls and has a leasehold right to use all waters of the Upper Churchill and within the catchment area of the Upper Churchill and the other catchment areas that by diversion can be made tributory to the catchment area of the Upper Churchill. It also has, during the period of the Lease, the exclusive right to harness and make use of the Upper Churchill, all hydro-electric and hydro power rights to and in respect of the Upper Churchill necessary for the development of hydro-electric and hydraulic power, the exclusive right to store so much of the Upper Churchill as may be economic and beneficial for the purposes of the development, the right to transmit and export hydro-electric power subject to the proviso set forth in Clause 2(e) and, finally, the right to flood or otherwise impair unoccupied Crown lands in the development area.

103 Basically, it is given the right in respect of the Upper Churchill to store water in the catchment area, to generate hydro-electricity from the flow of the stored water and to sell the electricity so generated.

104 The second defendant is Quebec Hydro-Electric Commission which, as indicated, will be called Hydro Quebec. This is the Quebec counterpart of Newfoundland Hydro.

105 Some years ago all generating facilities in the Province of Quebec were brought within the control of Hydro Quebec which has the sole rights to generate, transmit and distribute electricity in that province.

106 For the construction of the hydro-electric facility on the Upper Churchill funds were needed. Investors purchased bonds. These bonds were secured by the First Mortgage Trust Deed. The third defendant is the Royal Trust and it is the trustee named in that trust deed. The amount secured thereby originally was $ 550,000,000.00. There was provision for issuing bonds in excess of that amount.

107 Additional funds not provided through the purchase of bonds secured by the First Mortgage Trust Deed were provided by Hydro Quebec, which purchased bonds to the value of $ 100,000,000.00. These bonds are secured by the General Mortgage Trust Deed. The fourth defendant is General Trust and it is the trustee named in the General Mortgage Trust Deed.

108 If the Government is successful in its claim against CFLCo, Hydro Quebec will be directly affected, because the pool of hydro-electric power upon which it draws pursuant to the provisions of the power contract will be reduced from 5,225 MW to 4,425 MW.

109 Further, for reasons that will hereafter appear, the security of the Royal Trust and General Trust may be impaired.

110 Hydro Quebec, the Royal Trust and General Trust are deemed to be necessary parties to the case against CFLCo.

Part 7: The relief sought in the statement of claim

111 The claim for relief that the Government seeks is:

[*page203] (a) a declaration that the Government is entitled by virtue of Clause 2(e) to request 800 MW of electric power as set forth in the Order-in-Council;

(b) a declaration that the Government by reason of the Financial Agreement is not prevented or prohibited from commencing this action; and
(c) a declaration that, by virtue of Part 1 of the Lease and Sections 3 and 4 of the Lease Act, CFLCo is obliged to comply with the request contained in the Order-in-Council.

112 There were two other prayers for relief which were struck out in the course of

interlocutory proceedings.

113 The statement of claim supports the prayer for relief by reciting numerous pertinent facts.

114 The origin of the Government's alleged right is to be found in the Lease which was dated May 16, 1961. The Lease was made between the Government as lessor and CFLCo as lessee. By it the Government leased to CFLCo the exclusive use of certain waters on the Upper Churchill River watershed for the purpose of generating electrical energy.

115 Included in the rights granted by the Lease was the right to transmit throughout the province any electric power generated as a result of the harnessing of the whole or any part of the Upper Churchill and to export such power from the province provided that, in the language of paragraph 5 of the statement of claim,

"upon the request of the Government consumers of electricity in the said province shall be given priority where it is feasible and economic to do so."

116 The form of the Lease is a schedule to the Lease Act. Sections 3 and 4 of the Lease Act are set forth in Part 2. They provide, inter alia, that the Lease shall upon its execution and delivery be valid and binding upon the parties thereto and shall have the force and effect of law for all purposes as if expressly enacted in that act, notwithstanding any other statutes or law.

117 On May 12, 1969, CFLCo and Hydro Quebec entered into the Power Contract under which CFLCo agreed to sell and Hydro Quebec agreed to buy certain hydro-electric power and energy in accordance with the provisions set forth in that agreement.

118 On May 15, 1969, CFLCo executed and delivered the First Mortgage Trust Deed to the Royal Trust. This instrument was designed for the purpose of securing the payment of bonds to the value of $ 550,000,000.00. Hydro Quebec, the Government and General Trust all intervened in the First Mortgage Trust Deed.

119 The intervention of Hydro Quebec is not important to the issues in this case. The intervention of General Trust was to subordinate its security under the General Mortgage Trust Deed and the Debenture Indenture to the security of the First Mortgage Trust Deed.

120 The Government Intervention was designed to provide the Government's consent to the extent that it was required, if at all, to the provisions, terms and conditions of the First Mortgage Trust Deed with respect to the charging of the specifically mortgaged premises as therein defined.

121 The Government Intervention also operated to preclude the Government from exercising rights upon default under the Lease except in relation to the non-payment of money and only then upon express terms. This provision is contained in Article 25.01 (6) of that instrument. Further reference will be made to that later in relation to arguments presented by some of the defendants.

[*page204] [122] Prior to the date of the First Mortage Trust Deed, on May 12, 1969 the Government executed and delivered to the Royal Trust and CFLCo the Financial Agreement. This instrument was apparently executed in contemplation of the First Mortgage Trust Deed. Although somewhat broader, its terms are quite similar to the Government Intervention.

123 Prior to the execution and delivery of the First Mortgage Trust Deed and the Financial Agreement, CFLCo had on September 1, 1968, executed and delivered to General Trust of Canada the General Mortgage Trust Deed securing the payment of $ 100,000,000.00 to the purchasers of general bonds. This deed was expressed to be subordinate to the indebtedness to be secured by the First Mortgage Trust Deed. General Trust intervened in the First Mortgage Trust Deed to confirm the subordination.

124 The execution and delivery of the Financial Agreement and the Government Intervention were authorized by the Financing Act. There does not appear to have been any Intervention or statutory provision for intervention in the General Mortgage Trust Deed.

125 None of the First Mortgage Trust Deed, the Financial Agreement, the Government Intervention or the General Mortgage Trust Deed appears to be important to the Government's case herein except to the extent that the Government Intervention and the Financial Agreement both provide a reservation by the Government of its right to take action against CFLCo for the enforcement of its rights under the Lease.

126 The Government in its statement of claim went on to provide that in the year 1983 and thereafter there would be a need for additional electric power on the Island of 800 MW. On August 6, 1976, the Order-in-Council was passed, which requested pursuant to the Lease that CFLCo supply to Newfoundland Hydro, an agent of the Government, a total of 800 MW of electrical power generated from the waters of the Upper Churchill River watershed commencing on October 1, 1983. There was also a request for limited amounts of power for commissioning purposes prior to that date.

127 On the same day the request was dispatched to CFLCo who responded on August 31, 1976.

128 The Order-in-Council, the Transmittal Letter and the CFLCo Reply appear in Appendices A, B and C.

129 The Government then goes on to allege that pursuant to the Lease and Sections 3 and 4 of the Lease Act CFLCo was obliged to comply with the request.

130 Section 3 of the Lease Act, which is set forth in Part 2 to this judgment, provides that the Lease should have statutory effect and Section 4 provides that Section 3 should have effect notwithstanding any other statute or law.

131 The Government then went on to allege that the making of the request constituted a force majeure under the Power Contract and that that fact would relieve CFLCo from any penalty under the provisions of that agreement.

132 This plea, for whatever reason it was made, proved to be important because it in effect anticipated the subsequent plea of CFLCo that compliance with the Order-in-Council would subject it to liability by way of damages at the suit of Hydro Quebec and might trigger default under the security instruments and would not therefore be feasible and economic.

133 The Government finally contended that Hydro Quebec must have been aware of the provisions of the Lease and for this reason it would be an implied term of the Power contract that the obligation of CFLCo thereunder would be subject to its obligation to the Government under Clause 2(e).

134 That is a synopsis of the Government's claim. There are other allegations in the statement of claim to [*page205] which reference has not been made for these played no part either in the evidence or in the argument.

Part 8: The defence of CFLCo (1)

135 CFLCo is in a somewhat difficult position in this case because it was being sued by its majority shareholder and one of its co-defendants, although not necessarily its ally, was Hydro Quebec, its minority shareholder.

136 Its basic position is that if it was bound by the Power Contract, it would not be feasible and economic to provide 800 MW of electric power to the Government. This position was stated more broadly in paragraph 26 of its defence where it said that compliance with the request of the Government would constitute a breach of the Power Contract and an event of default under the security instruments and that these factors would render compliance unfeasible and uneconomic.

137 It pleads further that the Government participated in negotiations leading to the execution of the Power Contract, which contains in Clause 6.6 a provision for "recapture" of 300 MW. The Government, it alleged, had made known that this was the extent of its future requirements and according to CFLCo expressly or impliedly agreed that it would not request power in excess of that amount.

138 Further, the Government exhausted its rights under Clause 2(e) by requesting the recapture provision, Clause 6.6 of the Power Contract.

139 CFLCo says further that it relied upon the acts of the Government in that respect to its detriment and that the Government is therefore estopped by its conduct from requesting power in excess of 300 MW.

140 CFLCo also relies upon Clause 11 of Part 4 of the Lease, which excuses performance by CFLCo of its obligations under the Lease where performance is prevented, restricted, delayed or interfered with by the demand or requirement of any government or agency thereof or for any other reason beyond the reasonable control of CFLCo. It alleges that Hydro Quebec is an agency of the Government of quebec.

141 In respect of the security and other instruments referred to by the Government in its statement of claim CFLCo says that they must be referred to for the full terms thereof and for their effect.

142 CFLCo also denies that the Order-in-Council was made pursuant to the Lease and adds that in any event its refusal to comply with the request was with respect to existing facilities only.

Part 9: The defence of Hydro Quebec

143 Hydro Quebec says that the Attorney General is not the person who should bring this action to enforce the rights asserted.

144 It states that the Government is not entitled to make any request which would interfere with the delivery of electric power by CFLCo to it.

145 It further alleges that the Minister of Mines, Agriculture and Resources pursuant to the requirement of Clause 3 of Part 4 of the Lease consented to the development because in the submission of Hydro Quebec requesting the consent adequate reference was made to the Letter of Intent to enter into the Power Contract (the "Letter of Intent") which embodied the contemplated terms of the Power Contract.

146 Hydro Quebec goes on to say that under the Lease disputes between the parties are to be settled by arbitration and, apart from that, provision is made for references to the Supreme Court of Newfoundland in respect of non-observance or non-performance of obligations.

147 It relies upon the provisions of the Financial Agreement and of the Government Intervention and alleges that the latter was designed to ensure that the Power Contract would be a [*page206] continuing security under the First Mortgage Trust Deed.

148 It further pleads that the Government recognized the Power Contract and the provisions thereof and had agreed or consented to the provisions thereof, particularly those which provided for the recapture of 300 MW by it and has now waived its rights or is estopped from making the request provided for in Clause 2(e). Further in this connection it relies upon the provisions of the Letter of Intent which provided, inter alia, that CFLCo sell all its saleable energy to Hydro Quebec and that the Plant would have a firm capacity for continuous energy, subject only to a right to "recapture" 300 MW.

149 Because the provisions of the Letter of Intent and of the Power Contract were so important to the case of Hydro Quebec, extracts therefrom relating to recapture are set forth in full in Appendix D. The first portion sets forth Article 10 in the penultimate draft letter of intent. The second portion is Article 10 taken from the Letter of Intent. The final portion is Clause 6.6 as it appears in the Power Contract. It is noted that, in these last two, references to Newfoundland are deleted.

150 Hydro Quebec pleads that under the Power Contract matters in dispute between

the parties are to be resolved by Quebec courts according to Quebec law.

151 The Government had alleged that there would be a need for additional electric power and that it proposed to satisfy the need by transmitting such power from Labrador. In that respect Hydro Quebec put the Government to the strict proof that there would be a need for additional electrical energy and that the supply of the same by CFLCo would be feasible and economic having regard to the price, the cost and feasibility of transmission, the price to consumers, the demand and the availability of alternate sources of power. Most of the evidence centered around these very questions.

152 Hydro Quebec denies that the Government is entitled to make the request referred to in the Order-in-Council by virtue of the Government Intervention and the Financial Agreement. It says further that the Government has waived its rights under Clause 2 (e) in this respect except to the extent of Clause 6.6 and is estopped from now claiming them.

153 It denies that the Government has a right to assert that the passing of the Order-in-Council constitutes a force majeure or an implied term in the Power Contract since these are matters of concern only to CFLCo and Hydro Quebec and are to be determined in Quebec courts by Quebec law.

154 It also, like CFLCo, pleads Clause 11 of Part 4 of the Lease and added that the Government by not exercising its rights at the time of the Letter of Intent has waived them.

155 It denies that the request for power was valid and says that the request that was made was not in accordance with the Order-in-Council. The request should have been made prior to the Letter of Intent being executed.

156 It states that the Government is precluded from making the request by virtue of the Financial Agreement and the First Mortgage Trust Deed and because it would interfere with the rights of it and CFLCo, which rights are to be determined in Quebec courts by Quebec law.

157 Hydro Quebec also refers to amendments to the Lease Act and the Lease in 1966 and 1970. The former precludes the jurisdiction of the Public Utilities Board and the latter provides sales tax exemptions. It pleads again that a request cannot be made that will interfere with its power supply. This plea appears remote from the facts alleged in relation to it and did not become any more clear in argument.

[*page207] [158] It went on in like vein to say the request could not overrule the Newfoundland and Labrador Hydro Act, 1975, the Public Utilities Act, R.S.N. 1970, or other acts referred to in the statement of claim.

159 It takes the position that this court has no jurisdiction to deal with force majeure or implied term under the Power Contract.

Part 10: The defence of the Royal Trust (1)

160 The Royal Trust asserts that the proviso in Clause 2(e) is not an unrestricted right and is subject to the provisions of the Financial Agreement and the Government Intervention.

161 It further says that the full effect of the agreements can only be determined by reference to the total contents thereof and not by reference to selected passages.

162 It says that the Government by its intervention in the First Mortgage Trust Deed specifically approved and consented to the provisions, terms and conditions relating to the charging of the specifically mortgaged assets.

163 The Financial Agreement referred to by Hydro Quebec in its defence, plays a more important part in the defences of CFLCo and the Royal Trust, particularly the Royal Trust. The pertinent provisions thereof are set forth in Part 31. These correspond in most detail with Article 25.01 (6) of the First Mortgage Trust Deed.

164 It pleads, and relied mainly in argument, on an implied term of the Government Intervention that the Government would not do or cause to be done anything contrary to the terms of the First Mortgage Trust Deed relating to the mortgaging of the assets.

Part 11: The defence of General Trust

165 The defence of General Trust corresponds for the most part with the defence of Hydro Quebec. It will be recalled that bonds secured by the General Mortgage Trust Deed were purchased by Hydro Quebec and to some extent the interests of Hydro Quebec and General Trust are the same.

166 General Trust in addition pleads its security instruments and a voting trust dated October 28, 1968, between Brinco, General Trust Company and Hydro Quebec.

167 It concludes that any abrogation or alteration in the terms of the obligations imposed upon the parties under the Power Contract and the other agreements would prejudice the rights and the security of General Trust as trustee.

Part 12: The issues generally

168 Upon a review of the pleadings, apart from the questions of fact relating to whether or not the project is feasible or economic, there are several questions of law.

169 Dominant among these is the interpretation of the proviso in Clause 2(e).

170 This and the other points of law are listed in the index and need not be detailed here. They are dealt with in the parts contained in the division marked C entitled "Decision on Legal Questions".

171 Compliance with the request would as its consequence trigger the construction of a transmission line from Churchill Falls to Soldier's Pond near St. John's. This involves many things - great and small - such as converter stations, switching stations, conductors,

towers, cables and undersea trenches or tunnels. Each of those involves consideration of the natural factors such as adverse weather conditions, unstable environment for cable installation and repair and economic factors such as load forecasting and financibility. The end result of construction is referred to herein as the project.

[*page208] [172] Most of the 12 days of argument dealt with these points. Most of the 87 days of evidence dealt with the factual question of whether the project is feasible and economic.

173 One aspect of this question is whether CFLCo may successfully plead force majeure in an action against it under the Power Contract if it complies with the request and whether there is an implied term in the Power Contract that it would be subject to Clause 2(e). That is a question of Quebec law.

174 The other aspect involves the whole spectrum of feasibility and economics including the transmission, demand, financibility and cost estimates. That is entirely a question of fact.

175 The feasibility and cost estimates are most strongly at issue on the question of crossing the Straits of Belle Isle from Labrador to the Island and of crossing the Long Range Mountains on the Great Northern Peninsula.

176 The demand and load forecasts were also quite contentious areas.

177 The financibility strikes at the very heart of the project. Even if a decision is here made that the project is otherwise feasible and economic, it cannot ultimately be so unless those people who provide funds either by way of project financing or by way of bond purchases, or both, are themselves satisfied that the project is feasible and economic. They will have the last word!

C. Decision on Legal Questions

Part 13: Is Clause 2(e) ambiguous?

178 The language of Clause 2(e) should be set out in full at this point. It reads as follows:

> "2. Subject to the provisions, terms, conditions, exceptions and reservations of this Lease, the lease and demise of the Upper Hamilton created hereby includes the grant to the lessee during the term created by this Lease of
>
> "(e) the right to transmit throughout the province any electric power generated as the result of the harnessing of the whole or any part of the Upper Hamilton and to export from the province such power: [Emphasis start]Provided that upon the request of the Government consumers of electricity in the province shall be given priority where it is feasible and economic to do so;[Emphasis end] and"

Emphasis added.

179 The right to transmit and the right to export were only incidental to the dispute that was before court.

180 It is interesting to note that nowhere in the Lease is the express right given to CFLCo to sell energy. Because this point may be important, it should be noted at this point that the right to sell is an implied right of the Lease.

181 The right to manufacture has as a necessary companion the right to sell and indeed without this right there could be no manufacturing.

182 The question arises then as to whether the right to sell is confined to export sales and sales made pursuant to the proviso.

183 The right to transmit appears in the same subclause as the right to export. Are these two companion rights? Does CFLCo have the right to sell for export only and for the purpose of the exercise of that right the further right to transmit?

184 The proviso in Clause 2(e) indicates that there may be a sale to consumers of electricity in the province, (the "Newfoundland consumer").

185 The Lease Act was amended by Act No. 84 of 1966-67. Section 7 was amended to provide, inter alia, that the Public Utilities Act, 1964, should [*page209] not apply to:

"the supply of hydro-electric power developed under the Lease made pursuant to the Act No. 51 of 1961, as now or hereafter amended, at the Churchill Falls Power Project in Labrador to

(i) Quebec Hydro-Electric Commission
(ii) The Newfoundland and Labrador Power Commission, . . ."

186 The new section concluded with the following words:

". . . but the said The Public Utilities Act, 1964, applies to the production, storage, transmission and supply of all other hydro-electric power developed under or in pursuance of the Lease executed and delivered pursuant to this Act."

187 One may continue from this language that it was certainly within the contemplation of the Government that hydro electric power might be supplied otherwise than as enumerated in the passage first quoted above from section 7 either within or outside the province, but that the operation of the Public Utilities Act would apply where not included.

188 From this the conclusion is drawn that the right to transmit and the right to export while associated in a sub-clause are disjunctive and each right exists independently of the other. It is only upon such a conclusion that the right to transmit for the purpose of a sale within the Province could exist independently of the right to export.

189 If one questions such a conclusion on the basis that the Public Utilities Act, 1964 (which appears to be silent on the questions of production, storage and transmission) only regulated supply within the province, one may arrive at the same conclusion by noting the use of the word "throughout" in Clause 2(e) which clearly includes internal sales and the use of the word "export" which clearly means external sales.

190 If the right to supply hydro-electric power within the province is not excluded by the Lease or the Lease Act, then it exists by implication. Because it is not so excluded, it exists. As the right to sell is a necessary consequence of the right to manufacture, so is the right to transmit a necessary consequence of the right to sell.

191 These matters are only mentioned in passing. There was no debate on them and in fact the matter is only mentioned because it touches upon something that is later said herein.

192 The real struggle exists with respect to the proviso in Clause 2(e).

193 This is again reproduced, this time by itself.

"Provided that upon the request of the Government consumers of electricity in the province shall be given priority where it is feasible and economic to do so; and . . ."

194 The basic rule of interpretation of statutes is that if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. (Sussex Peerage Case (1844), 8 E.R. 1034).

195 If there is no ambiguity, then there is no problem.

[*page210] [196] There was at one time a line of cases saying that if the words are found to be unambiguous, the court must then consider whether there is "such manifest absurdity" as would enable the court in construing the legislation to say that the natural meaning of the words could not possibly be the meaning intended by the legislature. (Brown & Sons v. The Russian Ship Alina (1880), 42 L.T. 517, at 520).

197 The question came up again in R. v. The Judge of the City of London Court, [1892] 1 Q.B. 273, and in that case Lord Esher said at page 290:

"Now, I say that no such rule of construction was ever laid down before. If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity. In my opinion, the rule has always been this--if the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation."

198 In the same case Lopes, J., putting the matter perhaps in clearer perspective than

Lord Esher, said:

"I have always understood that, if the words of an Act are unambiguous and clear, you must obey those words, however absurd the result may appear; and, to my mind, the reason for this is obvious. If any other rule were followed, the result would be that the court would be legislating instead of the properly constituted authority of the country, namely, the legislature."

199 The foregoing matters are reviewed in greater detail by E.A. Driedger, The Construction of Statutes (1974), Chapter 1.

200 It is not difficult to find ambiguity in the proviso. The opening words "provided that" themselves have a variety of meanings, so many in fact that the use of those two words should generally be avoided. The interpretation will be made in Part 15. To illustrate the problem, however, it might be noted at this time that Clause 1 of Part 1 of the Lease uses the words:

". . . the Government hereby leases and demises unto the lessee full right and liberty to use exclusively . . . (the Upper Churchill.)"

201 Clause 2 indicates that the lease and demise of the Upper Churchill includes the grant of the rights thereafter enumerated including the right to transmit and the right to export.

202 In effect, therefore, the right to transmit and the right to export are being granted during the term of the Lease but subject to a proviso. Does the proviso mean that the right to transmit and to export does not exist unless the Newfoundland consumer is given priority upon request or that such rights continue to exist but are limited by whatever rights may accrue to the Newfoundland consumer upon its being given priority pursuant to a request?

203 The term "request of the Government" offers little or no problem in interpretation for it is not really ambiguous. Some query is raised as to what form a request should take. Not a great deal of time will be used in pondering this particular problem, although some reference to it will be made when consideration is given later to discussion of what is meant by an act or governmental authority.

204 The term "consumers of electricity in the province" is a very broad term. It could literally include every person in any part of the province who consumes electricity; it could include retailers of electricity such as Newlight; it could include wholesalers of electricity such as Newfoundland Hydro.

205 The problem with this particular phrase is not underlined in this [*page211] case because the Government requested that Newfoundland Hydro be given priority. As some meaning must be attributed to the language used and there would appear to be little concern that whatever the term means it must have included Newfoundland Hydro, the problem of interpretation is probably not important in this area.

206 It has to be pointed out, however, that the phrase is capable of more than one meaning and one of these meanings could be that the Government may request that CFLCo enter into the retail distribution of energy and there has to be a question as to whether that was within the contemplation of the parties.

207 The words "shall be given" seem straightforward enough but the use of the passive tense suggests that the conditions of feasibility and economics may operate not only on the donor of the priority but also on the donee.

208 The term "priority" is not in its natural habitat in this proviso. It is usually used to determine the quality of two otherwise equal claims but no claims exist here. What has been spoken of are purchase rights.

209 The words "feasible and economic" are likewise ambiguous. While the term "feasible" may only refer to whether a thing can be done or not, the term "economic" may be descriptive of something that can be done profitably or something that is the most profitable of several economic alternatives.

210 This consideration is particularly important because there are numerous alternatives to the project, all of which have varying degrees of cost effectiveness. The witnesses are not all agreed upon which is the most cost effective.

211 Finally the simple words "to do so" are ambiguous. These are tied in with the passive term "shall be given". Does the word "so" refer to the act of giving, to the act of being given or to both?

212 Those then are the ambiguities. Before proceeding with the construction of the proviso, it is necessary to comment on the various rules of interpretation that were suggested by counsel.

Part 14: Rules of construction

213 A number of rules for the construction of statutes were cited during the course of the argument. In addition to this, a number of positions were put which it was suggested had a bearing on the construction of the Lease.

1. Does the Lease have the force of law?

214 Counsel for the plaintiff urged that the Lease had the force of a statute. Numerous authorities were cited for this proposition but there seems to be no need to review them. Sections 3 and 4 of the Lease Act are set forth in Part 2 herein.

215 In reference to the Lease Section 3 says that:

". . . all and singular the provisions thereof shall have the force and effect of law for all purposes as if expressly enacted in this Act, . . ."

216 The real question in this connection is not so much whether the Lease has the force

of law but rather what is the effect of it having such force.

217 Obviously between the parties to the Lease it is of no significance, for each is bound by the Lease and the position of neither is improved by the statutory provision in section 3 of the Lease Act.

218 The obvious consequence of the Lease having the force of law is that it is binding on third parties.

[*page212] [219] If, for example, there were a provision in the Lease exempting CFLCo from the jurisdiction of the Public Utilities Board or the Labour Relations Board or the Workmens' Compensation Board, then such provision would not by itself bind the board but by virtue of Section 3 would bind it. It becomes not only the law of the parties to the Lease but also the law of the land.

220 If the Lease gave CFLCo the right to expropriate, then that too would be the law of the land.

221 If the Lease gave the right to flood land, redirect water courses, reduce water flows and things of that nature which might affect the rights of trappers, the holders of timber leases or licences, the holders of water leases or licences or others having rights affected by the rights granted under the Lease, then such persons too would be bound by the Lease (subject, of course, to the contra proferentum rule, which will be mentioned later).

222 If the Lease says that CFLCo has the right to export or does not have the right to export, then that is the law of the land. If the Lease says that CFLCo has the right to export only after the requirements of the Newfoundland consumer from time to time have been met, then that is the law of the land.

223 In such a context, its impact is mainly bilateral, but if it is the law of the land, it is binding on Hydro Quebec to the same extent as it is binding on anybody else.

2. Is the Lease Act a private act?

224 In Craies, Statute Law (7th Edition 1971), the following passage appears at page 557:

"Parliament now understands by private Bills all those projects of laws which affect the interests of particular localities, persons or corporations, and are not of a public general character. Every Bill for the particular interest or benefit of any person or corporation, whether it is brought in upon petition or motion, or report from a committee, or brought from the Lords, is a private Bill within the meaning of the table of fees established by the Standing Orders of the House of Commons."

225 Continuing at page 559 he says:

"Blackstone defines private or special Acts 'to be rather exceptions than rules, being those

which only operate upon particular persons and private concerns, such as the Romans entitled senatus decreta, in contradiction to senatus consulta, which regarded the whole community.'"

226 In the face of all this, however, Section 5(1) of the Interpretation Act reads as follows:

"5.--(1) Every Act shall, unless by express provision it is declared to be a private Act, be deemed to be a public Act and may be declared on and given in evidence without being specially pleaded."

227 The courts have, oddly enough, tended to disregard this provision. In St. Hyacinth Gas Company v. St. Hyacinth Hydraulic Power Company (1895), 25 S.C.R. 168, at page 173, Sir Henry Strong, C.J., in reference to legislation that had a clause declaring it to be a public act said:

"It is none the less a private Act for the reason that it contains a clause declaring it to be a public Act. In Dawson v. Paver, (5 Hare 434), Wigram V.C., says that:

'Whether an Act is public or private does not depend upon any technical considerations (such as having a clause or declaration that the Act shall be deemed a public Act) but upon the nature and substance of the case.'"

228 Subsequent cases have overwhelmingly supported this view, which [*page213] undoubtedly comes from a high authority. It has been generally held that legislation such as Section 5 only means that every act not declared to be a private act is a public act for the purpose of being declared upon and being given in evidence without being specially pleaded.

229 The first and last portion of the enactment are linked by the word "and". The first part lends itself to no ambiguity and none is created by the second part. One may be excused for wondering how these decisions were reached. Be that as it may it is an interpretation that is now well established and it ill behooves the court at this level to challenge it; nor does it seem necessary, for the same result with respect to interpretation would follow anyway.

230 In truth, the issue in this and other cases has not been whether the act was a private act or a public act but rather whether it has the nature of a private act or a public act. It is its nature that influences its construction.

231 The legislature appears to have acknowledged that a public act may have the nature of a private act by virtue of Section 14, which reads as follows:

"Where an Act is of the nature of a private Act no provision of the Act affects the rights of any person save only as mentioned or referred to in the Act."

232 The conclusion is that by virtue of section 5 of the Interpretation Act the Lease Act

is a private act. However, by virtue of the jurisprudence on the distinction between private acts and public acts the Lease Act is an act in the nature of a private act.

233 Logically, therefore, the rules of construction that apply to private acts but not to public acts apply equally to acts that are in the nature of private acts and not public acts.

3. The contra proferentem rule.

234 This rule originally designed for assistance in the construction of contract has been found useful in the construction of private acts. The original Latin rule reads "verba chartarum fortius accipiuntur contra proferentem" translates:

"The words of deeds are to be interpreted most strongly against him who uses them."

235 The use of Latin in the law is more durable than its use in other areas. A skeptic might consider that its continued use to enunciate principles of law gives them an aura of authority that they might not otherwise have. More probably, however, the continued use is derived from the convenience of using a more compact language and of being able to select key words from a Latin passage which immediately conjure up in a legally trained mind an entire principle of law.

236 This is well illustrated with such extracts as contra proferentem, eiusdem generis, in pari materia and expressio unius.

237 In Osborne's Concise Law Dictionary (6th Ed. 1976) it is said that contra proferentem expresses the doctrine that the construction least favourable to the person putting forward an instrument should be adopted against him.

238 This rule and its use in the interpretation of private acts has never been questioned.

239 In Ex parte Eton College (1850), 20 L.J. Ch. 1, Lord Chancellor said at pages 8 and 9:

"Now it has often been said that these Acts of Parliament are to be considered as bargains between the railway companies and the public. It [*page214] will be remembered that it was a railway company who prepared those Acts of Parliament . . . and it has been so repeatedly held, that this has become an axiom, that where the Acts of Parliament leave some doubt as to any matter between the public and the company, the inclination ought to be rather to give such construction to the Act as is consistent with the justice of the case, if the words will bear them, and rather to put a construction adverse to the company and in their favour, [Emphasis start]inasmuch as they are the persons who have the preparation of the Act, and have the best means of protecting themselves."[Emphasis end]

Emphasis added.

240 In the same vein in Parker v. Great Western Railway (1884), 135 E.R. 107, Tindal, C.J., at page 21 said:

"And it is to be observed, that the language of these Acts of Parliament is to be treated as a language of the promoters of them. They ask the Legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Acts passed under such circumstances, should be construed strictly against the parties obtaining them, but liberally in favour of the public."

241 Such reasoning was adopted in the Canadian case Re New Brunswick and Canada Railway Company (1878), 17 N.B.R. 667 (C.A.).

242 The case of Altrincham v. Cheshire (1885), 15 Q.B.C. 597, is often referred to. At page 602 and 603 Esher, M.R., said as follows:

"Now it is quite true that there is some difference between a private Act of Parliament and a public one, but the only difference which I am aware of is as to the strictness of the construction to be given to it when there is any doubt as to the meaning. In the case of a public Act you construe it keeping in view the fact that it must be taken to have been passed for the public advantage, and you apply certain fixed canons to its construction. In the case of a private Act, which is obtained by persons for their own benefit, you construe more strictly provisions which they allege to be in their favour, because the persons who obtain a private Act ought to take care, that it is so worded that that which they desire to obtain for themselves is plainly stated in it. But, when the construction is perfectly clear, there is no difference between the modes of construing a private Act and a public Act, and, however difficult the construction of a private Act may be, when once the court has arrived at the true construction, after having subjected it to the strictest criticism, the consequences are precisely the same as in the case of a public Act. The moment you have arrived at the meaning of the legislature, the effect is the same in the one case as in the other."

243 It was argued that it is a rule of interpretation that where in a private act there is an ambiguity, it is to be construed against the entrepreneur and in favour of the public. Such a rule was reflected in the case of Stourbridge v. Wheeley (1831), 109 E.R. 1336, where Tenterden, C.J., said at page 1337:

"This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this - that any ambiguity in the terms of the contract must operate against the adventurers, and in favour of the public; and the plaintiffs can claim nothing which is not clearly given to them by the Act."

244 On the 10th Edition of Maxwell on Interpretation of Statutes at pages 303 and 304 the following passage appears:

"Enactments of a local or personal character which confer any exceptional exemption from a common burden, [*page215] or invest private persons or bodies, for their own benefit and profit, with privileges and powers interfering with the property or rights of others, are construed against those persons or bodies more strictly, perhaps, than any other kind of enactment. Any person whose property is interfered with has a right to require that those

who interfere shall comply with the letter of the enactment so far as it makes provision on his behalf. To deprive him, by a private Act, of the right to do what he was doing for reward at the passing of the Act requires clear and unequivocal words in the private Act. The courts take notice that the statutory powers are obtained on the petitions framed by their promoters and, in construing them, regard them, as they are in effect, as contracts between those persons, or those whom they represent, and the legislature on behalf of the public and for the public good. Their language is therefore treated as the language of their promoters, who asked the legislature for them and, when doubt arises as to its construction, the maxim (ordinarily inapplicable to the interpretation of statutes) that verba cartarum fortius accipiuntur contra proferentem, or that words are to be understood most strongly against him who uses them, is justly applied. For this reason, saving clauses in a private Act, which may be said to have been inserted by way of compromise, may be given a wider interpretation than the rest of the Act. The benefit of the doubt is to be given to those who might be prejudiced by the exercise of the powers which the enactment grants and against those who claim to exercise them."

245 (The reference to a saving clause in the second last sentence appears somewhat out of context. Maxwell relies on Tanner v. Oldman, [1896] 1 Q.B. 60, which appears to stand alone in support of this principle. Whether or not it is a valid statement of the law, it cannot be supported by the contra proferentem rule.)

246 Maxwell appears to support the view expressed in the Stourbridge case but on the basis that it arises from the principle of contra proferentem.

247 If the rule in the Stourbridge case was allowed to stand alone, it would appear that the court was trying to undo the law of the jungle, to provide protection for the weak against the strong. While such a motive is not to be questioned, it is going slightly farther than the contra proferentem rule suggests. Private acts generally confer benefits upon an entrepreneur and he is not to be deprived of these rights unless the language upon which he relies to support those rights is ambiguous. In the case of an ambiguity the construction which is least favourable to him will usually be adopted by the court, not because he is an entrepreneur, but because he is the one who produces them or puts them forward.

248 This is derived from the principle that the person who selects the language to support the rights which he claims is expected to use or to approve the use of language which will clearly support those rights.

249 Such rights cannot be supported by ambiguous language.

250 The contra proferentem rule is basically a rule of contract which has been brought into the interpretation of private acts. Such use developed largely in the hearing of the many cases involving railway companies after the development of rail transportation in England and later in Canada.

251 It appears to have been largely assumed, probably correctly so, that these acts were drafted by or on the petition of the companies and that the language had the approval of such companies.

252 It should be noted in connection not only with the contra proferentem rule but also in connection with all the other rules that, unlike rules of law, they are not inflexible but [*page216] are guides to interpretation in cases of ambiguity (Craies on Statute Law (7th Ed. 1971), page 10).

253 In Stevenson v. Reliance Petroleum Limited and Canadian General Insurance Company, [1956] S.C.R. 936; [1954] 4 D.L.R. 730, Cartwright, J., suggested that the contra proferentem rule was really a last resort. At page 953 S.C.R. he said:

"The rule expressed in the maxim, verba fortius accipiuntur contra proferentem, was pressed upon us in argument, but resort is to be had to this rule only when all other rules of construction fail to enable the court of construction to ascertain the meaning of a document."

4. Statutory or contractual rule.

254 The question arises as to whether the Lease itself is to be interpreted according to the rules of construction of statute or the rules for the construction of a contract. These rules are not always the same.

255 This is, perhaps, a small point because the distinction between the two sets of rules is not great and indeed in this case has a very low profile.

256 Lord Esher, M.R., in the Altrincham case suggested that subject to the application of the contra proferentem rule a private act (which has been likened to a contract - see Ex parte Eton College, supra) should be construed just as any other act.

257 In the case of Davis & Sons, Ltd. v. Taff Vale Railway Co., [1895] A.C. 542, Lord Watson said at page 552:

"In cases where the provisions of a local and personal Act directly impose mutual obligations upon two persons or companies, such provisions may, in my opinion, be fairly considered as having this analogy to contract, that they must, as between those parties, be construed in precisely the same way as if they had been matter, not of enactment, but of private agreement. It was in that sense that in Countess of Rothes v. Kirkcaldy Waterworks Commissioners 7 App, Cas. at p.. 707 I ventured to observe that "such statutory provisions as those of s. 43 occurring in a local and personal Act, must be regarded as a contract between the parties, whether made by their mutual agreement, or forced upon them by the Legislature." For all purposes of construction, I thought that the provisions which the House had to interpret might be legitimately viewed in that light. But it did not occur to me then, nor am I now of opinion, that the analogy of contract, for it is nothing more, could, in an English case especially, be carried further."

258 It is logical to extend this view to the situation of an act in the nature of a private act which not only imposes obligations upon two parties but actually incorporates into itself the contract, the execution of which is thereby authorized.

259 An act in the nature of a private act then is to be construed more strictly against those who obtain it for the reasons expressed by Lord Esher, M.R.

260 If we extend the factual situation in the Davis & Sons case from one where a private agreement is implied to one where a private agreement actually exists, it is logical to suppose that the "private" act should be interpreted according to the rules for the construction of a contract.

261 The difficulty here is with the provisions of the Lease Act, which gives the lease the force of law.

262 In this connection it would appear that those parts of the Lease Act which affect the public should be interpreted according to rules for the construction of a statute, while those [*page217] which do not should be interpreted according to the rules for the construction of a contract. It is noted that in all of the cases dealing with the contra proferentem rule concerning entrepreneurs, the rights of the entrepreneur were embodied in the statute, while the rights of the public were external to the statute.

263 No such situation exists in this conflict. The rights of the public in this contest are not external to the lease or the Lease Act, but are embodied in Clause 2(e). In that respect they do not exist outside of Clause 2(e). Whatever the rights of the public are, they must be determined solely by reference to Clause 2(e).

264 The rules of interpretation for contracts rather than statutes are applicable to Clause 2(e). Either way, of course, the contra proferentem rule applies, but as will be seen, it does not necessarily apply to the benefit of the entrepreneur.

5. Similar expressions have similar meaning.

265 Where the same expression is used more than once, then prima facie the inference is that the expression has the same meaning wherever it is used.

266 In support of this counsel for the Government cited the case of Wolf Company v. R. (1921), 43 S.C.R. 141, and Ballantyne v. Edwards, [1939] 3 D.L.R. 554. In the latter case Rinfret, J., said at page 555:

"According to the accepted rule of interpretation, the same word used throughout the same legislation should be construed as having the same meaning."

267 That was a Quebec case. The judge noted that the Civil Code rule and the common law are the same.

268 This rule is perhaps common sense and not much need be said about it. As in all cases, of course, it must not be used without reference to other rules that may be applicable and it must be recognized that the contexts in which the same expression appears may be so different that the expression cannot have the same meaning in each.

6. Economic reality and absurdity.

269 Part 13 dealt with absurdity. Although the references were there expressed with certainty, it must be acknowledged that some uncertainty in this area of the law of construction remains. This, of course, is only of passing interest in this particular case as an ambiguity has been found and the question of whether unambiguous language that leads to an absurdity may be construed by the court does not arise.

270 Frequently quoted are the words of Lord Wenselydale in Grey v. Pearson (1857), 6 H.L.C. 61, which appear at page 106:

"I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther."

271 A similar view was expressed by Spence, J., in City of Toronto v. W.H. Hotel Limited, [1966] S.C.R. 434, at page 440:

"I agree that this transaction being an ordinary commercial transaction it is the duty of the court in interpreting that document to avoid such an interpretation as would result in commercial absurdity. Duff, J., in Reddy v. Strople, (1911), 44 S.C.R. 246, at p. 257 added to the canon that the primary meaning if unambiguous should be adopted, the proviso [*page218] that it should be "sensible with reference to the extrinsic circumstances . . . ". In such a course the learned late Chief Justice of this Court adopted in terms the "golden rule of interpretation" as stated by Lord Wensleydale in Grey v. Pearson (1857), 26 L.J. Ch. 473 at p. 481. I suggest it is also put with accuracy and relevancy to the question here at issue by Rigby, L.J., in Diederichsen v. Farquharson Brothers, [1898] 1 Q.B. 150, at p. 159:

'If the literal construction leads to an absurdity, repugnancy, or inconsistency which reasonable people cannot be supposed to have contemplated under the circumstances, it ought if possible to be modified so as to avoid such a result.'"

272 In Schuler A.G. v. Wickman Machine Tool Sales Ltd., [1974] A.C. 235, Lord Reid said at page 251:

"The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."

273 The instrument under consideration there was a contract.

274 In Prenn v. Simmonds, [1971] 3 All E.R. 237, Lord Wilberforce said at page 240:

". . . if it can be shown that one interpretation completely frustrates that object, to the extent of rendering the contract futile, that may be a strong argument for an alternate interpretation, if that can reasonably be found."

275 In Chitty on Contracts, (24th Edition 1977), it is said in paragraph 704:

"The rule that words must be construed in their ordinary popular sense is liable to be departed from where that meaning would involve an absurdity or create some inconsistency with the rest of the instrument, or where, if they were so construed, they would impose upon the contractor a responsibility which it could not reasonably be supposed he meant to assume."

276 In reviewing the jurisprudence on the matter of the interpretation of instruments that contain no ambiguity one is continually referred back to the basic proposition cited by Chitty.

277 It seems almost as though the existence of the absurdity, repugnance or inconsistency themselves create ambiguity.

278 While it may or may not be open to doubt that an absurdity, repugnance or inconsistency can justify a court in departing from the clear meaning of the language, there surely can be no doubt that where these factors exist and there is also an ambiguity, the course for the judge to follow is the one that does not lead to any such result.

279 Compare these decisions and comment with the decision of Finnemore, J., in Holmes v. Bradfield R.D.C., [1949] 2 K.B. 1, where he said at page 7:

"Of course the mere fact that the results of applying a statute may be unjust or even absurd does not entitle this court to refuse to put it into operation. It is, however, common practice that if there are two reasonable interpretations, so far as the grammar is concerned, of the words in an Act, the courts adopt that which is just, reasonable and sensible rather than one which is, or appears to them to be, none of those things."

280 In Nokes v. Doncaster Amalgamated Collieries, [1940] A.C. 1014, at 1022, the following passage is to be found:

[*page219] "The golden rule is that the words of a statute must prima facie be given their ordinary meaning. We must not shrink from an interpretation which will reverse the previous law, for the purpose of a large part of our statute law is to make lawful that which would not be lawful without the statute, or, conversely, to prohibit results which would otherwise follow. Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words, but where, inconstruing general words the meaning of which is not entirely plain there are adequate reasons for doubting whether the Legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction.

[Emphasis start]At the same time if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."[Emphasis end]

Emphasis added.

281 As stated, we are not concerned here with a case of unambiguous legislation leading to an absurdity. There are ambiguities and the rule with respect to the interpretation of statutes is that a construction which would reduce the legislation to futility should be avoided.

282 Were there no ambiguity, one would be powerless to offer an interpretation that leads to no absurdity because if there is no ambiguity there is but one path to follow and we must go wherever that leads us.

283 The Schuler case, supra, expressed the law clearly. So too does the Diederichsen case quoted by Spence, J., in the City of Toronto case, supra, and the Prenn case, supra. Note in each case the use of the words referring to the modification or alternative interpretation of meaning - "if possible" in the first, "if that can be reasonably found" in the second.

284 In the same vein it may be said, for this was the expression used in argument, that cognizance must be made of the economic reality of the situation and that if one of two possible interpretations defies the economic reality, then the other interpretation ought to be adopted. If an interpretation defies or denies economic reality, then an alternative meaning should be found if there is one to be found. This applies equally to contracts and statutes.

