Hello, my name is Jason Churchill, I want to thank the Commission for this opportunity to provide a synopsis of the historical background paper prepared for the Commission called **A History of Negotiations to Develop the Hydroelectric Resources of the Churchill River from 1949 to 2007**. After this point I will be referring to the report as the "Background Paper". The paper provides a general overview of the history of negotiations from Confederation to the publication in 2007 of Newfoundland and Labrador's energy strategy, *Focusing Our Energy*.

The aim of this oral presentation is to bring into focus the influence that the history of attempts to develop the Churchill River had on the crafting of the 2007 energy strategy. In particular I want to draw attention to two key issues that have dominated and shaped negotiations over the decades and how that experience is reflected in *Focusing Our Energy*. The first issue involves the struggle of successive Newfoundland and Labrador governments to find the means of gaining unfettered access to the lucrative North American energy markets - selling energy directly into the marketplace in lieu of having to sell the majority of electricity produced to Hydro-Quebec. The inability to gain direct access weakened the province's relative bargaining position.

The second issue concerns the signing of the 1969 Upper Churchill Contract which enabled construction to proceed but in the longer term provided the lion's share of profits from the facility to Quebec and not the owner of the resource the province of Newfoundland and Labrador. The contract expires in 2041 and the province will assume full control over the Upper Churchill facility. It is therefore not surprising that the province's energy strategy kept a firm eye on the road to 2041 and sought to ensure that the province was in as strong a position as possible to reap the benefits at that time.

In September 2007, the government of Danny Williams released its much anticipated *Focusing Our Energy: An Energy Plan for Newfoundland and Labrador*. The plan expressed great optimism for the future and argued that the province was at a watershed; it had faced challenges in the past that had taught some hard lessons, but the lessons had been learned and the province was now potentially on the cusp of sustained prosperity. This prosperity would be enabled through the prudent development of the province's natural resources. While the background paper and this presentation only examine the energy strategy in terms of electricity policy, there is no doubt that the experience of attempting to develop the hydroelectric potential of the Churchill River was a strong influence over the other natural resource sectors as well. That however would be a story for another day.

While the background paper nominally starts in 1949, its actual starting point occurs 22 years before in 1927. In that year, the highest court in the British Empire, the Judicial Committee of the Privy Council (JCPC) ruled in Newfoundland's favour against Canada concerning who had jurisdiction over Coast of Labrador and where the border between the two colonies should have been drawn. The JCPC decision provided Newfoundland with jurisdictional control over a vast inland territory that included the Churchill River watershed.

It would be difficult to overstate the decision's importance to the subsequent history of negotiations to develop the Churchill River's hydroelectric potential.

Having jurisdiction over the Churchill River enabled Newfoundland to pursue hydroelectric developments. However, Labrador is bound by the North Atlantic to the east and Quebec to the south and west. As a result, Churchill River hydroelectric resources are isolated from the eastern Canadian and American energy markets. Newfoundland's relatively small population and industrial base meant that gaining access to those markets was a prerequisite to the economic viability of potential projects. Over the subsequent decades, the geographic reality provided Quebec with a significant negotiating advantage concerning potential Churchill River projects.

Focusing Our Energy was published 80 years after the JCPC decision, and yet the implications from the decision remained apparent. Quebec's insistence on being the sole broker for Labrador power was evident in the 1960s and had remained the same into the early 2000s. Quebec's position was firmly established by Quebec Premier Jean Lessage in 1965, when he stated that Quebec would never allow a transmission line through its territory that and any electricity that ever entered Quebec territory would "become property of Hydro-Quebec".