7. Acts of the parties

285 It was argued that when parties have acted on the basis of certain assumed facts or positions concerning the interpretation or application of a contract, the court will interpret the contract in accordance with those facts and positions. While earlier cases support this position, it is not a concept which has survived under modern jurisprudence.

286 There was an unequivocable statement in support of the proposition is In Re Labrador Boundary, [1927] 2 D.L.R. 401. At page 422 Viscount Cave, D.C., said:

"The Colony of Newfoundland claimed to support its case founded on the documents by a reference to evidence showing that the annexation of the "coast" had from the year 1763 onwards been understood and treated by everyone as including the whole area lying between the sea and the watershed or "height of land;" and there is no doubt that, where a document is ambiguous, evidence of a course of conduct which is sufficiently early and continuous may be taken into account as bearing upon the construction of the document."

[*page220] [287] In that matter the contending parties agreed that reference might be had to any evidence which might be thought material and proper to be considered. Both parties felt that no available material which might possibly bear upon the question to be decided should be excluded from consideration.

288 In later cases, an examination shows that to interpret the contract in question as urged would produce a result that was inconsistent with the subsequent acts of the party and it was considered to create an absurdity.

289 Other cases were nothing more than thinly veiled cases of estoppel.

290 The present concept was clearly stated in Miller v. Whitworth, [1970] 1 All E.R. 796. That case was referred to by Lord Denning, M.R., in Amalgamated Investment and Property Company Limited v. Texas Commerce International Bank Limited, [1981] 3 All E.R. 577, at 582-583:

"For many years I thought that when the meaning of a contract was uncertain you could look at the subsequent conduct of the parties so as to ascertain it. That seemed to me sensible enough. The parties themselves should know what they meant by their words better than anyone else. In this I was supported by Watcham v. Attorney General of East African Protectorate, [1919] A.C. 533, [1918-19] All E.R. Rep. 455, a Privy Council case which was applied repeatedly in my early days in the common law courts. But it was always repudiated by the more logical minds in Chancery. Eventually the logicians prevailed. In James Miller (James) and Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd., [1970] All E.R. 796, at 798; [1970] A.C. 583, at 603, Lord Reid said:

'. . . it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.'

"I can understand the logic of it when the construction is clear; but not when it is unclear. Still, we must accept it. Nevertheless a way of escape was left open by Viscount Dilhorne in that very case when he said ([1970] 1 All E.R. 796, at 805; [1970] A.C. 583, at 611): '. . . subsequent conduct by one party may give rise to an estoppel.' So here we have available to use, in point of practice if not in law, evidence of subsequent conduct to come to our aid. It is available, not so as to construe the contract, but to see how they themselves acted on it. Under the guise of estoppel we can prevent either party from going back on the interpretation they themselves gave to it."

291 It is to be noted that Lord Denning, seeing that one door had been closed in his face, characteristically discovered at the same time that another one was open and held that while subsequent conduct might not assist in the interpretation of a conduct, it could create an estoppel.

292 It was argued that in respect of the interpretation of contracts by subsequent conduct the Canadian law was different than the English law. Having examined the cases

cited there is not sufficient force to the decisions to warrant a finding that the Canadian law is in fact different than the English law.

293 In the circumstances the proposition cited under this subheading is rejected but will be discussed further in Part 19 dealing with estoppel.

8. The origins of the lease as an aid to interpretation.

294 There is little doubt on the law in this case. It was summed up by Lord Wilberforce in Prenn v. Simmonds, [1971] 3 All E.R. 237, at 241, in the following terms:

[*page221] "In my opinion, then, evidence of negotiations, or of the parties' intentions, . . . ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively of the 'aim' of the transaction."

295 Historical matters relating specifically to the Lease have been discussed in Parts 2 and 3 and no further comment is made on this principle at this time.

9. Provisos not restrictive.

296 The second plaintiff argues that a proviso should generally speaking be interpreted restrictively and not so as to effectively interfere with or eliminate the substantial rights conferred by the instrument in question.

297 There is no difficulty in agreeing with the proposition that a proviso should not be interpreted so as to eliminate the right to which it is appended.

298 It is equally axiomatic that a proviso may be interpreted so as to limit the right to which it is appended; otherwise it would not be a proviso.

299 The use of the term "proviso" is, as mentioned unfortunate but, however the intended term is set forth, if it is of the nature of the one that appears in Clause 2(e) of the Lease, it would normally be expected to reduce in some fashion what would have been given initially had the proviso not been there.

300 There appears to be no need to refer to the cases cited on this question for it must be obvious that a proviso as used in Clause 2(e) affects, but does not eliminate, what would otherwise have been granted.

Part 15: The interpretation of Clause 2(e).

1. Clause 2(e)

301 The language of the clause must be brought forward once again for quick reference in its consideration.

302 It must be remembered at the outset that the principal subject matter of the Lease is

the watershed of the Upper Churchill, which is leased to CFLCo for 99 years from May 16, 1961. It is during this period that the right to transmit and export energy may be enjoyed by CFLCo.

303 Once again then, Clause 2(e) reads as follows:

"Subject to the provisions, terms, conditions, exceptions and reservations of this Lease, the lease and demise of the Upper Hamilton created hereby includes the grant to the lessee during the term created by this Lease of

(e) the right to transmit throughout the province any electric power generated as the result of the harnessing of the whole or any part of the Upper Hamilton to export from the province such power: [Emphasis start]Provided that upon the request of the Government consumers of electricity in the province shall be given priority where it is feasible and economic to do so; and"[Emphasis end]

Emphasis added.

304 Comment has already been made on the right to transmit and the right to export in Part 13. The real issue is the meaning of the concluding words of the clause which is called the proviso.

2. "Provided that . . . "

305 The words "provided that" are perhaps the most overused and least [*page222] understood words in the drafting of statutes and contracts. They have a variety of meaning and frequently their use is completely redundant. Reviewing the standard law dictionaries, such as Black's Law Dictionary (1952), one finds that they may introduce

(a) a condition;
(b) a limitation;
(c) a qualification;
(d) a restraint;
(e) a modification; or
(f) a covenant.

306 In the various contexts in which they are used, they may be found to mean

(a) if;
(b) but;
(c) but not unless; and
(d) provided always and it is hereby agreed that (a redundancy).

307 Some of the functions of the words are to defeat, limit, enlarge or create what precedes them. An example of defeasance is the proviso for redemption in a mortgage. A proviso for limitation is one that is similar to a reservation. A proviso for an enlargement or creation could exist in a grant of real estate where a grant is enlarged or comes into

existence upon the occurrence of an uncertain event (see Stroud's Judicial Dictionary, (3rd. Ed.), page 2364).

308 In viewing their use in the proviso, one is immediately attracted to the view that the proviso is a reservation or limitation.

309 However, upon an examination of Clause 2(e) one sees immediately that what is reserved is a right to purchase energy, but what is limited is a right to transmit and a right to export energy.

310 The right limited and the right reserved are inconsonant.

311 What has apparently been abridged by the proviso is the right to sell. The right to export and the right to transmit continue subject to whatever limitations there might be on the right to sell. If the proviso is to be a reservation or a limitation, then it is illmatched to the words which precede it.

312 It is interesting to note the language of Clause 9(5) of the Brinco Agreement, which reads as follows:

"(5) In the event of the exercise of the water power rights hereby granted, the Corporation shall not export any electric power from Newfoundland or Labrador without the previous consent of the Government, which consent shall not be unreasonably withheld, having regard to the most economical and efficient means of utilizing such electric power and to the requirements of consumers or potential consumers within Newfoundland and Labrador."

313 Here we have the same sort of matching. There is an express prohibition against exporting power without consent and in determining whether or not the consent was to be withheld, the Government would have regard to the requirements of the Newfoundland consumer.

314 If one were to construe Clause 2(e) according to the rules for the interpretation of statute, we might have regard to earlier statutes. This is not the case, however, with respect to the intpretation of contracts.

315 Clause 9(5) prohibits export without consent. Clause 2(e) expressly permits it subject to whatever effect the proviso may have upon it.

316 The proviso is not a limitation on the rights granted by Clause 2(e) because the obligation to sell to a Newfoundland consumer subtracts from the right to sell to others and only indirectly affects the right to export.

[*page223] [317] The right to export is not attached to any quantity of energy. The language of Clause 2(e) is "any electrical power".

318 It is not a limitation. By the same token one can probably eliminate the term as a

modification. It is not a restraint, for the language of the proviso does not admit of such a result.

319 It might be a qualification. It might mean simply "if" or "but not unless". In this interpretation one would interpret the clause to mean that the right to transmit and the right to export only exists while the Newfoundland consumer has priority upon the request of the Government.

320 Upon examination, however, such an interpretation does not seem possible. The clause does not indicate whether one or many requests may be made. Whether one or more requests be made, however, one only may be made at a given point in time and that has no dimension. The right to transmit and the right to export has dimension; they continue during the term of the lease. They cannot be qualified by an event that has no dimension in time unless, of course, the qualification is a prerequisite to the existence of the right, which it obviously is not in this case.

321 The term is not an enlargement or a creation of rights.

322 It could be interpreted as a defeasance of right but this, too, is an interpretation not permitted by the language where rights to transmit and export are purportedly matched with the obligation to sell.

323 The only interpretation that blends with the language and the punctuation is that the term means "provided always and it is hereby agreed that". These words are largely superfluous and might be construed as a 'conjunctive clause' if there is such a thing. Upon this interpretation, Clause 2(e) without the proviso and the proviso become separate paragraphs, each standing on its own.

324 This is a reasonable interpretation. If the proviso was intended to have a bigger task, it falls short of such intentions.

325 (In effect, it becomes a reservation on the implied right to sell but its extent is limited as hereafter shown.)

326 Such an interpretation precludes a disharmony that otherwise exists. The right to transmit and the right to export are not interfered with.

327 The priority of the Newfoundland consumer is not interfered with.

328 The only thing that is interfered with is the implied power of sale and this is only interfered with to the extent that, subject to the interpretation of "priority", a sale must be made to the Newfoundland consumer.

329 The drafter probably equated the right to sell with the right to export. It was not considered when the Lease was drafted that the Province could consume anything but a small portion of the proposed energy that would be generated from the Plant and that the project could only work if there were "sales west", that is to say, export sales directed to

markets beyond the western boundaries of the Province of Labrador.

330 In result, interpretation of the words "provided that" is that they mean "provided always and it is hereby agreed" and have the same affect as if the proviso without the words "Provided that" had appeared separately from the rest of clause 2(e).

3. Upon the request of the Government.

331 These words require only brief comment. Government is defined in the lease to mean Lieutenant-Governor in Council. It follows therefore that the [*page224] Lieutenant-Governor in Council must make the request or direct that the request be made on his behalf.

332 In actual fact the Order-in-Council was the request. In the Order-in-Council the Minister of Mines and Energy was directed to forward a certified copy of the Order-in-Council to CFLCo.

333 The Order-in-Council is reproduced in Appendix A.

334 It is interesting to note that although the Order-in-Council noted that priority should only be given where it is feasible and economic to do so, it is nowhere suggested that such conditions exist.

335 In fact, in the seventh recital of the Order-in-Council reference is made to an investigation and the conclusion of the investigation is that additional power and energy would be needed on the Island beginning in 1983.

336 It is not required, of course, that the request specify that the giving of priority is reasonable and economic. The priority, however, must be granted if these conditions exist and if there is disagreement as to whether or not they exist, then the matter would normally be resolved by arbitration under the Lease.

337 In this particular case court action has been commenced and no application was made for a stay by CFLCo because of the arbitration clause. It has therefore become incumbent upon this court to make the decision as to whether it is feasible and economic if such a decision becomes necessary.

338 There appears no difficulty or ambiguity with respect to the form of the request. Conceivably it might have taken other equally valid forms. When it comes directly in the form of an Order-in-Council, it seems to be above reproach; although one might believe that such a request would not normally be made in this fashion.

4. Consumers of electricity in the province.

339 This is a term that permits at least four meanings and, in fact, may have all four meanings. The meanings are:

(a) the wholesale distributor such as Newfoundland Hydro;

(b) the retail distributor such as Newlight;
(c) the industrial consumer; and
(d) the domestic consumer.

340 For the purpose of convenience, the term consumers of electricity in the province has been defined as "the Newfoundland consumer". The use of the plural in the original term contemplates more than one consumer.

341 In section 7 of the Lease Act it was originally provided that the Public Utilities Act should not apply to sales made by CFLCo to satisfy the commitments of the Twinco project which had been absorbed into the Churchill Falls project. This amounted to 225 MW. It was at that time contemplated that all other sales should be subject to the Public Utilities Act.

342 In 1966-67 the Lease Act was amended to provide that that act should be inapplicable, not only to energy supplied to satisfy the obligations of the Twinco project, but also to energy supplied Hydro Quebec and the Newfoundland Hydro under any written agreement.

343 With two exceptions, which are not important here, the Public Utilities Act applied to all other production, storage, transmission and supply of other hydro electric energy developed at Churchill Falls pursuant to the Lease.

344 It seems at that point that the Government was contemplating that the Newfoundland consumer should be Newfoundland Hydro and, if at any time there were a sale to it under a written agreement, the Public Utilities Act would not apply. It does not, however, close the door on other sales, [*page225] such as sales to Newlight, sales to commercial consumers and sales to domestic consumers.

345 With the exception of those items expressed by Section 7 of the Lease Act as amended to be exempt from the provisions of the Public Utilities Act, that act applied to any sale by CFLCo whether a block sale, which presumably would be done normally by agreement, or a sale to members of the public or certain classes of the public where the rates, tolls and charges would be established or at least approved by the Public Utilities Board.

346 It is unnecessary to give very much consideration to the interpretation of the term "consumers of electricity in the province" in this particular case. It is clear that Newfoundland Hydro is a consumer of electricity in the province. There may be some doubt as to whether there is contemplated by this section retail consumers or industrial or commercial consumers. These would involve the establishment of trunk transmission lines, distribution facilities, distribution transmissions lines, the establishment of rates, tolls, charges and a base rate to be approved by the Public Utilities Board and a system for the measurement of sales, billing for sales and collection of accounts for this particular level of enterprise.

347 It seems unlikely that this was contemplated by the parties at the time the

agreement was entered into. It is fortunately unnecessary to make a decision on the point at this point as it is not really in issue.

348 It is not to be doubted that Newfoundland Hydro does come within the term.

5. Shall be given.

349 There was some discussion in argument as to whether or not the term "feasible and economic" applied only to the supply of power by CFLCo and not the purchase of that power by the Newfoundland consumer. In support of this contention, reference was made to Clause 4 of Part II, which reads as follows:

> "4. the lessee shall in the procuring of materials, equipment and labour for any work undertaken by it or for its account under the terms of this Lease [Emphasis start]give[Emphasis end] preference, [Emphasis start]where it is feasible and economic to do so,[Emphasis end] to material and equipment originating, manufactured or distributed and serviced in the Province of Newfoundland and prior opportunity to workmen whose usual place of residence is in the said province and shall use its best endeavours to give effect to this provision."

Emphasis added.

350 The argument referred to the rule that where similar words or similar expressions are used in different places in a document, they should be given similar meaning. Bearing in mind that that is but a guide and not an absolute rule to interpretation, there is no argument with it.

351 The argument continued that there was no doubt under Clause 4 that feasible and economic is determined from the subjective point of view of CFLCo. Again, there is no argument with this position.

352 Nor is there any argument that the same words "where it is feasible and economic to do so" are used.

353 But there is a difference. That difference is the use of the active verb "shall . . . give" used in Clause 4 and the passive verb "shall be given" used in Clause 2(e).

354 The distinction is underlined by the following table:

See table next page. [*page226]

Subject	Verb	Direct Object	Indirect Object
4. The Lessee shall give		preference	to (the Newfound-land supplier)

2(e). (the Newfoundland consumer)	shall be given	priority	(by the Lessee)

(The underlined term is implicit in Clause 2(e).)

355 Nothing more need be said about this distinction at this point. It will become apparent what the problem is when the words "to do so" are discussed. By themselves the active verb and the passive verb as used make little difference in each case. They impose upon CFLCo the obligation to give something to somebody.

356 The application of the term feasible and economic is open to doubt. When it applies to the act of giving it clearly applies to the donor. When it applies to the act of being given, it may apply to the donor, the donee or both.

357 This will be considered under subheading 8 dealing with the words 'to do so'.

6. Priority

358 The question of what is meant by priority is a troublesome one. The obligation of CFLCo is to give a priority. At this point that priority does not exist. The power of the Government is to request that a priority be given and this judgment will determine whether or not there is a liability to give priority. If the judgment pronounces in favour of the Government in this respect, then the priority will for legal purposes be deemed to have existed from the date of the request for the same, because if the right existed to request the priority, then the obligation to give it existed at the time that the request was made.

359 (There is an issue as to whether proof of entitlement must be made in respect of that period or a subsequent period. That matter is discussed in Part 24. The entitlement may by virtue of that Part have a later date.)

360 If it is assumed then that a proper request was made on August 6, 1976, the date of the Order-in-Council, then the priority existed from that date.

361 What is it? A priority is not a property right; it is not an option.

362 In the context of the Lease it would be nothing more than a right of first refusal to purchase electricity that may be available for sale.

363 There are few legal definitions of "priority".

364 The following definition appears in Black's Legal Dictionary:

"Priority: Precedence; going before.

A preference or precedence.

When two persons have similar rights in respect of the same subject matter, but one is entitled to exercise his right to the exclusion of the other, he is said to have priority."

365 Webster defines it as follows:

"priority: the quality or state of being prior; precedence in date or position of publication; superiority in rank, position, or privilege; legal precedence in exercise of rights over the same subject matter;"

366 In respect of priority the Government suggests that it is in the nature of a reservation; Hydro Quebec, without offering an alternative, suggested it as something less than a [*page227] reservation. For convenience it is to be referred to herein as a right, although that term perhaps is itself too flattering. Both CFLCo and Hydro Quebec suggested that whatever it was, the right was one which had to be exercised prior to the execution and delivery of the Power Contract.

367 Such an interpretation, however, is hardly reasonable, for there is no provision in the Lease under which CFLCo is bound to give the Government notice of any sale. If a prior right is to be exercised, the person having that right obviously must be notified if it is about to be superseded so that he may have an opportunity to assert his prior right. In actual fact, however, the right did not exist at the time of the Power Contract. The right does not come into existence unless the Government makes a request. No request was made until August 6, 1976. Assuming that the Government is entitled to have the right extended to the Newfoundland consumer as of that period, then it is only from that period that such right exists.

368 There are, in effect, two rights. The first is the right of the Government to request the priority and the second the right of the Newfoundland consumer to exercise that priority (which, of course, could only be enforced by the Government because there is no third party beneficiary legislation in this province).

369 Some difficulty is encountered in relating the words 'priority', and 'feasible and economic'. From a common sense point of view, the granting of an option can only be feasible and economic if its exercise of the option is feasible and economic. The purchaser may exercise the option, when it is feasible and economic to him, but it may not then be feasible and economic to the vendor. While a court is reluctant to rewrite a contract for parties, it seems a proper conclusion that 'priority' must have had a meaning to the parties which embodies both the creation and the exercise of the right.

370 The term "priority" is universally used in relation to debts which would otherwise be of equal standing or in relation to charges upon property.

371 It is seldom used in relation to a purchase right. (An option is more appropriate for that purpose.) It generally does not supersede vested rights; although obviously legislation appropriately drafted can accomplish this. If it is assumed that the right came into

existence in August 1976, it is obviously a right to purchase, but the question now is to purchase what?

372 In 1963 when the Power Contract was made, the priority or right to purchase did not exist, CFLCo entered into an obligation to sell its production to Hydro Quebec. It is a longterm agreement. It existed in 1976 and will exist for many years hereafter.

373 The right to purchase could only extend to the energy which was available for purchase. Energy that had been sold or had been agreed to be sold to Hydro Quebec was not available to be purchased by the Newfoundland consumer.

374 In effect, therefore, the priority once it came into existence was a right to purchase power available for sale before sales might be made to other persons. It was and is a right of first refusal to purchase whatever power might become available for sale after 1976.

375 The Government suggests that the contra proferentem rule should prevail in the construction of the Clause. If this rule is applicable, it operates against the Government and not in its favour!

376 In the first place there is no proof before this court that CFLCo petitioned in some fashion for the Lease Act or the Lease. The history of the matter set forth in the Introduction discloses that at the very best from the Government's point of view it was a mutual endeavour and arguably it [*page228] could be said that the whole thing was generated at the behest of the Government. Certainly since 1952 the Government had been actively pursuing the development of the resources in Labrador and the development of the water resources was one of these. It sought out the investors and urged the investors at every step of the way to get on with the development of the water power. It is not suggested, of course, that CFLCo was a reluctant bride in this connection. It wanted to harness water power.

377 The Government sought development. CFLCo sought profit. Both motives are honourable.

378 Secondly, there is no evidence that CFLCo chose the language of the proviso.

379 The proviso is a clause which purports to bestow a benefit not on CFLCo but upon the Government. The language of the proviso must have been approved by the Government. It is expressed to be for public benefit. If the Government has subscribed to an ambiguity, it is stuck with the interpretation less favourable to it. It was certainly the duty of the Government and not of CFLCo to see that its position in the Lease was protected. The loss lies with the Government if its rights under the Lease are ambiguously worded.

380 If the broader rule expressed in some of the cases that legislation is to be interpreted against the entrepreneur is to be considered, the basis for that rule must be considered. The basis is that the entrepreneur petitioned the Act of Parliament and where an ambiguous clause pits the public interest against the entrepreneur, then the construction should be against the entrepreneur.

381 As mentioned before, this relates to situations where the public right is external to the statutory right. Here, the public and private rights are embodied in a statutory agreement. The broader rule ought not apply, because it is based on the proposition that the entrepreneur is expected to see that the rights he seeks are properly drafted. No such rights are in controversy. It is the right of Government which is inadequately expressed. CFLCo should pay no price for this inadequacy.

382 The application of the contra proferentem rule serves CFLCo, not the Government in this case.

383 In the interpretation of a priority, economic reality plays a major role. It must be kept in mind that the harnessing of Churchill Falls was a major dream of Premier Smallwood and the Government since 1952 and of the members of Brinco since that company was formed sometime after. While the precise power potential may not have then been known, it was known to be substantial. It was so substantial that the energy that could be created would be far greater than could be consumed in the province. In fact, up to the time of the Power Contract, none of the generation of the Plant was required in the province except small amounts allocated for use in Labrador. If there was no market for the power in Newfoundland in 1969, when the Power Contract was executed, there was certainly no demand for power in 1961 when the Lease was executed.

384 It was known, therefore, to the Government and to CFLCo that the project could not succeed without "sales west", that is to say, sales to Hydro Quebec or some other consumer west of the Newfoundland-Quebec border.

385 The closest major market was Montreal. There were no transmission lines from Churchill Falls to Montreal. It was obvious, too, that substantial financing would be required by CFLCo for the construction of the Plant and by the customers of CFLCo for the construction of a transmission line to their distribution centres.

386 There were, in fact, four underlying realities which were prerequisite to the construction of the generating plant at Churchill Falls. These were:

[*page229] (a) a customer;

(b) a transmission line; and
(c) money to finance the construction of the Plant;
(d) money to finance the construction of the transmission line.

387 All of these factors were interdependent. None could exist without the others.

388 Important, too, was the fact that any customer for the power, who agreed to purchase a substantial block of power from Churchill Falls, would necessarily commit itself to such a purchase as part of its overall planning for its then present and future electricity needs.

389 In sharp contrast to this, the court is asked to find that the proviso meant that the

Government could request any amount of power at any time for any period of time without a commitment to the bondholders, without a power contract and without a price. Indeed, the only condition to its right is that the purchase of power by the Government should be feasible and economic which should at least protect CFLCo on price.

390 While the dollars involved do not have any impact upon the legal consequences of the situation, they do serve to underline just how grave the situation would have been if the position put by the Government is correct.

391 While the precise cost of the project was not in evidence, the indication is that it was in the vicinity of $ 700 million. Similarly, while the cost of the transmission line from Churchill Falls to Montreal was not in evidence, it is believed to be in the vicinity of $ 500 million. As Montreal was the major market, whether the customer was Hydro Quebec or some other party, it must have been within the contemplation of the parties that the customer, whoever it might be, would have had to bring the power at least as far as Montreal.

392 If bondholders and others are to put up $ 700 million for the construction of a power plant, they are not particularly interested in the bricks and mortar that make up the physical plant. They are interested in the sale of energy, for it is from this that the revenue will be derived to discharge the obligation to the bondholders.

393 While it may not have been known who the customer would be in 1961, it was known that the customer would not be the Government or any consumer within the province.

394 The bondholders would look to the existence of one or more customers who would be prepared to commit themselves to purchase the output of the plant, at least for the lifetime of the debt, and to pay it. Although it could not necessarily be presumed that such wide assurances would be given as were given by the Province of Quebec, both as to completion, financing and guarantees, these were all to be matters of negotiation. The reliability of the revenue was a major factor.

395 The reliability of the revenue would be dependent upon the reliability of supply.

396 If the Government by the proviso had the right to supersede or surplant a customer, that would preclude the bondholders putting up any money.

397 The first consequence of the Government interpretation is that there would be no customer for, from an economic point of view, it is inconceivable that a customer would commit itself to the purchase of such a large block of power faced with the possibility that that power could be interrupted at any time to any extent for an undetermined period upon the request of the Government.

398 Secondly, if such a customer could be found, it presumably would not bind itself to pay for energy not delivered. With the interruption of supply, there would be an interruption of revenue.

[*page230] [399] To take it a step further, the customer would have to construct the transmission line. The specifications for the line would have to be such that the maximum potential load could be carried. This involves a question of design. What sort of customer could be found who would build an expensive transmission line designed to carry a maximum load who was faced with the legal possibility that the energy that flowed through that line could be reduced by an unspecified amount at any time for an unspecified period?

400 The answer is that no such customer could be found.

401 It is improbable, too that financing for the construction of such a transmission line could be found in those circumstances without collateral assurances.

402 Further, it is reasonable to conclude that a person purchasing such a large block of power and who lays out such a sum for a transmission facility would regard that power as part of the energy pool upon which it could draw according to its need. It could not be considered acceptable that such a pool could be diminished at the will of a third party for an undetermined period, for from a practical point of view it is like having no pool at all. What good is it for a distributor of electricity to say that it has 5200 MW to draw on one day, but may not have it to draw upon the next?

403 The concept of the sale of electricity is different than the concept of the sale of other manufactured goods or the produce of farms.

404 The manufacturer and the customer are inevitably bound to each other. The customer, if he finds the manufacturer is unable to supply him, cannot suddenly turn around and deal with somebody else. He cannot fill the void and yet he cannot permit the void to continue to exist.

405 Reliability is the hallmark of electrical distribution. A customer might be able to do without building supplies or fresh beef or fresh eggs or fresh milk or newsprint for a week or he might be able to obtain them from other sources.

406 That is not the case with electricity.

407 It is normal, of course, to have alternate sources of electrical generation such as thermal plants for reliability.

408 The developments over the years serve to illustrate the point. At the present time the output of the Plant represents about one-sixth of the potential of the Hydro Quebec system. In earlier days it represented a higher percentage. It is not the sort of power that can be replaced except on a temporary basis by reserve generating units.

409 In short, what CFLCo had to commit itself to was "firm power" and not "intermittent power", terms used by counsel for Hydro Quebec in argument.

410 Without the potential for a firm commitment, there would be no customer. Without the customer, there would be no transmission line. Without the customer or its

transmission line, there would be no bondholders. Without the bondholders, there would be no Plant. Without the Plant, there would be no electricity for the Newfoundland consumer.

411 The court is asked to find that the term priority means that CFLCo must immediately divert to the Newfoundland consumer the amount of power specified for the term specified (if a term is specified and none is in this case).

412 Such an interpretation defies economic reality. The reality is that if that was the correct interpretation, there would be no Plant and there would be nothing for the Newfoundland consumer.

413 The finding is that it was not within the contemplation of the parties that the term "priority" should [*page231] have that meaning. Being ambiguous, there is strong argument for an alternate interpretation, if that can reasonably be found (Prenn v. Simmonds, supra).

414 There is one. It is that "priority" means the right of first refusal to purchase energy that may be available for sale at the time that the request is made - energy that is surplus to the energy that is required to meet the commitments of CFLCo at the time of the request.

415 Such an interpretation is economically realistic. It permits the construction of the plant, the financing of the construction of the plant, the export of power to a western customer and the construction of the transmission lines from Churchill Falls to the point of distribution of that customer and the financing of that transmission line.

416 It also permits the Government to come along at any time and request of CFLCo that, before it sells any uncommitted power to anyone, it first offer the same to the Newfoundland consumer.

417 In Part 14 there was discussion as to whether the acts of the parties could be referred to for the purpose of interpreting a provision in a contract and it was held that they could not. This perhaps is fortunate from the point of view of CFLCo, for the acts of the contracting parties and the acts of Hydro Quebec all indicated that they presumed in 1969 that the proviso had just that meaning that the Government now urges upon the court. Otherwise they would not have negotiated Clause 6.6. That is the evidence. The recapture provisions of the Lease were clearly intended to satisfy the future needs of the province and to limit the effect of the proviso. None of the parties wanted a situation to exist where the Government could come along some years after and upset the complex negotiated network of sale, purchase and financing by requesting energy under the proviso.

418 They all either assumed that the proviso meant this or they were fearful that it meant this. In either event they wished to protect themselves against it.

419 If evidence of this behaviour was admissible for the purpose of interpretation, the interpretation might have been different. This is unlikely, however, as the other factors

mentioned in this part lead also to the conclusion that priority means right of first refusal.

420 The evidence may not be considered, however, for this purpose and the economic reality outlined above indicates an interpretation agreeable with the interpretation indicated elsewhere herein.

421 To underline this, Clause 3 of Part II of the Lease is reproduced herewith:

> "3. The lessee will commence and proceed with due diligence with the development of the supply of electricity from the Upper Hamilton, beginning with the development of Twin Falls Power Corporation Limited of a supply of electricity from the Twin Falls Project."

422 This is one of the lessee's covenants. The economic reality is that CFLCo could not have complied with this covenant if Clause 2(e) was given the meaning which the Government attributes to it for that meaning would preclude the existence of a customer, a transmission line and participating bondholders.

423 Using the rules of contra proferentem and economic reality, one naturally gravitates to the position that priority can mean nothing more than the first right to purchase energy for sale. This does not include energy previously and properly committed for sale because it was known in 1961 that a commitment for the sale of energy was a key to the construction of the Plant, a key to the performance of the obligation contained in Clause 3 [*page232] of Part II. A commitment for the firm sale of energy was a prerequisite to financing both the Plant and transmission line. An interpretation that precludes any of these leads to an economic absurdity which precludes such an interpretation and permits the alternate one.

424 It means that the Newfoundland consumer is to be first among potential customers, which is the normal situation with a priority, but it does not give the Newfoundland consumer the right to supersede existing customers to whom a commitment for firm power has been made.

7. Feasible and Economic.

425 In discussing the term "feasible and economic" it is necessary to give a brief preview of what the words "to do so" are held to mean. Briefly, they are held to refer to the act of giving and of being given. The result is that the words "feasible and economic" are viewed subjectively both by the donor and the donee of the priority.

426 The interpretation becomes a little complex when considering what acts the term applies to. There are two acts involved.

427 The first has two components. Initially there is the request; correlative to it is the giving of the priority.

428 The second is the exercise of that priority.

429 As the proviso is worded, the words "feasible and economic" refer to the acts of giving and been given the priority. In reality they are inapplicable to such actions for the giving of a priority does not of itself involve questions of feasibility or economics.

430 It is the exercise of the option that matters. The Government requests the priority; the Newfoundland consumer receives the priority.

431 The priority is only a right to be exercised. Only upon the exercise of that right is the question of "feasible and economic" germaine.

432 The distinction, of course, is a fine one. It is something that underlines the inadequacy of the proviso. It perhaps suggests that "priority" was not the word sought but rather something that would create an immediate compulsion to sell. Such a meaning of course, is ruled out for the reasons discussed under sub-heading 6 of this Part dealing with "priority".

433 To give some meaning to the words, it is necessary to equate the giving of the priority and the exercise of the right thereby involved as one occurrence or two simultaneous occurrences. Certainly that was envisaged by the Order-in-Council, but that, of course, does not assist in the interpretation of the Lease which had been made 16 years earlier.

434 As noted earlier, of course, CFLCo must assess in this manner anyway for, once given, a priority may be exercised at any time. To CFLCo, therefore, the priority may be exercised at the time of giving and must then be feasible and economic.

435 There is no real difficulty as to the meaning of the words within the context of the Lease. There, of course, is great debate in this case as to whether the Project has been proven to be feasible and economic.

436 "Feasible" generally is a term used to describe something that is capable of being carried out successfully. The term "feasibility study" is not an unfamiliar one. Such a study would be a study to determine whether a project could be built and operated on a profitable basis.

437 The term "feasible" as used in the proviso probably has a more limited meaning than in connection with the feasibility study in the example mentioned above. Economics is then implied. In the proviso the term economic stands by itself.

[*page233] [438] For this reason feasibility may very well mean whether or not the proposal is capable of being carried out.

439 The term economic may have a range of meaning particularly in conjunction with a utility. If it is considered in connection with the proposal embodied in the exercise of the right, it must, at the very least, signify something that is profitable and may go even farther to signify something that is the most profitable.

440 If it is used in a broader sense, it may mean something that standing by itself is not profitable at all but when the other operations of the Newfoundland consumer are brought into consideration, the overall result may not be unprofitable. This occurs by the use of weighted averages which, in effect, result in a portion of the profits from other operations being siphoned off to neutralize the non-profitability of the project.

441 The supply and purchase of energy involves basically a switching facility for feeding the electricity from the bus bar at the plant to the transmission facilities and the erection of a transmission facility to conduct the electricity to the point of distribution.

442 The distribution would, of course, be the function of the retailer.

443 The proviso is silent on the question of switching and transmission facility but from a mathematical point of view the result is probably the same. If the supplier supplies these facilities, then the cost will be embodied in the price. If the purchaser supplies the facilities, it will have to bear the cost directly but pay for the energy at a lower price. Whether the capital cost of the project, translated into an annual figure, is born by the supplier or purchaser makes little difference to the ultimate consumer or the economy of the project.

444 The question as to whether it is feasible really only involves the question of whether or not such facilities can be provided and applies equally whether it is to be done by the supplier or the purchaser.

445 The term "economic" appears to have a slightly different meaning to CFLCo and the Newfondland consumer.

446 From the point of view of CFLCo the revenue must be at least sufficient to retire that portion of the capital debt of CFLCo that may be properly attributable to the production of 800 MW and to make a contribution to the cost of operations, maintenance, and profit.

447 That, of course, is the least that CFLCo could expect. It is probable that the replacement value of the CFLCo plant has increased over the years. In the circumstances CFLCo might justifiably seek a greater return than one based on original cost or one based on the Power Contract.

448 The question of what is economic to CFLCo blends with what is economic to the Newfoundland consumer.

449 CFLCo may only go so high over the least amount which it is entitled to expect. At some point the figure will become uneconomical to the Newfoundland consumer.

450 From the point of view of the Newfoundland consumer, it too should expect to be able to recover from its market a sufficient amount to pay the cost of purchasing the energy from CFLCo, to retire the capital debt associated with the transmission and distribution of that power and to contribute an appropriate amount to operations, maintenance, other costs and profits.

451 These factors common to both CFLCo and the Newfoundland consumer may be said to be the basic criteria.

452 As the price to the ultimate [*page234] consumer increases, the market will decrease. As the other costs will remain somewhat static, the cost of acquisition is of key importance.

453 The Newfoundland consumer should be able to make a profit also and this profit will only be available when the price of the energy to it falls within a certain range, be it great or small.

454 When the price which CFLCo is entitled to receive to ensure that it generates sufficient revenue to meet the basic criteria and the price which the Newfoundland consumer must pay, in order that upon the further distribution of the energy, it too may generate sufficient revenues to satisfy the basic criteria fall within the same range, then the project may be said to be economic to both.

455 If there is no point at which the price ranges of CFLCo and the Newfoundland consumer meet, then the project cannot be said to be economic for when a common price is found, it must have uneconomic results for one or other of the two or both.

456 The matter was discussed with more particularity in the evidence, but this related, not so much as to what the term meant, as to whether the project was cost effective or was the least cost alternative.

457 The question of what is economic is not difficult. The question of whether or not a given situation is economic is another matter. This is a question of fact and in its consideration such items as cost efficiency and least cost alternative and weighted averages and other such factors may be considered.

8. "To do so".

458 The interpretation of these words must be read in conjunction with the interpretation of the words "shall be given". The words "to do so" are used and the question is as to what "so" refers to. It could refer to the act of giving or to the act of being given or to both.

459 The proviso has used the passive tense and the immediate conclusion that jumps to one's mind is that it refers to the act of being given. This being so, then the term "feasible and economic" must be interpreted from the subjective point of view of the Newfoundland consumer.

460 There is a different emphasis here from Clause 4. In Clause 4 the emphasis was on giving and in Clause 2(e) the emphasis is on being given.

461 Further, it is not to be expected that the parties have contracted without regard to the financial consequences of the proviso on CFLCo. The agreement could not be construed as imposing an obligation on CFLCo to supply energy under Clause 2(e) without

compensation that would be at least equal to the basic criteria for utilities suggested above.

462 The rule of economic reality enters into the picture in this connection also. It is not to be supposed that either party contemplated that there should be an obligation on the part of CFLCo to supply electrical energy to an uncertain market. It must be noted that the Newfoundland consumer is not a person identified in the Lease. In conjunction with the current request, it is Newfoundland Hydro, an agency of the Government. It might and still could be upon any request in the future be any Newfoundland consumer.

463 Bearing in mind the financial commitments of CFLCo and the cost to it of generating the power, one can hardly assume that either party considered that Clause 2(e) could be interpreted to mean that CFLCo could at any time and for any period of time be required to allocate some or all of its energy output to an uneconomic market. Certainty of payment would not exist.

464 The allocation or the re-allocation of such a large block of power would not be readily marketable elsewhere should the Newfoundland consumer [*page235] fail or be unable to meet its purchase costs.

465 The whole thing is just too big to be vague. It is, in fact, not economical for CFLCo to supply power to a market that is not itself economical.

466 The end result, however one views the situation, is the same.

467 It must be feasible and economic for CFLCo. It is not economical for CFLCo to have to supply on undefined terms an unidentified customer. CFLCo can only be obliged to sell into a viable market. Such a market could only be one to when the project is feasible and economic.

468 Therefore, it must be feasible and economic to the Newfoundland consumer for that reason also.

469 The Lease cannot be construed otherwise.

9. Conclusion.

470 That completes the interpretation of Clause 2(e). Counsel for the Government suggests that to ascribe to it the meaning urged by CFLCo and Hydro Quebec is basically to re-write the clause. Unfortunately, this is true. By the same token to attribute to it the meaning suggested by the Government is equally to re-write the clause.

471 In any interpretation process that is actually what transpires. The meaning of each phrase is expanded or limited according to the circumstances and to give emphasis to the meaning new expressions may be offered, not by way of re-writing the clause, but rather by way of stating what the clause means.

472 The finding is that the proviso may be summarized as follows.

473 Upon the request of Government, the Newfoundland consumer shall be given by CFLCo a right of first refusal to purchase all energy that becomes available for sale and is not then otherwise committed when it is feasible and economic for CFLCo to supply such power and for the Newfoundland consumer to purchase such power.

474 Nothing is said in this Part about the terms of such a supply agreement. This will be discussed in Part 28.

Part 16: When may requests be made?

475 It was suggested in argument by CFLCo and Hydro Quebec that the request for a priority should have been made prior to the Power Contract. The logic of this position is somewhat elusive.

476 There is nothing in the Lease that requires CFLCo to notify the Government of any proposed sale either within the province or by export. How then can this court impose upon it the requirement to make a request for the priority prior to a proposed sale?

477 While the proviso may be vague, it cannot be said to be meaningless; nor can it be said to have meaning only until CFLCo has committed all of its produce.

478 The right to make a request endures throughout the period of the lease. It is not necessary in this judgment to determine whether one or several requests may be made. At this point in time there has been only one.

479 The first request may be made at any time.

480 Failure to make a request prior to the Power Contract has as indicated had some adverse affect upon the value of the priority to the Newfoundland consumer, but the request itself is not invalid, because it was not made prior to the Power Contract. The only effect of making the request after the Power Contract is that the value of the priority to the Government is less for the priority only affords to the Government the right of first refusal to purchase so much of the saleable energy as has not been otherwise committed.

[*page236] Part 17: Has the Government power to make the request?

481 This point was raised by counsel for the second defendant. It is perhaps not the sort of argument upon which a party would wish to rest its entire case.

482 The right of the Government to make a request is clearly contained in Clause 2(e). That perhaps is the only part of Clause 2(e) that is clear.

483 In the agreement the Government is, by definition, the Lieutenant-Governor in Council. It is therefore the Lieutenant-Governor in Council which must make the request. The Order in Council is the request; the Minister of Mines and Energy was directed to communicate it to CFLCo.

484 Pursuant to that the Minister of Mines and Energy, John C. Crosbie, directed a letter to CFLCo on August 6, 1976 enclosing a copy of the Order in Council which as he correctly pointed out in the letter was self-explanatory.

485 These two documents and the reply of CFLCo appear in Appendices A, B and C.

486 There were parts of the request that were perhaps not within the rights contained in the proviso.

487 At this point it is desirable to reproduce a portion of the Order in Council:

"BE IT THERFORE ORDERED THAT CFLCo be and it is hereby requested to

"(a) supply to Newfoundland and Labrador Hydro, an agent of Her Majesty in right of the province, a total of 800 Megawatts of power, generated from the waters of the said Upper Churchill Watershed, at a 90% load factor, commencing on October 1, 1983; and

"(b) give Newfoundland and Labrador Hydro access to limited quantities of power for commissioning purposes prior to October 1, 1983,

all such power

"(c) to be supplied at such price and upon such other terms and conditions as may be mutually agreed between CFLCo and Newfoundland and Labrador Hydro and as shall, in any event, be not less favourable to CFLCo than the price and other terms and conditions prescribed in the Power Contract dated as of the 12th. day of May, A.D. 1969, and made between Quebec Hydro-Electric Commission and CFLCo; and

"(d) to be delivered to Newfoundland and Labrador Hydro at or near Churchill Falls, the exact point or points of delivery to be such as may be mutually agreed between CFLCo and Newfoundland and Labrador Hydro."

488 Paragraph (a) presupposes that the proviso of Clause (e) obligates CFLCo to supply the Newfoundland consumer. The Government regarded the request for priority and the exercise of rights thereunder as one thing. For practical purposes it makes little difference. The test of feasible and economic must be made at this point for reasons given in Part 15 and Part 35.

489 The same paragraph requests 800 MW at 90% load factor commencing October 1, 1983. There is no reference in the proviso to quantity, load factors or dates, but this does not matter. There is no limit expressed in the proviso as to the amount of energy which will be subject to the priority. This would be limited only by the capacity of the Plant and the existing commitments of the Plant if these are to prevail against priority. As far as the [*page237] date is concerned, once the priority exists, it can be enforced at any time by the Government.

490 Paragraph (b) relates to limited quantities of power for commissioning. There is no

specific right of the Government to request energy for commissioning purposes. However, if there is a right to purchase energy, then this right is not limited to exclude energy that may be used for commissioning purposes. The only test is that the purchase and supply must be feasible and economic. The request is in order, therefore, but the obligation to provide energy pursuant to it rests upon it being established to be feasible and economic.

491 Paragraph (c) deals with the question of price. This will be dealt with separately in Part 35. There is, of course, a larger question than price involved. The evidence indicated that if CFLCo is to supply and a Newfoundland consumer is to purchase energy, a power contract between the two is required. Price is only one factor. No mention is made of price in the Lease.

492 The Government has already drawn some of the 300 MW reserved for recapture and no difficulty apparently was encountered in this with respect to price and agreement.

493 However, it appears that there may be implied in the proviso an agreement to make an agreement. Courts have generally held that such an agreement is void where something is left to be agreed upon; although recent jurisprudence has said that where there are arbitration clauses and in some cases even where there are none, such an agreement can be upheld. In those cases, it was held that where there is a dispute as to price, the price will be stipulated by an arbitration board or will otherwise be a reasonable price. This matter is discussed in more detail in Part 28.

494 Paragraph (d) refers to a delivery point. Again no provision is made in the Lease for this. It emphasizes the suggestion made above that the proviso is nothing more than an agreement to make an agreement and that there are things to be considered between the two before the priority can have any significance.

495 The Government may have requested more than it was entitled to under the Lease. To the extent of such excess, this decision will have no effect as it deals only with what rights accrued when the Government made the request.

496 Apart from that, the Government has the power to make the request unless for some reason it is estopped from doing so or has in some manner waived its right.

497 Waiver and estoppel are discussed in Part 19.

Part 18: CFLCo participation in Government request

498 It is not to be overlooked that at the time of the request three of the directors of CFLCo were representatives of the Government and the Government was the major shareholder.

499 While one might in a non-legal sense be excused for being suspicious, there is nothing to demonstrate any complicity between the parties or any sense of wrongdoing. The Government has made a request which by the terms of the Lease it was entitled to make. CFLCo has taken a relatively neutral stance being mindful of the fact that it is

owned by the Government and Hydro Quebec and has taken the position that compliance with the Government request would expose it to damages at the suit of Hydro Quebec which would render the compliance with the request non-feasible and non-economic.

500 There is nothing in the [*page238] evidence to suggest that CFLCo had in any way conspired with the Government to interfere with the obligation of CFLCo under the Power Contract.

Part 19: Waiver, Estoppel and Merger

1. The facts.

501 The Power Contract is dated May 12, 1969. Clause 6.6 of the Power Contract reads as follows:

6.6 Recapture

"CFLCo may, on not less than three years prior written notice to Hydro-Quebec, elect to withhold from the power and energy agreed to be sold hereunder blocks at a specified load factor per month to be stated in said notice, of not less than 60% nor more than 90%, which blocks in the aggregate shall not exceed during the term hereof 300,000 kilowatts for a maximum withholding of 2.362 billion kilowatt-hours per year provided that:

"(i) energy so withheld is sold by CFLCo only for consumption outside the Province of Quebec;

"(ii) any part of the energy so withheld which, from time to time may become available for purchase by Hydro-Quebec, may be purchased by Hydro-Quebec, if before the Effective Date, as part of Energy Payable priced in accordance with Section 8.3, and, if on or after the Effective Date, at the price of 33.33% of the Applicable Rate multiplied by the number of kilowatt-hours so purchased, and to this end Hydro-Quebec shall have access to the pertinent sales records of CFLCo; and

"(iii) any part of the power and energy so withheld before the seventh Delivery Date shall not relieve CFLCo from its commitment to deliver power and energy in accordance with Schedule II of the present Power Contract."

This clause, as presumably were the other clauses, was the result of intense negotiations between Hydro Quebec and CFLCo. The negotiations were done with a view to arriving at a figure that would satisfy the future needs of the province. They were embarked upon with the clear expression from Hydro Quebec that there would be no power contract unless the amount of power that could be recaptured for sale in the province or to the Newfoundland consumer was limited to an express figure.

502 There were 5,225 MW of power available to produce energy for sale. Of these 225 MW was reserved to provide energy to meet the commitments of the Twinco.

503 That was provided for in the Power Contract. This commitment and understanding existed from the beginning.

504 The only other reservation in the Power Contract was the annual energy that could be produced by 300 MW of power not exceeding 90 percent load factor per month, as contained in Clause 6.6.

505 The recapture right belonged to CFLCo. It was designed, however, to meet the obligation of CFLCo to the province.

506 While this may not be clear in the final draft of Section 6.6 of the Power Contract, it becomes clearer in the Letter of Intent of October 13, 1966, and an earlier draft thereof which appear in Appendix D to this judgment.

507 There is certainly no doubt between CFLCo and Hydro Quebec as to the function of Clause 6.6. The correspondence which was entered into between them during the period prior to the execution of the Power Contract makes this abundantly clear. This correspondence is contained in the various volumes that comprise Exhibit 1.

508 It seems unnecessary to chronicle the various pieces of correspondence, for indeed there was no [*page239] argument between any of the parties that Clause 6.6 was to serve this purpose.

509 Moreover, it is equally clear that the Government knew of the negotiations between CFLCo and Hydro Quebec in this respect and acquiesced in them. The Government knew and made known to CFLCo that it knew that the extent of its rights under Clause 2(e) was considered by CFLCo and Hydro Quebec to be limited to 300 MW. The Government accepted this limitation and made known its acceptance to CFLCo.

510 It recognized that its rights were limited in the energy that could be produced by 300 MW and that its further energy requirements would have to be generated by development on the Lower Churchill.

511 In a letter dated April 26, 1967, sent by the Premier of the Province to Mr. McParland, the then president of CFLCo, questioning not so much the amount of the reserve but the price of the reserve, the premier evidently assumed that the price would be less than that to be paid by Hydro Quebec. Mr. McParland replied that it was his belief that the revenue lost from Quebec would be replaced by the province.

512 In the premier's letter Mr. Smallwood also insisted that the 300 MW block be increased to at least 500 MW. To this Mr. McParland replied that this would throw serious obstacles into final negotiation.

513 On April 14, 1967, Denis Groom, the then Deputy Minister of Finance for the province, wrote to the premier about the matter of obtaining more power. The memorandum reads in part as follows:

The Honourable the Premier

"I understand that Hydro-Quebec are presently negotiating with U.S. interests for the sale of surplus power from the Churchill. From this it would appear that it might not be too late for Newfoundland to arrange for its share of Upper Churchill power to be increased. In fact, judging from information I have been given, it would appear that the province will be in an extremely difficult situation if it does not get an increase.

> "2. The Upper Churchill will develop 32 billion kwh per annum. Newfoundland's share of this is 2.4 billion kwh. . . .
> "6. Everything possible should therefore be done to increase the province's share of the Upper Churchill power to a point which will justify the construction of the transmission line and will meet the province's load growth for the foreseeable future."

514 (2.4 billion KWH is the annual energy that will be produced by approximately 275 MW, not taking into consideration line losses.)

515 There are a great number of examples in the evidence illustrating that the province knew and accepted the proposition that its right under Clause 2(e) was being limited to 300 MW. It wanted more, but ultimately yielded to that figure. It recognized that its future energy needs would be satisfied in part by the energy that could be generated by this amount of power with the balance required being generated on the Lower Churchill.

516 The evidence also illustrates that its acceptance of this position was made clear to CFLCo.

517 There were no direct negotiations between the Government and Hydro Quebec. There were negotiations at the political level between the Province of Newfoundland and the Province of Quebec, but these did not relate to detailed matters such as the future power requirements of Newfoundland.

518 According to their evidence, Mr. Boyd and Mr. DeGuise speaking on behalf of Hydro Quebec had made the [*page240] position clear that the amount of power which was to be available to Newfoundland was not to exceed a specified figure. Without such a limitation there would be no Power Contract. This is a factor that was recognized by the Government, CFLCo and Hydro Quebec.

519 Further, it was provided in the First Mortgage Trust Deed that CFLCo would not sell power recaptured in accordance with Clause 6.6 except on terms that are "not materially less favourable" than the terms pertaining to a sale of such power under the Power Contract (Section 12.23).

520 There were never any negotiations between the Government and Hydro Quebec. There were discussions between the Government and CFLCo in which the Government held out that a recapture provision of 300 MW would be satisfactory to it. CFLCo relied on this and held out to Hydro Quebec that that was the position of Government. Hydro

Quebec relied on this.

521 It has all the earmarks of estoppel. The Government held out a certain position and CFLCo relied upon this position and acted upon it. CFLCo held out the Government's position to Hydro Quebec who likewise relied upon it and acted upon it.

522 There is no doubt that from the point of view of Hydro Quebec had the Government not held out such a position, there would have been no Power Contract and no project.

523 No representation was made by the Government to Hydro Quebec. Nevertheless, the documents in evidence indicate that such a representation was made in many ways over a lengthy period by the Government to CFLCo and, according to the evidence of Mr. Boyd and Mr. DeGuise, this position was represented to them by CFLCo.

524 As these representations had, in fact, been made, the Government, except for any immunity it may have, is not in a position to deny them in view of the reliance placed upon them.

525 The facts relating to estoppel which have not heretofore been discussed ought now to be presented. In view of the finding contained in the second heading of this part it is not necessary to elaborate on the facts in overly great detail.

526 In this action, certain documents were put in by consent. These consist of great reams of correspondence that took place between the Government and CFLCo and between CFLCo and Hydro Quebec.

527 One of the prime concerns of all parties was to satisfy the needs of the province in relation to electricity. Clause 6.6 was inserted with a view to providing a pool of power to satisfy whatever demands might be made by the Government pursuant to the Lease.

528 There can be no doubt that it was Clause 2(e) of the Lease that sparked the concern of all parties. Whatever interpretation might have been placed on Clause 2(e) after the fact, the parties knew or felt that a segment of the production should be set aside to satisfy the needs of Newfoundland.

529 This was discussed continually both in conversation and by letter and it was ultimately decided that 300 MW would be set aside for recapture by the province. In letters and telephone calls, in public speeches and in a Government commission report it was recognized that Newfoundland should have a share of the production of Churchill Falls and ultimately that that share should be 300 MW.

530 This figure was actually negotiated between representatives of CFLCo and the Government. The Government took the position that it was not enough but ultimately and perhaps reluctantly later agreed that it was.

531 In accordance with the provisions of the Lease an application for approval of the project was submitted to the Minister of Public Works. With [*page241] the documentation

submitted was a copy of the Letter of Intent which provided for a recapture of 300 MW. Consent to commence construction was given.

532 The Government was not only aware that 300 MW were being reserved for recapture, it participated in discussions leading to the settlement of this figure and by its conduct held out to CFLCo and Hydro Quebec that there would not be demands under the Lease in excess of that figure.

533 This had been a matter of concern to René Lévêsque, then Minister responsible for the electrification program in Quebec, who indicated that there could be no power contract until the recapture provision had been settled to the satisfaction of the province. This it clearly was.

534 There is no other interpretation open to the conduct of the Government in this respect. If any right of recapture existed, it could only exist under the Lease. There was no other provision in that connection; nor was there any legal requirements to provide for the future needs of Newfoundland except to the extent that they may have been contained in the Lease.

535 The Government clearly and unequivocally held out specifically to CFLCo and by its conduct to Hydro Quebec that the recapture provisions in the power contract would satisfy whatever rights the Government had under Clause 2(e).

536 In other circumstances it would be estopped from seeking more.

2. Does estoppel or waiver operate against the Government?

537 A great deal of uncertainty surrounds this question. While the principles of estoppel are old, the confusion is relatively new.

538 It appears to originate in the case of the Attorney General to the Prince of Wales v. Collum, [1916] 2 K.B. 198.

539 Estoppel is an ancient rule of evidence. In modern times this has been viewed as an inadequate description of it. In Moorgate Mercantile v. Twitchings, [1975] 3 All E.R. 314, at 323, Lord Denning, M.R., said:

"Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this. When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so."

540 Estoppel by deed does not lie against the Crown. The authorities are unanimous in this respect. In the Collom case, Atkin, J., said at page 204:

"A further point was raised that no estoppel binds the Crown and that this equity is based upon estoppel. There is authority for the general proposition so far as estoppel by deed is

concerned. I know of no authority for the proposition as applied to estoppel in pais. But I think that it is established that equitable defences such as I consider this to be are available against the Crown: see Attorney General for Trinidad and Tobago v. Bourne, [1895] A.C. 83; in Ramsden v. Dyson, L.R. 1 H.L. 129, was applied against a claim of the Crown in a decision of the Judicial Committee in Plimmer v. Mayor, etc., of Wellington, 9 App. Cas. 699."

541 Apart from the cases referred to by Atkin, J., in Collom, counsel for Hydro Quebec also cited Attorney General of Victoria v. Ettershank (1875), L.R. 6 P.C. 354, Davenport v. R. (1877), 3 App. Cas. 115, R. v. Paulson, [1921] 1 A.C. 271, British Columbia Hospital Corporation v. District of Kent, [1925] 3 D.L.R. 171, and Queen Victoria and Niagara Falls Park Commissioners v. International Railway Company (1928), 63 O.L.R. 49. In none of these cases does it appear that [*page242] estoppel prevailed to subvert the expressed will of the legislature.

542 In Verreault & Fils v. The Attorney General of Quebec and others, [1977] 1 S.C.R. 41, Pigeon, J., in delivering the judgment of the court referred at page 47 to a passage from Griffith & Street, Principles of Administrative Law (3 Ed. 1963), at page 271:

"It is submitted that the law is as follows: a contract made by an agent of the Crown acting within the scope of his ostensible authority is a valid contract by the Crown; in the absence of a Parliamentary appropriation either expressly or impliedly referable to the contract, it is unenforceable."

543 He referred to that as a correct principle. In that connection, of course, some emphasis must be placed on the word "ostensible".

544 This was followed in a more recent decision of the Trial Division of the Federal Court of Canada in the case of CAE Industries Ltd. et al. v. Her Majesty the Queen, a 1982 decision for which a citation is not yet available.

545 It may be that a Minister is authorized to enter into contracts with certain classes of persons relating to certain matters and to amend the same from time to time. It may be too that having entered into one such contract, the Minister or someone on his behalf by his conduct has invited the contracting party to believe that a certain situation exists and the party relies upon it.

546 That may very well and reasonably create an estoppel against the Crown.

547 Such a situation does not exist here.

548 The answer to the situation that prevails here is to be found in the old case of DeCosmos v. R., [1883] B.C.R. Pt. II 26 where Gray, J., said at pages 29 and 30:

"The parties to this alleged contract are the Government on one side, the petitioner on the other. It cannot be too strongly impressed that (apart from departmental contracts or acts authorized by statute, or necessarily pertaining to the object for which a department is

created) the acts or agreements of a Government can only be evidenced in one way, that is by the action of a constitutional head. The mere promise or opinion of an individual member of a Government, however influential he may be, is in no way legally binding on the Government. The country is entitled to the collective wisdom of all the members constituting the Government. They are simply the advisers of the Lieutenant-Governor, and he it is who, under their advice makes the contract. Promises, therefore, made by, or understandings had with, individual members of a Government are of no legal value in Government contracts, unless the Government had deputed a particular member to take action in the particular instance, and had subsequently confirmed and adopted his act by Order-in-Council as sanctioned by the Lieutenant-Governor. A country might be ruined if each individual member of its Government could legally bind it by primary obligations. There is a great difference between political consequences and legal consequences. A Court of Law can only recognize the latter. The country at large passes judgment on the former."

549 It is said that estoppel does not lie against the Crown because the Sovereign is not bound by the common law. Perhaps a more mundane view could be taken.

550 The simple fact is that no authority, ostensible or otherwise, lies in any person to negate the will of the legislature.

551 The Crown has certain prerogatives as pointed out in Attorney General v. DeKeyser's Royal Hotel, [1920] A.C. 508. These prerogatives may be limited by statute. The prerogative of the Crown in respect of matters [*page243] dealt with by a statute are limited or eliminated by that statute.

552 In the DeKeyser case, Lord Atkinson said at pages 539 and 540:

"It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the Legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word "merged" is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same--namely, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been."

553 Whatever prerogative may have existed in the Crown in respect of the letting of water rights on the Upper Churchill these are merged in the Lease Act and may be abridged by it.

554 There is no question of ostensible authority here. No person was vested with power, ostensible or otherwise, to surrender what the legislature had provided for the province.

555 In modern jurisprudence distinction is being made between the Crown when acting as such and the Crown when acting as a commercial person. Such a distinction is not to be made in the case of estoppel for the acts of the legislature prevail against the will of those who would avoid them whether the Sovereign wears a crown or a business suit.

556 The Lease by itself is a contract between the Government and CFLCo. It is something more, however. It is part of an act of the House of Assembly. Whatever meaning may be attributed to Clause 2(e), the meaning is the will of the House. It has legislative sanction. The law of the land is that the Newfoundland consumer shall, upon the request of the Lieutenant-Governor, be given priority. No person, however highly placed, may deny that right to the Crown, or limit it. Only the House of Assembly may do that.

557 The Government need not make the request for priority, but no person can by his words or actions abrogate the right to do so.

558 That law is known or must be presumed to be known by all of the defendants. Estoppel does not assist their cause, for estoppel cannot operate to defeat the will of the legislature. The same may be said of waiver, for the principle is the same.

559 Whether estoppel or waiver may lie against the Crown in other situations is not material. They do not lie against the Crown on the facts of this case.

3. Merger.

560 Counsel for the second defendant referred to the Power Site Lease, the Roads Lease, the Transmission [*page244] Lines Lease, the Airport Lease and the Airport Approaches Lease, all dated August 1, 1968.

561 These might be described as support leases or leases designed to give rights ancilliary to those provided by the Lease and necessary for the purposes of the Lease. In none of these leases is there any reference to the proviso contained in Clause 2(e) of Part I of the Lease.

562 Counsel submitted that:

"A particular instance of waiver estoppel exists in the doctrine of Merger. Where parties enter into an executory contract contemplating the fulfillment of rights set forth in that first contract in a subsequent contract or contracts, a court may hold that if, a party claiming or asserting rights under the first contract has not asserted them at the time of the closing of the second contract, he is to be taken as having waived those rights, which rights are

merged in the closing of the second contract."

563 In support of this, he refers to Leggott v. Barrett (1880), 15 Ch. D. 306 (C.A.), at page 309:

". . . if parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself."

564 While the authority of this case is not to be doubted, the merit of the argument that it applies to this case is somewhat obscure.

565 In the Lease the Government purported to retain certain purchase rights for the benefit of the Newfoundland consumer. It cannot be said that any of the other leases interferes with this right. Nor can it be said that the exercise of the right will interfere with any of the leases.

566 The Lease does not merge with the support leases. They are a series of related leases, but none supersedes another. In these circumstances, it cannot be said that the Government by not having the proviso embodied in the support leases has waived the right it contains.

Part 20: The Consent

567 Clause 3(1) and (2) of Part 4 of the Lease provide as follows:

"3.-(1) Before commencing any development utilizing the Upper Hamilton or any part thereof, or any major modifications or improvements of any such development then existing, the lessee shall obtain the written consent of the Minister of Mines, Agriculture and Resources for the said province and in every such case such consent shall be a condition precedent to such development or modification or improvement but the consent of the said Minister shall not be unreasonably withheld.

"(2) When the lessee seeks the consent of the Minister of Mines, Agriculture and Resources in accordance with sub-clause (1) of this clause, it shall submit to the Minister in support of its application all information and data necessary to inform the Minister of the proposed development or major modifications or improvements, including without limiting the generality of the foregoing,

"(a) profiles and other preliminary drawings showing the describing the projected dams, tunnels, canals, diversions and any and all other works, together with all relevant general plans;

"(b) general plans of the lands required for the purpose of flooding the same, whether for

the purpose of storage reservoirs or for regulating [*page245] the flow of any stream within the Upper Hamilton or otherwise;

"(c) particulars with regard to the capacity of the machinery and its actual or possible production; and

"(d) all other information and data that the Minister may request."

568 Pursuant to these provisions CFLCo on November 20, 1967, submitted a detailed application for ministerial consent to proceed with the Churchill Falls Power Project.

569 In the portion of the application where the project was described the following paragraph appears:

"Churchill Falls Power Project is located at a particularly favourable site in Labrador. A number of lakes in the Upper Churchill River basin will be linked to form two large reservoirs with a usable storage capacity of 1100 bcf. A controlled flow averaging 47,750 cfs will be discharged through eleven hydroelectric generating units operating under a net head of approximately 1040 feet to develop a total of 6,765,000 horsepower with an estimated annual electrical energy output of 34.11 billion kilowatt hours at the generator terminals. [Emphasis start]From the switchyard at Churchill Falls this energy, less requirements for station services and transmission losses, will be transmitted at 735 kv to the Hydro-Quebec system, and at 230 kv to the Twin Falls system." [Emphasis end]

(Emphasis added.)

570 The amount of horsepower expressed in that passage, namely 6,765,000 is roughly equal to 5,047 MW. The letter was submitted by C.T. Manning, Vice-President (Legal) of CFLCo and responded to by C.M. Lane, Minister of Mines, Agriculture and Resources on November 24, 1967.

571 In the final paragraph of his letter Mr. Lane said:

"In accordance with Clause 3, Part IV, of the 1961 Agreement between Government and Churchill Falls, (Labrador) Corporation Limited, I hereby give my consent to your corporation to proceed with the Project, with the understanding that as the Project is translated from the planning and design stages into reality some of the specifications and plans, as outlined in the report, will require alteration."

572 It was argued that the consent of the Minister to the request for the same constituted concurrence with the Power Contract. This cannot be. The Power Contract was not then in existence. The Letter of Intent was. No reference was made to it, or to recapture, in the application for consent.

573 The provision set forth above from the Lease made no reference to consent to the disposition of the energy. Although this had been provided for in the Brinco Act, the reference was not included in the Lease Act. Clause 2(e) is the substitution for that

provision.

574 Even if reference were made to recapture in the application, there was no statutory requirement for it and the consent of the Minister could only then be considered on the basis of an estoppel. Estoppel has been dealt with in Part 19. Upon that finding, the Minister's consent, even if directed to the Letter of Intent, would not supersede the proviso.

Part 21: The Financial Agreement

575 A great deal was made in argument by Hydro Quebec about the effect of the Financial Agreement in this matter. The Financial Agreement was dated May 12, 1969, and made between the Lieutenant-Governor in Council, the Royal Trust and CFLCo.

[*page246] [576] The prime reason for the Financial Agreement was to confirm the consent of the Government to the mortgaging of the Lease and other leases previously referred in Part 19(3).

577 The Financial Agreement provides in Clause 2 that the Government will not terminate, limit or restrict the Lease and lease rights in any way. A special provision was made in respect of the failure to pay money. In such cases the Royal Trust was to be given notice and time in which to pay such money.

578 The actual language of Clause 2 of the Financial Agreement which is relied upon is as follows (omitting unnecessary language):

> "2. The Government covenants and agrees with (the Royal Trust) that, so long as (the Lease) . . . shall be required by the terms of (the First Mortgage Trust Deed) to be subject to the lien thereof, it will not cause or permit, . . .

. . . (the Lease) . . . required to be subject to the lien of the indenture, or

any of (CFLCo's) rights thereunder, including

its rights to possession, operating, management and control of the premises thereby demised,

"to be terminated, limited or restricted in any manner . . ."

579 An examination of those provisions will indicate that the rights of CFLCo under Clause 2(e) have not been abrogated at all. The Lease by the request is not being "terminated, limited or restricted". If the Government has a right under Clause 2(e) that right existed on May 16, 1961 when the Lease was executed and delivered. It was and is a right of the Government and it was not a right that CFLCo could abrogate either by the Power contract or in a mortgage.

580 The rights of CFLCo were from the very beginning subject to the proviso and nothing more than those rights as far as CFLCo as lessee is concerned could have been mortgaged. The rights become no greater because CFLCo choses to mortgage them or to

go beyond them in the Power Contract.

581 The principle nemo dat quod non habet is applicable to this situation. CFLCo cannot sell or mortgage what it does not have. The Government seeks merely to enforce a right which it claims it had from the beginning. If it had the right from the beginning, then CFLCo could not have had it and therefore could not have either sold it to Hydro Quebec or motgaged it to the Royal Trust.

582 A reading of Clause 2 of the Financial Agreement does not change this position at all. In fact, ironically it may stengthen the position of the Government. It is one of the rules of estoppel that a party who accepts the title of another under a deed cannot subsequently deny that title. The situation here is somewhat analogous.

583 Both the Royal Trust and CFLCo by entering into the Financial Agreement and the former by entering into the First Mortgage Trust Deed in which the Government intervened in somewhat the same language as is contained in the Financial Agreement must really be deemed to have accepted the "title" of the Government and cannot now deny that title.

584 The Government in effect said that CFLCo might have all of the water power except that to which the Government had a right to request for the Newfoundland consumer. Nothing was said to abrogate that position and the Royal Trust and CFLCo having accepted the purchase rights subject to the Government right can hardly be heard to deny that right.

585 Section 3 of the Financial Agreement does not change this position. This reads as follows:

[*page247] "3. Subject to the provisions of paragraph 2 hereof, the Government reserves the right to take any action against the lessee for the enforcement of any of its rights against the lessee under the Leases or under the Ancillary Leases which will not have for effect the termination, limitation or restriction of any of the Leases or Ancillary Leases or any rights thereunder of any holder thereof."

586 Precisely the same reasoning that was used above may be applied in this case. The Government does not seek to terminate, limit or restrict the Lease or any rights under the Lease but to enforce a reserved right - a right that had not passed by the Lease and could not pass by sale or mortgage.

587 The observations in this Part are made really on the assumption that the Government has, in fact, reserved some rights under Clause 2(e). This, of course, is not necessarily so. The ultimate resolution, however, will not be made by consideration of the Financial Agreement.

588 In relation to this matter reference is also made to Part 31.

Part 22: Declaratory Relief

589 Counsel for Hydro Quebec took issue with the nature of the relief sought by the Government. It is urged upon the court that declaratory relief ought only be granted with great care and caution and not as a substitute for another form of action.

590 No issue is taken with his submissions in this respect. The law is well expressed in Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Limited, [1921] 2 A.C. 438, Hugh W. Simmonds Limited v. Foster, [1955] S.C.R. 324, and McMurray Homes Ltd. v. New Town of Fort McMurray, [1976] 5 W.W.R. 442.

591 All these cases and countless others are of similar effect.

592 The law is adequately summed up in Halsbury's Laws of England (3rd Ed.), Volume 22, page 749 (paragraph 1611):

"The power to make a declaratory judgment is a discretionary one; the discretion should be exercised with care and caution, and judicially, with regard to all the circumstances of the case, and, except in special circumstances, should not be exercised unless all parties interested are before the court. It will not be exercised where the relief claimed would be unlawful or unconstitutional or inequitable for the court to grant, or contrary to the accepted principles upon which the court exercises its jurisdiction. A declaration as to legitimacy will not be made except under the court's statutory powers. The court will not make a declaratory judgment where the question raised is purely academic, or the declaration would be useless or embarrassing, or where an adequate alternative remedy is available, . . ."

593 The power to make a binding declaration of right is a discretionary one. Reference is made to it in Order 24, rule 5, of the Rules of Court which reads as follows:

> "5. No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

594 The exercise of the power is a discretionary function of the judge. There are undoubtedly a great number of cases in which higher courts have pronounced the manner in which a trial judge ought to exercise his discretion; and of course, the exercise of discretion by a trial judge in granting or refusing relief has on more [*page248] than one occasion been overruled in a higher court.

595 It is, nevertheless, to the trial judge that the discretion is granted and it is he who must, upon review of what is before him relating to that discretion, determine how it ought to be exercised.

596 The question of whether or not declaratory relief ought to be made available was argued in an interlocutory proceeding in this matter heard on September 8, 1978, which resulted in Order No. 3. There it was argued that declaratory relief is discretionary and ought not to be provided because

(a) There is another tribunal competent to hear the issue;
(b) There is another person competent to pursue the matter; and
(c) The relief sought anticipates the defence of the first defendant.

597 It was held that it was not proper for the court to determine how it would exercise its discretion at that time, but rather after the hearing of the matter.

598 The first two of these points presumably relate to the provision of the Power Contract containing the choice of law and choice of forum provisions which indicated Quebec law and a Montreal court.

599 That, of course, is not a situation that has any bearing here. The question is whether CFLCo is bound by the request of the Government. That question arises under the Lease which is governed by Newfoundland law and is in no way subject to the provisions of the Power Contract.

600 The Power Contract is really only pertinent to the question of feasible and economic, because if the Power Contract is binding on CFLCo and overlaps with CFLCo's obligation to the Government, then CFLCo could be liable in damages which would render compliance with the Government request unfeasible and uneconomic.

601 These factors are not a guide to the determination of how the discretion granted under the rule should be applied.

602 As far as the last point is concerned, it perhaps is irrelevant. The original claim of the Government embodied additional prayers for relief seeking more specifically declarations that compliance with the request of the Government by CFLCo would not place it in default under the mortgage trust deeds. It presumably was contemplated that CFLCo would defend the case at least partially on the basis that compliance with the request would result in a default under these deeds which could bring down the whole structure like a house of cards.

603 That factor, or course, is still pertinent on the question of feasible and economic but, insofar as the remaining relief now sought is concerned, it is not pertinent on the question of the exercise of discretion.

604 In the passage of Halsbury quoted above the editor suggests that the Court will not make a declaratory judgment where an adequate alternate remedy is available. This is a statement not fully supported by the cases which he quoted, such as Grand Junction Water Works Company v. Hampton Urban Council, [1898] 2 Ch. 331, and North Eastern Marine Engineering Company v. Leeds Forge Company, [1906] 1 Ch. 324. In each of those cases a remedy was available to the plaintiff before another forum and the court was of the view that an application for a declaration of right was an inappropriate substitute for seeking the appropriate relief before such other forum.

605 One obtains the view that the plaintiff in each of those cases and in the others quoted chose to seek relief circuitously by proceeding in the [*page249] Supreme Court

rather than face the question of seeking direct relief before a designated forum.

606 In this case there is no other court or forum competent to deal with the question which is before the court whether it be in the form of a claim for declaratory relief or in the form of a claim for specific performance (which is the relief which counsel for Hydro Quebec suggests ought to be sought).

607 The desirability of granting declarations of right was determined when the rule was made.

608 Halsbury on page 747 of the volume last mentioned said:

"It is, however, sometimes convenient to obtain a judicial decision upon a state of facts which has not yet arisen, or a declaration of the rights of a party without any reference to their enforcement."

609 That seems to be the precise situation that is here. The Government fearful or apprehensive of the consequences of its success in an action for specific performance has chosen instead to seek a declaration of right to see whether an action for specific performance might succeed. It undoubtedly would prefer to know also the answers to the questions embodied in the original claim for relief as to whether the consequences of compliance with the request of the Government would create a default in the financing documents.

610 In the circumstances of this case the seeking of a declaratory judgment is a prudent move and, assuming that the facts upon which the Government relies support the relief which it claims and are proven, the discretion of this court in these circumstances would be exercised in its favour.

611 There is a further reason. This action was started in 1976 and will not have been disposed of in the first instance until 1983.

612 As noted in Order No. 3, the court can hardly indicate on an interlocutory motion how it will exercise its discretion. The case must run its course before this determination may be made.

613 To deny an order for declaratory relief on a discretionary basis done after such a time would mean that the years of work would be for nought.

614 The passage of time in this respect favours the plaintiff but only in the matter of discretion. If the right is there, the defendants are not prejudiced for if the action had been a prayer for specific performance the resulting judgment would have at least equal if not greater impact than a declaration of right.

Part 23: Right of Attorney General to bring action

615 It was suggested in the defence of Hydro Quebec and General Trust that the

Attorney General had no right to bring this action. This point was not pressed in argument.

616 The plea of Hydro Quebec in the second paragraph of its defence is as follows:

> "2. With respect to paragraph 1 of the Statement of Claim, this defendant denies that the plaintiff so styled is competent to represent Her Majesty or the Lieutenant Governor-in-Council or that the Government of Newfoundland is in any way entitled to enforce the rights asserted in the Statement of Claim herein."

617 The Government had pleaded in paragraph 1 of its amended statement of claim that the plaintiff represented her Majesty in Right of Newfoundland.

618 Section 10 of the Department of Justice Act provides in part as follows:

"10 The Attorney General shall

"(a) be entrusted with the powers, [*page250] functions and duties which belong to the office of the Attorney General and Solicitor-General of England by law or usage, so far as the same powers, functions and duties are applicable to the province, and also with the powers and duties which belong to the office of the Attorney General and Solicitor-General under the laws of Canada and of the province to be administered and carried into effect by the Government of the province;

> "(b) (not applicable);

"(c) have the regulation and conduct of all litigation for and against the Crown or any public department in respect of any subjects within the authority of jurisdiction of the Legislature; and

"(d) be charged generally with such other powers, functions and duties as are at any time assigned by the Lieutenant-Governor in Council to the Attorney General."

619 There is no doubt under constitutional law that the Attorney General represents the Queen in all legal matters and that he cannot represent anyone else.

620 The point at issue is a formal one and that is as to whether or not the Queen should be named as a party or whether the Attorney General may be named as a party in her place.

621 In some jurisdictions, legislation provides that that shall be the case. There is no such legislation in this Province.

622 It has however long been the practice in this Province and indeed elsewhere that actions brought by Her Majesty be so styled.

623 The issue as to style has not apparently been specifically addressed. The use of the practice is illustrated in Attorney General v. Commercial Cable Company (1911), 9 Nfld.

L.R. 464. The opening sentence of the judgment of Horwood, C.J., reads as follows:

"The plaintiff who is Her Majesty's Attorney General for the Colony of Newfoundland, takes this action for and on behalf of His Majesty the King, . . ."

624 That is the precise situation that prevails here. The plaintiff who is Her Majesty's Attorney General for the Province takes this action representing "Her Majesty in right of Newfoundland" according to the statement of claim.

625 This has been a time honoured practice. It would be unfitting for this court at this time to condemn such a practice.

626 The plea is therefore rejected.

Part 24: Must the cause of action have existed in 1976?

627 There is an ominous question looming over the entire proceeding that relates to proof of the Government's claim. The request under Clause 2(e) was made on August 6, 1976, and the action commenced on September 13, 1976. The main factual question in this case is whether or not the giving and being given of a priority is feasible and economic. The question has arisen as to whether the facts proven must relate to the situation as it prevailed on the date that the action was commenced or to the situation at the time of trial.

628 Are the facts upon which the plaintiff relies for the relief which it seeks ones that existed at the time that the writ was issued? There seems to be no doubt that the law is that a cause of action must be fully accrued at the date of the writ which, in this case, was August 13, 1976.

[*page251] [629] The rights of the parties are to be determined as of the date of the commencement of the proceedings.

630 In support of this proposition there were cited the cases of Cornish v. Boles (1914), 31 O.L.R. 505 (Ont. C.A.), Petrie v. Rideout, [1923] 1 D.L.R. 585 (N.S. App. Div.), and R. ex rel. Anderson v. Hawrelak (1965), 53 W.W.R.(N.S.) 257 (Alta. C.A.).

631 There appears to be no doubt that this is the law. From a practical point of view, of course, it has to be the law. A person whose cause of action has not yet accrued may not bring an action.

632 The whole purpose of court proceedings is to proclaim or deny in one fashion or another the existence of certain rights to relief. When the existence of a right depends upon the existence of certain facts, then the existence of these facts at the date of the writ is a prerequisite to success.

633 It follows as a matter of course that in its statement of claim a plaintiff must disclose a set of existing facts that if proven would entitle him to the relief claimed. In this respect

the facts must be proven to have been in existence at the time that the writ was issued, for if they were not and if they are an essential part of the basis of his claim to relief, he cannot succeed, for it cannot be said that he had a cause of action on the day that the writ was issued.

634 Although it is perhaps not a matter of law, it is obviously highly inconvenient for a defendant to attempt to defendant a matter where the facts required to be proved include those which may occur after the writ has been issued and even during the period of the trial.

635 That was, in fact, the situation in this case as much of the proof offered by the Government related not so much to the question of whether the project was feasible and economic in 1976, but whether or not it was feasible and economic at the time of trial.

636 It has to be noted that this case is different for two reasons.

637 The first reason is that this is a claim for declaratory relief. It has been said in some jurisprudence that it is not a cause of action. This is, of course, true in the sense that it is not a claim for redress for a wrong done and that no consequences will immediately flow from the judgment rendered herein.

638 Nevertheless, as noted in one of the earlier orders herein, a cause of action is basically a set of facts which if proven require a court either absolutely or in this case in its discretion to grant the relief claimed.

639 It is difficult to distinguish it from any other cause of action.

640 The only real distinction is the question of locus standi. It appears that in the traditional forms of action the claim must be personal to the plaintiff while, in claims for declaratory relief, the claim need not be personal to the plaintiff. It appears, in fact, as the granting of declaratory relief is discretionary so is the determination of whether a particular plaintiff should have standing is discretionary. Generally the court will have regard to whether a party is personally interested and adversely affected by the matters which he alleges.

641 Placed in the context of this case the Government is, by allegation, personally interested and adversely affected by the failure of CFLCo to respond to its request.

642 There is a distinction between declaratory and other relief in the sense that the former provides no [*page252] right to redress. In that respect, justice is served by consideration of facts arising to the time of trial, provided the defendants have reasonable opportunity to answer them.

643 The second matter is that this case by its very nature demands proof of facts that could not have been in existence in 1976 when the writ was issued.

644 The plaintiff must and has alleged the making of the request that the giving and

receiving of priority is feasible and economic and that there has not been compliance with the request.

645 In a matter of this nature the answer to the question of whether or not the project is feasible and economic is forever changing. It would be senseless, although perhaps the court might have no choice in the matter, to award judgment in favour of the Government if it proved that in 1976 the project was feasible and economic, even though the subsequent developments changed that position so that what was feasible and economic in 1976 was not feasible and economic in 1983. It would be senseless also - and again perhaps the court would have no choice in the matter - to deny judgment to the Government on the grounds that although the project may be feasible and economic today, it was not feasible and economic in 1976.

646 In a case of this nature the facts are of an evolving nature. The planning and construction of a transmission line and distribution system is not something that is done overnight but something which takes six or seven years. During such a period factors affecting the feasible and economic realities are forever changing.

647 In respect of economics generally they change for the worse. As prices go up and forecasts go down, money becomes scarce and costs more. In contrast to this, technical advances in the many fields of engineering tend to make projects of this nature more feasible.

648 Is the Government to be prevented from proving current factors to support its claim and required to prove factors existing in 1976 when those latter factors might have absolutely no relevance to the current situation?

649 Another concern, of course, is the ability of the court to respond to a matter of this nature. As noted, the trial itself occupied 99 days. These days were spread over a period of 13.5 months. Nearly three months passed after the hearing before the taking of a view could be completed and by that time six years had elapsed since the writ had been issued.

650 Interlocutory application and appeals therefrom occupied much of that time. The balance was spent in preparation for trial.

651 Engaged as it is in a controversy which by its very nature consumes time on an avaricious basis, time which witnesses a never ending parade of changes in the worlds of feasibilities and economics, the court, if it is to dispense justice, must fashion its decision on current rather than obsolete circumstances. To be concerned at this point with circumstances that existed in 1976 would be absurd.

652 Much of the evidence, of course, while gleaned from recent studies, reflect situations that always existed. Particularly, such items as weather patterns, geological formations, ocean currents and other natural phenomena are unchanging and facts pertaining to these although obtained after the writ are admissible.

653 While natural phenomena remains static, the state of the art advances. Improved

cable designs are devised; underwater trenching machines are proven satisfactory on an experimental basis; underwater repair technology gets better. All these things and many more have developed since 1976. Evidence of them has to be pertinent.

654 It cannot be said that proof of economic feasibility in 1976 was made. While many points were covered, many [*page253] more were not.

655 There are such topics as load forecasting which constantly change, the overhead transmission system, the Strait of Belle Isle submarine crossing, tunnel alternatives and cable supply, the capital costs and schedules, the power system studies and reliability, the cost effectiveness and the financing. These were reviewed in evidence for the most part from a current rather than from a retrospective point of view.

656 Further for reasons to be explained in Part 36 and Part 41, it cannot be said that the economic feasibility of the Project to CFLCo either in respect of 1976 or 1982 was ever proved.

657 However, in the circumstances of this case it must be deemed that if the Government is entitled to relief at all, that relief must be determined upon the basis of current facts pertinent to the question before the court rather than facts that are six years old and virtually obsolete to the current situation.

658 While it is clearly wrong to hold that such is the case in every controversy, it would be equally wrong to hold that such is not the case in this controversy.

659 On the facts of this case it seems proper to depart from the usual rule that the cause of action must be complete at the time that the writ is issued.

660 Such a conclusion cannot be said to prejudice any party because the issue of whether the project was feasible and economic was fought upon the basis of the situation as it existed in 1981 and 1982 when the trial took place and not on the situation as it existed in 1976.

661 Where a court is faced with a fluid situation where continually changing factors influence for the better or worse the cause of action of a party, evidence of these factors may be admitted for the purpose of determining the issue before the court, notwithstanding that they occurred after the issuance of the writ. To deny such evidence is to deny reality; to dispense justice without it is to encourage the consideration of empty decisions, judgment of value to no party.

662 It is the determination of this court that, on the facts of this case, the relief sought by the plaintiff ought not be denied on the grounds that facts proven relating to the question of feasible and economic are current and did not exist when the writ was issued.

Part 25: Force majeure under the Lease

663 The question of force majeure arises out of four sets of pleadings and in two

concepts in this matter.

664 It first arises in respect of the Power Contract by virtue of the plea of the Government in paragraph 25 of its statement of claim which reads as follows:

> "25. In the alternative the plaintiff says that the request set forth in the Order-in-Council constitutes Force Majeure as such term is defined under the Power Contract, and therefore the first defendant will not be subject to any penalties under the provisions of the Power Contract or incur any other liability to the second defendant by reason of complying with such request, and the Power Contract shall not be in default or breached. The plaintiff repeats the allegations contained in paragraphs 6 and 7 hereof."

665 The question of force majeure under the Lease was raised by CFLCo in paragraph 29 of its defence, which reads as follows:

> "29. This defendant further says that it is excused from the performance of any obligation to comply with the request made by the plaintiff referred [*page254] to in paragraph 21 and 22 of the Statement of Claim because of the continuing demands and requirements of the second defendant, a subdivision, authority, agency or representative of Government of the Province of Quebec, pursuant to the provisions of the Power Contract and because of the terms and provisions of the First Mortgage Trust Deed, the General Mortgage Trust Deed and Debenture Indenture, all of which the plaintiff has had prompt notice of and which prevent, restrict, delay or interfere with any obligation this defendant may have to comply with the request made by the plaintiff. This defendant pleads and relies upon the provisions of Clauses 11(b) and (c) of Part IV of the Lease which provides as follows:-

'11. If the performance of the obligations of the Lessee set forth herein shall to any extent be prevented, restricted, delayed or interfered with by reason of

--(b) any law, order, proclamation, regulation, ordinance, demand or requirement of any government or any subdivision, authority, agency or representative of any government; or

> (c) any other cause whatsoever, whether similar or dissimilar to those above enumerated beyond the reasonable control of the Lessee,

'the lessee shall, on prompt notice to the Government be excused from the performance of such obligations to the extent of such prevention, restriction, delay or interference.'"

666 It was further raised by Hydro Quebec in paragraph 28 of its defence, which reads as follows:

> "28. In any event, even if the Orderin-Council is an effective request under Clause 2(e) of Part I of the Lease, which is not admitted but expressly denied, the Power Contract and the continuing requirement of this defendant, being an

> Agency of the Government of Quebec, and the First Mortgage Trust Deed, are sufficient to excuse the first defendant from any obligation which the first defendant may have had to the Government with respect to such request, and the first defendant gave notice to the Government of its inability to satisfy such request in its letter dated August 31st, 1976 referred to in Paragraph 23 of the Statement of Claim. Accordingly, this defendant relies upon Clause 11(b) and (c) of Part IV of the Lease."

667 Finally, it was raised by General Trust in a paragraph of its defence similar to that of Hydro Quebec.

668 The pertinent parts of Clause 11 of Part IV of the Lease are correctly set forth in the passage from the defence of CFLCo quoted above. Particular reference is made to subclause (b). Counsel contend that Hydro Quebec is an agency of the government of Quebec and that its right under the Power Contract comes within the classifications set forth in Clause 11(b). More particularly, it is alleged that it is a demand or a requirement of an agency of the Government of Quebec.

669 These pleas put government against government, province against province. It is argued by some defendants that the claim of right under Clause 2(e) is not an act of government authority and that therefore the defence of force majeure is not available to CFLCo in any action against it by Hydro Quebec under the Power Contract.

[*page255] [670] In contrast to this it is argued by those same defendants that the right of Hydro Quebec under the Power Contract comes within the classification of clause 11(b), which classification by its choice of language embodies acts of government authority.