The history of negotiations to develop the Churchill River is largely the story of three critical political groups of actors reacting to the two dominant factors mentioned at the start of this presentation: the geographic isolation of the Churchill River from the energy markets, and the legacy associated with the 1969 Contract. Those actors are:

- Hydro-Quebec and the Quebec Government
- The federal government, and

- the Newfoundland and Labrador government (this includes the British Newfoundland Corporation established in 1953 with the purpose of developing hydroelectric resources in Labrador; BRINCO who represented the province's interests)

The first two groups of actors have been consistent in their response to the geographic reality and to the 1969 Contract.– Quebec had insisted consistently that it was to be the sole broker for all electricity that entered its territory, meaning that all electricity produced in Labrador for sale in the Canadian or American markets would first have to be sold to Hydro-Quebec. They further held that a Contract is as contract, that the 1969 Contract was entered into in good faith and the terms of the Contract had to be respected.

The federal government had consistently maintained that the question of the export of electrical power was a matter between two provinces and it would not impose measures that interfered with what Quebec claimed was within their jurisdictional authority to control. While there are numerous examples that can be provided to support the claim, I want to discuss two examples now that are representative of the overall federal approach and attitude.

The first is the idea of establishing a National Power Grid to link various electrical energy sources to areas with high power demands. The idea of an integrated national electrical system was introduced to the House of Commons by Prime Minister John G. Diefenbaker in 1962. Many Members of Parliament pushed the Prime Minister to move forward quickly with the project. They viewed the initiative as a major "nation building" exercise similar to other major construction endeavours such as the building of the Canadian Pacific Railroad, and the Trans-Canada Highway. However, the Prime Minister instead decided to establish a Committee on Long Distance Transmission (CLDT) to study the matter. Quebec opposed the idea from the outset. After five years of study Committee`s final report concluded that without Quebec participation, a national power grid was not possible and all that could be accomplished was a series of regional interties. The final report also stated that there "was no doubt an improved network would assist in the marketing of Nelson and Churchill River power." The Nelson River project was in Manitoba. Despite this, the overall benefits of the plan were perceived as marginal and a further study was deemed unwarranted.

The idea of a National Power Grid came back to the fore over forty years later as a possible means to help Canada meet its international obligations under the Kyoto Accord. In 1997, the United Nations Convention on Climate Change met in Kyoto, Japan, and negotiated the Kyoto Accord which committed Canada and 36 other industrialised countries to reduce their carbon emissions by 5.2% below 1997 levels by 2012. A year later Prime Minister Jean Chretien signed the Accord and pledged that Canada would reduce its GHG emissions by 6% below 1990 levels by 2012. To accomplish that feat, Canada would have to find the means to cut emissions by 240 megatonnes (MT) over what was expected to be emitted in 2010 if no action were taken.

Newfoundland politicians argued the case that developing the Lower Churchill alone could contribute about 15% of what was needed to meet those obligations. It was within the context of moving towards a low-carbon intensive economy that the idea of a national power grid remerged. Quebec expressed reservations from the start and insisted that it would have to agree to any plans and be adequately compensated for any existing infrastructure that it had in place that was used for the grid. The federal government's attitude was reflected by federal Minister Ralph Goodale who said that the federal government would not impose a grid on Quebec and the province would have to agree to plans.

We also see the consistency of the federal attitude to the transmission of Churchill Falls energy in the passing of Bill 108 in the 1980s. The Bill was meant to update the *National Energy Board (NEB) Act* to provide the NEB similar powers with regards to electricity as it did for the transmission of oil and natural gas across borders. The Bill successfully passed, however federal Minister Marc Lalonde insisted that the only path forward for the Lower Churchill was to first have a negotiated arrangement between Quebec and Newfoundland. While the federal government was willing to act as a mediator, it was not willing to enact further measures until an agreement was struck between the two provinces.

It would not be fair to argue that the federal government refused to offer assistance to Newfoundland and LAbrador in hopes of advancing hydroelectric development. The province was not abandoned by the federal government. An early example is how in 1965 Prime Minister Lester B. Pearson's government passed the *Public Utilities Income Act*. The Act substantially increased the transfer to the provinces of taxes collected from utility companies. To aid in negotiations, te Smallwood governemnt passed the additional savings on to BRINCO which consequently allowed the Corporation to sell Upper Churchill electricity to Hydro-Quebec at a reduced price.