671 It is an anomalous situation. There is interaction between a Lease in which the Province is the lessor and a Power Contract in which the Province of Quebec through its agency Hydro Quebec is the purchaser. The Government has retained rights by its Lease, while Hydro Quebec has been given rights by its Power Contract.

672 While there was no evidence of it, it seems proper to assume that Hydro Quebec had the authority of the Quebec legislature to execute the Power Contract either under specific or general legislation or under its charter or otherwise.

673 The Lease, of course, was executed pursuant to special legislation and furthermore was given the effect of a statute by that legislation.

674 The effect of force majeure under the Lease and under the Power Contract may be incongruent. The reason for this, of course, is that the Lease is interpreted according to Newfoundland law, while the Power Contract is interpreted according to Quebec law. Further, different factors pertain.

675 The matter of the interpretation of an act of government authority under the force majeure clause of the Power Contract will be dealt with in Part 38. At this time it is proposed only to discuss the force majeure clause in the Lease.

676 To put the matter in perspective, it is to be noted that the plea of force majeure under the Lease is the plea of CFLCo. CFLCo may plead that it is excused from honouring Clause 2(e) by virtue of Clause 11(b). Likewise, Hydro Quebec and General Trust may plead that CFLCo may make such a plea. Hydro Quebec and General Trust may not make the plea directly themselves, because they are not parties to the Lease, but, because they are deemed to be necessary and proper parties to this action, they may put to the court the defences that are available to CFLCo. Otherwise there would be little point in their being joined as necessary and proper parties.

677 The basic question is whether or not CFLCo can succeed in such a plea.

678 There are three basic points to be made in dealing with this argument.

679 The first point is that to construe the right of Hydro Quebec under the Power Contract as the demand or requirement of an agency of the Province of Quebec is to extend the meaning of Clause 11(b) far beyond what could ever have been envisioned by the parties.

680 What is being spoken of there is clearly an act of government authority. It might be legislation. It might be subordinate legislation. It might be the exercise of prerogative powers. Whatever form it takes, its nature is a requirement that originates with the Crown.

681 A similar situation might exist if, for example, instead of the Government requesting 800 MW pursuant to Clause 2(e), Newfoundland Hydro acting under the authority of the Crown through the legislature and appropriate legislation commandeered or expropriated 800 MW in such a fashion that the commandeering or expropriation became the irresistible law of the Province. That is the type of situation that is described in Clause 11(b) in relation to the demand of a government agency. It is not the type of situation that exists here in relation to Hydro Quebec. The rights of Hydro Quebec cannot fit into any classification set forth in Clause 11(b).

682 The second point is that the rights of Hydro Quebec were created by CFLCo.

[*page256] [683] A party cannot avoid liability for the performance of an obligation under a contract by his own conduct which renders performance impossible. CFLCo cannot avoid liability for performance under the Lease by entering into provisions in the Power Contract which render performance of the obligations under the Lease impossible.

684 This position applies equally to Clause 11(b) and (c). Numerous authorities were cited in argument, but it is not necessary to consider these in any depth because the matter is virtually axiomatic.

685 If A, a farmer, agrees to sell all of his produce to B and subsequently agrees to sell all of his turnips to C, he cannot deny B's claim for specific performance or damages on the basis of his contract with C because that is his own act.

686 The law was well expressed in the case of Stirling v. Maitland (1864), 122 E.R.

1047, where Cockburn, C.J., said:

"I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative."

This case was approved in Southern Foundries (1926) Ltd. v. Shirlaw, [1940] A.C. 710, at 717, where Lord Atkin in referring to that passage said:

"That proposition in my opinion is well established law. Personally I should not so much base the law on an implied term, as on a positive rule of the law of contract that conduct of either promiser or promisee which can be said to amount to himself 'of his own motion' bringing about the impossibility of performance is in itself a breach."

687 The principle was followed in the Canadian case of Culina v. Giuliani et al. (1971), 22 D.L.R.(3d) 210. There is no need to speak further on the matter. Counsel in the Stirling v. Maitland case said it all when he said:

"If a party renders the performance of his contract impossible, his liability on it remains."

688 The third point to be made is that CFLCo cannot escape the consequences of the foregoing on the basis that both the Government and Hydro Quebec were aware of what was going on.

689 The facts illustrate that the Government officials conferred with officials of CFLCo, who conferred with officials of Hydro Quebec. A firm understanding was reached between the two sets of parties that 300 MW would be allocated to satisfy the requirements of the Government under Clause 2(e) and that this allocation was a limitation on the rights of the Government under Clause 2(e) which was satisfactory to it.

690 Further, both the Government and Hydro Quebec were aware that CFLCo was entering into the Power Contract, which would preclude it, if the Power Contract was to be honoured, from meeting any future demands of the Government under Clause 2(e) in excess of 300 MW.

691 The Government and Hydro Quebec were as much a part of the act rendering compliance with Clause 2(e) impossible (if that was its affect) as CFLCo.

692 The argument to be dealt with here is that it is scarcely open to the other parties to deny CFLCo the right to plead force majeure when they themselves were parties to that very act. This may very well be so, but it is of no consequence.

693 In this context Hydro Quebec may not plead anything that CFLCo may not plead and CFLCo may not plead it [*page257] because it is in effect setting up waiver or estoppel against the Government, which it cannot do.

694 The part played by the Government in the performance of the act which is set up as force majeure is acquiescence in the 300 MW limitation.

695 There is no authority for any government official to agree to any such limiting allocation. The legislature has reserved the broad right expressed in Clause 2(e) and is not open to anybody other than the legislature to make it less broad.

696 No government official had authority, ostensible or otherwise, to hold out that Clause 2(e) would be satisfied by a reservation of 300 MW any more than CFLCo or Hydro Quebec had a right to rely on the holding out. The will of the legislature is not to be superseded by government officials.

697 The question has already been discussed in Part 19 dealing with estoppel. There is nothing further to be added.

698 Clause 11 of Part IV of the Lease contains nothing which excuses CFLCo from compliance with the Government's request.

699 The conclusion reached in this part varies from the conclusion reached in Part 39 where the plea of force majeure by CFLCo against Hydro Quebec is discussed. There, Hydro Quebec was a party to the creation of the force majeure; here, the Government was not a party. Further, estoppel against the Crown is not there a pertinent consideration.

Part 26: The Lease - Part IV, Clauses 4 and 9

700 Hydro Quebec has alleged that Clauses 4 and 9 of Part IV of the Lease are the only procedures available to the Government for the enforcement of the terms of the Lease.

701 For the purposes of ruling on these provisions it is necessary only to set forth the first paragraphs of each clause. These read as follows:

"4.--(1) If the Lessee, in the opinion of the Government, has failed to observe or perform any term or condition which under this Lease it is required to observe or perform and such failure continues for a period of sixty (60) days from the date that notice thereof in writing has been given by the Government to the Lessee, the Government may, notwithstanding any provisions herein with respect to arbitration, upon giving the Lessee not less than sixty (60) days notice, refer the matter of such non-observance or non-performance to the Supreme Court of Newfoundland or a judge thereof and if the court or judge finds that the Lessee has failed to observe or perform any term or condition which it is required to perform or observe under the provisions hereof as notified to it by the Government, the court or judge may

"(a) order performance by the Lessee of the terms of this Lease; or

"(b) order the payment of a sum by way of liquidated damages for the failure of the Lessee to perform said terms; or

"(c) make both of the orders referred to in paragraphs (a) and (b) of this sub-clause.

"9.--(1) If any dispute arises under this Lease, the matter shall in default of agreement between the parties, be settled by arbitration at the request of either of such parties."

702 These points were not stressed in argument and may be dealt with fairly quickly.

703 The argument under Clause 4 [*page258] fails at first glance for it provides not an exclusive remedy but rather one of the remedies that is available to the Government if the Lessee fails to observe or perform any provisions of the Lease.

704 The word "may" appears in paragraph 1 of this Clause. It was clearly within the contemplation of the parties that this was a remedy that was available to the Government and it was equally within their contemplation that such a remedy was not to be to the exclusion of any other remedy.

705 With respect to the arbitration provision, the law is well established on this.

706 Section 179 of the Judicature Act reads as follows:

> "179. If any party to a submission, or any person claiming through or under him, commences any legal proceedings against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

707 CFLCo not having taken issue with the proceedings, the matter is properly before the court.

708 Pleading Clause 9 at this time is not appropriate by virtue of Section 179. Further, Hydro Quebec may not plead it, but may only plead that CFLCo may plead it. Such a plea by Hydro Quebec fails, because such a plea by CFLCo would fail.

709 Although Section 179 of the Judicature Act uses the word "may" as did Clause 4 set out above the jurisprudence on the matter produces different consequences.

710 The law is that the party to a submission who is sued may apply for a stay.

711 The law goes further than that though. It states that parties cannot by agreement preclude the jurisdiction of the court. For that reason although a court may stay a proceeding on the basis of an application by a defendant to give the arbitration processes

an opportunity to take place, it will not dismiss an action on the basis of an arbitration provision in a contract upon which the action is based.

712 Further, if a party does anything more than apply for a stay as his initial step in the action after filing an appearance, he is deemed to have acceded to the jurisdiction of the court.

713 Normally, of course, a party submits to the jurisdiction of the court by entering an appearance. In fact, there are very few circumstances in which a party may be heard by the court without entering an appearance. There is no provision for a conditional appearance under the Rules of Practice of this jurisdiction.

714 To apply for a stay of proceedings, however, a party must file an appearance, for, if he does not, he is not entitled to seek such an order.

715 He does not prejudice himself by filing an appearance for the court is given the jurisdiction in its discretion to grant a stay upon application by Section 179 and that discretion cannot be refused simply on the basis that an appearance has been entered, for it is only by the entering of the appearance that the party could be heard to make such an application.

716 If, however, the party files an appearance and takes other interlocutory proceedings or pleads to the statement of claim, it becomes a [*page259] matter of estoppel or waiver. Basically, by acceding to the jurisdiction of the court by making interlocutory applications other than an application for a stay or by pleading, a party is deemed therefore to have waived the arbitration provision.

717 That is exactly what has happened in this case. CFLCo has taken part in interlocutory proceedings, and has pleaded to the statement of claim. It must be deemed to have waived the arbitration provision contained in Clause 9 of Section 4 of the Lease. Therefore, it cannot plead the arbitration provision and because of that, Hydro Quebec cannot plead it either.

718 In conclusion therefore the plea that Clauses 4 and 9 of Part IV of the Lease are the only procedures available to the Government for the enforcement of the Lease cannot succeed.

Part 27: Other Legislation

719 Hydro Quebec in paragraph 26 of its defence pleads as follows:

> "26. In addition, this defendant pleads that the Order-in-Council cannot override the provisions of the Newfoundland & Labrador Hydro Act, 1975, The Public Utilities Act, R.S.N. 1970, Chapter 322 and the other Statutes referred to in the Statement of Claim and in this defence and accordingly is ineffective in law as constituting the basis for any legal requirement that the first defendant supply power to Newfoundland and Labrador Hydro."

With respect its plea in this connection appears to be somewhat nebulous.

720 It appears mainly to refer to the Newfoundland and Labrador Hydro Act and its predecessor acts relating to the Newfoundland and Labrador Power Corporation, the Public Utilities Act and the British Newfoundland Corporation Limited - Churchill Falls (Labrador) Corporation Limited Act 1966.

721 Section 15 of the Newfoundland and Labrador Hydro Act reads as follows:

> "15. Subject to the rights of any person existing immediately before the enactment of this Act, there is hereby granted to and vested in the Corporation the sole and exclusive right and franchise limited to the Island of Newfoundland,

"(a) to sell in the first instance either for consumption by way of domestic, individual, or any other use whatsoever, or for resale all power generated by the Corporation; and

"(b) to develop, generate, and sell in the first instance, either for consumption or for resale all power developed after the coming into force of this Act from any new hydro-electric sites."

722 This provision has counterparts in earlier legislation relating to Newfoundland Hydro in its earlier forms.

723 Section 67(1) and (2) of the Public Utilities Act and Section 68 read as follows:

"67.--(1) No public utility shall charge, demand, collect or receive any compensation for any service performed by it whether for the public or under contract until the public utility has first submitted for the approval of the Board a schedule of rates, tolls and charges and has obtained the approval of the Board thereof and thereafter the schedule of rates, tolls and charges so approved shall be filed with the Board and shall be the only lawful rates, tolls and charges of the public utility, until altered, reduced or modified as provided in this Act.

"(2) In the case where a contract for block sale of electrical energy for ultimate distribution [*page260] to the public is in force at the passing of this Act and in the opinion of the Board the price per unit charged under such contract is unreasonable and not in the public interest, the Board may require all parties to the contract to reform the contract in respect of the price per unit charged to the purchaser, and this shall not invalidate the contract in any other respect.

> "68. A public utility shall submit for the approval of the Board the rules and regulations which relate to its service, and any amendments thereto, and upon approval by the Board they are the lawful rules and regulations of the public utility until altered or modified by order of the Board."

724 Section 2 of the British Newfoundland Corporation Limited - Churchill Falls (Labrador) Corporation Limited Act (1966) reads as follows [using defined terms in

substitution for paragraphs (a) and (b)]:

"2. Regulations made under Section 41 of the Newfoundland and Labrador Power Commission Act, 1965, the Act No. 20 of 1965, as amended, shall not apply to British Newfoundland Corporation Limited and Churchill Falls (Labrador) Corporation Limited in connection with the exercise by them or either of them in Labrador at any time or from time to time of their respective rights and liberties to water powers in Labrador as conferred by

"(a) (the Brinco Agreement), and

"(b) (the Lease)"

725 Finally, section 7 of the Lease Act as amended by Act No. 84 of 1966-67 reads in part as follows:

"7. The Public Utilities Act, 1964, the Act No. 39 of 1964, as now or hereafter amended shall not apply to
(b) the supply of hydro-electric power developed under the Lease made pursuant to the Act No. 51 of 1961, as now or hereafter amended, at the Churchill Falls Power Project in Labrador to
(i) Quebec Hydro-Electric Commission,
(ii) the Newfoundland and Labrador Power Commission, or
(iii) any company which, at the date of the enactment of this Act, is being supplied with hydro-electric power by Twin Falls Power Corporation Limited and which is then engaged in mining, beneficiating, concentrating, agglomerating or otherwise treating or processing iron ore in Labrador which is derived from any mineral deposit in Labrador,

"under any written agreement with any of such Commissions or companies, or to the issuance of any securities in connection with or to the financing or construction of facilities for the installation and transmission of hydro-electric power from the said Churchill Falls Power Project; or

"but the said the Public Utilities Act, 1964, applies to the production, storage, transmission and supply of all other hydro-electric power developed under or in pursuance of the Lease executed and delivered pursuant to this Act."

726 In considering these provisions reference should also be made to Clause 2(e) which, it will be recalled, gave CFLCo the right to transmit and to export.

[*page261] [727] It was argued that all the legislation was designed to protect was the right of CFLCo under the Lease to sell, transmit and export to Hydro Quebec all of the energy generated.

728 With respect to Section 15 of the Newfoundland and Labrador Hydro Act there is no doubt, of course, that the prefatory words of this section protect the right of CFLCo under

the Lease. That is as far as it goes in respect of the Lease. To the extent that CFLCo is given a right to do any of the things mentioned in paragraphs (a) and (b) of Section 15 of that Act prior to the date thereof, that right continues and is not diminished or eliminated by the Newfoundland and Labrador Hydro Act. It has nothing to do with the situation which is before the court.

729 Further, at this point we are not faced with an interpretation of the Lease, but with the reality of the situation. The Government has made the request and has by it designated Newfoundland Hydro as the consumer. There is no question of a sale in the Island of Newfoundland as mentioned in section 15 of the Hydro Act.

730 In the terms of the request the sale if it is to be made is to be made in Labrador.

731 Counsel for Hydro Quebec argue that the right to transmit the power is the right of CFLCo. Presumably, the extension of this argument is that the right to transmit continues to the point of distribution and it is at this point that the sale takes place. (Under the terms of the proposal the distribution point would be at Soldier's Pond on the Island.)

732 As noted earlier it is a necessary implication of the Lease that CFLCo has the right to sell. It probably is a necessary implication that it likewise has the right to transmit, but this right has been expressed.

733 CFLCo is given the right to transmit electrical energy generated at Churchill Falls.

734 There is nothing to preclude CFLCo from selling energy at Churchill Falls and another party from transmitting it. The right to transmit the generated energy is not exclusive.

735 Turning next to the Public Utilities Act, sections 67 and 68 are really only of peripheral interest.

736 Sections 67 and 68 provide for the regulation of rates, tolls and charges upon a general distribution or under contract.

737 It also provides for the review of unit prices on block sales pursuant to contracts existing at the time that the Act came into force.

738 There seems to be an uncovered area here. Newfoundland Hydro is not the public as that term is used in section 68 and there is no contract. Assuming for the moment that there is an obligation on the part of CFLCo to sell and a right on the part of Newfoundland Hydro to buy, section 67(1) would have no application. It would in normal circumstances only have application upon a contract being entered into but, by virtue of Section 7(b) of the Lease Act, once the written agreement is entered into, the Public Utilities Act has no application anyway.

739 In the circumstances that prevailed in this particular case the Public Utilities Act has no application.

740 There are, of course, circumstances where a sale and a purchase under the proviso would be subject to the Public Utilities Act. It is not necessary to speculate on what those might be. It would not apply in the circumstances of this case.

741 The matter of an agreement is one of considerable importance, however, and that will be dealt with in [*page262] the Part 28.

742 Finally, reference was made to the British Newfoundland Corporation Limited - Churchill Falls (Labrador) Corporation Limited Act (1966). This was mentioned only to illustrate the extent to which the legislature went to protect CFLCo under the Lease. It did not provide rights additional to those contained in the Lease, but offered immunity from regulations that might be made by Newfoundland Hydro with the approval of the Lieutenant Governor in Council.

743 There is no legislation that improves the position of Hydro Quebec under the Power Contract in respect of energy purchased by it and sold by CFLCo pursuant to the implicit power of sale in the Lease.

744 None of that legislation has any bearing on the issues in this case.

Part 28: Agreement to agree

745 Once again we must look at the language of the proviso:

"Provided that upon the request of the Government consumers of electricity in the Province shall be given [Emphasis start] priority[Emphasis end] where it is feasible and economic to do so."

Emphasis added.

746 The term "priority" has been defined in the context to mean a right of first refusal to purchase energy available for sale and not previously committed. Whether such an interpretation of the word is acceptable or not, the word itself necessarily embodies a sale of energy by CFLCo and a purchase of the same by the Newfoundland consumer. Three things should be noted in this connection.

747 The first is that the proviso puts no limit on the amount of energy in respect of which the Newfoundland consumer shall have priority.

748 The second is that while the Newfoundland consumer has the right to purchase an unspecified quantity, no time period is indicated over which the purchase shall continue.

749 The third is that Clause 9 of Part IV of the Power Contract contains an arbitration provision. Subclause 9 (1) reads as follows:

"9.--(1) If any dispute arises under this Lease, the matter shall in default of agreement between the parties, be settled by arbitration at the request of either of such parties."

750 It is noted that there is in Clause 6.6 of the Power Contract provision for the recapture of 300 MW. Of this amount a portion has already been recaptured for sale to a consumer in the Province.

751 There was apparently no difficulty between CFLCo and the Government or the purchaser or purchasers in drawing up whatever agreement or agreements were necessary relating to the resale of the energy recaptured.

752 That does not solve the legal problem that confronts us at this point. The questions that arise are whether or not the proviso contemplates that there should be an agreement between the parties to agree upon a power contract between CFLCo and Newfoundland Hydro, and if so, can any disagreement settling the terms of such a power contract be resolved by invocation of the arbitration provision of the Lease?

753 The answer to the first question is easily disposed of. If there is to be a sale by CFLCo and a purchase by Newfoundland Hydro, that in itself is a contract.

754 The proviso is silent on the amount of energy that may be required to be sold.

755 The present capacity of the [*page263] Plant is 5225 MW. This is all committed to Hydro Quebec subject to the recapture provision and the provisions providing for the accommodation of the commitments of Twinco.

756 According to the definition of priority referred to above we would really only be concerned with the amount of energy that could be generated by the Plant in excess of the contractual commitments.

757 At the present time this quantity is less than the recapture allocation because some has already been recaptured and there is really very little power available for the priority.

758 To answer the problem, we may make one of two assumptions - either that the interpretation of priority is wrong and that priority extends to the entire production of the Plant whether previously committed or not or that CFLCo in some manner expands the capacity of the Plant to answer the request of the Government.

759 In either circumstance there will be purchased no more energy than is available for sale. The Newfoundland consumer will have the right to purchase any portion of this quantity. That is not a negotiable item.

760 The Government may request any quantity and so much of that quantity as is available for sale must be sold by CFLCo to the Newfoundland consumer.

761 There is no provision as to the duration of the purchase.

762 While the term "power" is used in Clause 2(e), power is not really a merchantable commodity.

763 In the Power Contract it is defined as the rate at which energy is transferred at any

point measured in kilowatts or multiples thereof. In Webster's New Collegiate Dictionary (1980) "power" is defined as a source or means of supplying energy.

764 In short, power is the capacity of the plant to produce energy.

765 It may be the subject of compensation, for there may be a requirement on the manufacturer of electricity to maintain a certain level of power, although not all of the energy that may be thereby produced is purchased.

766 The term "electric power generated" which is used in Clause 2(e) has to mean energy. Otherwise it would have no meaning. It follows, therefore, that when there is talk of priority, it is a right to purchase energy and not to purchase power.

767 Mention of the foregoing is made because a time factor is involved in the purchase of energy.

768 A volt is a unit of power. An ampere is a unit of current. A watt is a unit of energy and is the product of voltage and amperage.

769 When it is said that the plant has a capacity of 5225 MW, it means that it can produce that amount of energy at any point in time.

770 It is usually measured in kilowatt hours.

771 Assuming it operates at full capacity, the plant could produce 45, 552 million kilowatt hours a year which is roughly the equivalent of 61, 061,662 horsepower a year.

772 In this context time is used in two senses. The first is to determine a unit of energy which is a kilowatt hour and the second is to determine the period of time over which the prescribed number of units of energy will be required.

773 As no limit is imposed upon this latter figure in the Lease, one has to conclude that the term over which the energy will be required is not negotiable.

[*page264] [774] In other words the Newfoundland consumer has the right to state that it will require a certain amount of energy for a certain number of years and, subject to availability, CFLCo must comply. That part seems simple enough.

775 The sale by CFLCo and the purchase by the Newfoundland consumer of electrical energy involves a contract or agreement between those two parties. While the questions of quantity and time are not negotiable, everything else is.

776 The Lease has to be interpreted according to the legal rights which it purports to bestow. At the present time it has a capacity to produce 5, 225 MW of electrical energy. Conceivably, its capacity could be increased.

777 There being no limit on the quantity of energy which may be requisitioned under Clause 2(e), all of the available capacity could be called upon. The Power Contract was

not in existence when the Lease was negotiated. According to the finding hereinbefore expressed the obligation of the Power Contract operates as a limitation on the amount of electrical energy which may be requested under Clause 2(e). This fact may reduce the complexity of a power agreement between CFLCo and the Newfoundland consumer, but it does not alter the legal principle that was involved and that has been involved since the Lease was executed in 1961. If price were the sole consideration between CFLCo and the Government and that could be resolved by an arbitration proceeding, then perhaps pursuant to the jurisprudence hereunder referred to there would be no problem.

778 There are, however, at least two problems.

779 The first is that price is not the only factor to be negotiated. The Power Contract illustrates eloquently the complexities of a power agreement. To pick but a few illustrations, it refers to firm capacity, firm capacity schedule, delivery point, transmission facilities, base rate, price adjustments.

780 There are a great many factors to be negotiated. How many, of course, will be determined by the extent of the request of the Government.

781 In the present case 800 MW of electrical energy is requested. Very conceivably this may be siphoned off the main current to Hydro Quebec without extensive complication. If on the other hand substantially all of the production were requested, there would be a great many complications.

782 The second point is that it is not a matter of settling a price between the parties to the Lease. It is a matter of settling price between CFLCo and the Newfoundland consumer, in this case Newfoundland Hydro. There is no provision for arbitration between CFLCo and a third party.

783 The extent of the Government's right is to compel the giving of a priority to Newfoundland Hydro. What transpires thereafter is between CFLCo and Newfoundland Hydro.

784 It is clear, therefore, that Clause 2(e) necessarily implies that an agreement shall be entered into, not an agreement between the parties, but an agreement between one of the parties and a third party.

785 What then is the law on this matter?

786 The consumption of electricity is not static. It varies according to the time of day and the season of the year. There would be times when the power available would be excess to the needs of the Newfoundland consumer.

787 There is the question of payment, not only for the power that the Newfoundland consumer draws but for the payment of power that it is entitled to but does not draw.

788 There is a matter of the control of the reservoir of the flow of water power and the

flow of electrical energy.

[*page265] [789] It is not difficult to conclude, therefore, that if the proviso bestows upon the Government the right to insist that CFLCo sell power to a Newfoundland consumer, then it implies also that there must be an agreement with the Newfoundland consumer, for CFLCo cannot be required to sell what could amount to all of its capacity to a Newfoundland consumer without a contract covering all of the matters to be considered, some of which were mentioned above.

790 The matter becomes more clearly focussed if one visualizes the situation where the Government requisitions all of the power and draws it without the benefit on an agreement such as the Power Contract.

791 It must be remembered, too that the Newfoundland consumer is not a party to the Lease. In this particular case the Newfoundland consumer designated by the Government is Newfoundland Hydro; which is an arm of the Government and for legal purposes the two may be regarded as one.

792 But that is not necessarily the situation under the Lease and must be interpreted from the point of view that the Newfoundland consumer may not be an agent of the Government.

793 Counsel for the plaintiff suggests that the question of the price of power is premature. He says that once the question of the Government's rights have been finally adjudicated upon the matter of price may then arise. But the Government's right according to its position is that the Newfoundland consumer shall have the right to purchase power in priority to the existing commitments of CFLCo. That is all very well, but if the parties have not stipulated the terms upon which the power is to be sold and purchased, what is the end result? The end result is that you have an agreement to make an agreement. The situation is worse than that, however, because there is an agreement that one of the parties to the agreement shall make another agreement with a third party.

794 The only guideline that conceivably exists for the determination of what that agreement shall be is that it shall be feasible and economic. If that is the case, of course, the Government must fail because if the provisions of a power agreement are to be feasible and economic to the parties and the Government has the obligations of proving that it is feasible and economic then it cannot do so until such an agreement is reached.

795 The case of Thomson v. McPherson (1912), 3 O.W.N. 791, was cited. While the cited facts do not disclose clearly in what respect the contemplated agreement there in issue could be defined as indefinite or incomplete, the finding of the court was in effect that the agreement was indefinite and incomplete and was therefore not an agreement at all.

796 Reference was made in the Thompson case to House v. Brown (1907), 14 O.L.R. 500. In that case Anglin, J., said:

"That the want of a definite provision in a contract fixing the amounts and dates of payment

of deferred instalments of purchase money renders a contract incomplete and unenforceable, where it is contemplated that these matters shall be the subject of further negotiation and future settlement between the parties themselves is well established."

797 Kelly, J., who rendered the decision in the Thompson case, also referred to Logan v. Mesurier (1847), 13 E.R. 628, where it was held to be well settled law that to render a contract for sale complete there must be a price ascertained or ascertainable.

798 There is a series of English cases on the matter, which traces a fine line between these cases where an agreement to agree can be sustained and these cases where it cannot be sustained.

[*page266] [799] The first of these cases was May & Butcher, Limited v. R. which may be found in [1934] 2 K.B. 17 as an appendix to the case of Foley v. Classique Coaches Limited, [1934] 2 K.B. 1.

800 In that case there was an agreement for the sale of goods at prices to be agreed upon from time to time with the provision that all disputes with reference to or arising out of the agreement would be submitted to arbitration. The seller considered that it was no longer bound by the agreement and the matter came to court and found its way to the House of Lords. Lord Buckmaster outlined the three issues that were before the court. The third of these is not important and is not set forth. At page 19 of the report he said:

"The points that arise for determination are these: Whether or not the terms of the contract were sufficiently defined to constitute a legal binding contract between the parties. The Crown says that the price was never agreed. The suppliants say first, that if it was not agreed, it would be a reasonable price. Secondly, they say that even if the price was not agreed, the arbitration clause in the contract was intended to cover this very question of price, and that consequently the reasonableness of the price was referred to arbitration under the contract."

He then went on to say at pages 19 and 20.

"What resulted was this: it was impossible to agree the prices, and unless the appellants are in a position to establish either that this failure to agree resulted out of a definite agreement to buy at a reasonable price, or that the price had become subject to arbitration, it is plain on the first two points which have been mentioned that this appeal must fail.

"In my opinion there never was a concluded contract between the parties. It has long been a well recognized principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all. It is of course perfectly possible for two people to contract that they will sign a document which contains all the relevant terms, but it is not open to them to agree that they will in the future agree upon a matter which is vital to the arrangement between them and has not yet been determined."

Dealing with the second point he said:

"The next question is about the arbitration clause, and there I entirely agree with the majority of the Court of Appeal and also with Rowlatt, J. The clause refers 'disputes with reference to or arising out of this agreement' to arbitration, but until the price has been fixed, the agreement is not there. The arbitration clause relates to the settlement of whatever may happen when the agreement has been completed and the parties are regularly bound. There is nothing in the arbitration clause to enable a contract to be made which in fact the original bargain has been left quite open."

801 In the same case Viscount Dunedin said at page 21:

"This case arises upon a question of sale, but in my view the principles which we are applying are not confined to sale, but are the general principles of the law of contract. To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties. In the system of law in which I was brought up, that was expressed by one of those brocards of which perhaps we have been too fond, but [*page267] which often express very neatly what is wanted: 'Certum est quod certum reddi potest.' Therefore, you may very well agree that a certain part of the contract of sale, such as price, may be settled by some one else. As a matter of the general law of contract all the essentials have to be settled."

Further on page 21 and 22 he said:

"There would have been a perfectly good settlement of price if the contract had said that it was to be settled by arbitration by a certain man, or it might have been quite good if it was said that it was to be settled by arbitration under the [Emphasis start]Arbitration Act[Emphasis end] so as to bring in a material plan by which a certain person could be put in action. The question then arises, has anything of that sort been done? I think clearly not. [Emphasis start]The general arbitration clause is one in very common form as to disputes arising out of the arrangements. In no proper meaning of the word can this be described as a dispute arising between the parties: it is a failure to agree, which is a very different thing from a dispute."[Emphasis end]

Emphasis added.

802 In the case of Hillas & Co., Ltd. v. Arcos, Ltd. (1932), 147 L.T. 503, the parties had entered into an agreement for the sale by one and the purchase by the other of lumber. The agreement provided that the buyer should have the option of entering into a contract with the seller for the purchase of 100,000 "standards" for delivery during 1931. In the same paragraph it provided that such paragraph was to stipulate that whatever the conditions are the buyer should obtain the goods on conditions and at prices which show to him a reduction of 5% on the F.O.B. value of the official price list at any time during 1931. The option was exercised and the House of Lords said that a valid agreement was

thereby created between the parties.

803 The words "whatever the conditions are" were considered to be extraneous. Lord Tomlin said that, upon this view, it could not be said that there was nothing more than an agreement to make an agreement.

804 The distinction between the two cases appears to be one of fact. In the case of May & Butcher Limited v. R. there was a provision for a sale at reasonable price to be agreed. This was deemed to be an agreement to make an agreement and was void.

805 In the Hillas case there was no such stipulation. The House of Lords found that upon the exercise of the option there was a settled contract, rather than an agreement to agree.

806 In the case of Foley v. Classique Coaches Limited (supra) the plaintiff agreed to sell and the defendant to purchase his land and, by a subsequent agreement, the defendant agreed to purchase from the plaintiff all the petrol required for his business at a price to be agreed upon by the parties in writing from time to time. The agreement worked well for a number of years, but the plaintiff ultimately found a cheaper source of petrol and forsook the agreement, which resulted in the action, which went to the English Court of Appeal.

807 In the Foley case the judgment of the Court of Appeal was given by Scrutton, L.J., who described what had happened in May & Butcher v. R. and Hillas & Co. v. Arcos.

808 Following the Hillas case he said at page 10 as follows:

"In the present case the parties obviously believed they had a contract and they acted for three years as if they had; they had an arbitration clause which relates to the subject-matter of the agreement as to the supply of petrol, and it seems to me that this arbitration clause applies to any failure to agree as to the price. By analogy to the case of a tied house there is to be implied in [*page268] this contract a term that the petrol shall be supplied at a reasonable price and shall be of reasonable quality. For these reasons I think the Lord Chief Justice was right in holding that there was an effective and enforceable contract, although as to the future no definite price had been agreed with regard to the petrol."

809 It should be noted that Scrutton, L.J., had given a dissenting judgment when the May & Butcher case was in the Court of Appeal. The majority view in that case was upheld in the House of Lords. The May & Butcher decision was followed by him in the Hillas case only to be overruled by the House of Lords. He relates what transpired in this connection at pages 9 and 10 of his decision in the Foley case preceding the above passage.

810 The arbitration clause in the Foley case read as follows:

> "8. If any dispute or difference shall arise on the subject matter or construction of this agreement the same shall be submitted to arbitration in the usual way in accordance with the provisions of the Arbitration Act, 1889."

811 The decision seems somewhat out of accord with the view of Viscount Dunedin in the May & Butcher case, where he distinguished between a dispute and a failure to agree, the inference being that a dispute was arbitrable while a failure to agree was not. In the Foley case Scrutton, L.J., held that the arbitration clause applied to "any failure to agree as to the price." To make this finding he apparently relied upon the implied term that the petrol should be supplied at a reasonable price and should be of reasonable quality.

812 This being so it would seem that by reference to the implied term there was not so much a failure to agree as a dispute as to what a reasonable price might be. (Of course, the parties in that case had not reached the point of dispute. The plaintiff was suing to enforce the agreement and it was held to be enforceable. Presumably if subsequently the parties did not agree on what a reasonable price and a reasonable quality would be, it was determined by arbitration.)

813 The cases were later discussed in the matter of Scammel v. Ouston, [1941] 1 All E.R. 14. In that case there was an agreement for the purchase and sale of a truck. The price was to be paid in part by the trade in of an old truck and in part by a hire-purchase agreement.

814 The court held that there was no concluded agreement, since the expression "on hire-purchase terms" was too vague to be given any definite meaning.

815 In that case Viscount Maugham said at page 16:

"It is a regrettable fact that there are few, if any, topics on which there seems to be a greater difference of judicial opinion than those which relate to the question whether, as the result of informal letters or like documents, a binding contract has been arrived at. Many well-known instances are to be found in the books, the latest being that of Hillas & Co., Ltd. v. Arcos, Ltd., [1932] All E.R. 494 (H.L.). The reason for these different conclusions is that laymen unassisted by persons with a legal training are not always accustomed to use words or phrases with a precise or definite meaning. In order to constitute a valid contract, the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that, unless this can be done, it would be impossible to hold that the contracting parties had the same intention. In other words, the consensus ad idem would be a matter of mere conjecture. This general rule, however, applies somewhat differently in different cases. In commercial documents connected with dealings in a trade with which the parties are perfectly familiar, the court is [*page269] very willing, if satisfied that the parties thought that they made a binding contract, to imply terms, and, in particular, terms as to the method of carrying out the contract, which it would be impossible to supply in other kinds of contract: Hillas & Co., Ltd. v. Arcos, Ltd. [1932] All E.R. 494 (H.L.), at pp. 511, 512, 514."

816 Lord Wright said at page 26:

"However, I think that the other reason, which is that the parties never in intention, nor even in appearance, reached an agreement, is a still sounder reason against enforcing the claim. In truth, in my opinion, their agreement was inchoate, and never got beyond

negotiations. They did, in deed, accept the position that there should be some form of hire-purchase agreement, but they never went on to complete their agreement by settling between them what the terms of the hire-purchase agreement were to be. The furthest point they reached was an understanding or agreement to agree upon hire-purchase terms. However, as Lord Dunedin said in May & Butcher, Ltd. v. R. (reported in a note to Foley v. Classique Coaches, Ltd.,) at p. 21:

'To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties.'"

817 An interesting editorial note appears on pages 14 and 15 of that which perhaps explains the apparent differences in the cases.

"It has often been said that the English courts, especially on the common law side, have in recent years been apt to give a wide interpretation to the terms used by business men in business documents, and have been inclined to find a binding contract where very indefinite expressions have been used. In the present case, their Lordships have decided that words which most business men would have thought sufficiently definite and conclusive are too vague to constitute a binding contract. Such a question is necessarily purely one of degree, but it is here of particular interest, as the words are now very commonly used. To the business man, the words "on hire-purchase terms" have a definite meaning, and he is little concerned with the exact arrangements for obtaining the necessary credit. In future, if there is to be a binding contract, the particular form of hire-purchase finance to be employed must be specified."

818 None of these cases, of course, is identical to the situation at hand. There was no mention of an agreement in the Lease. It seems unlikely that any thought was given to it.

819 The truth of the matter is that to give proper effect to the priority a price would have to be settled; more than that, a complex agreement would have to be drawn!

820 In the Scammel case Lord Wright referred to a hire-purchase agreement as a complex arrangement. The implication is that the court will not give effect to an agreement on the basis that reasonable prices and reasonable terms are not adequate to fill the gap left in the so-called agreement.

821 This matter is further reviewed in Part 35 dealing with CFLCo's price.

822 The sum and substance of the situation is that first of all there was no agreement that there should be a price to be agreed upon. This might not matter if the court could find sufficient facts present in this case to follow the decision of the House of Lords in Hillas & Co., v. Arcos. No [*page270] such finding can be made.

823 In the second place, according to the decision of the House of Lords in May & Butcher Limited v. R., the arbitration clause is of little value in this case. The function of an arbitration board is not to create an agreement, but to settle disputes arising out of an agreement already created. There is no express obligation to make an agreement. There is nothing for the arbitration board to put its mind to.

824 In the third place and most importantly, the proviso purports to impose upon CFLCo an obligation that is not adequately defined. One might say unkindly that it is not defined at all. There is an implied obligation, upon the exercise of the priority, for CFLCo to sell power to the Newfoundland consumer. That is the only contractual obligation that may be implied against CFLCo and it cannot be enforced because what the obligation is beyond that point is not stated. The court will not impose upon it the obligation to enter into such an undefined or inchoate obligation.

825 The jurisprudence which declares void an agreement to make an agreement is applicable in this case where there is an agreement to enter into an undefined obligation with the third party. It is void and cannot be enforced.

826 There is no proposition of law that would entitle this court to impose upon one party to a contract at the request of the other the obligation to sell merchandise to a third party upon terms that are neither ascertained nor ascertainable.

827 It is not the function of an arbitration board under a contract between two parties to settle the terms of a contract between one of these parties and a third party.

828 The terms of a power agreement between CFLCo and Newfoundland Hydro are unascertained and unascertainable. In relying upon those principles of law already discussed, although applying them to a slightly different factual situation, it is the finding of the court that the request of the Government imposes no obligation upon CFLCo.

Part 29: Quebec proceeding

829 On May 24, 1977, Hydro Quebec brought action against CFLCo in the province of Quebec seeking declaratory relief in relation to the Power Contract. The Government, Royal Trust and General Trust were joined as "mis-encause".

830 The relief sought included declarations that

(a) by virtue of the Power Contract Hydro Quebec has the obligation to buy and CFLCo has the obligation to sell and deliver to Hydro Quebec all the power and electrical energy which the plant can generate subject to the recapture provisions; and
(b) default by CFLCo to sell and deliver to Hydro Quebec all such power and electric energy would constitute a breach of the Power Contract.

831 The Government took what is called in Quebec a declinatory exception on the basis of immunity and lack of jurisdiction. The matter was heard in the Superior Court and the

Court of Appeal in Quebec and ultimately by the Supreme Court of Canada, which ruled in favour of the Government on the matter of lack of jurisdiction and did not deal with the question of immunity.

832 In the same action CFLCo brought a motion to dismiss the claim basically on the ground that Hydro Quebec did not by its pleading show that any "genuine problem" existed between CFLCo and Hydro Quebec and that the existence of such a problem is a prerequisite to the granting of declaratory relief.

[*page271] [833] In this respect the Supreme Court of Canada denied the motion.

834 The matter is not of immediate importance to the decision that has to be made herein.

835 The matter comes up because Hydro Quebec argues that CFLCo has in some fashion compromised itself by the position which it took in the Quebec proceeding.

836 There are two matters to be considered in this connection. The first is whether or not the record of the Quebec proceeding is admissible and the second is, if so, whether or not CFLCo in some fashion therein compromised itself for the purposes of this action.

837 Relevance is one of the tests of admissibility. For that reason, it is appropriate to deal with the second question first, for that will, in this case, avoid consideration of the first.

838 It is perhaps sufficient to observe the following.

839 The statement of Halsbury's Laws of England (4th Ed.), vol. 17, paragraph 195, that pleadings recorded in one cause are admissible in evidence in subsequent proceedings to prove the institution and subject matter of the cause but are generally inadmissible even as against parties or privies as proof of the facts stated in them is well supported by case law. It seems necessary only to refer to Boileau v. Rutlin (1848), 154 E.R. 657, Kleeners Pty. Ltd. v. Lee Tim (1961), 78 W.N. (N.S.W.) 746, and Austin v. Austin, [1905] V.L.R. 564.

840 The evidence was admitted provisionally and marked MJ 1, 2 and 3.

841 The initials MJ indicated Mr. Jette, a legal associate of Geoffrion & Prud'Homme, attorneys for Hydro Quebec in the Quebec proceeding.

842 The issue oddly enough revolves around the question of force majeure. As noted, the Government, in apparent anticipation of CFLCo's defence that it would be liable to damages at the suit of Hydro Quebec if it honoured the request of the Government under Clause 2(e), has pleaded that CFLCo could plead in its own defence in any such action force majeure.

843 In simple terms Hydro Quebec takes the positions that:

(a) CFLCo has denied the allegation of the Government that it could plead force majeure in a proceeding against it in the Province of Quebec arising out of the

Power Contract;

(b) CFLCo by its letter of August 31, 1976 to the Minister of Mines and Energy (see Appendix C) has said that it is bound by the provisions of the Power Contract; and

(c) CFLCo has stated in the Quebec proceedings before the Supreme Court of Canada that there is no genuine problem between the parties.

844 Hydro Quebec is suggesting that in view of the position taken by CFLCo in the Quebec proceeding, it cannot plead force majeure under the Power Contract - that force majeure being its obligation to the Government under the Lease.

845 This is really a question of Quebec law. At this point the question is not whether such a plea would succeed but whether it can be made in the first instance.

846 There was no evidence of Quebec law on this particular point. There was a great deal of evidence of Quebec law on other aspects of force majeure, but not on the aspect of whether CFLCo in view of its position taken in the Quebec proceeding could later in that [*page272] or a subsequent proceeding at the suit of Hydro Quebec plead the Government request as force majeure.

847 The law of Quebec is presumed to be the same as the law of Newfoundland unless the contrary is proven. The following passage is taken from Halsbury's Laws of England (4th Ed.), vol. 8, paragraph 794:

"Subject to certain exceptions, foreign law is a question of fact which must be specifically pleaded by the party relying upon it, and must be proved to the court. The English court cannot generally take judicial notice of foreign law, and it presumes that this is the same as English law unless the contrary is proved. Thus, the onus of proof of foreign law lies on the party relying on it."

848 What follows therefore is a determination of the issue according to Newfoundland law. In this connection reference is also made to Part 39.

849 In relation with this matter the following is an extract from the factum of CFLCo before the Supreme Court of Canada in the Quebec proceeding. The quoted paragraphs are taken from pages 16, 17 and 18 of the factum, but are not consecutive.

"Having established that there is no difficulty in law between the parties one might be tempted to say that since there is no problem, no solution is required under the present circumstances; this is obviously a truism.

"A more proper test is to consider the situation where appellant CFLCo would confess judgment to the petition of respondent Hydro Quebec as it now stands. This brings us to a careful consideration of the conclusions of the petition submitted by respondent Hydro Quebec . . .