In addition, substantial federal funding was often provided for background research and various feasibility studies. The best example of the extent to which the federal government was willing to assist was in the creation and operations of the Lower Churchill Development Corporation (LCDC) created in the 1970s. It was owned 49% by the federal government and 51% by Newfoundland and Labrador. The LCDC mandate was to develop the Gull Island and Muskrat Falls sites and supervise the construction of an accompanying transmission line to the island. To lay the groundwork, a $14.9 million feasibility study was commissioned to investigate the potential of the Lower Churchill River.

Ironically, it is also the LCDC that illustrates the limits of federal government assistance. The lack of a cooperative spirit between Newfoundland and Quebec prevented "any meaningful negotiations for the sale of surplus energy from LCDC. Without a resolution of the problem associated with access through Quebec, the value of the Eastern North American markets [became] somewhat academic." By 1981 the LCDC was frustrated and pessimistic towards the prospects of initial Lower Churchill development. It said that the solution to issues required, "legal, legislative and/or political solutions beyond the mandate of LCDC." In 1982 the LCDC decided to curtail its operations "until a more favourable climate for development [had] been established." This was the limits of federal assistance had been reached.

The examples just mentioned gives an indication of the federal government's consistent attitude towards negotiations from 1949 to the early 2000s. In terms of the sanctity of the 1969 Contract, the federal perspective was in line with the Quebec's. This was evident when the Peckford government's *Water Rights*

Reversion Act went to the Supreme Court. The Act sought to reclaim the water rights given to CFL Co. in a 1961 lease which had enabled the Churchill Falls project to proceed. A reversion of the water rights would have placed the province in a significantly stronger position to renegotiate revenue sharing from the Upper Churchill Falls.

The federal government intervened in the Supreme Court of Canada case and supported the Quebec position. Hydro-Quebec argued that the real purpose of the Act was to interfere with the 1969 Contract. In May 1984, the SCC delivered its decision which agreed with the Hydro-Quebec/federal government perspective. The court ruled that the purpose of the *Water Rights Reversion Act* was outside the actual legislation and that it was intended to interfere with the 1969 Contract.

Overall, the Quebec and federal government positions on the transmission of electricity through Quebec and on the 1969 Contract have been largely aligned and had been consistent from the 1960s up to the early 2000s.

The third political actor in the story, the province of Newfoundland and Labrador (which includes BRINCO). The province had not been consistent and at various times tried numerous strategies both mitigate its geographically-imposed relatively weak bargaining position with Hydro Quebec and to secure additional benefits from the 1969 Contract. The Smallwood era was marked by attempts to find alternatives to Quebec being the sole broker of Labrador electricity. In particular feasibility studies were ordered to investigate the “Anglo-Saxon” route which would by-pass Quebec to get to the energy markets. The route would bring electricity from Labrador, to the island and then be shipped via a further transmission line to the Maritimes. The route would span a distance of 1710 miles and cost $941,000,000 in 1960s dollars. Studies showed that the route was not economically feasible for either domestic consumption or for energy sales into the US energy markets.

The Smallwood government also contemplated requesting the federal government use section 92 (10) (c) of the *British North America Act* (BNA Act) to declare the Churchill River project in the general interest of Canada. This move, in theory, could have enabled the federal government to overrule any jurisdictional objections or roadblocks to development from Quebec. While, the Smallwood government may have never formally requested the federal government declare the Churchill Falls project to be in the national interest; it was certainly a major piece of serious conversation.

In the end, in the interest of getting the Upper Churchill developed, after 17 years of arduous negotiations, Smallwood enabled BRINCO to agree to the idea of Hydro-Quebec purchasing all but 300MW of energy from the Upper Churchill facility and then reselling it into the domestic and international energy markets.

In doing so the Smallwood government secured short-term economic benefits through the construction phase, however, the 1969 Contract did not address the core issue of market access for Labrador power. Ultimately, the 1969 Contract itself became an albatross about the neck of subsequent negotiators attempting to secure final agreements to develop sites on the Lower Churchill River at Gull Island and Muskrat Falls.

The response of the next two Conservative governments, Frank Moores' and Brian Peckfords', was to use the courts and legislation to: secure market access to find redress for the 1969 Contract and to demand the right to recall additional power from the Upper Churchill. Attempts were also made to engage the federal government in a more forceful way to essentially override Quebec objections. However, as mentioned previously, the federal government maintained the position that the question of getting Labrador electricity to market was an inter-jurisdictional affair. The federal government offered technical and financial assistance, but would only go so far. From the perspective of developing the Lower Churchill, the Moores and Peckford eras achieved little beyond the gathering of technical baseline environmental information and numerous engineering studies for when and if the new projects were begun.

A return of Liberal governments from Clyde Wells to Roger Grimes saw the emergence of another approach. The Liberal governments did not directly challenge the right of Hydro-Quebec to be the sole broker of Labrador power. The Wells' government at one point received a substantial offer from Hydro-Quebec to develop the Gull Island site. The key point for this summary is that the offer was predicated on virtually all the power being sold to Hydro Quebec for their resale. The same approach was repeated in draft agreements developed during the time of the Brian Tobin and Roger Grimes governments.

Meanwhile, the government's approach to securing greater benefits from the 1969 Contract varied by Premier. Well's attempted to privatise Newfoundland Hydro in conjunction with bringing in the *Electrical Power Control Act*

(EPCA). With a private company in control of hydroelectric operations, the government would have appeared to have been regulating an industry rather than being directly involved in interfering with established contracts. The government would have been the regulator, not the owner/operator. However, Wells' plans were thwarted by determined opposition to the idea of privatisation of Newfoundland Hydro from the general public.

The next Premier, Brian Tobin shifted the approach from legislative means to use moral persuasion. Tobin conducted a strong Canadian public relations campaign to bring pressure to bear on Quebec to provide Newfoundland and Labrador with greater benefits from the Upper Churchill. One of the areas that Tobin highlighted was the future stability of CFL Co. Tobin told national audiences how he felt it was unfair and absurd that the owner/operator of the lucrative Churchill Falls facility would be facing insolvency within years due to a lack of revenues from power sales. Of all the Premiers discussed, it is only Tobin that succeeded in getting increased benefits for the province. He did this through two side agreements. The first was the *Shareholder's Agreement* which allowed the Newfoundland government to put money into CFL Co. if an infusion of cash was needed. This ensured that Newfoundland would maintain its controlling 66% share in the company. Previously only Hydro-Quebec had the right to inject funding and could have used the extra financing to purchase additional shares.

More significant was the agreement to enter into the *Guaranteed Winter Availability Contract* (GWAC). The GWAC guaranteed to Hydro-Quebec 682 MW of additional capacity from Churchill Falls during the winter months from

1998 until the conclusion of the 1969 Contract in 2041. The GWAC was to be periodically renegotiated and it had an escalation clause. With GWAC, CFL Co's future financial stability was secured and the province expected to net an additional $1 billion dollars over the 1969 Contract Tobin was successful in securing greater benefits for the province; however the side-agreements were concluded without touching any provisions of the 1969 Contract.

The next government under Roger Grimes also did not challenge the 1969 Contract. However, in 2002 a draft agreement to develop Gull Island the government was anxious to show that the most problematic provisions from Newfoundland and Labrador's perspective would not be repeated.

- Newfoundland and Labrador would wholly own the project
- There would be an escalation clause
- The province would have the right to recall power when industrial or other demands required

The draft Gull Island agreement would have involved selling the bulk of the electricity produced to Hydro-Quebec for them to resell. It took matters a step further and proposed the Hydro-Quebec was also to arrange for the financing of the project.