"The effect of granting such a conclusion would not clarify or interpret in any manner

whatsoever the existing obligations of the parties to the Power Contract since it simply confirms and repeats the provisions of section 1.2 of the Power Contract. We respectfully submit that respondent Hydro Quebec's position is not in any fashion clarified or enhanced by the granting of such a conclusion which is a mere repetition of a [Emphasis start]perfectly clear and unambiguous provision of the Power Contract[Emphasis end] . . . [Emphasis added]

"With respect to this conclusion, first of all, appellant [Emphasis start]CFLCo has categorically stated[Emphasis end] in its letter of August 31, 1976, [Emphasis start]that it would be in default under the Power Contract were it not to supply all the electricity it generates to Hydro-Quebec[Emphasis end]; there is no difficulty between the parties as to the interpretation of the contract. [Emphasis added]

"Secondly, it is obvious that [Emphasis start]failure by CFLCo to supply all the electricity it generates to Hydro-Quebec is an event of default under the contract[Emphasis end], this obligation being the very essence of the Power Contract. One must conclude therefore, that there is no difficulty whatsoever between the parties, be it in fact or law . . ." [Emphasis added]

850 An added perspective is given by citing a paragraph appearing on page 15 of the same factum:

"As can clearly be seen from the above, respondent Hydro Quebec does not allege any difficulty in law between the parties to the contract, since nowhere in its petition does it demand clarification or interpretation of a certain clause of the contract. Also, there is no difficulty in fact between the same parties since appellant CFLCo has categorically refused to comply with the provisions of the Order-in-Council. As a matter of fact, the only apparent difficulty derives from the enactment of Order-in-Council 1001-76 which is manifestly the act of a stranger to the contract i.e. 'le fait d'un tiers'."

[*page273] [851] There are two aspects of the matter. The first is the argument of CFLCo that Hydro Quebec did not show a genuine problem by its pleading. The second is that CFLCo by its argument appears to place some reliance upon its own letter of August 16, 1976, (Appendix C) pointing out that it has indicated its refusal to accommodate the request of the Government and has pointed out that it is bound by the Power Contract.

852 On the first point there is no doubt that pleadings and arguments on the pleadings do not constitute admissions. A defendant may take issue with the contents of a statement of claim before pleading to it. He may argue that the statement of claim does not show that an accident took place or that there was a breach of duty or that damages were suffered or that a contract existed. He is not by taking such a position on an interlocutory application precluded from subsequently taking the position that there was indeed an accident, or that there was a breach of duty, or that there were damages, or that there was a contract. This is not only a rule of law; it is a matter of common sense.

853 The law of procedure, of course, goes much further than that. It allows inconsistent pleas. It also allows secondary pleas to fall back on in the event that a primary plea fails.

854 Such is the position within the framework of a single case. It would be strange indeed if the law were different when another case arises.

855 The second point is perhaps less easily disposed of because CFLCo did to some extent rely upon the contents of its letter to the Minister of Mines and Energy referred to above.

856 In this connection there is reliance upon a factual situation.

857 The position of Hydro Quebec in this matter, however, appears to rest on rather flimsy grounds. The actual passage referred to in the letter from CFLCo to the Minister of Mines and Energy reads as follows:

"We are also bound by the provisions of the Power Contract dated as of May 12, 1969 under which most of the electricity generated at the company's facilities at Churchill Falls was sold to Hydro-Quebec."

858 There is obviously no doubt that CFLCo was bound by the provisions of the contract and, it might be added, is entitled to the benefit of the provisions of the Power Contract. The extent to which it is bound is limited by the extent, if at all, to which the plea of force majeure will succeed.

859 There is no doubt from a reading of the Power Contract that most of the electricity generated was sold to Hydro Quebec.

860 There appears to be nothing there that compromises CFLCo at all.

861 It is noted that later in the letter it is said:

"Having sought the advice of counsel on this matter and in the light of their opinion, we feel that as a matter of prudent management, we cannot make a commitment for the supply of power from the presently installed capacity in the amount prescribed in the Order-in-Council."

862 The last passage quoted in the Quebec proceeding by CFLCo points out that CFLCo has categorically refused to comply with the provisions of the Order-in-Council.

863 Nowhere does a reading of the pleading indicate a reliance by CFLCo on the factual position that it is bound by the Power Contract and not bound by Clause 2(e) of the Lease. In those circumstances and in those circumstances only might it be open to Hydro Quebec to argue that CFLCo itself takes the position that the plea of [*page274] force majeure is not available to it by reason of anything stated in the Quebec proceeding.

864 If, however, such a qualification did appear in the Quebec proceeding or if there is something in the Quebec proceeding that amounts to its taking a position that it is bound by the Power Contract and for that reason the defence of force majeure is inapplicable, to what extent does that benefit Hydro Quebec?

865 In support of the proposition that CFLCo could not resile from that statement in the subsequent proceedings, counsel for Hydro Quebec relied on the case of Khan v. Golecha International Ltd., [1980] 2 All E.R. 259. That, however, was a case of estoppel where the plaintiff in one action pleaded the non-applicability of a certain piece of legislation and abandoned that plea but, in a subsequent pleading, raised it again. It was held that he was estopped from doing so. The Latin maxim neo debet bis vexari pro una et eadem causa was mentioned in support of this proposition. Loosely translated this probably means no one should be troubled twice for one and the same reason. It was a question of issue estoppel and has nothing to do with this case.

866 CFLCo was taking a position of law in the Quebec proceeding. It took the position that a claim of Hydro Quebec did not show the existence of a genuine problem and suggested that in reality there was none anyway as between them according to the letter of August 16, 1976.

867 The problem, if there was one, was attributable to a third party.

868 The Supreme Court of Canada disagreed with its position. Nevertheless CFLCo., having allegedly acknowledged its ability under the Power Contract, is not thereby prevented from pleading force majeure in defence of the claim of Hydro Quebec.

869 At the stage that the decision of the Supreme Court of Canada was given, CFLCo had not pleaded to the claim of Hydro Quebec. The matter has now been heard; the plea of CFLCo is unknown. There is no need to speculate on what plea might be made.

870 It is easy to lose sight of the real problem that exists in this case on this particular issue. Reference was made in argument to the evidence of the attorneys from Quebec to the effect that a person who is not a party to the provisions of a contract may not plead those provisions. In particular a person not a party to a contract containing a force majeure provision may not plead that provision because he is not a party.

871 The case of Torquay Hotel v. Cousins, [1969] 2 Ch. 106, was referred to. An action was brought by the plaintiff against the defendants, members of a trade union, for interfering with oil deliveries which Esso was obliged to make and the plaintiff obliged to receive.

872 The defendants in their own defence pleaded that the plaintiff could rely upon the force majeure clause in its agreement with Esso.

873 Of this Lord Denning said at page 137:

"So here I think the trade union officials cannot take advantage of the force majeure or exception clause in the Esso contract. If they unlawfully prevented or hindered Esso from making deliveries, as ordered by Imperial, they would be liable in damage to Imperial, notwithstanding the exception clause. There is another reason too. They could not rely on an excuse of which they themselves had been 'the mean' to use Lord Coke's language: see New Zealand Shipping Co. Ltd. v. Societe des Ateliers et Chantiers de France [1919]

A.C. 1, 7, 8."

874 (The Imperial referred to is the name of the hotel operated by the plaintiff in that case.)

[*page275] [875] This situation is quite different. The law is clear that a person, party or not, may not rely upon a force majeure situation that he has unlawfully created.

876 In this case we are embarked upon an inquiry as to whether the request of the Government imposes an obligation on CFLCo or not and if it is determined that it does, is compliance with it by CFLCo a response to a force majeure? It is a legitimate and essential avenue of inquiry.

877 If it is established that the request of the Government is a valid one, subject only to it being established to be economic and feasible to comply with it, one readily sees that an inquiry as to the question of feasibility and economics is a legitimate one.

878 For the determination of this question it is essential to know what liability, if any, CFLCo will have to Hydro Quebec if CFLCo complies with the Government's request.

879 The determination of that question depends in part on whether or not the defence of force majeure would succeed.

880 CFLCo takes the position that, if it will succeed, there is no problem and compliance with the request may be made. If on the other hand it will not succeed, there will be a liability which would clearly render compliance uneconomic.

881 Nothing has transpired in the Quebec proceeding and no law has been cited in this case which would indicate that CFLCo is precluded from taking this position.

882 What one loses sight of is that the real question is not whether the Government may plead that its request is force majeure, but whether the Government in this case can plead successfully that CFLCo can plead successfully force majeure in an action brought against it by Hydro Quebec for breach of the Power Contract.

883 (While that was roughly the question in the Torquay Hotel case (supra), the difference is that there the force majeure was the unlawful act of the union who pleaded that it could be pleaded by the hotel. In this case the request cannot be termed an unlawful act and the Government cannot be considered instruments in the difficulty that arises.)

884 At this point there is being considered only the effect of the Quebec proceeding on such a plea. For want of evidence of Quebec law on the matter, reliance is placed on Newfoundland law.

885 The answer to the real question is that there is nothing in the Quebec proceeding that would preclude CFLCo from successfully pleading the Government request as force majeure. CFLCo's stand has not compromised its position in any way.

886 The exhibits MJ 1, 2 and 3 will remain as exhibits because they have been so marked, albeit provisionally. Counsel for CFLCo takes objection not so much to their admission as to the effect of what is shown to have transpired therein.

Part 30: The Defence of CFLCo (2)

887 The points raised by the defence of CFLCo have for the most part been dealt with in what has preceded this part.

888 There is one aspect of its defence that has not been dealt with specifically.

889 CFLCo takes the view that if it is obliged to comply with the request contained in the Order-in-Council it will be subjected to substantial penalties to Hydro Quebec.

890 It is not necessary to detail at this point with what those penalties will be. It is sufficient for the [*page276] purpose of this case to state that if Hydro Quebec is successful in an action against CFLCo for a breach of contract, CFLCo will be liable in amounts involving many millions of dollars and that if these amounts are paid, compliance with the request will certainly not be feasible and economic from its point of view.

891 The evidence on this matter was presented by Mr. Johnson and Mr. Magrath. Mr. Magrath is on intimate terms with the provisions of the Power Contract and outlined graphically what would happen to CFLCo if it failed to live up to its undertaking to Hydro Quebec.

892 The evidence of these two gentlemen is accepted without question and it is not necessary to elaborate on it further.

893 There is, of course, the further question of whether there would be such a liability. This largely depends on whether or not CFLCo can establish in an action brought against it by Hydro Quebec in the Province of Quebec that the request of the Government constitutes a force majeure as that term is defined in the Power Contract or that there is an implied term in the Power Contract in which the parties are deemed to have agreed that the obligation of the Power Contract was subordinate to the obligation of the Lease.

894 These matters are dealt with in Parts 36-40. The finding there is that the request is an act of governmental authority, a force majeure under the Power Contract, and that CFLCo is not barred from successfully pleading it because Hydro Quebec was as much a party to the creation of the consequences of the force majeure as CFLCo.

895 It is further held in those parts that there is no such implied term as was suggested.

896 It follows from this point of view alone that the Government has failed to show the project is feasible and economic for CFLCo.

Part 31: The defence of the Royal Trust (2)

897 Up to this point the judgment has considered mainly the defences of CFLCo, Hydro

Quebec and the General Trust. To a major extent the last two overlap. All of the points raised in these three instruments have now been dealt with.

898 The defence of the Royal Trust was slightly different and requires special attention.

899 To an extent it overlaps with one of the positions taken by Hydro Quebec relating to the Financial Agreement and the Government Intervention.

900 The interest of the Royal Trust in the issue was confined to the question of whether or not compliance with the request of the Government would interfere with the security of the Royal Trust and the bondholders whom it represents or the lien created by the First Mortgage Trust Deed or would cause any party to the First Mortgage Trust Deed to be in breach of its obligations thereunder.

901 For the purpose of considering the argument of the Royal Trust it is assumed that the Government had the right to make the request and was entitled to compliance with it.

902 The position of the Royal Trust is firstly that there were implied terms in the Government Intervention to the following effect:

"that the Government would not do anything contrary to the provisions of the First Mortgage Trust Deed relating to the mortgaging of the specifically mortgaged premises as therein defined (which included the Power Contract) and that the Government would not cause any other party to the First Mortgage Trust Deed to do anything contrary to the provisions [*page277] thereof relating to such mortgaging."

903 Secondly, counsel argued that, assuming there to be such implied terms, requiring compliance with the request would constitute a breach of them.

904 Quoting from Halsbury's Laws of England (4th Ed.), vol. 9, paragraph 351, counsel listed three classifications of implied terms. These are as follows:

"(a) terms which the parties probably had in mind but did not express;

"(b) terms which the parties, whether or not they actually had them in mind, would probably have expressed if the question had been brought to their attention; and

"(c) terms that, whether or not the parties had them in mind or would have expressed them if they had foreseen the difficulty, are implied by the court because of the court's view of fairness or policy or in consequence of rules of law."

905 He correctly noted that item (c) is not really concerned with the intention of the parties except to the extent that the particular rule of law may be overridden by an express contrary intention.

906 It should be noted that the Lease Act is dated May 13, 1961, and was amended by subsequent acts dated March 29, 1963, June 10, 1964, April 25, 1967, May 28, 1968, May 9, 1969, and June 18, 1970. With one exception, the Lease was amended by

supplemental agreements the forms of which were attached to each of these amending acts. The exception was the act dated March 29, 1963, which amended the Lease without any statutory agreement!

907 The execution and delivery of the Lease and the supplementary agreements were approved by these acts.

908 Threaded through the picture are other documents of importance, to which reference has been made. On May 9, 1969, the legislature enacted the Churchill Falls (Labrador) Corporation Limited (Financing) Act, 1969 (the Financing Act). This act authorized the execution and delivery of the Financial Agreement. It also authorized the Government Intervention. The Bond Purchase Agreements are dated May 15, 1969. These contain the undertaking of CFLCo to the prospective bondholders. This was followed by the First Mortgage Trust Deed bearing formal date May 15, 1969, which contained the Government Intervention.

909 The General Mortgage Trust Deed from CFLCo to General Trust bears formal date of September 1, 1968. This instrument was drawn to secure bonds in an aggregate principle amount not exceeding $ 100 million. General Trust intervened in the First Mortgage Trust Deed and the effect of the intervention was basically to subordinate the security of the General Mortgage Trust Deed to the security of the First Mortgage Trust Deed.

910 There was a further security instrument having the formal date of May 15, 1969, whereby CFLCo executed and delivered to General Trust a deed known as the Debenture Indenture. This made provisions for the issuance of unsecured debentures of $ 1,000.00 each, unlimited as to aggregate. The obligation of the Debenture Indenture was subordinated to the First Mortgage Trust Deed and the General Mortgage Trust Deed both by its terms and by the intervention of General Trust in the First Mortgage Trust Deed. According to the pleading no debentures were issued pursuant to this instrument and it plays no part in these proceedings.

911 Amid the security instruments stands the Power Contract made between Hydro Quebec and Churchill Falls dated May 12, 1969.

912 The Lease as amended, the First Mortgage Trust Deed, the General Mortgage Trust Deed, the Financial Agreement, the Government Intervention and [*page278] the Power Contract are all relevant to the argument of the Royal Trust as to implied terms.

913 Section 25.01(3) of the First Mortgage Trust Deed appearing in article 25 entitled "Intervention of Province of Newfoundland" reads as follows:

"(3) The Government, insofar as any consent or approval on its part may be necessary in order to perfect the security afforded to the Trustee and to the Holders or Owners for the time being and from time to time of any First Mortgage Bonds of the Company whether now or hereafter issued under the Indenture, hereby agrees with the Company and the Trustee, respectively, that it approves and consents to the provisions, terms and conditions

of the Indenture with respect to the hypothecating, mortgaging, pledging and charging and ceding and transferring and the granting, conveying, assigning, transferring, selling, mortgaging and charging of the Specifically Mortgaged Premises (including, for purposes of greater assurance, all rights, liberties and benefits granted to, or obtained or obtainable by, the Company under the Lease, and the Taxation Trust Agreement, and all right, title and interest of the Company therein, thereto and thereunder including all rights of renewal and of extension thereof) as and by way of a first, fixed and specific charge, and of the Mortgaged Premises, other than the Specifically Mortgaged Premises, as and by way of a first floating charge, to and in favour of the Trustee for the benefit of the Holders or Owners for the time being and from time to time of any of the First Mortgage Bonds of the Company from time to time Outstanding and entitling the Holders or Owners thereof to the benefit of the security of the Indenture, whether now or hereafter issued by the Company."

914 By way of explanation the term "Government" used in that section means the province and for practical and legal reasons has a meaning synonymous with that with which it is used in this judgment.

915 The trustee is the Royal Trust and the Company is CFLCo.

916 The specifically mortgaged premises include the Lease and the Power Contract.

917 Also by formal date May 15, 1969, the Government executed and delivered to CFLCo and the Royal Trust the Taxation Trust Agreement. This was set up to accomodate Clause 2A of Part IV of the Lease which had been introduced by the 1967 amendment. It provided, inter alia, that the Government should pay to CFLCo for its own use and benefit 47.9% of all monies collected by Canada by way of existing taxes on or measured by income of CFLCo and paid by Canada to the Government. Government-owned utility companies were exempt from taxation. Hydro Quebec was the principal customer and, if the rate which it would be paying for the energy was calculated by taking into consideration the potential tax liabilities of CFLCo, then it, a government owned utility, would be paying indirectly taxes for which it would be exempt if the power came from its own plants or another government-owned utility. (At that time Brinco was the majority shareholder of CFLCo.)

918 To avoid or mitigate the effect of this the Lease was amended to provide for repayment to CFLCo of 47.9% of all taxes received by Canada from CFLCo and remitted to the Government.

919 By the Taxation Trust Agreement, the Government appointed the Royal Trust as its agent for the purpose of receiving from Canada that part of the taxes referred to in Clause 2A and to hold and disperse the same in accordance with the provisions of the agreement.

920 Section 25.01(6) of the First Mortgage Trust Deed reads in part as follows:

"(6) The Government hereby agrees with the Trustee that, so long as the Lease shall be required by the terms of the Indenture to be subject to the lien thereof, the Government, [*page279] notwithstanding any provisions to the contrary contained in the Lease, will not

cause or permit, in its own right or behalf or by any person claiming through or under it, the Lease or any of the Company's rights and liberties thereunder, including the rights to possession, operation, management and control of the premises thereby demised, to be terminated, limited or, restricted in any manner, whether by reentry, by judicial, arbitral or other judgment, decree or determination, by sale, by exercise of any remedy provided under any provision of the Lease or to which it may become entitled in law or equity or otherwise, . . ."

921 Thereafter are contained paragraphs describing circumstances when that subsection is not to apply. They are not material to this case.

922 Section 2 of the Financial Agreement is similar to section 25.01 (6) of the First Mortgage Trust Deed. It is reproduced hereunder. A comparison will indicate that there are variations buy that they are not significant in the overall effect.

> "2. The Government covenants and agrees with the First Mortgage Trustee that, so long as the Leases and the Ancillary Leases shall be required by the terms of the Indenture to be subject to the lien thereof, it will not cause or permit, in its own right or behalf or by any person claiming through or under it, any of the Leases or Ancillary Leases required to be subject to the lien of the Indenture, or any of the lessee's rights thereunder, including its rights to possession, operation, management and control of the premises thereby demised, to be terminated, limited or restricted in any manner, whether by reentry, by judicial, arbitral or other judgment, decree or determination, by sale, by exercise of any remedy provided under any provision of the Leases or Ancillary Leases or to which it may become entitled in law or equity, or otherwise, . . ."

923 Exclusionary provisions similar to those appearing in the First Mortgage Trust Deed follow.

924 Counsel for the Royal Trust correctly points out that if the Government obtains 800 MW pursuant to its request, the amount of energy delivered to Hydro Quebec will be reduced and hence the revenue that flows from Hydro Quebec to CFLCo will be reduced. This is an important part of the security of the Royal Trust. Further, insisting on compliance is a violation of the express agreement set forth in Sections 25.01(3) and 25.01(6) of the First Mortgage Trust Deed. The court ought to refuse to declare that the Government is entitled to make such a request and expect compliance.

925 Counsel also points out that presumably the revenue lost from Hydro Quebec would be replaced by revenue from Newfoundland Hydro but, when viewed from the time of the First Mortgage Trust Deed, there was obviously no assurance of this or even that Newfoundland Hydro or whatever Newfoundland consumer might be designated by the Government would be a satisfactory customer from a point of view of assessing the value of the security of the Royal Trust. The effect of success by the Government would change the landscape from the point of view of the Royal Trust from one that was assessed and proven to be satisfactory to one that is unassessed. The bondholder's money would have been pledged by one scenario but secured by another.

926 Be that as it may, the language of the Government Intervention is nothing more than a consent to the charging of certain assets of CFLCo obtained by it by agreement with the Government. It was not a consent that CFLCo could, in respect of the Lease, mortgage benefits not granted by the Lease or the revenues that flowed from such benefits. If the Government had in some fashion retained to itself the right for a Newfoundland consumer to purchase energy, then this was not included in the rights that had been obtained by CFLCo under the Lease. It was a right that CFLCo never owned [*page280] from the outset and could not mortgage to the Royal Trust.

927 There is no language in any of the oral or documentary evidence that changes this picture.

928 The advisors of the Royal Trust either overlooked or were not concerned with the possible implications of Clause 2(e). They considered themselves protected by Clause 6.6. In this respect they were in good company, for there do not appear to be any advisors who took a different position. The other advisors may have been lulled into a false sense of security by Clause 6.6 which was believed by all including the Government to be the extent of the Government's requirements. Unfortunately, as stated when discussing estoppel in Part 19, a Government official cannot gainsay the wish of the legislature. All counsel should have been cognisant that this is the law and that the statements of Government officials can not preclude the operation of that law by acts and statements done without the approval of the legislature.

929 (It was suggested in one place in the argument of one of the parties that the Lieutenant-Governor-in-Council was competent to limit the amount that might be recaptured under Clause 2(e). This is not correct. The power of the Government under the legislation was confined to requesting power; there was no power to limit the amount that could be requested. It is a long-term lease and it could not be incumbent upon the Lieutenant-Governor-in-Council of any day to limit or eliminate the amount that might be requested by the Lieutenant-Governor-in-Council at any other time.)

930 It was argued that the purpose of the Financial Agreement was embodied in the last two recitals which read as follows:

"AND WHEREAS the Leases and the Ancillary Leases are, by their respective terms, subject to termination at the instance of the Government in the event of certain defaults thereunder by the lessee;

"AND WHEREAS this Agreement is entered into to afford to the First Mortgage Trustee a right to protect its security against such termination as aforesaid."

931 Against this it was argued that the Government Intervention was not accompanied by any such recital. It was executed pursuant to the authority of section 5 of the Financing Act, which reads as follows:

> "5. The Lieutenant-Governor-in-Council is authorized to intervene in and to become a party to the Indenture described in the Agreement set forth in the

> Schedule, as well as to intervene in and to become a party to any modification, amendment or supplement to the said Indenture, for the purpose of confirming and approving in the said Indenture or in any such modification, amendment or supplement thereto, the provisions of the Agreement authorized under Section 2 hereof or any matter giving effect thereto or arising therefrom, and confirming and approving the rights given to the Trustee in said Indenture in respect of possession, use and release of the mortgaged premises, application of moneys received by the Trustee upon the release of property from the lien of the Indenture and the application of insurance moneys, as well as for the purpose of confirming and approving, without limitation by reason of anything stated in the foregoing, or otherwise, such other provisions of the said Indenture or of any such modification, amendment or supplement thereto as the Lieutenant-Governor-in-Council may from time to time deem appropriate."

932 This section appears to give broader powers to the Lieutenant-Governor-in-Council than were exercised in the Financial Agreement. However, the Government Intervention goes no farther than the Financial Agreement did. The language of both is similar and it cannot be successfully argued that one has one meaning because of the recitals above quoted and the other has another meaning because it was not accompanied by the same recitals.

[*page281] [933] Apart from that there is nothing in the recitals or Section 5 or in the Government Intervention which abrogates in any way the provisions of the Lease or the Lease Act. All that is being talked about both in the Government Intervention, the Financial Agreement and the Financing Act is the confirmation and approval of the rights given to the trustee by CFLCo. CFLCo could not and did not purport to give rights in the First Mortgage Trust Deed that it did not have. Nothing was said in any of these documents that in any way detracts from the rights, if any, of the Government in Clause 2(e).

934 This may appear to be anomalous conclusion. The contents of the Power Contract were known to the Government. The Government knew that there was no specific provision for the accommodation of Clause 2(e) in the Power Contract. There was, of course, Clause 6.6 providing for recapture, but this was not specified to be in satisfaction of Clause 2(e); although it was tacitly understood by everybody that this was to be the case.

935 In the face of this the Government consented to the provisions of the First Mortgage Trust Deed which mortgaged the specifically mortgaged premises. The Government further agreed with the Royal Trust that it would not cause or permit the Lease or any of CFLCo's right or liberties thereunder to be terminated, limited or restricted in any manner.

936 The specifically mortgaged premises are described to include in Section 9.01(a)(ii) and 9.01(b)(ii) of the First Mortgage Trust Deed

"(ii) all rights, liberties and benefits granted to, obtained or obtainable by, the Company under the Lease, . . . the Power Contract . . . and all right, title and interest of the Company therein . . ."

937 In respect of the Lease only the "rights, liberties and benefits" of CFLCo were mortgaged. Whatever was retained by Clause 2(e) is not such a right, liberty or benefit.

938 In respect of the Power Contract, while this is included generally (but not specifically) in Section 25.01(3), its mortgaging has received the approval and consent of the Government under that section

". . .insofar as any consent or approval on its part may be necessary in order to perfect the security . . ."

939 The Royal Trust had a valid charge on the Power Contract. Neither the approval nor consent of the Government was required.

940 Where the deed speaks of perfecting security, it refers to the perfection of title to the security and has no application to the terms. Even if it had broader application, the result would be the same.

941 The Financing Act cannot be interpreted to repeal or alter in any way Clause 2(e). Such an interpretation is barred when there is no indication of a particular intent to do so. (Seward v. The Vera Cruz (1884), 10 App. Cas. 59, 68). There is no such indication in the Financing Act.

942 There was no authority in the Financing Act for the Lieutenant-Governor-in-Council or anyone else to abrogate the terms of the Lease and, because estoppel cannot in these circumstances operate against the Crown, there being no ostensible authority for anyone to create such an abrogation, the Financial Agreement and the Government Intervention can go no farther than what is expressly stated.

943 In his argument counsel for the Royal Trust correctly points out the dire consequences to his client of compliance with a request of the Government under Clause 2(e). It must be noted again that there is no limit on the amount that the Government may [*page282] request. If it requests all of the power and there is compliance with that request, then the basic security of Royal Trust under the First Mortgage Trust Deed, namely the revenues under the Power Contract, is eliminated and nothing is necessarily substituted therefor.

944 A court cannot imply a term simply because the parties might have agreed to it. The function of any implied term is to fill a void in an agreement. It may add to, subtract from or merely clarify the rights and obligations of the parties.

945 In Reigate v. Union Manufacturing Company (Ramsbottom) Limited and Another, [1918] 1 K.B. 592, Scrutton, L.J., said at page 605:

". . . A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "What will happen in such a case," they would both have replied, "Of course, so and so will happen; we did not

trouble to say that; it is too clear." Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."

946 In Liverpool City Council v. Irwin, [1977] A.C. 239, Lord Wilberforce said at page 253:

"To say that the construction of a complete contract out of these elements involves a process of "implication" may be correct; it would be so if implication means the supplying of what is not expressed. But there are varieties of implications which the courts think fit to make and they do not necessarily involve the same process. Where there is, on the face of it, a complete, bilateral contract, the courts are sometimes willing to add terms to it, as implied terms: this is very common in mercantile contracts where there is an established usage: in that case the courts are spelling out what both parties know and would, if asked, unhesitantingly agree to be part of the bargain. In other cases where there is an apparently complete bargain, the courts are willing to add a term on the ground that without it the contract will not work - . . ."

947 The Moorcock (1889), 14 P.D. 64, is a leading case on the matter of implied term. At page 68 of that decision Bowan, L.J., said:

"Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have."

948 From a reading of that decision one might be inclined to agree with counsel for the Royal Trust that there was indeed an implied condition as suggested by counsel. It must be remembered, however, that both the Financial Agreement and the Government Intervention are statutory contracts. (There is some question that either instrument is a contract at all. This will be discussed later.) The court cannot imply a term in a statutory contract for which there is no parallel implication in the act authorizing the statutory contract.

949 In this respect, therefore, we [*page283] must have regard not only to the rules relating to the implication of terms in contract but also to the implication of provisions in statutes.

950 In the case of contractual interpretation, a court will imply a term to give efficacy to the contract. Normally, of course, the form of a statutory contract will have been attached to the statute approving it and one might argue that the legislative approval of the statutory contract constitutes legislative approval of the implications of the contract.

951 That is not so in this case, however, for the following reasons.

952 There is, or at least for the purposes of this Part there is presumed to be, a right of the Government under the Lease to request the priority. That is a contractual right under a statutory contract and the legislature, in approving the form of that contract, expressed its will that the Government should have such rights. In accordance with the principle above quoted of Seward v. The Vera Cruz the court will not deem that the legislature in the Financing Act has in any way approved the alteration of the right without any indication of a particular intention to do so. There is no indication of a particular intention to do so. An implied term by its very nature indicates the absence of an indication of a particular intention. If there was such an indication, there would be no need for an implied term.

953 Apart from that, the rules for implying provisions into statutes set forth in Halsbury's Laws of England (2nd Ed.), vol. 31, at page 500, do not say that the court may imply a term in legislation sanctioning an implied term in a scheduled statutory agreement. There is no such rule. As far as the Financing Agreement is concerned what the Royal Trust sees is what the Royal Trust gets - nothing more.

954 There is nothing in the Financing Act which suggests that there is power in the court to say that the Financing Act by implication authorized the execution of a statutory agreement which contains by implication the term suggested by counsel.

955 Counsel drew attention to sections 12.14 and 13.03(1) of the First Mortgage Trust Deed, which read in part as follows:

"Section 12.14. The Company will observe and carry out all obligations, conditions, covenants, stipulations and provisions on its part to be performed and pay any rent, royalty or other indebtedness owing by it under each of the following contracts and instruments, as each of such contracts may from time to time be supplemented and amended, and will permit no default on its part to exist thereunder beyond any period of grace specifically allowed therein with respect thereto and will not take or fail to take any action under any such contract or instrument which would or might reduce the Company's income or diminish or eliminate any right thereunder of the Company, the Trustee or the Bondholders:

"(1) the Lease,
"(2) the Power Contract,

"Section 13.03. (1) The Company may not, without prior authorization by Extraordinary Resolution, modify, amend, supplement,. . . cancellation or replacement would or might adversely affect the Company's income in any respect or would or might

"(a) reduce the term of, the amount of power on order or the price of power payable under the Power Contract;

"(b) reduce or eliminate any obligation of Hydro-Quebec under the Power Contract, or modify the provisions of Section 5.2 or Section 12.2, relating to the subordination

[*page284] of securities issued under Articles V and XII, of the Power Contract or reduce or eliminate any right thereunder of, or in favour of, the Company, the Trustee or the Bondholders; or

"(f) reduce or eliminate any right of the Trustee, the Bondholders or the Company under the Statutory Agreement;"

956 He suggests that the implied term which he urged upon the court included a covenant not to cause any other party to the First Mortgage Trust Deed to do anything contrary to the provisions of the First Mortgage Trust Deed relating to the "hypothecating, mortgaging, pledging and charging" of the specifically mortgaged premises.

957 He continues that the effect of the request and compliance with the request would result in the breach of these covenants in section 12.14 and 13.03(1). That might very well be, if there was such an implied term.

958 Halsbury suggests that implied terms are divided into the following:

(a) terms implied by custom;
(b) terms implied by law; and
(c) other terms implied by the courts.

959 We are not at this point concerned with terms implied by custom or by law. While it was suggested earlier that the third division of the first group mentioned precluded an intention, this is perhaps not critically correct. According to Halsbury the implication which the law draws from what obviously must have been the intention of the parties is drawn with the object of giving efficacy to the transaction in preventing such failure of consideration as cannot have been within the contemplation of either side (Halsbury (4th Ed.), vol. 9, paragraph 355).

960 It can in no sense be said that the Government intended to forego its rights under Clause 2(e). Even if it had that intention, there was no authorization from the legislature to give effect to such intention.

961 It is not a question of giving efficacy to either the Financial Agreement or the Government Intervention. These undertakings stand on their own.

962 It is not a straightforward matter such as where the parties have either left something out because (a) they saw no need to put it in or (b) they overlooked it, but had they given thought to it, they would have agreed upon it. Even if it were, that is not enough. What is being urged is a new term, not a term which stands out by its absence.

963 It is not incumbent upon the court to impose such a term. It is probably outside the power of the court to do so for the court cannot presume that the will of the legislature to be something that it has not expressed to be its will.

964 Reference was made to the case of Stirling v. Maitland and Another (1864), 122

E.R. 1043, and Southern Foundries (1926) Limited v. Shirlaw, [1940] A.C. 701.

965 In the last mentioned case Lord Atkins said at page 717:

". . . The arrangement between the parties appears to me to be exactly described by the words of Cockburn, C.J., in Stirling v. Maitland, at p. (1047):

'If a party enters into an arrangement which can only take effect by the continuance of an existing state of circumstances . . . there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative.'

[*page285] "That proposition in my opinion is well established law. Personally I should not so much base the law on an implied term, as on a positive rule of the law of contract that conduct of either promiser or promisee which can be said to amount to himself "of his own motion" bringing about the impossibility of performance is in itself a breach. . ."

966 In the cases referred to above, no finger is pointing at the Government. If a finger is pointing at all, it is pointing at CFLCo. It would be argued that it was an implied term of the Lease that CFLCo would not do anything that would preclude it from fulfilling the terms of the Lease; certainly it is not an implied term that the Government would surrender any of its rights under the Lease.

967 A few further observations might be made. In this connection the discussion is about two instruments; the first, the Financial Agreement and the second, the Government Intervention. Both instruments, the latter being incorporated into the First Mortgage Trust Deed are, upon examination, deeds. While deeds may be contracts, they more generally are by their nature the means by which contracts are performed or, on the other hand, they may be nothing more than gratuitous, unilateral acts of a party.

968 In this case the Government gave its deeds either pursuant to the terms of a prior agreement with the parties who benefited by the deeds or as an accomodation to them without obligation. Except to the extent mentioned in Stirling v. Maitland and Southern Foundaries (1926) Limited v. Shirlaw, it is improper to impute to a party to a deed an undertaking greater than that which he has expressed. All that the Government did was, to the extent that was necessary, consent to the mortgaging of the Lease and provide certain assurances relating to what would happen if there was default thereunder.

969 Article 25.01 of the Lease was executed pursuant to Section 5 of the Financing Act. The execution thereof was approved by Order in Council dated May 15, 1969. The concluding language of the order was as follows:

"Ordered further that all of the provisions of the said Article Twenty-Five be and hereby approved for the purposes of such execution and delivery as an Intervenor."

970 The power of the Lieutenant-Governor-in-Council was limited in the language of section 5 by the following words:

"The Lieutenant-Governor-in-Council is authorized to intervene in and to become a party to the (First Mortgage Trust Deed) . . . for the purpose of confirming and approving . . . such other provisions of the said indenture . . . as the Lieutenant-Governor-in-Council may from time to time deem appropriate."

971 Pursuant to the authority of the act in the Order in Council the Lieutenant-Governor-in-Council approved and consented

"to the provisions, terms and conditions of the indenture with respect to the hypothecating, mortgaging, pledging and charging and ceding and transferring and the granting, conveying, assigning, transferring, selling, mortgaging and charging of the Lease and the Power Contract."

There may be some question as to whether there was any necessity for the consent or approval to the mortgaging of the Power Contract to which the Government was not a party.

972 The language of 25.01(3) says:

". . . insofar as any consent or approval on its part may be necessary in order to perfect the security."

973 To imply a term into a deed goes beyond what is involved in implying a term in an ordinary contract. It [*page286] ought not to be done unless the contract, if any, upon which the deed is done requires it. There is no evidence of such a contract.

974 It could be argued that the security insofar as it comprised an assignment of the Power Contract needed some perfection from the Government in order that the obligation which Clause 2(e) might prevent would be fulfilled.

975 This raises the question of whether the authority of the Financial Act could abrogate any of the provisions of the Lease Act or the Lease itself.

976 The general language of the Financial Act cannot be deemed to overrule or supersede the specific language of Section 3 or 4 of the Lease Act or Clause 2(e) of the Lease. This point has already been covered. All the Government has said is that, if its consent or approval is necessary, it is provided. It approved and confirmed the mortgaging of the Lease but did not thereby surrender its rights reserved thereunder. If it may be said to have approved and confirmed the mortgaging of the Power Contract, it could only be in respect of the rights of CFLCo thereunder. This basically would be the right to receive money for energy sold.

977 In determining the attitude of the Government in this respect one must have regard to the subjective point of view of the Government, which would consider that if the revenues from Hydro Quebec diminished, it would be because the sale of energy to it diminished and the sale of energy would only diminish because of a sale of energy to a Newfoundland consumer pursuant to a request under Clause 2(e), and that the revenue of

CFLCo from all sources in respect of power would not thereby be depleted.

978 Of course the Royal Trust has no assurance that this would be the case, but in determining whether an implied term existed, one must view the position of the person against whom the term is to be implied.

979 The spectre of estoppel raises its head in this matter too, as it does in so many aspects of this case. It takes on a slightly more animate form in this aspect because there is the vaguest suggestion of ostensible authority. This is to be found in Section 5 of the Financing Act and in the recitals to the Financial Agreement.

980 However, the spectre never takes upon itself sufficient body to become a real form of estoppel against the Government. The links are too weak between hope and reality.

981 The Royal Trust sets up an implied term which for its existence depends upon the existence of an implied enactment or ostensible authority.

982 If ostensible means implied, it is precluded for the reasons expressed in this case that any implication is precluded. If it means something more than implied, it must describe an act in general terms or specific terms which may or may not be subject to executive or administrative approval. That is not the case here.

983 It is the finding of the court that no term may be implied against the Government in this respect. The provisions of the Financing Act, the Financial Agreement and the Government Intervention do not contain an implied term which would directly or indirectly mean that the Government was surrendering or suspending its rights under Clause 2(e).

Part 32: Voting Trust Agreement No. 2

984 General Trust in its defence alleged that it entered into the financial arrangements based on the Lease, the General Trust Mortgage and Voting Trust Agreement No. 2.

985 Voting Trust Agreement No. 2 arose out of obligations entered into by Hydro Quebec under the Power Contract for the purchase of bonds in certain circumstances.

[*page287] [986] The Voting Trust Agreement which is dated October 28, 1968, was made between Brinco, General Trust and Hydro Quebec and provides basically that in certain circumstances Hydro Quebec should have voting control of CFLCo.

987 There was no evidence as to what transpired in respect of this agreement when in 1974 the Government purchased the shares that Brinco held in CFLCo.

988 There is no indication either in argument or in a reading of the Voting Trust Agreement that it has any bearing on the issues before the court.

989 It is not necessary to determine whether the success of the Government in this action or the consequences of its success would create a circumstances under which voting control of CFLCo would pass to Hydro Quebec under that agreement. That issue

falls outside the action and nothing more need be said about it.

D. Feasible and Economic

Part 33: General observation

990 Under the heading C - Decisions on Legal Questions this judgment has dealt with question of law raised by counsel relating to the matter and to some extent with questions of fact which were not greatly in issue.

991 Upon the decisions contained in the various parts thereof it now appears that the Government cannot succeed for several reasons which will be summarized briefly in the conclusion in Part 42.

992 The judgment might stop at this point, as whatever decision is made on the question of feasible and economic the Government will at this level of the judicial system be unsuccessful by virtue of what already has been decided.

993 At the conclusion of the trial on July 9, 1982, a statement was made from the Bench. That statement included the following (slightly edited):

". . . I have concluded from the argument that certain interpretations of Clause 2(e) could lead to a decision without the necessity of considering the technical evidence. I do not say that they do but, depending on what conclusions of law are reached, the possibility is that decisions could be made either for or against the plaintiff without considering all the technical evidence.

"I am presuming, however, that the parties would wish me to deal with all of the technical evidence and the other issues anyway notwithstanding that I may be able to dispose of the case on a legal basis rather than on a factual basis.

"I do not conceive that any decision I make on Quebec law would preclude any proceedings in that province, so there is no assurance that a multiplicity of actions will be avoided by anything I say on that point.

"I do feel, however, that if I deal with all issues I obviate the possibility that a successful appeal might result in the matter being sent back for decision on questions of fact not dealt with by me."

994 In the first paragraph of that passage it was noted that there was a possibility of a decision being made without the technical evidence being considered.

995 Hydro Quebec could have succeeded on any one of the several points which it mentioned which would preclude victory by the Government and would obviate the necessity of reviewing the technical evidence.

996 In contrast to this Hydro Quebec might not have succeeded on any of the points which it raised and the Government might have succeeded in establishing that the

question of [*page288] whether or not the project was feasible and economic related to the project only from the subjective point of view of CFLCo. In such a case it was conceivable (although remotely so) that the project indeed was feasible and economic from the point of view of CFLCo as long as it received as much for the power from the Newfoundland consumer as it was receiving from Hydro Quebec and would not otherwise suffer economically through circumstances not brought about by its own act, such as incurring a liability in damages to Hydro Quebec.

997 The legal considerations arising out of the pleadings and the evidence have been reviewed and determined in the preceding Parts of this judgment. The result is that the Government must fail and judgment awarded against it.

998 It will be of no avail to the Government to review the technical evidence at this point and make a determination as to whether or not the project is feasible and economic either from the subjective point of view of CFLCo or the subjective point of view of the Newfoundland consumer.

999 Such a determination would only be of assistance to the Government if it successfully appealed the rulings hereinbefore made against it and was found to be entitled to compliance with the proviso, according to its interpretation of that clause, subject to its proving that the project was feasible and economic.

1000 If no determination is made at this point on the question of fact relating to feasible and economic and the Government is successful on appeal, the technical evidence can then be considered to see if the project is feasible and economic.

1001 At the time that the trial concluded it was clearly desirable that all matters and issues between the parties - the legal issues and the factual issues - be determined so that as the matter proceeded to appeal, all matters under review before an appeal court could be dealt with and the decision of the final appeal court would then in effect dispose of the matter without referring it back.

1002 The undertaking to review and determine the technical evidence was made in the belief that such a determination could be made more quickly than now appears possible. In the circumstances the court must renege on that particular undertaking.

1003 The reasons for such a decision, reached reluctantly, are compelling.

1004 As mentioned in Part 5, the evidence taken in this matter occupied in all 88 days. There were some 40,000 pages of evidence, exhibits and agreement.

1005 Close to 100% of the evidence and exhibits related to technical matters.

1006 In broad terms the general headings of the technical evidence related to the following subjects:

1. CFLCo's Price;

2. The question of Quebec law;
3. The design and projected cost of the overhead transmission;
4. The design and cost of:

(a) The submarine crossing of the Strait of Belle Isle; or

(b) The tunnel alternative;

5. The cables for use in the Strait of Belle Isle crossing;
6. The reliability of the project.
7. The cost effectiveness; and
8. The financibility.

1007 As the evidence on these matters was being reviewed, it became [*page289] increasingly evident that it would take many more months to reach a decision on the matter. Merely reading the documents without interruption would occupy a lengthy period. Bearing in mind that the evidence is highly technical and that in respect of each category the evidence of the witnesses and the exhibits are all interrelated a proper reading and comprehension take much longer.

1008 The review of the evidence and the determination of the issues of fact would occupy several hundred pages of judgment and the writing and editing of these pages would add considerably to the time required to complete a decision on the technical evidence.

1009 A decision had to be made as to whether it was more desirable to delay the filing of a judgment to enable the finding upon the technical evidence to be included or to file a judgment dealing with the points of law only, allowing a relatively early commencement of the appeal procedures.

1010 The decision now evident is that it was more desirable from any point of view to conclude the judgment without expressing a finding on the technical evidence so that the appeal procedures, if any are to be taken, might proceed.

1011 The advantage is time. Whether questions of fact are decided now or later, the time factor will be the same.

1012 The disadvantage is that findings on the facts might be a factor in a decision to appeal. This is, of course, only a tactical rather than a legal consideration.

1013 The matter is of utmost importance to the Government, because according to the load forecasts additional power will be required and if this is not procurable from Churchill Falls, it will have to come from some other source for which arrangements must be made.

1014 Likewise, it is of importance to Hydro Quebec, although perhaps less so, because the 800 MW which the Government has requested forms part of its pool of base energy which plays a role in its forward planning.

1015 In view of the lapse of time between concept and completion, whether it be a court action or a hydro electric complex, it is desirable to avoid delay where possible.

1016 The decision not to deal with the technical evidence at this point is made in what is believed to be the interest of the parties.

1017 However, it is deemed desirable to deal with three points relating to feasible and economic as these involve questions of law. These are the onus of proof, CFLCo's price and Quebec law. These topics are dealt with in the following parts.

1018 Quebec law of course is a question of fact but indirectly involves question of law in the province.

Part 34: Onus of Proof

1019 In considering the technical evidence in this matter, the onus of proof merits consideration. This is a civil case being considered (except for the purpose of interpretation of the Power Contract) according to the laws of the province.

1020 The basic rule is that the burden of proof lies upon the party who substantially asserts the affirmative of an issue. In the ordinary case and in this case on the technical evidence this burden rests upon the Government. According to Phipson on Evidence (12th Ed. 1976), page 37, the phrase "burden of proof" has two distinct and frequently confused meanings.

1021 The first is that the burden of proof is a matter of law and pleading. It is a burden of establishing a case.

[*page290] [1022] The second is the burden of proof in the sense of adducing evidence.

1023 The burden of establishing a case is the sense in which the burden of proof is most often used. However, while the burden of adducing evidence may shift throughout the course of a trial, the overall burden of establishing a case never leaves the party who substantially asserts the affirmative of an issue.

1024 For this reason the burden of establishing its case rests upon the Government. Whether this burden has been discharged is a matter of assessment when all of the evidence has been presented and is considered.

1025 The burden of adducing evidence will shift as a trial progresses. It lies upon the party who may be expected to lose if no evidence is offered. It does not mean, of course, that he will lose, but it does mean that if the other evidence which has been offered is accepted by the court, he will lose. If one talks in the simplest context of an issue between a plaintiff and a defendant, the plaintiff probably need only establish a prima facie case to shift the onus to the defendant of adducing evidence. A prudent plaintiff, of course, ought not to be satisfied with evidence which merely places him on the threshold of success, for from that position he may be readily dislodged by evidence presented by the defendant.

1026 The plaintiff will in the proof of his own allegations and in refutation of the allegations of the defendant appearing in the pleading attempt to meet the highest standard of proof that might be expected of him in a particular case.

1027 To do less would be foolhardy, for his right to present evidence in reply is confined to rebuttal evidence and answering matters in which the primary onus rests upon the defendant.

1028 The standard of proof in civil cases is not constant, although it has a constant definition. The person having the burden of establishing his case must prove it on a balance of probabilities or by a preponderance of evidence. These are the terms most frequently used.

1029 The degree of probability will vary according to the nature of the case. As Phipson points out at page 53 the degree depends upon the subject matter. A charge of fraud will require a higher degree of probability than a charge of negligence.

1030 In the case at bar despite its importance, the degree of probability is an ordinary one. The Government claims that it has a contractual right and must adduce evidence that will establish that that right may now be exercised. As between the Government and CFLCo it is a straightforward issue and the degree of probability takes on no greater or lesser dimension because of the nature of the case.

1031 Nor is the degree of probability altered as between the government and the other defendants who are not defendants in the ordinary sense of the word but are rather defendants because they are necessary and proper parties. If the government succeeds against CFLCo, the other defendants will be affected, but that does not mean that the degree of probability takes on a larger magnitude.

1032 There is always the difficulty of determining what the "ordinary degree" is. Some judges have drawn the analogy of placing the evidence pro on one side of a balancing scale and contra on the other side and if the "pro" side fails to dip, the degree has not been met, but if it does dip, then the "pro" side wins. One would hardly think that the mere tipping of the scales is sufficient.

1033 The spectrum of proof ranges from the mere tipping of the scales to a situation that is beyond a shadow of doubt. It may not be desirable to grade the quality of proof in notches from one to ten with degree one being the initial tipping and degree ten being beyond a shadow of a doubt and then say that in the ordinary civil case proof in the degree four, for example, is satisfactory. That is [*page291] probably an oversimplification of how to grade and quantify the evidence.

1034 Perhaps it is just a matter of feeling comfortable. When the judge feels comfortable with a decision in favour of the plaintiff, then it may be said that the plaintiff has discharged the onus of proof and attained the degree of probability that is required in the circumstances.

1035 That is not a solution to the problem, of course, but only another way of expressing it.

1036 It is a matter of showing whether the project is feasible and economic. There are as many experts would say it is as would say it is not. As with any business venture, there is risk and a high standard of proof is most likely unattainable.

1037 Further consideration of the matter is futile. It is perhaps sufficient to note that the case is not of a nature that requires a high degree of probability and that with this in mind if the weight of the evidence favours the plaintiff and the judge feels comfortable with a decision in its favour, then it may be said to have succeeded.

1038 That, unfortunately, is not the end of the problem. We are dealing with what is basically an engineering problem. Within reason there is nothing that engineers cannot do. The only restrictions on their accomplishments is money. Creative and ingenious minds can overcome most engineering problems, many of them without incurring additional expenditure to a marked degree.

1039 There is a simple illustration of this. The proposed transmission line from Churchill Falls to Soldiers Pond must cross the Long Range Mountains in the western part of the Island where it will be exposed to severe climatic loadings. To reduce the risk of failure, it is proposed to split the bipolar system so that one conductor will follow one route and the other another.

1040 That is an engineering solution.

1041 The court, if it had not been presented with evidence of such a solution, could not say that an undivided route was too risky and should be split. It could only say that it is too risky and, therefor, not economic.

1042 While the engineer in the field has the freedom to be expedient, the court is confined to the evidence which is presented to it.

1043 The point is that in circumstances such as this the court is limited to a black and white situation. The court may say that the Government has proved that the project is feasible and economic or that it has not. The engineer on the other hand can say that while the original proposal may subsequently prove not to be feasible and economic, there are satisfactory alternatives available.

1044 The reason for pointing this out is that although in respect of some of the evidence the court might find that the Government has not met the required standard of proof, that does not amount to a finding that it cannot be done economically, but rather that according to the evidence that is before the court, it cannot be done economically in the way proposed.

1045 It is probably for this reason that arbitration boards rather than courts are better adapted to the settlement of disputes of this nature. The Government has elected to bring

this action before the court. There are, of course, reasons why this was necessary. This unavoidably precludes, however, the submission of the issue of the technical evidence to arbitration and puts the Government in a forum less fluid than that of an arbitration board.

[*page292] Part 35: CFLCo's Price

1046 It was largely assumed throughout the trial except perhaps by Hydro Quebec that the price that CFLCo might receive for its power would be feasible and economic under any circumstances and that it was not necessary for CFLCo to prove what that price might be.

1047 This reasoning was fallacious and probably stemmed from a passage in the Order-in-Council which reads as follows:

"(c) to be supplied at such price and upon such other terms and conditions as may be mutually agreed between CFLCo and Newfoundland and Labrador Hydro, and as shall, in any event, be not less favourable to CFLCo than the price and other terms and conditions prescribed in the Power Contract dated as of the 12th. day of May, A.D. 1969, and made between Quebec Hydro-Electric Commission and CFLCo . . ."

1048 The first thing to be noted and this has been stated before is that no time for the supply of power has been prescribed and there does not seem to be any reason that any assumption should be made in respect thereof. The function is therefore to prescribe a rate for an undetermined period.

1049 The second point to be made is that the Government suggests that the price be "mutually agreed between CFLCo and Newfoundland and Labrador Hydro". There is no device for determining the price if an agreement cannot be made. There have been laid out in Part 15.7 some if not all of the considerations that are taken in arriving at a price that satisfies both parties. There is no certainty of agreement and there is no provision for resolving the issues that are not agreed upon if no agreement can be reached.

1050 In the third place the suggestion that the price should be not less favourable to the CFLCo than the price prevailing under the Power Contract, while encouraging, really does nothing more than establish a minimum price. This does not make every price in excess of that figure feasible and economic.

1051 As was evidence throughout the trial, costs are constantly changing and almost always upwards. CFLCo may be stuck with the price which it has committed itself to under the Power Contract but, if it has to comply with the request of the Government, it has no such commitment.

1052 CFLCo may very reasonably take the position that if it is legally bound to sell to the Newfoundland consumer 800 MW for an unspecified period, then it must receive a unit price feasible and economic to it, even though such price must not be feasible and economic to the Newfoundland consumer.

1053 The Lease does not say that it must be feasible and economic to one or another of the two parties. As interpreted it must be feasible and economic to both and, if it is not proven so to be, the Government cannot meet the prerequisite of proving the project is feasible and economic.

1054 This is not an unreasonable postulation. The price was negotiated 14 years ago. The price under the Power Contract diminishes rather than increases as the years go by but historically the cost of operations generally increases.

1055 It need only be added to bolster the finding made in Part 28 that the Order-in-Council in the passage quoted above refers also to "such other terms and conditions". These are to be agreed upon between CFLCo and the Newfoundland consumer, but there is no provision for what transpires if there is no agreement. It was argued that this is not the problem of the court. As noted, it is the problem of the court, because the court is unwilling to interpret, on the language used in the Lease, the clause so as to find [*page293] that CFLCo is committed to enter into an agreement the terms of which have not been defined and for which there is no agreed method of definition.

1056 The alternate to this is for CFLCo simply to fail to agree in which case there will be no agreement with the Newfoundland consumer. Either way the requirement of the government is not met.

1057 Perhaps there could be a finding that the obligation rests on CFLCo only if an agreement can be reached with the Newfoundland consumer. There is nothing in the lease to suggest this. The only suggestion of terms and conditions to be agreed upon is contained in the Order-in-Council, a unilateral document.

1058 What the Lease says is that CFLCo must give priority, but how can it give priority if no price, no terms and no conditions have been agreed upon and there is no provision for settling the same?

1059 Victor Young indicated that it had no trouble reaching an agreement in respect of energy allocated for recapture which has already been claimed. It was suggested in argument that all the Government was really looking for was something to release CFLCo from the yoke of the Power Contract in order to allocate the power to the Newfoundland consumer. If the freedom was granted, there would be no trouble with an agreement. This may very well be the case from a practical point of view, but it does not follow from the language of the Power Contract.

1060 The government is not entitled to have a priority extended to the Newfoundland consumer unless and until it has been shown to be feasible and economic.

1061 It may be that there is no price at which the sale by CFLCo and the purchase by the Newfoundland consumer will be feasible and economic to both. Unless and until the government proves that there is such a price and that it has been agreed upon, then one of the conditions prerequisite to its having the priority extended has not been established.

1062 More particularly for the purpose of this particular part no price for the sale by CFLCo has been established or suggested. It is not enough to say that the energy be supplied at a price not less favourable than that prevailing under the Power Contract. that does not mean that the price must necessarily be feasible and economic for a price in excess of the price prevailing under the Power Contract is not necessarily that.

1063 While CFLCo is operating at a profit at the present time, it appears from the language of the Power Contract that its revenues will decrease and from the nature of the times that its prices will increase. The Power Contract itself has not been shown to be feasible and economical over future periods. With the opposite trends in revenue and expenditure it is very possible if not probable that if 800 MW of energy is removed from the Power Contract for sale to the Newfoundland consumer, CFLCo may reasonably be entitled to be paid for that an amount which the prevailing and anticipated economic situations demand.

1064 If it ever was the intention of the Government that it should have the right to recapture from another purchaser of CFLCo an unspecified amount of energy for an unspecified time at an unspecified price and for unspecified terms, it certainly placed an unbearable burden upon the language chosen for Clause 2(e) to which it agreed.

1065 On this ground alone the Government's claim must fail, for it has not shown that a price has been estalished for any sale by CFLCo to Newfoundland Hydro that is feasible and economic to it nor that any mechanism has been agreed upon for establishing such a price nor, in fact, that any [*page294] price is feasible and economic to CFLCo.

1066 Presumably, of course, there is such a price excluding for the moment any liability that may be imposed upon CFLCo for re-directing its energy sales, but that price must as noted in Part 15.7 be within the range where prices that are feasible and economic to CFLCo and prices that are feasible and economic to Newfoundland Hydro meet.

1067 The existence of such a range has not been proven. The existence of a feasible and economic price to CFLCo has not been established.

1068 As noted no finding of a feasible and economic price from the point of view of Newfoundland Hydro will be made at this time. On the basis of the foregoing, such a determination is unnecessary.

1069 It must not be overlooked, as noted in Part 28 that price is not the sole concern. Terms and conditions not involving price are involved and not determined or determinable.

1070 This court cannot find that the project is feasible and economic to CFLCo unless it is shown what price is to be paid and that that price is feasible and economic.

Part 36: Quebec Law

1071 To introduce this matter it is appropriate to start with paragraph 26 of the defence of CFLCo. This paragraph reads as follows:

"26. This defendant says that it is alleged by the second defendant that compliance with the request would constitute a breach of Power Contract in which event it would not be economic and feasible to comply with the request. This defendant further says that compliance with the request may constitute an event of default under the First Mortgage Trust Deed, the General Mortgage Trust Deed and the Debenture Indenture or any one or more of them in which event it would not be economic and feasible to comply with the request."

1072 The Government apparently had anticipated such a plea and in paragraph 25 of its claim had pleaded as follows:

"25. . . . the plaintiff says that the request set forth in the Order-in-Council constitutes force majeure as such term is defined under the Power Contract, and therefore the first defendant will not be subject to any penalties under the provisions of the Power Contract or incur any other liability to the second defendant by reason of complying with such request, and the Power Contract shall not be in default or breached . . ."

1073 In effect, the government was saying that CFLCo could avoid such liability by pleading force majeure under the Power Contract, because that is what the request of the Government is.

1074 One would normally have expected to have found such a plea in a reply rather than in a statement of claim. Be that as it may the issue is joined and is there to be decided.

1075 That was the Government's position on the question of force majeure. It also pleaded on the question of implied term in paragraph 26 of its claim which reads as follows:

"26. . . . the plaintiff says the second defendant was at all times aware or should have been aware that, notwithstanding the provisions of the Power Contract, upon the request of the Government, the first defendant would be obligated under the Lease to give priority to the consumers of electricity in the Province of Newfoundland, and by reason thereof it was or ought to have been the understanding [*page295] of the first defendant and the second defendant that there is an implied term of the Power Contract that the obligation on the part of the first defendant as contained in the Power Contract to deliver to the second defendant hydro-electric power and energy would be subject at all times to the obligation of the first defendant, as set forth in paragraph (e) of Clause 2 of Part I of the Lease, to give, upon the request of the Government, priority to the consumers of electricity in the Province of Newfoundland . . ."

1076 Hydro Quebec pleaded to this issue in paragraph 27 of its defence in the following terms:

"27. The plaintiff has no right to assert, and this Honourable Court has no

jurisdiction to determine that the plaintiff's action in passing the Order-in-Council of August 6th, 1976, constitutes force majeure or an implied term of the Power Contract as pleaded in paragraphs 25 and 26 of the statement of claim because, as set forth in the Power Contract, those are matters as between the first defendant and the second defendant and they can only be determined by the courts of the Judicial District of Montreal, and in accordance with Quebec law, and as so determined, the said action of the plaintiff does not constitute force majeure within the meaning of the Power Contract, nor is there an implied term in the Power Contract which concept is not recognized by the said laws of the Province of Quebec."

1077 General Trust entered a similar plea.

1078 The Royal Trust in paragraph 10 of its defence took the following position:

"10. The third defendant says that paragraphs 24, 25 and 26 of the amended statement of claim contain only allegations relating to the provisions of the Power Contract, (as defined in paragraph 10 of the amended statement of claim) which said document is by its terms to be interpreted solely by Courts of the Province of Quebec in accordance with the law of the Province of Quebec, and there are no allegations in the said paragraphs in respect of which it is necessary for the third defendant to plead."

1079 Under the heading of Quebec law there are essentially four questions to be answered.

1080 The first is whether or not a Newfoundland Court is competent to determine an issue arising under the Power Contract which by its terms provides that all disputes thereunder shall be resolved according to the law of Quebec in a Quebec forum.

1081 That is not really, of course, a question of Quebec law. It is a question of Newfoundland law but one that must be determined before the other three questions are considered.

1082 The second is whether or not the request of the Government constitutes force majeure under the Power Contract.

1083 The third which arises out of the second is if the request constitutes force majeure, could CFLCo successfully plead force majeure in its own defence in a Quebec court in an action against it by Hydro Quebec arising out of the compliance by CFLCo with the request of the government.

1084 The fourth is whether or not there is an implied term in the Power Contract under which CFLCo would be free to comply with the request of the Government under Clause 2(e) of the Lease without being liable to Quebec for breach of the Power Contract.

[*page296] [1085] The evidence as to Quebec law was presented by four witnesses.

These were Mr. Vineberg, Professor Crepeau, Mr. Fortier and the Honourable Mr. Tremblay, each of whom are further mentioned in the list of witnesses contained in Appendix F. All of these witnesses were highly qualified to testify, but as might be expected, were not in total agreement on all matters. They have already been declared to be expert witness by the general finding in this respect set forth in Part 5.

Part 37: Quebec law - Newfoundland forum

1086 Clause 1.2 of the Power Contract reads as follows:

"1.2 Applicable Law

"This Power Contract shall at all times and in all respects be governed by, and interpreted in accordance with, the laws of the Province of Quebec. The only courts competent to adjudge disputes between the parties hereto arising out of this contract are, subject to appeal to the Supreme Court of Canada when such appeal lies, the Courts of the Judicial District of Montreal, where, for purposes of litigation only as aforesaid, CFLCo elects domicile for service at One Westmount Square in the City of Westmount, District of Montreal or at such other place in the said District of Montreal of which CFLCo may from time to time give written notice to Hydro-Quebec."

1087 It was argued both on interlocutory applications and at the end of the trial in this matter that this court should not determine the issue of force majeure and implied term between CFLCo and Hydro Quebec because, by the virtue of Clause 1.2, the Power Contract is governed by and to be interpreted according to Quebec law and disputes thereunder are to be adjudicated upon in the courts of the Judicial District of Montreal, Quebec.

1088 It has been already pointed out in orders made pursuant to the interlocutory applications that the Government is not a party to the Power Contract and is not bound by the choice of forum clause.

1089 If Hydro Quebec is a necessary and proper party to this proceeding, and it has been found to be so, and if it becomes necessary to make a determination of the rights and liabilities of CFLCo under the Power Contract for the purposes of adjudicating on the claim of the Government then that might be done by a court in this province but by reference to Quebec law where proven.

1090 This question was dealt with in Order No. 3 filed herein some time ago. It seems unnecessary to deal with the matter further for it is self-evident.

1091 It may be undesirable for this court to determine an issue arising out of a contract which according to its terms is governed by the law of another jurisdiction.

1092 In fact, the court has no choice, for the primary issue has been joined and it cannot be adjudicated upon without a resolution of the collateral issue arising upon the Power Contract and these issues cannot be resolved without considering the three questions last

mentioned in the preceding Part.

1093 This court, for the purposes of this case, has jurisdiction to determine the issues arising out of the Power Contract, but must do so according to the law of Quebec where proven. The choice of forum clause is not binding on the Government, which is not a party to the Power Contract.

Part 38: Quebec Law - Force Majeure

1094 The Government takes the position that its request constitutes force majeure under the Power Contract. The Power Contract in Head X of Clause 1.1 defines force majeure as follows:

[*page297] "'Force Majeure' means:

"(a) any fortuitous event, act of governmental authority, act of public enemies, war, invasion or insurrection, riot, civil disturbance, labour trouble, strike, and

"(b) any flood, fire, shortage of labour, or of materials or of transport or other cause of inability to perform or delay in performing obligations hereunder which, in each such event, is beyond the reasonable control of the party or parties affected.

"Failure of equipment to perform adequately, or improper operation of equipment, shall not constitute force majeure."

1095 The consequence of an event of force majeure are contained in Article 17, which reads as follows:

"17.1 Contract Not Terminated

"No event of force majeure or of default hereunder shall give rise to, or result in, the termination of this Power Contract.

"17.2 Effect of Force Majeure on Payment Obligations

"Events of force majeure shall have the effect of abating to the extent thereby not earned any payments provided for in the present Power Contract with the exception that, notwithstanding force majeure or default hereunder, Hydro-Quebec must still make advances required of it under and otherwise comply with the provisions of Articles V and XII.

"17.3 Obligations Suspended or Abated

"Subject to the provisions of Sections 17.1 and 17.2 hereof, should either or both parties hereto by reason of force majeure be prevented or delayed in the performance of any of its or their obligations hereunder, such party or parties shall thereby be subject to no penalty under the provisions hereof or incur any other liability to the other, but shall nonetheless perform such obligation as soon as possible and to as full an extent as possible.

"17.4 Assignment of Indemnification

"Should either party hereto be prevented by any act of governmental authority from performing any of its obligations hereunder and be thereby entitled to claim indemnification from such governmental authority, such party shall, to the extent of the damages thereby occasioned to the other party, ipso facto assign to such other party the right to receive such indemnity. Notwithstanding such assignment, the party prevented shall, at the option of the other party, itself attend to the claiming and receiving of such indemnity but at the expense of both parties in proportion to the damages collected by each."

1096 Lengthy as the legal evidence was it really dealt only with two terms appearing in the definition. These terms were:

(a) a fortuitous event; and
(b) an act of governmental authority.

It was argued that the request could fit other events mentioned in paragraphs (a) or (b) of the definition. For reasons hereafter given, this argument fails.

1097 There are certain findings of fact that should be expressed at this time, although there was never any doubt as to them.

1098 The first is that the Lease is dated May 16, 1961. Hydro Quebec was aware of the contents of the Lease.

1099 The second is that the Power Contract was executed on May 12, 1969. The Government was aware of the [*page298] contents of the Power Contract.

1100 The third is that the Government held out to CFLCo that 300 MW would be sufficient to satisfy its right under Clause 2(e).

1101 The fourth is that CFLCo held out to Hydro Quebec that the Government had held out to it that 300 MW would satisfy the right of the Government under Clause 2(e).

1102 Fifth, as a matter of law, but based on the facts of this case, estoppel does not operate against the Government which is therefore not estopped from denying or taking a position inconsistent with that which it has been found to have held out.

1103 Sixthly, CFLCo cannot meet its commitments to Hydro Quebec and at the same time supply 800 MW to the Government.

1104 Seventhly, if CFLCo does not comply with the Power Contract, it will be liable for extensive damages to Hydro Quebec and default procedures under the security instruments may be triggered unless it can successfully plead force majeure or implied term.

1105 Eighthly, if CFLCo fails to comply with the Government request being under a legal obligation to do so, it will be liable to substantial damages and may risk forfeiture of the

Lease, again with the result that default procedures under the security instruments may be triggered.

1106 Ninthly, water resources of Labrador are the property of the province and the Government has the right, if not the obligation, to see that they are developed, operated and managed for the benefit of the province.

1107 The nature of a contract governed by Quebec Law is described in Article 1022 of the Quebec Civil Code. This reads as follows:

"Art. 1022. Contracts produce obligations, and sometimes have the effect of discharging or modifying other contracts.

"They have also the effect in some cases of transferring the right of property.

"They can be set aside only by the mutual consent of the parties, or for causes established by law."

1108 A contract creates between the parties to it what may be known as a conventional regime. Mr. Crepeau in his evidence referred to what he described as "the famous article 1134 of the French Civil Code", which says that a contract legally entered into is the law unto the parties to it. He said that the courts of Quebec have very often said that even though Article 1134 of the French Civil Code is not in the Quebec Civil Code, it is nevertheless the present law of Quebec.

1109 There are several provisions of the Quebec Civil Code dealing with force majeure. In actual fact the defined term in the Code is a fortuitous event or in French cas fortuit.

1110 It is defined in Article 17(24) in the following words:

"17(24). A 'fortuitous event' is one which is unforeseen, and caused by superior force which it was impossible to resist."

1111 Articles 1071 and 1072 provide as follows:

"Art. 1071. The debtor is liable to pay damages in all cases in which he fails to establish that the inexecution of the obligation proceeds from a cause which cannot be imputed to him, although there be not bad faith on his part.

"Art. 1072. The debtor is not liable to pay damages when the inexecution of the obligation is caused by a fortuitous event, or by irresistible force, without any fault on his part, unless he has obliged himself thereunto by the special terms of the contract."

[*page299] [1112] The words superior force in Article 17(24) and the words irresistible force in 1072 both appear in the French text of those sections as force majeure.

1113 There was no disagreement among the legal witnesses that the parties may contract as they chose and may be their contract add to or subtract from the impact that

the provisions of the Civil Code would otherwise have on the contract.

1114 The only exception to this is that under Article 13 no one may by private agreement validly contravene the laws of public order and good morals.

1115 In respect of force majeure but subject to Article 13 the parties to a contract may incorporate into it their own provisions relating to force majeure and override those provisions of the Civil Code which are inconsistent with it.

1116 In this case the parties have incorporated into the Power contract a force majeure provision. A force majeure is defined and the consequences of an event of force majeure are prescribed.

1117 Article 17 of the Power Contract set out above supplements and may even override the provisions of Article 1071 and Article 1072 of the Quebec Civil Code also set out above.

1118 The terms force majeure and fortuitous event (cas fortuit) are used interchangably in Quebec courts, according to Mr. Vineberg.

1119 P.B. Mignault in a voluminous work entitled Droit Civil Canadien (1901) said that fortuitous event (cas fortuit) or force majeure is an accident of nature or an act of man, an event which no human prudence might foresee and which is impossible to resist. Mignault further divides an act of man into two classifications le fait du prince and le fait d'un tiers. The term le fait du prince is a concept of French and Quebec law not usually translated into English. It may be said to be an act of governmental authority, although all acts of governmental authority do not fall into the classification of le fait du prince.

1120 Le fait d'un tiers refers to the classification of acts of third parties, which is not of concern in this particular case.

1121 Mr. Vineberg said that historically a fortuitous event was an act of man, while a force majeure was an act of nature. The distinction is not preserved today, but it is interesting to note that in the definition of force majeure in the Power Contract this division has been recreated although perhaps unintentionally. The (a) portion of the definition generally describes acts of man while the (b) portion generally describes acts of nature (always assuming, of course, that economic conditions creating shortage of labour and material may be properly described as acts of nature).

1122 It is really only in connection with the first term of paragraph (a) of the definition that the Civil Code has any import. The witnesses were agreed that the term fortuitous event used therein would have the same definition as it has in Article 17(24) of the Quebec Civil Code.

1123 (It was argued that the Government request was something beyond the reasonable control of the parties and that, therefore, the (b) part applied. Using the ejusdem generis rule hereunder defined, this cannot be so, for the general words are a

classification of events of the particular words which precede them. The Government request cannot be identified with this paragraph.)

1124 There are three and possibly four features of a fortuitous event. Three are:

1. unforeseeability;

[*page300] 2. irresistibility; and

3. impossibility.

1125 A fourth feature, exteriority, is sometimes mentioned.

1126 The test of unforeseeability is applied from an external objective viewpoint to determine whether or not an event could have been reasonably anticipated. If it could not have been reasonably anticipated, then one of the three tests of fortuitous event exists.

1127 Mr. Fortier referred to a passage from Mazeaud and Mazeaud: Lecons de droit civil, vol. 2, page 528, which he translated as follows:

"It is not necessary, in order to have unforeseeability, to be faced with an event which has never yet happened. No doubt the happening of any event which is not new can be foreseen; but it is not a such abstract, general unforeseeability which is in issue. An event is unforeseen if in fact there is no particular reason to think that the event would have happened."

1128 While the text uses the word "unforeseen" the meaning attributed to the passage in that respect is that the event be "unforeseeable".

1129 The concept of irresistibility was not uniformly described by the witnesses.

1130 Mr. Vineberg attributed to this term an absolute meaning. An event cannot be force majeure simply because it meets the other tests and is also more difficult or more onerous to perform. It is necessary that it be irresistible. The most usual example of irresistibility is le fait du prince. Numerous examples from the jurisprudence were given of le fait du prince such as expropriation and the prohibition of a movie theatre to operate. Mr. Crepeau attributed to it the quality of describing something which is unsurmountable or inevitable.

1131 Mr. Fortier was of much the same view, but linked irresistibility with exteriority, the fourth factor mentioned above.

1132 The concept of impossibility finds its origin in the Latin precept of Roman law impossibilium nulla obligatio. Force majeure, said Mr. Vineberg, is primarily and quintessentially something which renders the performance of the obligation impossible. It must be viewed from an objective point of view. It requires some external force, something not personal to the debtor which brings about the state of impossibility of performance. There is not much that one can say about impossibility. If one takes the views of the legal

witnesses together, it appears that impossibility is an absolute term and as with irresistibility, it does not give way to such conditions as difficulty or onerousness.

1133 The fourth concept is exteriority. This was linked by Mr. Fortier with irresistibility and by Mr. Vineberg with impossibility. Mr. Crepeau referred to this as descriptive of something which is outside and beyond the debtor's sphere of activity. According to Mr. Vineberg it is not the act of the debtor, the incapacity of the debtor, the inability of the debtor, the defect in the debtor's position because he is not sufficiently talented, skillful or strong to perform but rather some exterior subject which has brought about the impossibility of performance.

1134 Mr. Crepeau said it must be something that is outside and beyond the debtor's sphere of activity.

1135 If his remarks are interpreted correctly, Mr. Fortier had the view that exteriority is something that is not brought about through the act or fault of the debtor. This perhaps is its essential feature. If it is a fourth category of fortuitous event, it must be something different than the other three. It merely expresses in one word the fact that a man cannot plead in his own defence a situation [*page301] he has brought upon himself. The situation must be exterior to him.

1136 In the case of Gregory v. Canadian Improvement Company, 5 Themis 10, the defendant unsuccessfully sought to defend itself against the claim of the plaintiff on the basis of legislation which it had been instrumental in procuring. Of this Mr. Fortier said

"Indeed, to hold otherwise would be to permit the debtor to invoke his own turpitude as an excuse for non-performance."

1137 In fact all witnesses appeared to regard exeriority as an undeveloped concept and one which has not yet quite found a firm footing in the civil law of Quebec. However, the principle of no fault is well established and strongly suggested by Article 1071 of the Code.

1138 Upon an analysis of the evidence one finds little difficulty with the concepts of foreseeability, irresistibility and impossibility.

1139 It appears that irresistibility and impossibility may be readily blended and in fact are linked in Article 17(24) where it says "impossible to resist".

1140 Exteriority is a concept of particular importance in this case for as will be seen when it comes time to consider the question of an act of governmental authority, the concept of foreseeability disappears and there are substituted for the concepts of impossibility and irresistibility the concepts of prevention or delay under Article 17 of the Power Contract.

1141 All that survives in that area is the question of exteriority and this in relation to the fact that CFLCo entered into an obligation with Hydro Quebec under the Power Contract which was in conflict with its obligation to the Government under the Lease.

1142 There seems little reason to spend very much time on the question of any fortuitous event. There are at least two reasons for this.

1143 The first is that the test of unforeseeability is not met. Whether or not the parties themselves foresaw the possibility of the Government making a request, the making of such a request when viewed from an external point of view was clearly foreseeable. Express provision was made for it in the Lease to which CFLCo was a party and of which Hydro Quebec was aware. While they themselves may have believed that Clause 6.6 took care of the potential problem they were mistaken in this respect. The reason for this is that estoppel in this case does not operate against the Crown. The question has already been fully dealt with in Part 19. A government official by an act or deed not authorized by the legislature cannot supersede the will of the legislature.

1144 The second is that if it is a fortuitous event, it is so because it is le fait du prince which according to the evidence is a component of the term act of governmental authority and therefore must be considered under that heading rather than under the heading of fortuitous event because the parties have contracted to deal with an act of governmental authority as an event of force majeure separately from fortuitous event.

1145 There was no disagreement among counsel that where A obliges himself to B under contract which contains provisions that are in conflict with prior contractual obligations of A to C, A cannot successfully plead force majeure in an action against him by B after he has fulfilled his obligation to C and prevented himself from fulfilling his obligation to B.

1146 This is an elementary proposition which needs no further elucidation.

[*page302] [1147] That is what has happened here and unless the performance of the obligation to C which would in this case be the Government may be deemed to be not so much the response to a contractual obligation as a response to an act of governmental authority the plea of force majeure would fail.

1148 There is perhaps a third aspect touched upon obliquely in dealing with the second aspect and that is the question of fault or exteriority. That will be discussed in Part 39.

1149 It was only on the question of act of governmental authority that there was any noted disagreement among the witnesses. The testimony left some doubt as to whether the request was an act of governmental authority at all. Mr. Vineberg said that because the parties had made specific reference to an act of governmental authority in describing force majeure the matter of foreseeability was not pertinent. Basically and logically the parties by expressing, albeit in general terms, the event must have foreseen it and to require of such an act the condition of unforeseeability when the parties had not only foreseen it but provided for it is to deny the parties the benefit of the law that they have made unto themselves. This cannot be done unless it offends the rule that precludes provisions that are contrary to public order and good morals.

1150 Mr. Fortier did not wholly disagree with this position, but said that one can only

determine the applicability of unforeseeability upon an interpretation of the contract.

1151 Mr. Tremblay went farther than any of the other witnesses and, again if his remarks are considered correctly, offered the view that all of the words in paragraph (a) after the words "any fortuitous event" are but specific instances of fortuitous event. He said that the fact that fortuitous event is mentioned qualifies all of the other things mentioned in the paragraph.

1152 The ejusdem generis rule provides that where particular words are followed by general words, the general words are limited to the same kind or genus as the particular words. (See Osborne's Concise Law Dictionary (6th Ed. 1976), pages 1-8). This rule of interpretation according to Mr. Fortier is part of the Quebec law.

1153 It has no application to the interpretation of paragraph (a) where no general words appear.

1154 The words "fortuitous event" are defined by the Civil Code and the other words must stand by themselves. Each event enumerated is separated by a comma and there is no grammatic or other feature that would limit the meaning of one by reference to another.

1155 Neither the views of Mr. Vineberg nor of Mr. Fortier preclude the finding that unforeseeability is not a factor in dealing in this particular case with any act of governmental authority.

1156 The basic thing, of course, is that the parties have expressed it. It does not really matter whether the event is foreseeable or unforeseeable for the parties have said that an event of force majeure is, among other things, any event of governmental authority and that, if an event of force majeure occurs, certain consequences will follow.

1157 Because they have provided specifically for what is to transpire in the event of the occurrence of an event of force majeure they have really taken themselves outside the codal provisions altogether. They have eliminated not only unforeseeability but also irresistibility and impossibility. They have created a conventional regime in which they provide in Article 17 of the Power Contract that no penalty shall attach to either party if performance is prevented or delayed by force majeure (as defined) and that the obligations of Hydro Quebec to pay are abated to the extent that they are not earned due to force majeure.

1158 Not the unforeseeability, irresistibility nor impossibility (except [*page303] in relation to fortuitous event) is pertinent in the Power Contract. If an event that is described as force majeure occurs and results in prevention or delay, the contractual provisions relating to that situation apply. That is all there is to it.

1159 Exteriority remains a factor. If the event is brought about by the act of CFLCo, it is not exterior to it and, but for factors hereafter mentioned, would preclude CFLCo from successfully pleading force majeure in an action against it by Hydro Quebec in Quebec.

1160 Two cases were mentioned which touch on this topic.

1161 The first of these is Otis Elevator Company v. A Viglione and Bross Inc., [1981] J.E. 92. In that case Otis agreed to install elevators for Viglione. It was provided in the contract that:

". . . neither you nor we shall be liable to the other party hereto for any loss, damage or delay due to any cause beyond your or our reasonable control, including, but not limited to, strikes, lockouts, fire, explosion, theft, floods, riot, civil commotion, war, malicious mischief or act of God . . ."

1162 No mention was made of fortuitous event in the contract, but it is noted that Otis was excused from liability for strikes beyond its reasonable control. Of this Turgeon, J.A., said:

[Translation] "It is true that generally, when there is no special agreement, strike is not a case of force majeure. Here, both parties to contract P-1 took the care to covenant that strike shall be a case of force majeure; I think their will must be respected."

1163 In referring to this case Mr. Vineberg said that where parties have made specific provision the codal rules do not apply.

1164 The second case was Atlantic Paper Stock Limited v. St. Anne-Nackawic, [1976] 1 S.C.R. 580.

1165 This was a New Brunswick case but was considered by all witnesses to fairly represent the law of Quebec. It was offered as an illustration of the emphasis that a court places on interpretation of a contract in determining the effect of a force majeure provision, but a reading of it indicates that it is more demonstrative of the principle of exteriority than anything else.

1166 In that case St. Anne agreed to purchase from Atlantic Paper material for its production. The force majeure provision was embodied in the following clause:

"St. Anne warrants and represents that its requirements under this contract shall be approximately 15,000 tons a year, and further warrants that in any one year its requirements for Secondary Fibre shall not be less than 10,000 tons, [Emphasis start]unless as a result of[Emphasis end] an act of God, the Queen's or public enemies, war, the authority of the law, labour unrest or strikes, the destruction of or damage to production facilities, or [Emphasis start]the nonavailability of markets for pulp or corrugating medium."[Emphasis end]

Emphasis added.

1167 In his decision at page 583 Dickson, J., said:

"An act of God clause or force majeure clause, and it is within such a clause that the words

'non-availability of markets' are found, generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill. If markets were unavailable to St. Anne, did they become so because of something unexpected happening after April 10, [*page304] 1970? Was the change so radical as to strike at the root of the contract? Could the company, through the exercise of reasonable skill, have found markets in which to trade? Clause 2(a) contemplates the following frustrating events: an act of God, the Queen's or public enemies, war, the authority of the law, labour unrest or strikes, the destruction of or damage to production facilities. Reading the clause ejusdem generis, it seems to me that 'non-availability of markets' as a discharging condition must be limited to an event over which the respondent exercises no control."

Emphasis added.

1168 Dickson, J., did not refer to the ejusdem generis rule but applied the Latin term to show how he was interpreting the phrase "non-availability of markets". He was basically interpreting it according to the company which it was keeping. All the other events therein referred to were events over which St. Anne had no control and he considered that "non-availability of markets" ought to be so classified.

1169 As far as the law of Quebec is concerned, it seems that such a finding would not have been necessary to support the ratio decidendi of Dickson, J., which appears on page 587 of his decision:

"I do not think St. Anne can rely on a condition which it brought upon itself. A fair reading of the evidence leads one to conclude that the whole St. Anne project for the manufacture of corrugating medium was misconceived. The problems which plagued it proceeded, however, not from non-availability of markets for corrugating medium but from (i) lack of an effective marketing plan, as I have stated; St. Anne spent $ 16,000,000 to produce a product without any notion of where the produce would be sold and (ii) inordinate operating costs aggravated by two subsidiary factors (a) lack of captive outlets and (b) failure to produce linerboard; customers needed both corrugating medium and linerboard, and preferred manufacturers who could offer both. The project, conceived in ephemeral hopes and not the harsh realities of the market place, resulted in a failure for which St. Anne and not changes in the market for corrugating medium during the period April 10, 1970, to June 9, 1971, must be held accountable."

1170 If the case were decided according to Quebec law, it would fall readily within Article 1072, which uses the words "without any fault on his part". If the doctrine of exteriority applies apart from this article, it likewise could be applied in Quebec to support the finding of Dickson, J. From the evidence of Quebec law before the court the interpretation of Dickson, J., of nonavailability of markets would not have been necessary to support the ultimate finding if the case had been one from Quebec, for the case there would fail for want of exteriority.

1171 Keeping in mind the decision in the St. Anne case and the opinion of Mr. Tremblay

referred to before that the words in paragraph (a) following the words "any fortuitous event" one might say for the moment omitting the words "act of governmental authority" that all of the events mentioned are by there nature unforeseeable. This being the case then the term "act of governmental authority" must be unforeseeable also.

1172 That is idle argument, however, not because an act of governmental authority is generally regarded as unforeseeable but because all of the events except the first mentioned in paragraph (a) are foreseeable by the very fact of their expression and that the only reason a "fortuitous event" is not foreseeable is because it is a term defined by the Civil Code so to be.

1173 The Atlantic Paper Stock case does not appear to have had any provision similar to Article 17 of the Power Contract. The clause referred to above suggests that St. Anne warranted that its requirements would be approximately 25,000 tons a year unless as a [*page305] result of the nonavailability of markets. The clause which was apparently originally in English does not read very well. The French translation appearing by its side in the Supreme Court judgment uses for the words "unless as a result of" the words "sauf en cas de". If the French words mean "except in the case of" it would appear that the French translation reads better than the original English provision.

1174 When the parties go to the trouble of defining force majeure and providing for what the consequences of it are, it ill-behooves a court to restrict their agreement. If the parties took the care to covenant that an act of governmental authority should be a case of force majeure, in the words of Judge Turgeon, their will must be respected. In effect the contract says that an act of governmental authority is force majeure and, if force majeure occurs, the obligations of the parties shall be abated according to Article 17.

1175 There is no need in this case to apply the test of unforeseeability to the term act of governmental authority simply because it is a test that could have been applied had they not been mentioned to most if not all of the other events mentioned in paragraph (a). Although the test is applied objectively, it is impossible to say of any of the specific events mentioned that the test of unforeseeability must be applied when the parties themselves have foreseen them and provided for them.

1176 The finding in this case on the evidence relating to the interpretation of the Power Contract is that unforeseeability is not a factor to be considered when determining whether an act of governmental authority is force majeure.

1177 The Power Contract itself precludes consideration if impossibility or irresistibility by imposing the tests of prevention or delay.

1178 The principle question next for consideration is whether the request of the government is an act of governmental authority. As stated, the evidence is that le fait du prince is an act of governmental authority but an act of governmental authority is not necessarily le fait du prince. Further the request of the Government in this case is not le fait du prince. According to Mr. Crepeau translating from Mignault (supra) le fait du prince consists of the commands and prohibitions of the superior authority to whom citizens owe

obedience. It was elsewhere defined, although not exclusively, as a legislative act, an administrative act or a judicial act which prevents performance of the obligations. It is further described as being a law of a general nature, although in its administrative execution it may be applied specifically.

1179 As an example of this last situation, the expropriation of property was described as a specific administrative act but one done pursuant to the authorization contained in a statute of general application.

1180 Still further the witnesses agreed that it included the specific act of expropriating property. If an act is passed which specifically expropriates the property of a named company, then that also is le fait du prince and may, according to the circumstances, be successfully pleaded in defence of an act brought for non-performance of its obligations.

1181 It is noted that neither force majeure nor act of governmental authority has attached to it the characteristics of unforeseeability, irresistibility or impossibility. These features, by Article 17(24) of the Code, are attached only to the term "fortuitous event".

1182 The term "act of governmental authority" is not mentioned at all in the Code.

1183 The law of Quebec does not [*page306] attach to the terms force majeure to the extent that it means act of governmental authority and the term act of governmental authority the characteristics of unforeseeability. There is no need to exclude the characteristic of unforeseeability, because the Code does not in respect of those terms impute such a characteristic. If the characteristic is imputed by virtue of the Code, it would have to be expressly or impliedly excluded by the agreement. Although there is no evidence on the matter, it would seem to be a logical consequence that if the characteristic is not imputed by the Code, then it would have to be created by an express or implied provision of the contract.

1184 That is only of academic interest, a passing though which perhaps may not be shared by the witnesses or Quebec law. It is not important because the event here, the request, as already held, was foreseeable.

1185 The evidence offered no real insight as to whether or not the request constitutes an act of governmental authority. In consideration of the question there arose considerable discussion as to whether it constituted an acta imperii or an acta gestionis. Mr. Tremblay said that the distinction between the two acts relates to jurisdiction only and one can readily see the logic of this.