The experiences of the Smallwood, Wells, Tobin and Grimes' governments show that when Hydro - Quebec was ensured of its sole-broker status, meaningful negotiations occurred on Lower Churchill development and substantial draft agreements negotiated. This contrasted with the approach of the Moores and Peckford governments who sought to exert what they perceived as Newfoundland

and Labrador's constitutional and economic rights to have unfettered market access. The various approaches taken by the Newfoundland and Labrador governments over the decades since confederation regarding developing the Churchill River was reflected upon in 2003 by the Royal Commission on Renewing and Strengthening Our Place in Canada, headed by long-time veteran of negotiations between Hydro-Quebec and Newfoundland, Vic Young.

The approach of the Grimes government was described in the Commission's final report as a 'recipe for failure' as having Hydro-Quebec be lender and purchaser would put the province in a weak position. It was the same position the province had been in during the 1960s and in the decades after.

The Commission also rejected the approach of Premiers Frank Moores' and Brian Peckford's governments when it said that "issues related to Churchill Falls should not be directly linked with negotiations to develop Gull Island." In short, the Commission's findings reflected the shortcomings and ultimate failures of Newfoundland and Labrador governments since Confederation to achieve fair and equitable arrangements to develop Churchill River power.

It is within that historical context that the Danny Williams government embarked on drafting an energy strategy that would guide policy and natural resource development decisions in the province going forward to 2041 and beyond. The Williams' government did not immediately attempt to engage in negotiations to develop hydroelectric resources in Labrador; first they decided to study the current circumstances using all the expertise required and survey the realms of possibilities before developing negotiating strategies.

It was also a time of significant change within the electricity sector. Starting in 1992, and continuing into the 2000s the American electric industry began the process of reforming how the electricity market operated. The goal was to ensure that monopolistic utilities selling in the US market engaged in "fair market practices" and that transmission rates for using existing infrastructures were not excessive. The potential implication was thatit might be more difficult for Hydro-Quebec to retain is sole-broker status.

In addition to those changes, the early 2000s was a time of emerging energy shortages in Canadian markets such as Ontario, and substantial interest in non-GHG emitting energy sources as part of the global effort to fight climate change.

A key step in learning about the current state of possibilities came in January 2005 when the government issued a *Request for Expressions of Interest and Proposals for Development of Lower Churchill Hydro Resource*. The process was open to any group that had the interest and ability to make a proposal. The initiative was described as the first step in what would be a four phase process. While the government received twenty-five proposals, a joint proposal from Hydro-Quebec and Ontario to develop the Lower Churchill attracted significant attention. TD Bank proclaimed that the Lower Churchill's "day in the sun may have finally arrived." National media stated that it was a win-win-win for the provinces involved.

The Quebec-Ontario proposal was predicated on the same assumptions dating back to the Upper Churchill contract negotiations. Labrador power would be sold to Hydro-Quebec, which would then resell the power to the customer. The proposal did not contain provisions for the wheeling of power through Quebec, but rather insisted that Newfoundland negotiate terms with Hydro-Quebec which would in effect retain exclusive rights to sell Churchill River power in the North American markets.

The Williams' government rejected the Hydro-Quebec/Ontario proposal and announced in May 2005 that the province would develop the Lower Churchill itself and would continue to seek partners to ensure Lower Churchill sites were developed with the maximum benefits accruing to the people of the province. In lieu of selling to Hydro-Quebec, the Premier announced that it had submitted an application to Quebec that would grant wheeling rights to the North American markets.

The government had made a major decision concerning the general principle it would adopt going forward, and now it turned its attention to understanding the broader context. In November 2005, the government released a Discussion Paper to engage citizens in creating a "comprehensive Energy Plan for Newfoundland and Labrador." Those discussions and provided an input into the creation of *Focusing Our Energy*.

Shaping the future and the lessons learned from the previous four decades of Churchill River negotiations were evident in *Focusing Our Energy*. The 1969 Contract, which expires in 2041, looms large throughout the entire document and is specifically mentioned ten times. A critical part of the province's energy plan was to ensure that CFL Co. maintains the Churchill Falls facility such that it is in optimum condition in 2041.

Focusing Our Energy's overall message concerning Churchill River hydroelectric developments was that the government planned to have the province in the best possible position to reap the maximum benefits of sustainable hydroelectric developments in Labrador over the long term. The government spent nearly four years since coming into power in 2003 studying multiple aspects of the past, present and possible futures of hydroelectric development in Labrador.

However, at the time it was not clear if an effective means had emerged that would allow the province to get Labrador energy to market without Hydro-Quebec being in the position of sole broker. The ability to wheel power to the markets remained dependent on external circumstances and political decisions at national and international levels. The previous decades of experiences in attempting to secure hydroelectric developments in Labrador had shown that if Newfoundland and Labrador was dependent upon Hydro-Quebec as its only customer, it put the province in a weakened negotiating position. Former Newfoundland and Labrador Energy Minister, Mr. William Marshall once stated "if parties [could] not negotiate on equal footing, inequities [were] bound to result."

It is within the context of ending Hydro-Quebec's status as sole-broker for Churchill River electricity that *Focusing Our Energy* stressed the vital importance of building a transmission line to the island to ensure the province was able to fully realise the benefits of its hydroelectric resources in Labrador.

The energy strategy noted, on numerous occasions, the fact that the 1969 Contract expires in 2041 and the province assumes full control over the Churchill Falls facility. However, the power lines that connect the generating station to the North

American energy markets will remain owned, operated and controlled by Hydro-Quebec. In 2007, it was far from clear that the province would be able to use any of: changes in the US energy markets (began in the 1990s), Ontario's and the Maritime's energy supply challenges, and international climate change concerns (coupled with Canada's international commitments) to ensure market access.

Consequently, in 2041 the province could have not been in any better a position to negotiate access to the markets than it had been in the 1960s or in the decades since. Moreover, the province had negotiated provisional power supply agreements with American customers, but without the means to get energy to markets, such arrangements were moot. Both the Peckford and Williams governments had established provisional contracts with New England states but were unable to deliver on their own.

The background paper strongly recommends a reading of, Ian Blue's article. "Off the Grid: Jurisdiction and the Canadian Electricity Sector," from 2007. The article provides an in-depth analysis of the profound impact on the Canadian electricity sector of changes brought in the US energy markets. Author Blue also warns of the perils of domestic jurisdictional and regulatory structures which prevent the Canadian electricity sector from fully capitalizing on domestic and international market opportunities. In short it provides an excellent snapshot of the broader regulatory and market setting in 2007 when *Focusing Our Energy* was published.

Uncertainly of access was a prime driver in the energy strategy's focus on the need for a transmission line from Labrador to the island and then across the Gulf of St. Lawrence through the Maritimes and into the United States. Such a line would fundamentally altered future discussions concerning market access. *Focusing Our Energy* had acknowledged that the province's "direct transmission access to export markets [was] extremely limited." The plan noted that the government was examining two potential export routes. The first was the most direct route which was through Quebec. Unlike in previous decades, the province saw an opportunity to gain domestic and international market access through Quebec territory byusing Hydro-Quebec's Open Access Transmission Tariff which had been developed in response to American regulatory changes mentioned earlier.

So in conclusion the long history of attempts to sign final agreements on developing hydroelectric sites on the Churchill River influenced the writing of *Focusing Our Energy*. For Newfoundland and Labrador from 1949 to 2007, governments, individuals and market circumstances may have changed but the core issue of getting electricity from Churchill River sites to the potentially lucrative energy markets did not. Since 1969, technical feasibility, economic conditions, and environmental imperatives have not facilitated the signing of final agreements to enable Lower Churchill projects to proceed. That historical context reflected the 2007 report's insistence on a flexible strategic approach to future negotiations to harness the remaining power of the Churchill River. The inclusion of the Labrador-Island Transmission link has added a new wrinkle to the established narrative. Time will tell if it means that things have changed utterly, or if the goals of Newfoundland and Labrador premiers since Confederation to have the province reap the full rewards of the Churchill River's hydroelectric resources will remain elusive.