1186 It does offer some assistance, however, in determining the nature of the request.

1187 The original law on the matter was stated in the case of Dessaulles v. Republic of Poland, [1944] S.C.R. 275, where the following statement is made:

[Translation] "There is no doubt that a sovereign state cannot be sued before foreign courts. This principle is founded upon the independence and dignity of states, and

international comity has always respected it. The courts have also adopted it as being the domestic law of all civilized countries."

1188 In the case of the Republic of the Congo v. Venne, [1971] S.C.R. 997, the court refused to accept what it described as the so-called doctrine of restrictive sovereign immunity which had been developing in the United States and elsewhere. In that case there were dissenting judgments of Hall, J., and Laskin, J., (as he then was) who described the doctrine of absolute immunity as "spent".

1189 The Court of Appeal in Quebec in a number of cases has, however, recognized a distinction for the purpose of foreign immunity between acta imperii and acta gestionis. The foremost among these cases is Zodiak International Products Inc. v. The Polish People's Republic, [1977] C.A. 366.

1190 In the House of Lords in England in the case of I Congreso del Partido, [1981] 2 All E.R. 1064, it was held that actions whether commenced in personam or in rem were to be decided according to the restrictive theory of sovereign immunity, so that a sovereign state had no absolute immunity as regards commercial or trading transactions.

1191 The headnote in that case reads in part as follows:

". . .Whether an act of a sovereign state attracted sovereign immunity depended on whether the act in question was a private act (jure gestionis) or a sovereign or public act (jure imperii), and the fact that the act was done for governmental or political reasons would not convert what would otherwise be an act jure gestionis or an act of private law into one done jure imperii. In considering whether state immunity should be granted, the court had to consider the whole context in which the claim against the state was made, with a view to deciding whether the relevant act on which the claim was based should, in the context, be considered as fairly within an area of activity, trading or commerical or otherwise, of a private law character in which the state had chosen to engage or whether the [*page307] relevant act should be considered as having been done outside that area and within the sphere of governmental sovereignty."

1192 Whether it is an acta imperii or an acta gestionis becomes a question of fact, but the answer is ultimately a determination of jurisdiction.

1193 It becomes a question of jurisdiction, because if there is sovereign immunity, then the sovereign cannot be impleaded in the foreign court.

1194 In the Quebec proceeding in the Court of Appeal Monet, J.A., said (translation of Mr. Fortier):

"There is more. The acts and behaviour of the Newfoundland government must be classified as acta gestionis rather than acta imperii. The lease (Exhibit R-5' J.R. 307 et seq.) has an economic objective, the order-in-council seeks to implement the rights which Newfoundland claims to have in virtue of this lease. The action for declaratory judgment instituted by Newfoundland is of an ex contractu nature. If indeed Newfoundland could

claim a form of immunity its meddling in the contractual matters of CFLCo and Hydro would constitute an obstacle thereto."

1195 In the same matter Montgomery, J.A., expressed some reservation on this in the following terms:

"My only reservation relates to the question whether, in entering into a lease with the respondent Churchill Falls, the government of Newfoundland was acting in the exercise of its sovereign powers. That the contract was, at least in some of its aspects, a commercial one is not, in my opinion, conclusive. This was a contract for the exploitation over a long term of one of the important natural resources of that province, and its execution was expressly authorized by statutes of the Newfoundland legislature (Exhibit R-5). Can it be said that, in entering into this lease, the province 'was not performing a public act of a sovereign estate but rather one of a purely private nature', to use the words of Mr. Justice Ritchie delivering the opinion of the majority of the Supreme Court in Republique Democratique du Congo v. Venne, [1971] S.C.R. 997, at p. 1001?"

1196 It must be noted, however, in that case and on the declinatory exception that was being considered the issue was whether or not the Province of Newfoundland enjoyed sovereign immunity and therefore could not be impleaded in the Quebec court.

1197 When the matter was considered in the Supreme Court of Canada, the matter of sovereign immunity was not dealt with. The court upheld the position of the province on other grounds.

1198 In this case there is no question of jurisdiction. It is a question of definition. Despite this, the evidence indicates that an acta imperii is an act of governmental authority while an acta gestionis is not. On this basis, classification of the request becomes relevant not only to jurisdiction but also to the Power Contract.

1199 On the matter of classifying the request as acta imperii or acta gestionis the Quebec court would consider the material facts. Some of these have already been outlined at the outset of this part.

1200 The water resource is basically the property of the province. It has been harnessed for the generation of electricity by CFLCo under lease from the province.

1201 The government has granted for the period of the Lease to CFLCo the right to export and the right to transmit and by implication the right to sell.

1202 The right is limited by whatever quantification if any may from [*page308] time to time be allowed in respect of the priority referred to in this proviso.

1203 The water power transformed into electrical energy was leased; ownership rights never left the province. Water power was leased and rights were granted during the period of the Lease. The lease and grant were qualified by the proviso.

1204 (There is, of course, some question as to the effectiveness of the proviso and this has already been dealt with. The discussion in this part is on the assumption that the proviso is not defective.)

1205 It is important to consider why a request could be made. It could be made for the benefit of consumers of electricity in the province. The management of resources is a sovereign matter. That there should be a reservation of the benefit of those resources for the Newfoundland people must likewise be a sovereign matter.

1206 It is part of the public service. The province builds roads, provides health and education service and other social benefits and had as noted in the introductory part of this judgment a policy for the electrification of the province.

1207 It appears to be not dissimilar to the situation that prevailed in Quebec at the time that Hydro Quebec started taking control of the electric utility companies theretofore carrying on business in that province. It was an implementation of sovereign policy.

1208 It was recognition that in this day and age electricity is an essential commodity in every household and that to the extent that it is not otherwise provided the sovereign must provide it.

1209 It might very well be that if the Government entered into a contract with Hydro Quebec for the sale to it of electrical energy, this might be considered to be an acta gestionis, a commercial transaction, but where the Government has programs, policies or contracts providing for electrical energy in the province, then the request certainly has the nature of a sovereign act.

1210 It was an act of the Government done by the Lieutenant-Governor in Council. Whether authority is intended to mean a person authorized or an act authorized does not seem to make much difference for both the person making the request and the making of the request itself were authorized. On that basis the request has the nature of an act of governmental authority, that is to say, an acta imperii.

1211 We must also examine the nature of the request not for the purpose of determining the jurisdiction or immunity but for the purpose of determining whether or not it was an act authorized by contract or an act authorized by the legislature.

1212 It was certainly an act arising out of the contract. The evidence was that under Quebec law a person who enters into conflicting contractual obligations with different people cannot plead his obligations under one contract as events of force majeure to relieve him of liability under the other contract. That is also the common law.

1213 The question really relates to the effect of Section 3 of the Lease Act upon the lease and the request made under the Lease.

1214 The language of Section 3 is unequivocal. It says that all of the provisions of the Lease shall have the same force and effect of laws as if expressly enacted in the Lease

Act.

1215 The grant of rights to CFLCo under the Lease was not only contractual but statutory. The withholding of that portion of the rights which might otherwise have been granted which was effected by the proviso is again not only contractual but statutory.

1216 While this does not improve [*page309] the position of the parties, vis-a-vis each other, it underlines the nature of the request. The question of acta imperii or acta gestionis does not arise between the Government and CFLCo because both are resident in the province and subject to the laws of the province.

1217 We are not concerned with the nature of the request, however, between the Government and CFLCo, but the nature of the request insofar as it concerns Hydro Quebec in a dispute between it and CFLCo.

1218 While the provisions of the Lease are contractual as between the parties to it, they are statutory as against third parties by virtue of Section 3 of the Lease Act. This means that this request is an act of governmental authority under Newfoundland law and is unlikely to be otherwise under Quebec law.

1219 In support of this, the evidence of Mr. Vineberg and Mr. Crepeau was that the request when viewed by CFLCo was an acta gestionis, but when viewed by Hydro Quebec was an acta imperii. No authority for this proposition was cited. It was not really refuted.

1220 In many ways it sounds like a strange proposition, because it seems that CFLCo is enabled to turn its contractual obligation to the Government into a statutory obligation when it faces Hydro Quebec.

1221 The evidence must be accepted and if it is understood correctly it is this - that in an action by Hydro Quebec against CFLCo, CFLCo under the laws of Quebec could establish that the request of the Government is an act of governmental authority within the meaning of the Power Contract.

1222 That is then a further reason for the finding that the request is an act of governmental authority.

1223 There is a third and more compelling reason than either of the two mentioned. The right contained in the proviso has largely been regarded as a contractual right. As noted, it is being assumed for the purpose of this particular part that the Government is correct in its interpretation of the proviso and that by requesting the priority, subject to its proving that the project is feasible and economic, it is entitled to supersede Hydro Quebec.

1224 The Government granted whatever rights are contained in the Lease. Whatever rights it expressed for itself in respect of the property which it leased are in effect rights which never left its possession. In effect it said to CFLCo that CFLCo might have this water power for as long as the Government did not want it for the Newfoundland consumer. When the government wants it for the Newfoundland consumer, it ceases to be part of the

leased property and becomes the property of the province.

1225 In effect all the government has done is to restore to the province for the benefit of the Newfoundland consumer property that it said CFLCo might have up to that point.

1226 In effect it is an act affirming its right to its own property for the public good.

1227 In a way this reasoning is a combination of the reasoning outlined in the first and second reasons above. The Government is claiming what is its own and this must be considered to be an act of governmental authority and if it is necessary to sub-classify it, it must be deemed to be an acta imperii.

1228 The conclusion of this rather circumlocutious part is that the request of the government is an act of governmental authority according to the law of the province of Quebec and is therefore a force majeure under the Power Contract.

1229 It need only be noted in conclusion that compliance with the request prevents full compliance with the Power Contract. That completes the [*page310] picture. A force majeure has occurred and the provisions of the Power Contract affording relief in such circumstances become pertinent if CFLCo is not precluded otherwise from successfully pleading force majeure.

Part 39: Quebec law - May force majeure be pleaded by CFLCo?

1230 The conclusion to be drawn on the question would appear to have been disclosed in several places herein. A man who enters into conflicting obligation with two parties cannot plead performance for one party in defence of an action against him by the other for non-performance.

1231 Such a principle is basic probably to all systems of law. A man cannot avoid liability for his own fault. That is the import of Article 1071 and 1072 and embodies most probably the concept of exteriority.

1232 CFLCo by entering into the Lease Act confirmed that the Government should have the power to make a request pursuant to the proviso. The request was made after the Power Contract. CFLCo cannot comply both with the Power Contract and the request at least as that request is interpreted by the Government.

1233 In Gregory v. The Canada Improvement Company et al. (supra) a decision rendered by Mr. Justice Jette in Montreal on July 6, 1883, the defendant had entered into an obligation with a Mr. Gregory, the plaintiff, and subsequently procured the passage of legislation which precluded or made impossible the performance of the obligation to Mr. Gregory.

1234 In that case the defence of force majeure was raised as le fait du prince and it was held that it could not succeed because of the participation of the defendants in procuring the legislation which was the instrument that made performance impossible. The

defendants were therefore condemned to pay damages equal to the obligation that was avoided by the legislation.

1235 In the same sense CFLCo, having entered into the Lease, may be said to have been instrumental in procuring the Lease which created the right to make the request. This, of course, did not interfere with any existing obligation, but when CFLCo subsequently entered into the Power Contract and the Government subsequent to that made the request which CFLCo had agreed could be made, it appears obviously that the resulting situation is one made possible by CFLCo.

1236 Whether one uses the exteriority principle and finds that the act of governmental authority was not exterior to CFLCo or the principles of Articles 1071 and 1072, the result is the same.

1237 (Conceivably Article 1072 does not apply, because it refers to a fortuitous event or irresistible force; whereas in this case we are discussing a conventional event of force majeure, namely an act of governmental authority. According to the evidence the concept of fault eliminating the defence of force majeure does not depend for its existence on the Civil Code. It is part of the Quebec common law.)

1238 A situation exists in this case that perhaps sets it apart from other cases. It is quite true that CFLCo in executing the Lease agreed that the Government would have the power to make the request. This by itself would naturally cause no problem.

1239 If the Power Contract had not been drawn and executed in its present form, there might be no problem. The obligation of CFLCo made no adequate allowance for the position of the Government.

1240 However, when the Power Contract was entered into, both CFLCo and Hydro Quebec were aware of the terms of the Lease Act. It is the conflict between the Lease Act and the Power Contract that creates the issue of force majeure.

1241 In these circumstances CFLCo through its fault in creating the [*page311] situation would normally not be able to plead force majeure. While the right of the Government was created by the Lease Act, it was the Power Contract that created the conflict. When this was entered into, Hydro Quebec had as much knowledge as CFLCo.

1242 Further, both parties were concerned about the effect of the proviso. As a result of this concern, the Government held out to CFLCo that the right to recapture 300 MW would be sufficient to satisfy the demands of the Government under the proviso and CFLCo held out to Hydro Quebec what the Government had held out to it.

1243 Both parties then in good faith believed that there would be no conflict.

1244 Upon an adequate analysis the causa sine qua non of the consequences of the force majeure was the Power Contract and for its contents both CFLCo and Hydro Quebec must plead equal responsibility.

1245 While they in good faith may have believed that the Government could not request more than 300 MW, they were mistaken in this belief. It was a mistake of law, but it was a mistake that they both shared.

1246 There was no evidence of Quebec law on this particular problem of fault shared between the contracting parties. In such circumstances where a matter is to be determined according to foreign law and there is no evidence of foreign law before the tribunal, then the tribunal assumes its law to be the same. In this connection reference is made to Part 29.

1247 There is no specific jurisprudence on this particular matter according to the law of Newfoundland.

1248 It is again upon proper analysis nothing more than a matter of common sense. Both parties, with full knowledge of the Lease Act and the Lease and with presumed knowledge of the law, created the Power Contract and without the creation of the Power Contract the force majeure problem would not exist.

1249 The term "equity" has a different meaning under Quebec law than under Newfoundland law. It is in that province a principle of law rather than, as in the province, a system of law.

1250 It would seem a principle of equity that one party to a contract cannot deny to the other the plea of force majeure when both have been instrumental in the creation of a circumstance (the Power Contract) which permits the problem created by the force majeure.

1251 Without the Power Contract as drafted there would be no such problem. That contract permitted the creation of the situation and both parties created that contract.

1252 While one can only speculate on what Quebec law might be for, in the absence of evidence, no conclusions on it may be drawn, one can with some confidence speculate that the Quebec law is in fact the same as the law of Newfoundland in this respect. It is a law which, if for no other reason, finds its authority in the principle of estoppel. Hydro Quebec is estopped from denying the plea of force majeure to CFLCo because it acquiesced in the creation of the force majeure situation.

1253 The finding is that the request constitutes an act of governmental authority as that term is used in the Power Contract, according to Quebec law, and that it can be successfully pleaded in Quebec because Hydro Quebec was equally at fault with CFLCo on the facts of the case. Its plea is not precluded on the basis of non-exteriority because Hydro Quebec was equally with CFLCo the creator of the situation.

[*page312] Part 40: Quebec Law - Implied term

1254 The implied term suggested by the Government is referred to in Part 33. In effect the Government says that there is an implied term that the obligations of CFLCo under the

Power Contract are subject to Clause 2(e).

1255 Not too much time need be spent on this particular topic. It is dealt with by Mr. Tremblay and Mr. Fortier in their evidence and exhibits. Articles 1016, 1017, 1020 and 1024 of the Quebec Civil Code read as follows:

"Art. 1016. Whatever is doubtful must be determined according to the usage of the country where the contract is made.

"Art. 1017. The customary clauses must be supplied in contracts, although they be not expressed.

"Art. 1020. However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract.

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

1256 It is only by virtue of these articles (and Article 1978 relating to laws and usages of commerce) that terms not written into a contract may, to use the common law term, be implied.

1257 Articles 1020 and 1024 come closest to opening a door upon the Government's position that it is an implied term of the Power Contract that the obligation of CFLCo to Hydro Quebec thereunder is subject to the obligation of CFLCo to the Government under the Lease.

1258 There clearly must be some basis upon which such an implication may be made. It must appear that the parties intended to so contract or that equity, usage or law demand that such a provision exist.

1259 (Equity, as used in the Quebec Civil Code, does not have the same meaning that is attributed to that term in the common law jurisdictions. Reference is made to this in Part 39.)

1260 Consideration of this matter involves basically the same principle involved in interpretation.

1261 It was certainly not intended by the parties. Hydro Quebec would never have intended such a term. If for no other reasons, it would not have contemplated the construction of its expensive transmission line if it intended that CFLCo could redirect to the Government any amount of energy at any time and for any length of time.

1262 For precisely the same reason, equity would not impose terms of such consequence.

1263 Neither usage nor law is material to the matter.

1264 If a term such as the Government suggests ought to be implied had been written into the Power Contract, the Power Contract would never have been signed. The evidence is that any provisions that CFLCo could withhold an undetermined amount of power for an undetermined amount of time would have been completely unacceptable both to Hydro Quebec and to the people charged with financing the project. These latter of course, were not involved in the Power Contract but they were obviously within the contemplation of CFLCo. It seems implausible that even CFLCo could have intended such a term for apart from its obligation to the Government to build the plant, it wanted the plant built anyway. The implied term if expressed would have precluded that possibility.

1265 It cannot be considered that such a provision would have had the agreement of the parties initially. There is nothing in the Civil Code provisions that justifies its imposition now.

[*page313] [1266] On this basis whether it be under the law of Quebec or the common law, the proposition of an implied term as suggested by the Government must be completely rejected.

Part 41: 1976

1267 While it has been held that proof of current facts if made would in this case sustain a claim for relief made in 1976, it ought to be noted for the record that whatever the facts may prove as of the time of trial, they did not prove that the project would have been feasible and economic in 1976 when the action was brought. While geological and meteorological conditions may be regarded for the time span that concerns us as constant, all other factors change from year to year. The evidence related generally to current situations and while it touched upon situations in 1976 in some areas, it fell far short of establishing the prerequisite to success - that compliance was then feasible and economic.

Part 42: Conclusion

1268 The sum and substance of this judgment is that the Government is unsuccessful. It is not entitled to the relief which it claims.

1269 The relief claimed is again reproduced. The claim for relief that the Government seeks is:

(a) a declaration that the Government is entitled by virtue of Clause 2(e) to request 800 MW of electric power as set forth in the Order-in-Council;
(b) a declaration that the Government by reason of the Financial Agreement is not prevented or prohibited from commencing this action; and
(c) a declaration that, by virtue of Part 1 of the Lease and Sections 3 and 4 of the Lease Act, CFLCo is obliged to comply with the request contained in the Order-in-Council.

1270 The Government is entitled to make the request and is not barred from bringing this action by reason of the Financial Agreement.

1271 There is a wide gap between what the Government really seeks and what it can get. For example, no matter how much energy it requests, it can receive no more than is surplus to the present commitment for sale of CFLCo plus whatever remains of the 300 MW recapture allowance.

1272 The granting of declaratory relief in respect of them (a) and (b) might indicate success where there is failure. Discretion indicates that such relief should not be granted.

1273 As far as item (c) is concerned this relief should be denied because both the findings of law and the limited findings of fact made herein indicate as much.

1274 The basic reasons upon which the Government fails may be listed as follows:

1275 Firstly, the proviso is interpreted to mean that upon the request of the Government the Newfoundland consumer shall be given by CFLCo a right of first refusal to purchase all energy that becomes available for sale and is not then otherwise committed when it is feasible and economic for CFLCo to supply such power and for the Newfoundland consumer to purchase such power. In that connection the power which has been committed for sale to Hydro Quebec is not available for sale to another customer. The right of first refusal which is extended upon the request of the Government is exercisable only in respect of the power in excess of that already committed and at the present time there is very little, if any, of that. (See Part 15.)

1276 Secondly, the proviso contemplates that CFLCo should have an obligation to enter into an agreement with a third party. The court will not enforce such an agreement, which is basically an agreement to agree wherein [*page314] the price, terms and conditions have not been ascertained and there is no mechanism for their ascertainment. (See Part 28.)

1277 Thirdly, upon the limited findings of fact made herein it has not been shown to be feasible and economic for CFLCo to supply such power. (See Part 34.)

1278 The Government wants 800 MW of energy out of the pool reserved for sale to Hydro Quebec. This it cannot have and obviously it cannot have a declaration that it is entitled to compliance with the request contained in the Order-in-Council for that is what that request contemplates.

1279 The relief sought in items (a) and (b) is denied as a matter of discretion and in item (c) upon the findings.

1280 The action is dismissed. The defendants are entitled to recover their costs of this action to be taxed against the Government.

Action dismissed

. . . .

APPENDIX "A"

The Order in Council

(August 6, 1976)

WHEREAS by a Lease dated the 16th. day of May, One Thousand Nine Hundred and Sixty-One and made between His Honour the Lieutenant-Governor in Council (hereinafter called the "Government") and Churchill Falls (Labrador) Corporation Limited (hereinafter called "CFLCo"), the Government granted to CFLCo the full right and liberty to use exclusively for the generation of electricity certain waters on the Upper Churchill Watershed which are more specifically described in the said Lease (the said Watershed being referring to therein as the "Upper Hamilton Watershed") and it was provided in the said Lease that such grant was subject to the terms, conditions, reservations, exceptions and provisions therein contained;

AND WHEREAS the said Lease was made pursuant to The Churchill Falls (Labrador) Corporation Limited (Lease) Act, 1961, the Act No. 51 of 1961;

AND WHEREAS the said Act and the said Lease was thereafter amended from time to time (the said Act and the said Lease as so amended being hereinafter called, respectively, the "Upper Churchill Act" and the "Upper Churchill Lease");

AND WHEREAS Section 3 of the Upper Churchill Act provides that from its execution and delivery, the Upper Churchill Lease shall be valid and binding upon the parties there to andthat all and singular the provisions thereof shall have the force and effect of law for all purposes as if expressly enacted in the Upper Churchill Act, and among other things, that the Lessee named in the Upper Churchill Lease shall have full power and authority from time to time to do or perform or omit to do or perform all and singular the several acts, matters and things in and by the Upper Churchill Lease provided to be done or not to be done, as the case may be, in the manner and with the effect and under the conditions stipulated and provided in the Upper Churchill Lease;

[*page315] AND WHEREAS Section 4 of the Upper Churchill Act further provides that Section 3 of that Act shall have full effect notwithstanding anything to the contrary contained in any other statute or law;

AND WHEREAS Clause 2 of Part 1 of the Upper Churchill Lease provides, among other things, that upon the request of the government, consumers of electricity in the Province of Newfoundland (hereinafter called the "Province") shall be given priority where it is feasible and economic to do so;

AND WHEREAS the government has caused an investigation to be made of the future needs of power and energy in the Island of Newfoundland (hereinafter called the "Island") and on the basis of that investigation has concluded that additional power and energy will be needed in the Island, commencing in the year 1983 and continuing thereafter;

AND WHEREAS the government proposes to meet the increased need in the Island by transmitting hydro-electric power from Labrador;

AND WHEREAS towards that end, the government has decided to invoke the said provisions of Clause 2 of Part 1 of the Upper Churchill Lease and to cause transmission facilities to be constructed from the said Upper Churchill Watershed to the Island;

AND WHEREAS it is necessary to secure a commitment now for the supply of the said power from labrador in order to arrange the financing of the said transmission facilities and to complete the construction thereof by the year 1983;

BE IT THEREFORE ORDERED THAT CFLCo be and it is hereby requested to

(a) supply to Newfoundland and Labrador Hydro, an agent of Her Majesty in right of the province, a total of 800 Megawatts of power, generated from the waters of the said Upper Churchill Watershed, at a 90% load factor, commencing on October 1, 1983; and
(b) give Newfoundland and Labrador Hydro access to limited quantities of power for commissioning purposes prior to October 1, 1983, all such power;
(c) to be supplied at such price and upon such other terms and conditions as may be mutually agreed between CFLCo and Newfoundland and Labrador Hydro, and as shall, in any event, be not less favourable to CFLCo than the price and other terms and conditions prescribed in the Power Contract dated as of the 12th. day of May, A.D. 1969, and made between Quebec Hydro-Electric Commission and CFLCo; and
(d) to be delivered to Newfoundland and Labrador Hydro at or near Churchill Falls, the exact point or points of delivery to be such as may be mutually agreed between CFLCo and Newfoundland and Labrador Hydro.

ORDERED FURTHER THAT all power and energy supplied to Newfoundland and Labrador Hydro pursuant to this request shall be used solely and exclusively for the purpose of supplying consumers of electricity in this province.

ORDERED FURTHER THAT the Honourable John C. Crosbie, Minister of Mines and Energy, [*page316] be and he is hereby directed to cause a certified copy of this Order to be delivered to CFLCo.

J.G. Channing (signed)

Clerk of the Executive Council

APPENDIX "B"

The Transmittal Letter

GOVERNMENT OF NEWFOUNDLAND AND LABRADOR DEPARTMENT OF MINES AND ENERGY

Office of the MinisterST. JOHN'S

August 6th, 1976.

Churchill Falls (Labrador) Corporation Limited,

1 Westmount Square,

Montreal, Quebec,

Canada.

Dear Sirs:

Pursuant to a direction given to me by His Honour the Lieutenant-Governor of the Province of Newfoundland in Council, I send you herewith a certified copy of Order-in-Council 1001-'76 of the Province of Newfoundland.

The Order-in-Council which is self-explanatory requests Churchill Falls (Labrador) Corporation to supply to Newfoundland and Labrador Hydro 800 MW of power generated from the waters of the Upper Churchill Watershed at a 90% load factor, commencing on October 1, 1983 and to give to the last named Corporation access to limited quantities of power and energy for commissioning purposes prior to October 1, 1983.

Yours sincerely,

(Signed)

JOHN C. CROSBIE

Minister of Mines and Energy

[*page317] APPENDIX "C"

The CFLCo Reply

August 31, 1976

Hon. John C. Crosbie,

Minister of Mines and Energy,

Department of Mines and Energy,

Confederation Building,

St. John's, Newfoundland

Dear Minister:

A certified copy of Order-in-Council No. 1001-'76 of His Honour the Lieutenant Governor of the Province of Newfoundland in Council was received by this Company with your letter of August 6, 1976.

The contents of the Order-in-Council have been considered and discussed by the Board of Directors of Churchill Falls (Labrador) Corporation Limited (CFLCo), and I have been asked by the board to send you this reply.

The Order-in-Council states that the request to supply 800 megawatts of power to Newfoundland and Labrador Hydro commencing October 1, 1983 is made pursuant to the Lease by which the Province conferred on CFLCo, the right to harness and make use of the waters of the Upper Churchill Watershed. We assume the request is for the 800 megawatts to be provided from presently installed capacity at Churchill Falls and our reply is wholly predicated on that assumption. If this assumption is not correct, please advise us and, if requested, we will consider the matter further.

We will of course comply fully with all terms and conditions of the Lease. We are in addition most anxious to cooperate with you in every way in order to assist in meeting the needs of consumers in the province for power and energy.

We are also bound by the provisions of the Power Contract dated as of May 12, 1969 under which most of the electricity generated at the Company's facilities at Churchill Falls was sold to Hydro Quebec. That contract is the basis on which those facilities were financed, and it has been assigned as security to the company's first mortgage bondholders pursuant to a Trust Deed which obliged the Company to observe and carry out all the terms and provisions of both the Power Contract and the Lease.

Under the recapture clause of the Power Contract, CFLCo is entitled to withhold (in addition to the power reserved for Twin Falls Power Corporation Limited) a maximum of 300 megawatts for power to be sold for consumption within Newfoundland. CFLCo have been advised that approximately 100 megawatts of this power will be required to meet the increased requirements of consumers of electricity in Labrador prior to October 1, 1983 and which has been contracted for in part with Newfoundland and Labrador Hydro in a letter dated August 30, 1976. We would, however, be pleased to use the balance in partial satisfaction of the government's request.

[*page318] By reason of the limitations on the amount of power that can be withheld from Hydro Quebec under the existing provisions of the Power Contract, however, we are unable to satisfy in full from power generated at the Company's existing facilities at Churchill Falls the Government's request for the delivery of 800 megawatts commencing on October 1, 1983. We are furthermore advised by counsel that meeting the terms of such request with power generated at the existing plants would constitute a default by CFLCo under both the Power Contract and the First Mortgage Trust Deed. Such a default would, among other things, entitle the bondholders to demand immediate payment of the more than $ 500 million of First Mortgage Bonds now outstanding and would have other

consequences that we do not believe would be in the best interests of the company, its shareholders or the province.

Having sought the advice of counsel on this matter and in the light of their opinion, we feel that as a matter of prudent management, we cannot make a commitment for the supply of power from the presently installed capacity in the amount prescribed in the Order-in-Council. I have therefore been instructed by the board to inform you accordingly.

It would be appreciated if you would bring our reply to the attention of His Honour the Lieutenant-Governor in Council, and I believe that, in view of the circumstances, the Government of the Province of Newfoundland will understand that we adopt this position in good faith, being mindful of our obligations under our trust deeds and our duty to all of the shareholders of this company.

Yours very truly,

(Signed)

J.W. Beaver

President and Chief Executive Officer.

APPENDIX "D"

Recapture Provisions

(From penultimate draft of Letter of Intent)

10.0 Power for Newfoundland

In order to provide for electrical energy requirements which may arise within Newfoundland, it is proposed that a reasonable amount of electrical energy for use within Newfoundland be reserved for recapture, upon reasonable notice to Hydro Quebec.

10.1 Notice and Amount of Power Available for Recapture

At any time, on no less than three years' advance written notice, CFLCo may recapture up to 300 magawatts of power to use by Newfoundland at a load factor of up to 90%, for a maximum annual energy recapture not to exceed 2.3652 billion kwh per year.

[*page319] 10.2 Price Arrangements on Reserved Power

The block of power reserved for Newfoundland will be available to Hydro Quebec, and will be purchased by Hydro Quebec at continuous energy prices until such time as CFLCo serves notice for the recapture of such power. During the notice period prior to recapture the price in effect for this block of power will be 0.27 mill per kwh lower than the price in effect at the time for continuous energy.

10.3 After recapture of any portion of the power by CFLCo for Newfoundland, any available surplus not used by Newfoundland will be sold to Hydro Quebec as "excess energy" at 1.0 mill per kwh.

(From Letter of Intent)

10.0 Notice and Amount of Power Available for Recapture

At any time, on no less than three year's advance written notice, CFLCo may recapture power in blocks not exceeding in the aggregate 300 megawatts at a load factor of up to 90%, for a maximum annual energy recapture not to exceed 2.3652 billion kwh per year.

10.1 Price Arrangement on Reserved Power

During any notice period prior to recapture, the price in effect for a block of power will be 0.27 mill per kwh lower than the price in effect at the time for continuous energy.

10.2 After recapture of any portion of the power by CFLCo, any available surplus not used will be sold to Hydro Quebec as "excess energy" at 1.0 mill per kwh.

(From Power Contract)

6.6 Recapture

CFLCo may, on not less than three years prior written notice to Hydro Quebec, elect to withhold from the power and energy agreed to be sold hereunder blocks at a specified load factor per month, to be stated in said notice, of not less than 60% nor more than 90%, which blocks in the aggregate shall not exceed during the term hereof 300,000 kilowatts for a maximum withholding of 2.362 billion kilowatthours per year provided that:

(i) energy so withheld is sold by CFLCo only for consumption outside the Province of Quebec;

[*page320] (ii) any part of the energy so withheld which, from time to time may become available for purchase by Hydro Quebec, may be purchased by Hydro Quebec, if before the Effective Date, as part of Energy Payable priced in accordance with Section 8.3, and, if on or after the Effective Date, at the price of 33.33% of the Applicable Rate multiplied by the number of kilowatthours so purchased, and to this end Hydro Quebec shall have access to the pertinent sales records of CFLCo; and

(iii) any part of the power and energy so withheld before the seventh Delivery Date shall not relieve CFLCo from its commitment to deliver power and energy in accordance with Schedule II of the present Power Contract.

APPENDIX "E"

Definitions

In the judgment of which this is Appendix "E" unless the content otherwise requires;

"Brinco" means the British Newfoundland Corporation;

"Brinco Act" means the Government-British Newfoundland Corporation Limited-N.M. Rothschild & Sons (Confirmation of Agreement) Act 1953, an act of the Newfoundland Legislature dated May 20, 1953;

"Brinco Agreement" means the agreement made between the Province, Brinco and N.M. Rothschild & Sons made pursuant to the Brinco Act;

"CFLCo" means Churchill Falls (Labrador) Corporation Limited, the first defendant;

"CFLCo reply" means the letter set forth in Schedule C;

"Churchill Falls" means the falls on the Churchill River between the Upper Churchill River from Lower Churchill River not far from the Plant;

"Churchill River" means the river flowing from the body of water now known as the Smallwood Reservoir through the Plant into Lake Melville;

"Clause 2(e)" means Clause 2(e) of Part 1 of the Lease;

"Clause 6.6" means Clause 6.6 of Article 6 of the Power Contract;

[*page321] "compliance" means compliance with the request;

"Clause 11" means Clause 11 of Part 4 of the Lease;

"Debenture Indenture" means an agreement dated May 15, 1969 between CFLCo and the Royal Trust as trustee;

"Financial Agreement" means the agreement made between the province, the Royal Trust and CFLCo pursuant to the Financing Act;

"Financing Act" means the Churchill Falls (Labrador) Corporation Limited (Financing) Act 1969 an act of the Newfoundland Legislature dated May 9, 1969;

"First Mortgage Trust Deed" means the deed of trust and mortgage between CFLCo and the Royal Trust dated May 15, 1969;

"General Mortgage Trust Deed" means the deed of trust and mortgage between CFLCo and General Trust dated September 1, 1968;

"General Trust" means General Trust of Canada, the fourth defendant;

"Grand Falls" means Churchill Falls;

"Government" means the plaintiff, the Province or the Lieutenant Governor in Council;

"Government Intervention" means the intervention by the Government in the First Mortgage Trust Deed;

"Hamilton Falls" means Churchill Falls;

"Hamilton Falls Power Company Limited" means CFLCo;

"HVDC" means high voltage direct current;

"Hydro Quebec" means Quebec Hydro-Electric Commission, the second defendant;

"IECO" means International Engineering Company of San Francisco;

"Island" means the island portion of the Province;

[*page322] "KV" means kilovolt or one thousand volts;

"Labrador" means the Labrador portion of the Province;

"Lease" means the lease from the Government to CFLCo dated May 16, 1961 and all amendments thereto;

"Lease Act" means the Hamilton Falls Power Corporation Limited (Lease) Act whose name was changed to the Churchill Falls (Labrador Corporation (Lease) Act;

"Letter of Intent" means the Letter of Intent entered into between CFLCo and Hydro Quebec on October 13, 1966 relative to the then proposed Power Contract;

"Lower Churchill" means that portion of the Churchill River flowing downstream of Churchill Falls;

"MRI" means Meteorology Research Incorporation of Pasadena, California;

"MW" means megawatts or one million watts;

"Newfoundland Hydro" means the Newfoundland Power Commission up to 1965, the Newfoundland and Labrador Power Commission up to 1974, the Newfoundland and Labrador Power Corporation up to 1975 and the Newfoundland and Labrador Hydro-Electric Corporation from 1975;

"Newfoundland consumer" means "consumers of electricity in Newfoundland" as that term is used in the proviso;

"Newlight" means Newfoundland Light & Power Co. Limited;

"Order-in-Council" means the Order-in-Council of the Government dated August 6, 1976

wherein the request for 800 MW of energy was made and directed to CFLCo pursuant to Clause 2(e);

"Plant" means the Hydro-Electric Generating Plant operated by CFLCo at Churchill Falls;

"Power Contract" means the contract entered into between CFLCo as vendor and Hydro Quebec as purchaser dated May 12, 1969;

"Project" means the entire project that would result upon compliance with the request;

"Province" means the Province of Newfoundland and Labrador;

[*page323] "proviso" means the concluding portion of Clause 2(e) beginning with the words "provided that";

"Quebec proceeding" mean the proceeding commenced in the Province of Quebec by Hydro Quebec against CFLCo, the government, the Royal Trust and General Trust seeking declaratory relief in relation to the Power Contract;

"request" means the request contained in the Order-in-Council;

"Royal Trust" means the Royal Trust Company;

"Smallwood papers" means exhibits JRS 1 and JRS 2;

"SNC" means Surveyer, Nenniger & Chenevert Inc.;

"Taxation Trust Agreement" means the agreement between CFLCo and the Royal Trust dated May 15, 1969 referred to in Part 31;

"Transmittal Letter" means the letter set forth in Schedule B;

"Twinco" means the Twin Falls Development Corporation Limited;

"Upper Churchill" means that portion of Churchill River lying upstream of Churchill Falls;

"Upper Hamilton" means Upper Churchill;

"voting trust" means the voting trust contained in the Voting Trust Agreement;

"Voting Trust Agreement" means the Voting Trust Agreement No. 2 dated October 28, 1968 made between Brinco, General Trust and Hydro Quebec.

APPENDIX "F"

Witnesses:

(The indications after each name - (P), (1D) and (2D) - indicate that the witness was called

for the plaintiff, the first defendant or the second defendant as the case may be. The numerical references are to the transcript of evidence. The third and fourth defendants did not call witnesses.)

[*page324] ALLAN, James N. (P - 13:1781-1915): A civil engineer since 1953 employed by Morrison Knudsen Company with experience in the heavy construction industry including tunnel construction.

AUGER, Paul Emile (2D - 68:9163-9321): A consulting geologist with an extensive academic and field background.

BAXTER, John (P - 55, 56:7280-7385): A qualified Registered Industrial Accountant in the Province of Ontario now residing at St. John's and holding the position of Vice-President, Finance and Administration, with the Newfoundland Hydro.

BERGLUND, Olov G. (P - 6, 7, 8:847-1127): A registered professional engineer in California and Sweden holding a masters degree in electric power engineering from Harvard University. He is a director and chief engineer of International Engineering Company, Inc., a subsidiary of Morrison Knudsen Company Inc.

BILLINGTON, Roy (2D - 75, 76:10,223-10,555): Head of the Electrical Engineering Department at the University of Saskatchewan, he has particular competence in power system reliability.

BOUGARAN, Alain Pierre (2D - 86, 87, 88:12,005-12,015, 12,022-12,207): A master mariner formerly captain of the Calypso now employed with Le Groupe Chambon and Le Compagnie Travocean, he has experience with electric cable laying on the sea bottom and in problems relating to surface and below surface operations.

BOYD, Robert (2d - 58, 59, 60:7634-7661, 7729-7888): Retired president and chief executive officer of Hydro Quebec. His testimony related largely to the historical development of the relationship between Hydro Quebec and the Upper Churchill River power project and CFLCo.

CAHAL, Robert Ross (P - 21, 22:2775-2902): Senior vice president of H. Zinder and Associates, an energy consulting firm of Washington, D.C., he holds the position of senior energy economist with responsibility for conducting and directing economic studies involving the supply, pricing, marketing and utilization of energy.

CAYER, Paul (P - 34, 35:4574-4623): A graduate in civil engineering at Laval University and now a professional engineer registered in the province of Quebec; he is employed by Roussea, Suave, Warren, Inc. a consulting engineering company. He has experience in cost estimates for electrical transmission projects.

CHAGNON, Jean Yves (2D - 85, 86:11,807-11,852): A geologist with a PH.D., he is a professor at the Department of Geology at Laval University and has acted as consultant on a number of projects.

CLARK, Harrison Kirtley (P - 26, 27:3542-3622, 3671-3729): A senior engineer with Power Technologies Incorporated of Schenectady, New York, he studied the impact of the proposed D.C. transmission line on the electrical transmission system in Quebec and in the province.

[*page325] CREPEAU, Paul-Andre (P - 48, 49: 6403-6549): A professor at the Institute of Comparative Law at McGill University, his testimony related to the law of Quebec pertinent in the interpretation of the Power Contract.

DeGUISE, Yvon F. (2d - 57, 58:7442-7634): A civil engineer, he is chief consultant on energy for Lavalin Inc. He is a former official of Hydro Quebec and testified as did Mr. Boyd in relation to historical matters.

DONYLUK, David Michael (P - 52, 53:6712-6932): Manager of the geophysics branch of McIhanney Surveying and Engineering Limited, he was earlier involved with Kenting Explorations Services Limited who did some contractual work for S.N.C. Lavalin for the Lower Churchill Development Corporation in connection with the transmission of electricity from a proposed hydro electric development on the Lower Churchill. He was supervisor of marine projects. He is a marine geophysicist who worked on the analysis of data collected relating to conditions on the Strait of Belle Isle.

DUBE, Claude (2D - 82, 83:11,394-11,494): Director of planning for Hydro Quebec, he testified on the consequences to Hydro Quebec of an 800 megawatt cutback in the supply of hydro electric electricity by CFLCo.

EICH, Edward (2D - 63, 64, 65:8498-8860): A consulting engineer advising utilities and manufacturers on economic and technical aspects of high voltage cables, his testimony was an assessment of the proposed cable crossing of the Strait of Belle Isle.

EMPEY, William F. (2D - 85:11,684-11,807): Vice president and director of economics with Data Resources of Canada, his testimony consisted of an analysis relating to the projections of various economic indicators referred to in the evidence of Mr. Sonnen and Mr. Pitblado.

FELIN, Beatrice (2D - 60, 61, 62:7922-8203): A meteorologist who has been with Hydro Quebec since 1974, she testified on her assessment of climatic studies done for the Government and its agencies.

FORTIER, L. Yves (2D - 66, 67:8866-9065): A partner in the law firm of Ogilvy, Renault in Montreal, he testified as to Quebec law.

GHANNOUM, Elias (2D - 62, 63:8203-8498): Employed by Hydro Quebec as head of transmission lines design group, he reviewed and testified as to the mechanical design criteria of the proposed HVDC transmission line from Churchill Falls to the Island.

GILL, Gilbert George (P - 54:7075-7179): Assistant Deputy Minister (Debt Management and Pensions) of the Department of Finance for the Province.

[*page326] GILLIAND, Pierre Andre (P - 55:7180-7280): Employed with the processing center in Paris of the Compagnie Generale Geophysique as manager. He was involved in special projects such as three dimensional seismic survey and testified as to the geological information gleaned from such surveys.

GREEN, Harry William (P - 31, 32, 33:4169-4406): A geological engineer, he is employed with SNC as senior geological engineer and testified in relation to the geological formations beneath the Strait of Belle Isle.

HANNAH, Arthur William (P - 28:3774:3859): A professional engineer employed with Montreal Engineering Company Limited as chief engineer, transmission line and substation, he testified in connection with route selection, meteorological conditions and optimization in respect of the proposed transmission line from Churchill Falls to St. John's.

HARRISON, Ronald E. (P - 22, 23:2902-3156): An electrical engineer and consultant employed with Teshmont Consultants Incorporated at Winnipeg, he is senior vice president and consultant in power systems engineering. He was involved in system engineering studies on a single bi-pole transmission system from proposed hydro developments at Gull Island or Muskrat Falls on the lower Churchill River.

HARGER-GRINLING, Virginia: (86:12,005): An interpreter sworn to interpret the testimony of Mr. Bougaran who testified in French.

HENDERSON, William Boyd (P - 24:3156-3277): A mining engineer employed with Domtar at Montreal as vice president of engineering, he testified on the tunnel scheme.

HOCKIN, Alan Bond (P - 42:5514-5605): Executive Vice President, Investments, of the Toronto Dominion Bank, he testified in relation to bank financing of the proposed transmission project during the construction period.

INGRAM, R. Grant (2d - 72, 73:9739-10,012): Chairman of the Oceanographic Institute at McGill University, he testified on the physical oceanographic aspects of the submarine project.

JETTE, Michel (2D - 58:7661-7723): A lawyer associated with Geoffrion Prud'homme attorneys for Hydro Quebec in Montreal who testified in relation to the Quebec proceeding.

JOHNSON, Gordon Lawrence (1D - 49:6549-6586): A chartered accountant and partner of Peat, Marwick, Mitchell and Company, Chartered Accountants, who testified in relation to the financial position of CFLCo and the possible effect of the redirection of the hydro electric output of CFLCo.

KIERANS, Thomas Edward (P - 43:5605-5789): President of McLeod, Young, Weir Limited, Investment Dealers, he testified in relation to the long-term financing of the transmission project.

[*page327] LAROCHE, Paul J. (2D - 73, 74:10,012-10,221): He is manager of geophysics

of the Societe Quebecois D'Initiatives Petrolieres who gave evidence of his evaluation of the geophysical surveys conducted across the Strait of Belle Isle between 1975 and 1981.

LEDOUX, Michel (2D - 83, 84:11,495-11,683): Employed by Hydro Quebec as an engineer with the interconnection division generating equipment service planning department, he testified on the cost effectiveness of the Labrador infeed.

LONG, Joseph S. (P - 12, 13:1606-1781): Chief geologist with IECO, he testified in relation to the tunnel project.

MAGRATH, Neil Alexander - (1D - 50:6586-6661): Vice president and manager of electrical services division for Acres Consulting Services Limited, he testified as to the impact of the Government's success up this action upon CFLCo under the Power Contract.

McMANUS, Dennis R. (P - 35:4623-4757): Operations manager for the energy and transport division of SNC, he gave estimates of the costs of the submarine project and the tunnel project with a comparative analysis.

MELLOR, Malcolm (2D - 80, 81, 82:11,114-11,394): An engineering research consultant with experience in engineering mechanics, geotechnical problems, constructional problems in terrestrial and marine environments, explosions, avalanche and iceberg technology, he testified on rock trenching for the tunnel scheme.

MERCER, David W. (P - 4, 5, 6:644-847): Vice president of corporate planning for Newfoundland Hydro, he is responsible for load growth forecasting, system planning environment policy and management information systems. He testified mainly with respect to load growth forecasting and system planning.

MICKEVICIUS, Adam (P - 9:1127-1251): An electrical engineer employed by IECO, he reviewed and testified as to the power system planning aspects of various studies which had been performed in connection with the Labrador infeed.

MORELLO, Aldo S. (P - 19, 20, 21:2595-2775): An electrical engineer holding the position of director of the centralized laboratories of the research and development of Industrial Pirelli S.p.A., Milan, Italy with experience in cable design, he testified in connection with electrical cables for a proposed use in the tunnel scheme and the submarine scheme.

MOUSLEY, Ian Malcolm (P - 21, 30:3859-4025): Civil engineer presently employed as chief of construction planning and estimating department with IECO, he reviewed and testified in relation to the estimates and schedules that had been prepared for facilities associated with the transmission line from Churchill Falls to Soldier's Pond.

[*page328] PEARSON, Harold William (P - 31:4025-4164): Group vice president of the energy and transport division of SNC, he testified in relation to the engineering aspects of the hydro-electric development on the Lower Churchill River including a transmission system similar to the transmission system which would be projected for the transmission of electricity from Churchill Falls to Soldier's Pond.

PITBLADO, James Bruce (P - 40, 41:5175-5410): Vice president and director of Dominion Securities Ames Limited Investment Dealers, he testified in relation to the feasibility of financing of the transmission system.

POLISCUK, Vladimir D. (P - 38:4090-4975): A geological engineer and scientific advisor to the Atomic Energy Control Board, he testified in relation to the seismic survey of the Strait of Belle Isle.

POWER, Bernard A. (P - 9, 10, 11:1251-1417): A meteorologist and president of Weather Engineering Corporation of Canada Limited, he testified in relation to the climatic condition which would affect the transmission system particularly in the area of the Long Range Mountains.

RATE, Charles John (P - 33, 34:4406-4463): A civil engineer employed by Lanmer Consultants, a division of Lavalin, one of the members of SNC-Lavalin Newfoundland Limited, he testified in relation to the tunnel scheme.

READ, Wallace S. (P - 2:247-4:693): An electrical engineer, he is president and chief executive officer of Lower Churchill Development Corporation with a background association with Newfoundland Power Commission, now known as Newfoundland and Labrador Hydro Electric Corporation, and CFLCo and Gull Island Company. He was the first witness and gave an overview of the factual aspects of the Government's position in this matter.

RICHARD, Jean Claude (2D - 69, 70:9322-9549): An electrical engineer employed by Hydro Quebec as an assistant in respect of negotiations with neighbouring electrical systems, he testified in relation to the effect of the plaintiff's success in this action upon Hydro Quebec.

RICHMOND, Maynard C. (P - 11, 12:1417-1533, 1558-1567): Mr. Richmond is a meteorologist employed as manager of the Meteorology Department of the Research Division of MRI. He testified in relation to the effect that the weather would have on the conductors and the installation and maintenance thereof.

RINGLEE, Robert J. (P - 18, 19:2456-2595): Dr. Ringlee is the principal engineer and a director of Power Technologies Incorporated of New York. He testified on a reliability audit which he did of the proposed system.

RYMES, John E. (P - 14, 15, 16:1915-2068): Dr. Rymes is an engineer employed by his own consulting company, J.E. Rymes Engineering Limited, doing business, among other things, in connection with design, study, development and evaluation of heavy mechanical equipment primarily related to exploration work, off highway work, construction work and pipelines.

[*page329] SCOTT, John Michael Grierson (2D - 78, 79, 80:10,812-11,113): Mr. Scott is a vice-chairman, director and a member of the policy committee at Wood Gundy Limited and is responsible for the firm's corporate, Government and real estate financing services. He

testified in relation to the financibility of the Project.

SCRUTON, George Henry (p - 36, 37:4757-4909): Mr. Scruton is an engineer with Shawinigan Consultants Inc. of Montreal and testified on the cost effectiveness of delivering power from Churchill Falls to the Island of Newfoundland.

SEARLE, Willard Franklin (P - 25, 26, 27:3422-3486, 3622-3659): Mr. Searle is chairman and founder of Searle Consortium Limited which is a federation of independent consultants who specialize in providing consultancy, engineering and operational management in the fields of general ocean engineering, ship salvage, diving, towing and rigging. He testified in relation to the laying of a submarine cable in the Strait of Belle Isle.

SEIDLER, Wolf K. (2D - 71:9552-9730): Mr. Seidler is an independent mining and tunnelling consultant of Val D'Or, Quebec. He testified in relation to the tunnel project.

SLADE, David (P - 53, 54:6932-7075): Mr. Slade is an economist employed by the Government of Newfoundland as director of economic research and analysis with the Cabinet Secretariat. He testified in relation to economic indications in the province.

SLAPP, John (P - 18:2347-2456): Mr. Slapp is an electrical engineer who is manager of the AC and DC transmission for the power transmission division of IECO. He testified in connection with the electrical design of the transmission facilities from Churchill Falls to Soldier's Pond using HVDC technology.

SONNEN, Carl A. (P - 39:5063-5175): Mr. Sonnen is vice president of Informetrica Limited. He is chief of professional operation surpervising macro-economic services, major projects analysis, quantitative services and software services. He testified in connection with the projections of construction prices to be faced by the Lower Churchill Development Corporation.

THOM, Raymond H. P. (P - 34:4463-4574): Mr. Thom is employed by S.N.C. Lavalin Newfoundland Limited. He testified in connection with a feasibility study and cost estimate for the generation of electricity in Labrador and its transmission to the Island with specific reference to the design of the high voltage transmission lines, converter stations and terminal stations.

THOMAS, Mireille (88:12,124): an interpreter sworn to interpret a part of the testimony of Mr. Bougaran who testified in French.

THORTON, David William (P - 24, 25:3277-3422): Mr. Thorton is a mechanical design engineer employed by Land & Marine Engineering Limited of England and gave evidence in relation to a rock cutting trial conducted in England.

[*page330] TREMBLAY, Lucien (2D - 67:9066-9159): Mr. Tremblay is a lawyer, a retired Chief Justice of Quebec, who testified on Quebec law.

VALAITIS, Rimas P. (P - 28:3729-3770): Mr. Valaitis is a professional engineer employed

in the power systems division of IECO and is head of the transmission line engineering for that company. He testified in connection with his assessment of the technical feasibility of the proposed transmission line relative to its engineering and construction.

VINEBERG, Philip F. (P - 44, 45:5790-6060; 48:6303-6401): Mr. Vineberg is a lawyer practicing at Montreal, Quebec who testified on Quebec law.

WATERHOUSE, Norman (P - 16, 17:2068-2347): Mr. Waterhouse is a mechanical engineer employed by BICC Limited, an amalgamation of British Insulated Cables and Calendar Cable Construction Company. He testified in connection with the installation of cables and trenches in the seabed.

WEIKSNER, George B (2D - 77, 78:10,558-10,812): Mr. Weiksner is one of 66 managing directors of the First Boston Corporation and testified in connection with the financibility of the project.

WIGMORE, Barrie A. (P - 41, 42:5410-5514): Mr. Wigmore is an investment banker employed by Goldman Sachs and Company and testified as to the financibility of the Project.

YOUNG, Harvey (P - 12:1534-1606): Mr. Young is an electrical engineer employed by Newfoundland Hydro. Mr. Young had been involved in consultation with Teshmont Consultants Limited and MRI in relation to the meteorological effects on the line where it crossed the Long Range Mountains.

YOUNG, Victor L. (P - 46, 47:6060-6275): Mr. Young has an M.B.A. and is, among other things, chairman and chief executive officer of Newfoundland Hydro and of Churchill Falls (Labrador) Corporation. In his evidence he gave an overview of the situation from the point of view of CFLCo and dealt also with associated matters concerning Newfoundland Hydro, Lower Churchill Development Corporation, Gull Island Power Company Limited and power distribution in the province.

APPENDIX "G"

List of Exhibits:

(These are listed alphabetically according to the initial letter of the exhibit reference. The last initial indicates the first initial of the last name of the witness. The numerals at the end indicate the transcript reference.) [*page331]

ADAM MICKEVICIUS - AM

AM-1	Document entitled: Province of Newfoundland Electrical System Load in 1980.	9:1135

AM-2	Document entitled: Power System Planning Process	9:1137
AM-3	Official publication of Department of energy, Mines and Resources entitled Electric Power in Canada 1979.	9:1149
AM-4	Total Island Energy Requirement 1980-2000.	9:1160

ALAIN PIERRE BOUGARAN - APB

APB-1	Curriculum Vitae of Alain Pierre Bougaran	86:12,006
APB-2	Report entitled "Consultant's Opinion of Navigation, Dredging and Trenching Phase for the Strait of Belle Isle Project, Newfoundland, Canada", and two pages of corrections.	87:12,031
APB-3	Article by Ocean Industry re Towing Icebergs dated April 1978.	88:12,163
APB-4	Document entitled: "Rig	88

		:12,186
	Anchor Release".	
APB-5	Diagram extracted from a Primer	88:12,187
	of Offshore Explorations.	

ALDO S. MORELLO - ASM

ASM-1	List of technical papers	19:25988
	authored or co-authored by A.S. Morello.	
ASM-2	Brochure of cable manufactured	19:26022
	by Pirelli-Italy	
ASM-3	Updated sheet with reference to	19:26022
	submarine cables.	
ASM-4	Brochure No. 10 with reference	19:26033
	to submarine cables.	

ASM-5	Document entitled: Long term tests on a +/- 600 kv DC cable system.	19:2609
ASM-6	Document re voltage DC transmission systems.	19:2615
ASM-7	Publication entitled installation of Oil-Filled Cables laid Vertically.	19:2619
ASM-8	Article on 330 kv oil-filled cables laid in 1600 foot vertical shaft at Kafue Gorge hydro-electric plant.	19:2619
ASM-9	Canadian Patent Method and Apparatus for laying an oil-filled cable at depths below laying equipment.	20:2630
ASM-10	Cable Review	20:2538

ASM-11	Paper on hydraulic design of submarine self-contained oil-filled cables.	2646

ARTHUR WILLIAM HANNAH - AWH

AWH-1	Document entitled: "Design of the Proposed 400 kv DC Gull Island Transmission Line".	28:3845

BARRIE A. WIGMORE - BAW

BAW-1	Background information of Mr. Wigmore's work and the work of his firm.	41:5411

BEATRICE FELIN - BF

BF-1	Curriculum vitae of Beatrice Felin	60:7924
BF-2	Copy of document entitled: "A Commentary on the Methodology Used by Meteorology Research Inc. to Calculate Climatic Loadings for the Gull Island Project".	60:7925

BERNARD A. POWER - BP

BP-1	List of publications prepared by Mr. Bernard A. Power.	9:1253
BP-2	Document entitled: 1973 Meteorology Research Incorporated Report (OGB 4-24 - Figure 1) delivered to Newfoundland Labrador Hydro.	10:1278
BP-3	Table 1, Wind and Ice Loadings, Extract from the SNC Lavalin Report in OGB-4 No. 4, page 3-11.	10:1292
BP-4	Similar document to BP-3 with return period converted to English units.	10:1292

CARL. A. SONNEN - CAS

CAS-1	Curriculum Vitae of Carl A. Sonnen.	39:5063
CAS-2	Projections of Construction	39:

		5 0 8 6
	Prices to be Faced by the Lower Churchill Development Corporation in the 1980s, from Informetrica Limited.	
CAS-3	Projections of Construction	3 9: 5 0 9 4
	Prices to be Faced by the Lower Churchill Development Corporation in the 1980s, an updated view dated September 20, 1981.	
CAS-4	Projections and Construction	3 9: 5 0 9 9
	Prices to be Faced by the Lower Churchill Development Corporation - Tunnel and Coal Plant Escalators, dated November 10, 1981.	

CLAUDE DUBE - CD

CD-1	Curriculum Vitae of Mr. Claude Dube.	82 :1 1, 40 0
CD-2	Report entitled: "Churchill Falls, the Consequences of a 800 MV Cutback".	82 :1 1, 40 1

CHARLES JOHN RATE - CJR

CJR-1	Curriculum Vitae of C.J. Rate	33:4407

DAVID MICHAEL DANYLUK - DMD

DMD-1	Curriculum Vitae of David M. Danyluk	52:6713
DMD-2	Operations Report, Strait of Belle Isle Marine Survey for SNC Lavalin Newfoundland Limited by Kenting Exploration Services Limited, Calgary, Alberta, submitted November 28, 1979.	52:6723
DMD-3	Interpretation Report, Strait of Belle Isle, Marine Survey 1979, submitted to SNC Lavalin Newfoundland Limited on February 6, 1980.	52:6723
DMD-4	Map entitled Strait of Belle Isle (West Area), Overburden Thickness and Side Sean Int.	52:6739

DMD-5	Figure 14, Strait of Belle Isle (East Area), Slope and Iceberg Scour Map.		52:6742
DMD-6	Figure 17. Strait of Belle Isle (East Area), Bathymetry, Scours and Slopes.		52:6743
DMD-7	Strait of Belle Isle West Area Side Scan Interpretation		52:6753
DMD-8	East Area Side Scan	52:6757	
DMD-9	Sub-bottom profile of line 1180.		52:6778
DMD-10	Belle Isle, West Area, Line # 1200.		53:6851
DMD-11	Chart of Bathymetry and Sub-		53:

		6 8 5 3
	bottom Profiles, Line # 1200 Strait of Belle Isle, West Area.	
DMD-12	Chart of Bathymetry and Sub-	5 3: 6 8 5 3
	bottom Profiles, Line # 32, Strait of Belle Isle, West Area.	
DMD-13	Document entitled, "Funda-	5 3: 6 8 9 9
	mentals of High Resolution Seismic Profile" dated March 1977.	
DMD-14	Two large maps showing Strait	7 2: 9 7 3 8
	of Belle Isle Marine Borings and Surveys 1981.	

(Formerly
Exhibit D)

DENIS R. McMANUS - DRM

DRM-1	Curriculum Vitae of D.R.	3 5: 4 6 2 4
	McManus.	

DRM-2	Document entitled: "Estimate Summary (December 79 $ Canadian)".	35:47004
DRM-3	Document entitled: "Estimate Summary (December 79 $ Canadian)".	35:47004
DRM-4	Document entitled: "Cash Flow (December 79 $ Canadian)".	35:47004
DRM-5	Document entitled: "Project Schedule."	35:47005
DRM-6	Summary form of report and schedules, prepared under witness' supervision.	35:47008

DAVID SLADE - DSS

DSS-1	Curriculum vitae of David	53:6

		9 3 2
	Slade.	
DSS-2	Basic standard definitions	5 3: 6 9 3 9
	used in the economics business.	
DSS-3	Reserved until February 17th.	--
DSS-4	Comparison of forecast given	5 3: 6 9 7 3
	to Hydro in March, and the one the government published in its five year plan in October.	
DSS-5	Copy of forecast given to	5 3: 6 9 7 8
	Hydro in November, 1981.	
DSS-6	Document containing historic	5 3: 6 9 9 2
	GDP numbers and growth rates.	
DSS-7	Document showing monthly	5 4: 7 0

	interest rates.	55
DSS-3	Document entitled, "Economic Review and Forecast; Chapter 2".	54:7058
DSS-3 (Revised)	Pages 23 to 27 of Chapter 2 entitled, "Economic View on Forecasts, taken from a publication of the Newfoundland Government entitled "Managing All Our Resources."	54:7068

DAVID WILLIAM THORTON - DT

DT-1	Drawings of the rock trenching machines.	24:3296
DT-2	Drawings of the rock trenching machines	24:3296
DT-3	Drawings of the rock trenching	24:3296

	machines.	
DT-4	Drawings of the rock trenching machines.	24:3296
DT-5	Overall photo showing prepared section of the quarry.	24:3301
DT-6	Photo showing trench	24:3301
DT-7	Publication of Land and Marine re the RTM-II rock trenching machine.	24:3315
DT-8 Volume 1 Volume 2 Volume 3	Reports written and submitted by SNC Lavalin--(Harry Greene, Tony Van DerSteen and David Thornton) to The Lower Churchill Development Corporation.	24:3342
DT-9	Coloured photographs	25:3346
DT-10	Coloured photographs	25:3346
DT-11	Coloured photographs	25:3346

DAVID W. MERCER - DWM

DWM-1	Island Energy Balancing Outlook 1976 to 1990.	5:668
DWM-2	Island Energy Balancing Outlook 1980 to 1995 based on Hydro's 1980 Interim Load Forecast.	5:687
DWM-3	Island Energy Balancing Outlook 1980 to 1995 based on Hydro's 1980 Official Load Forecast.	5:691
DWM-4	Comparison of Island Forecast and Actual Energy Usage.	5:691
DWM-5	Newfoundland's Energy requirements from Labrador 1983 to 1995.	5:697
DWM-6	Newfoundland and Labrador Hydro 1976 Load Forecast.	5:667
DWM-7	Newfoundland and Labrador Hydro 1980 Interim Load Forecast.	5:685
DWM-8	Newfoundland and Labrador Hydro's 1980 Official long term load forecast.	6:690
DWM-7A	Complete Table 7 prepared in DWM-7.	6:814

EDWARD D. EICH - EDE

EDE-1	Curriculum Vitae of Mr. E.D. Eich.	63:851 1
EDE-2	Document headed "Cable Crossing of the Strait of Belle Isle, an Assessment by Edward D. Eich, Millwood, New York".	63:851 2
EDE-3	List of documents provided by Mr. E. Eich.	64:854 5

ELIAS GHANNOUM - EG

EG-1	Curriculum Vitae of Elias Ghannoum.	62:820 9
EG-2	Report of Mr. Elias Ghannoum, dated January, 1982 entitled: "Review of Mechanical Design Criteria of HVDC Transmission Line from Labrador to New-	62:821 0

	foundland."	
EG-3	Three-page document entitled: "Notes about Probabilities".	6 2: 8 2 5 6
EG-4	Document entitled: A National Approach to Structural Design of Transmission Line" by Elias Ghannoum.	6 2: 8 3 5 7
EG-5	Working Paper submitted to CIGRE Working Group by Mr. E. Ghannoum, entitled "Failures in Transmission Lines from the Viewpoints of Safety and Reliability".	6 3: 8 4 7 8

EXHIBITS (NUMBERED)

1	Volumes I, II, III, IV, V, VI, VII, VIII, IX, X, XI of agreed documents.	
2	Document appearing in the Smallwood Papers as Document No. 31.	4:551
3	Submission to Cabinet by The Honourable John C. Crosbie entitled "The Status Report" dated October 1975.	4:585

4	Document, "Firm energy capacity on Island and Island load growth".	6:790
5	Memorandum from Mr. Groom to the Premier, dated April 14th, 1967.	16:2042
6	Newfoundland contract between Cementation and Gull Island Power Company	24:3182
8	The First Report by the Geotechnical Review Board to Gull Island Power Company Limited.	24:3255
9	Printout from seismic test.	32:4260
10	Compilation of information provided to G.H. Scruton by Newfoundland and Labrador Hydro.	36:4760
11	Province of Newfoundland	40:

			5 2 5 5
	Prospectus.		
12			
	Final Prospectus.	41:5382	
13	Province of Newfoundland		4 3: 5 7 1 7
	Prospectus dated July 21, 1976.		
14	Province of Newfoundland		4 3: 5 7 2 0
	Gross Public Sector Debt, Excluding Hydro, 1972 to 1981.		
15	Report on Geology and Seismic		4 6: 6 0 5 3
	Survey extracted from Exhibit OGB4-11, with the insertion of certain figures that were not included in OGB4-11 at the time of V. Poliscuk's testimony.		
16	Newfoundland and Labrador		4 6: 6 0 5 6
	HVDC Project HVDC Link, Reliability Studies prepared by Power Technologies Inc.		

17	Federal Environmental Assessment and Review of the Lower Churchill Hydro-Electric Project.	46:60:59
18	1976 Annual Report of CFLCo.	47:62:67
19	Ten-page list of documents numbered 1 to 19.	53:68:31
20	Documents listed in Paragraph 4, 5 and 6 of "Admissions by Agreement of Counsel".	56:73:88
21	Document identified as No. 7 on Admissions by Agreement of Counsel, formerly marked Exhibit A for identification.	56:73:89
22	Report entitled, "Lithology	56:

		7 3 9 1
	of Boreholes on either Side of the Strait of Belle Isle - Summary of Preliminary Results."	
23	Document entitled, "The prices	5 6: 7 3 9 2
	for petroleum products shown on Exhibits 8 and 10 of Exhibit JBP-2".	
24	Seismic velocities at Yankee	5 6: 7 3 9 5
	Point, Newfoundland, shown on figures 2 and 3.	
25	English translation of	5 8: 7 6 6 9
	Decision of Mr. Justice Monet.	
26	English translation of	5 8: 7 6 6 9
	Decision in the Otis Ele-vator case.	
27	Topographical map showing	6 1: 8 1 5

	Section of WSR 4, between Red Indian Lake and Grand Lake		6
28	Daily log of the ice accretion shown by a passive ice meter at the Hampden station.		61:8189
29	Excerpts from Craies on Statute Law, 7th Edition, pages 178 to 185.		66:8935
30	English translation of case known as Gregory vs. Canada Improvement Co. et al.		66:8954
31	Report of Marion vs. St. Denis	67:9151	
32	Report entitled "Strait of Belle Isle, Newfoundland, Marine Borings and Surveys 1981" Volume 1, 2 and 3, prepared by Beaver Dredging Company Limited		72:9735
33	Report regarding Rock and Soil		72:

		9 7 3 5
	Core Testing Strait of Belle Isle, Newfoundland, prepared by Golder Associates dated January, 1982.	
34	Cruise Report - Pandora II	6 8: 9 2 4 1
	81-057, October 13 to 28, 1981 by H.W. Josenhans.	
34	Cruise Report - Pandora II	7 2: 9 7 3 5
	81-057; October 13 to 28, 1981, by H.W. Josenhans.	
35	Meteorological Data, Strait	7 2: 9 7 3 5
	of Belle Isle, 1981.	
36	Oceanographic Data Collection	7 2: 9 7 3 5
	1981.	
37	Report entitled "Final Report	7 2: 9 7 3 5

	Strait of Belle Isle Iceberg Tracking Program June 1980 - June 1981" prepared by SNC-Lavalin Newfoundland Limited.	
38	Report entitled "Strait of Belle Isle Ice Feature Study 1980-1981 Final Report" prepared by SNC-Lavalin Newfoundland Limited, dated November, 1981.	72:9735
39	Report entitled "Laboratory Test Results Selected Soil Samples Strait of Belle Isle Cable Crossing" prepared by Newfoundland Geosciences Ltd. dated December 1, 1981.	72:9735
40	Report on Seabottom Overburden Removal for the Strait of Belle Isle Cable Crossing prepared by Santa Fe Technical Services Company dated 22 January, 1982.	72:9736
41	Draft Report Strait of Belle Isle Iceberg Tracking Program June 1981 - November 1981 pre-	72:9736

	pared by SNC-Lavalin Newfound-land Limited.	
42	Strait of Belle Isle Laboratory Rock Cutting Tests - Phase I Report dated November 1981, prepared by Colorado School of Mines.	72:9736
43	Strait of Belle Isle Labora- tory Rock Cutting Tests - Final Report dated January, 1982, with Appendices, pre-pared by Colorado School of Mines.	72:9736
44	Strait of Belle Isle Marine Borings and Surveys 1981 Maps and Charts, Volume 4, prepared by Beaver Dredging Company Ltd., dated February 1982.	72:9736
45	Strait of Belle Isle Investi- gation Program, Feasibility Study - Overburden Removal, Drilling and Blasting, Trenching, prepared by AVECO/ Volker Stevin, dated February 8, 1982.	72:9736

46	Document entitled "Mountain Building Events in Newfoundland & Labrador.	68:924 9
47	Map showing the Taconic Lithfacies of the Appalachian Orogency.	68:929 0
47A	Smaller version of Exhibit No. 47.	68:929 8
48	The electrical parameters of (i) the On-Island and System of Newfoundland and Labrador Hydro, and (ii) the Transmission and Generation System of Churchill Falls (Labrador) Corporation Limited, and the Quebec Hydro-Electric Commission equivalent, all as supplied to Power Technologies Inc., submitted by the plaintiff.	72:973 7
49	The Forced Outage Rates on	72:973 7

	the On-Island System of Newfoundland and Labrador Hydro, all as supplied to Shawmont (Nfld.) Limited submitted by the plaintiff.	
50	Supplemental Note 1 showing nature of the outage durations 2 drainage - 4 cable alternatives.	76: 10, 499
51	Document entitled "Canadian Provincial Government Financed 1981 Edition, Section 2 Statistics Published by Dominion Securities Ames".	80: 11, 071
52	Schematic of disc cutters or drum prepared by J.E. Rymes.	82: 11, 320
53	Extract entitled "The Current Value of Money", extracted from Engineering Economy, Fifth Edition by Thuesen, Fabrycky and Thuesen.	85: 11, 780
54	Safety Procedures for Semi-Submersible Drilling Barges of Total/Eastcan, issued 1976.	88: 12, 184

EXHIBITS (LETTERED)

(These exhibits were admitted for identification only and, except where marked, do not go beyond their initial purpose.)

A	Preece, Cardew and Rider	3 8:

		5012
	Report, December 4th, 1965. (Exhibit 21).	
B	Translation of Judgment from	48:6321
	Court of Appeal Montreal Division, January 8, 1981, summarized in 1981 J.E. 92, Otis Elevator Company vs A. Vigilone & Bros. Inc.	
C	English translation re Commis-	48:6391
	sion Hydroelectrique de Quebec v. Churchill Falls, Royal Trust Company and General Trust Company	
D	Maps 11 and 12 from the	54:7075
	Beaver Dredging Report.	
E	For reference in relation to	73:9955
	questions put by Mr. Mercer relating to notes at the end of Exhibit RGI-1.	
F	Current Meter Time Series -	7

	documents used by Mr. Mercer in cross-examination of witness.		3:9974
G	Page 196 from Anstey's text	74:10,179	
H	Drawing.	74:10,183	
I	Profile 13 taken from Exhibit 32, Volume 2, Figure 4.25.		74:10,188
J	Profile 14 taken from Exhibit 32, Volume 2, Figure 4.26.		74:10,189
K	Profile 3 taken from Exhibit 32, Volume 2, Figure 4.15.		74:10,190
L	Profile 9 taken from Exhibit 32, Volume 2, Figure 4.21.		74:10,191

M	Document on which Mr. Chalker was askng Dr. Billinton questions.	75:10, 368
N	Report by Wood Gundy on the feasibility of financing a Newfoundland and Labrador transmission system. (MS 2)	78:10, 739
O	Revised Tables 9, 10, 11, 21 and 22.	80:11, 062
P	Document entitled: "Public Sector Debt, 1078 to 1982".	80:11, 113
Q	Photocopy of Map 1600-09-II-3 contained in Exhibit 32, Volume 2, with a line marked on it identified as Dive 8, which document was used in questioning Mr. Chagnon.	86:12, 004

R	Article entitled: "Supply ships Tow Bergs away from Drillship off Labrador".		87:12,113
GILBERT G. GILL - GGG			
GGG-1	Curriculum Vitae of Mr. G.G. Gill.		54:7076
GGG-2	Document showing public sector debt growth (1972 to 1981 excluding Hydro).		54:7084
GGG-2A	Exhibit GGG-2 revised.	88:12,208	
GGG-3	Copy of page 37 from "Managing of our Resources".		54:7090
GGG-4	Document entitled, "Projected Gross Public Sector Debt Excluding Hydro (1981-1989).		54:7090

GGG-4A	Exhibit GGG-4 revised. 99:12,208	
GGG-5	Document showing projection of sinking fund assets to March 31st, 1989.	54:7108

GEORGE B. WEIKSNER - GBW

GBW-1	Curriculum Vitae of George B. Weiksner.	77:10,559
GBW-2	Document entitled: "The Newfoundland and Labrador Transmission System Feasibility of Financing" submitted by George B. Weiksner.	77:10,573
GBW-3	Graph entitled: "Bond Yields, 1977/1982".	77:10,604
GBW-4	Graph entitled: "Interest	77:10,604

Rate Windows in the Bond Market.

GEORGE HENRY SCRUTON - GHS

GHS-1	Curriculum Vitae of G.H. Scruton.		36:4763
GHS-2	Report SMR-19-81, Cost Effectiveness of Delivering Power from Churchill Falls to the Island of Newfoundland.		36:4765
GHS-3	SM 14-75.	36:4803	
GHS-4	Document entitled "Value of 800 megawatt from Churchill Falls at 10 mills", etcetera.		37:4886
GHS-5	Document entitled Table on Page 55 Modified.		37:4886
GHS-6	Document dated November 26,		37:48

		9 1
	1981: Recalculation of table on page 54 of Report SMR-18-81 with 2 graphs.	
GHS-7	Document dated November 27,	3 7: 4 8 9 3
	1981: Recalculation of Cost Benefit Ratio on page 55 of Report SMR 18-81, one sheet with graph attached.	
GHS-8	Volume entitled "Report on	3 7: 4 9 8 9
	Economic Considerations of Meeting the Estimated 1973-92 Load Growth on the Island of Newfoundland".	

GORDON LAWRENCE JOHNSON - GLJ

GLJ-1	Curriculum Vitae of G.L.	4 9: 6 5 5 2
	Johnson.	
GLJ-2	Statement of Income and Re-	4 9: 6 5 5 2
	tained Earnings for year ended December 31, 1980 for Churchill Falls (Labrador) Corporation Limited.	

HAVEY F. YOUNG - HFY

HFY-1	Report of H.F. Yong on "Icing Damage to Transmission Facilities in Newfoundland".	12:1568

HARRISON KIRTLEY CLARK - HKC

HKC-1	List of utilities that have purchased program.	26:3557
HKC-2	Report prepared by witness.	26:3569

HAROLD WILLIAM PEARSON - HWP

HWP-1	Curriculum Vitae of Harold William Pearson.	31:4026
HWP-2	Qualifications, Hydro-Electric Development and Energy Studies.	31:4029
HWP-3	Qualifications, Port Planning and Marine Works.	31:4030

HWP-4	Muskrat Falls Power Development 345 kv transmission intertie to Churchill Falls, cost estimate and project schedule.	31:4060
HWP-5	Gull Island Power Development and 735 kv transmission intertie to Churchill Falls, cost estimate and project schedule.	31:4061

HAROLD WILLIAM GREEN - HWG

HWG-1	Curriculum Vitae of Harold William Green	31:4171
HWG-2	Literature review conducted by E.F. Green.	31:4176
HWG-3	Plan showing locations of 17 bore holes.	31:4188
HWG-4	17 test hold records.	31:4192

HWG-5	Series of 18 photographs indicating bore hole boxes.	31:4199
HWG-6	Two-page document showing Plate 5, OGB4-18, Volume 1 and JSL-2.	33:4332

IAM MALCOLM MOUSLEY - IMM

IMM-1	Typical layout identifying various components of a construction cost estimate.	29:3885
IMM-2	Typical Project Cost Summary.	29:3895
IMM-3	Project Cost Summary for a plus or minus 400 kv DC transmission line from Churchill Falls to Soldier's Pond.	29:3922
IMM-4	Cost Summary, Strait of Belle	29:3929

	Isle Submarine Cable Alternative.	
IMM-5	Cost Summary, Strait of Belle Tunnel Alternative.	29:39:29
IMM-6	Document entitled Project, Planning and Scheduling.	29:39:41

JON BAXTER - JB

JB-1	Curriculum Vitae of John Baxter.	55:72:80
JB-2	Document entitled: "Flow and Sources of Information Used In Determining Hydro's Average System Cost as Shown in Exhibit JBP-2.	55:72:88
JB-3	Document entitled: "Summary of Capital Expenditures used in JBP-2".	55:72:91

JB-4	Document entitled: "Cash Flow Summary".	55:72921
JB-5	Document entitled: "1980 Interim Load Forecast Production Schedules.	55:72921
JB-6	Document entitled: "Revenue Requirement - Average System Cost".	55:72931
JB-7	Document entitled: "Exhibit 10 of JBP-10, Restated Using Data Supplied by G.H. Scruton".	55:73161
JB-8	Schedule of generation plant additions as determined by G.H. Scruton.	56:73501
JB-9	1980 interim load forecast	56:7331

		5 0
	production schedule based on information supplied by G.H. Scruton.	

JAMES BRUCE PITBLADO - JBP

JBP-1	Curriculum Vitae, James Bruce	4 0: 5 1 7 6
	Pitblado and information on Dominion Securities Ames Limited.	
JBP-2	Report entitled: Newfoundland	4 0: 5 1 8 0
	Transmission System, Feasibility of Financing.	

JEAN CLAUDE RICHARD - JCR

JCR-1	Curriculum Vitae of Jean	6 9: 9 3 2 6
	Claude Richard.	
JCR-2	Report of J.C. Richard headed	6 9: 9 3 3 4
	Churchill Falls-Recall of 800 MW.	

JOHN E. RYMES - JER

JER-1	Extract from OGB-4, No. 18.	15:1960
JER-2	Excerpt from the SNC Lavalin Report, volume 1, depicting a cross section of the Strait of Belle Isle.	15:1968
JER-3	Drawing of drum cutter, Land and Marine Engineering Limited.	15:1974
JER-4	Drawing of Rco-saw - Bortunio typical Roc-saw cutting assembly.	15:1974
JER-5	Schematic of rock cutting.	15:1982
JER-6	Photo of Land and Marine Underwater Trencher.	15:1997
JER-7	Not entered.	
JER-8	Picture of Travocean Under-	15:

		1 9 9 8
	water Trencher.	
JER-9	Xerox of a photo of a Coflexip	1 5: 1 9 9 8
	Underwater Trencher.	
JER-10	Picture of a Technomare Under-	1 5: 2 0 0 0
	water Trencher.	

JAMES N. ALLAN - JNA

JNA-1	Article on the Seabrook Pro-	1 4: 1 8 9 7
	ject by Desai, Saidman, Hirsh- feld, Rand and Pizzuti.	

JOSEPH R. SMALLWOOD - JRS

(Mr. Smallwood was not a witness but certain papers were filed and identified with his initials). [*page349]

JRS-1	The Smallwood papers
JRS-2	The Smallwood papers.

JOHN SLAPP - JS

JS-1	List of publications prepared	1 8:

		2 3 5 1
	by Mr. Slapp	
JS-2	Diagrams of monopolar and	1 8: 2 3 5 8
	bipolar transmission systems.	
JS-3	Diagram showing a transmission	1 8: 2 3 5 8
	line using a monopolar trans- mission.	
JS-4	Photograph of a bipolar trans-	1 8: 2 3 5 8
	mission line.	
JS-5	Photograph of 400 kv valves.	18:2370

JOSEPH S. LONG - JSL

JSL-1	Copy of Plate 2 from the SNC	1 2: 1 6 2 0
	Lavalin Report dated 1980 with dimensions modified to the English System.	
JSL-2	Copy of Plate 3 from the SNC	1 2:

	Lavalin Report dated 1980 with figures modified to the English System.	16:20
JSL-3	Diagram of shaft and tunnel - typical cross section.	12:16:29
JSL-4	Diagram of General Tunnel Ground Support Systems.	12:16:34
JSL-5	Diagram drawn by witness showing Stage 1 and Stage 2.	13:17:50

JEAN-YVES CHAGNON - JYC

JYC-1	Curriculum Vitae of Jean-Yves Chagnon.	85:11, 807
JYC-2	Report entitled: "Analysis of the Available Information	85:11, 821

	on the Overburden - Strait of Belle Isle Crossing".	
JYC-3	Figure 1 of JYC-2.	86:11,871

LUCIEN TREMBLAY - LT

LT-1	Curriculum Vitae of The Honourable Lucien Tremblay.	67:9070
LT-2	Pages 1 to 36 of of Opinion of Lucien Tremblay, Q.C.	67:9094
LT-3	Opinion of Lucien Tremblay, Q.C. on Penal Clause.	67:9097
LT-4	Opinion of Lucien Tremblay, Q.C. on Force Majeure.	67:9121

L.Y. FORTIER - LYF

LYF-1	Curriculum Vitae of L.Y.	66:887

	Fortier, Q.C.	2
LYF-2	Opinions on Force Majeure by L.Y. Fortier, Q.C.	66:88733
LYF-3	Opinion on "implied obligations" in Quebec law by L.Y. Fortier, Q.C.	66:88733
LYF-4	Opinion on "penal clauses" by L.Y. Fortier, Q.C.	66:88734
LYF-5	Opinion on "interpretation of contracts" in Quebec law by L.Y. Fortier, Q.C.	66:88734
LYF-6	Opinion on "interest" or "standing" in Quebec law by L.Y. Fortier, Q.C.	66:88735
LYF-7	Excerpt from the case of	66:

		8 9 6 5
	Dessaules v. Poland [1944] S.C.R. 275.	
LYF-8	Opinion of Ogilvy, Cope,	6 7: 9 0 4 3
	Porteous, Hansard, Marler, Montgomery and Renault, dated July 16, 1969.	

MAYNARD C. RICHMOND - MCR

MCR-1	Review of Ice Accumulation	1 2: 1 5 1 0
	Study conducted by Newfound-land and Labrador Hydro, 1976-1978, dated 13 October 1978.	
MCR-2	Photograph of Ice Deposit in	1 2: 1 5 1 7
	Labrador.	

MICHEL JETTE - MJ

MJ-1	Volume 1 of Joint Record	5 8: 7 6 7 9
	before the Supreme Court of Canada.	

MJ-2	Joint Record, Appeal before Supreme Court of Canada being discussed.	58:769 1
MJ-3	Hydro-Quebec factum in the Supreme Court of Canada in respect to the appeal by Churchill Falls.	58:771 3

MICHEL LEDOUX - ML

ML-1	Curriculum Vitae of Michel Ledoux.	83:11, 503
ML-2	Report entitled: "Cost Effectiveness of a Labrador Infeed" dated May, 1982.	83:11, 504
ML-3	Report head "Addendum to Cost Effectiveness of a Labrador Infeed", dated May 7th, 1982.	83:11, 504
ML-4		

	Revised Figure 2 of ML-2	84:11,649
ML-5	Document entitled: "PTI Reliability Model vs Billington Model, NLH Load Forecast, Cost of Upper Churchill Energy Purchase - Cost of Replacement to Hydro-Quebec.	84:11,660
ML-6	Document entitled: "PTI Reliability Model vs Billing-ton Model NLH Load Forecast Price of Power at Churchill Falls = 4.0 mills per kwh.	84:11,663
ML-7	Cost effectiveness of a Labrador infeed using the NLH load forecast, Decision 1980, with a real declining rate of 10 per cent.	84:11,667
ML-8	Cost effectiveness of a Labrador infeed using a NLH load forecast, Decision 1980, with an 11.11 per cent de-clining rate.	84:11,668

MALCOLM MELLOR - MM

MM-1	Curriculum Vitae of Malcolm Mellor.	80:11, 114
MM-2	Report entitled: "Rock Trenching Under the Strait of Belle Isle".	80:11, 132
MM-3	Picture of the cutting tool referred to as the BorTunCo bit or the BorTunCo pick.	81:11, 171
MM-4	Schematic of Dr. Mellor's reference on MM-2, page 24 prepared by J.E. Rymes.	82:11, 317

J.M.G. SCOTT - MS

MS-1	Curriculum Vitae of J.M.G. Scott.	78:10, 813
MS-2	Wood Gundy Report Feasibility	78

		:10,823
	of Financing the Newfoundland and Labrador Transmission System, formerly identified as Exhibit N.	
MS-3	Statement to the Alberta Legislature by Mr. Hyndman on the Suspension of Loans to Other Provinces by the Alberta Heritage Savings Trust fund.	78:10,861
MS-4	Report of various investment dealers of various purposes.	79:10,872
MS-5	Document entitled "Canadian Bond Market".	79:10,876
MS-6	Document entitled: "Borrowings by the Provinces and their Agencies in the Canadian Bond Market".	79:10,878
MS-7	Wood Gundy Economic Depart-	80

	ments Interest Rate Forecast.	:11,015
MS-8	Document entitled: "Issues in the Canadian and U.S. Markets by Provincial Governments and the Provincial Power Utilities".	80:11,026
MS-9	Table 8 (revised), Gross Public Sector Debt, excluding the debt of Hydro.	80:11,039

NEIL ALEXANDER McGRATH - NAM

NAM-1	Curriculum Vitae of Neil Alexander McGrath.	50:65877
NAM-2A	Text of Report of N.A. McGrath.	50:65922
NAM-2B	Plate entitled: Expected	50:65959

		2
	Schedule of Capacity Requirements (Average Water Year).	

NORMAN WATERHOUSE - NW

NW-1	Article on Methods for Installed Buried Submarine Cables for a 2 GW DC Cross-Channel Link.	16:2083
NW-2	Drawing of quarter scale model machine.	16:2089
MW-3	Diagram of Submarine Cable Unit, full-scale model.	16:2105
NW-4	Reduced scale drawing of the general arrangement of the prototype machine.	16:2113
NW-5	Reduced scale schematic layout of the after end of the Balder.	16:2116

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OLOV G. BERGLUND - OGB

OGB-1	Articles and papers written by Mr. Olaf G. Berglund.	6:850
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OGB-4	List of 46 studies performed by other engineering organizations. (The studies themselves were entered and marked as shown hereunder.)	6:866
OGB-4-1	"Cost effectiveness Analysis of Single Ling HVDC Scheme" by ShawMont (Nfld.) Ltd., SM-1-76, January 1976.	
OGB-4-2.	"Cost Effectiveness of Delivering Power from the Lower Churchill River in Labrador to the Island of Newfoundland." by Shawmont (Nfld.) Ltd., SM-12-80, June, 1980	
OGB-4-3.	"Transmission Line Geotechnical Studies" by Teshmont	

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OGB-6	Study of Labrador Power Infeed to the Island of Newfoundland by Bechtel Canada Limited, April 1978.	8:1003

PAUL-ANDRE CREPEAU - PAC

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PIERRE ANDRE GILLIAN - PAG

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PAUL CAYER - PC

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PAUL E AUGER - PEA

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ROBERT A. BOYD - RAB

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ROY BILLINTON - RB

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RONALD E. HARRISON - REH

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RICHARD G. INGRAM - RGI

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RAYMOND H.P. THOM - RHPT

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RIMAS P. VALAITIS - RPV

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ROBERT J. RINGLEE - RJR

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THOMAS EDWARD KIERANS - TEK

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VLADIMIR D. POLISCUK - VDP

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VICTOR L. YOUNG - VLY

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WILLIAM F. EMPEY - WFE

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WILLARD FRANKLIN SEARLE - WFS

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W.K. SEIDLER - WKS

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YVON F. DeGUISE - YFD

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