

From: WChamberlain@nalcenergy.com
To: [Stanley, Todd](#)
Subject: HQ Motion - Fasken Translation
Date: Wednesday, July 24, 2013 8:20:49 AM
Attachments: [ATT1099871.gif](#)
[DM_MTL-#3093009-v1-NALCOR ENERGY - Requete introductive-ENGL.DOC](#)

Good morning;;

Please find attached is the Fasken English translation of the HQ Motion for a Declaratory Judgment. Presume you will circulate to Charles and others in Government as required.

Regards

Wayne



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Take time to work safely. Before starting any task always Step Back 5 X 5

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CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT

NO: 500-

HYDRO-QUÉBEC, legal person established in the public interest, duly constituted under the *Act respecting Hydro-Québec*, R.S.Q., c. H-5, with its head office at 75 Boulevard René-Lévesque West, in the City and District of Montréal, Province of Québec, H2Z 1 A4

Plaintiff

-v.-

CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED, a corporation duly constituted under the *Canada Business Corporations Act*, R.S.C. (1985), c. C-44, with its head office at 500 Columbus Drive, in the City of Saint John, Province of Newfoundland and Labrador, A1B 4K7

Defendant

**INTRODUCTORY MOTION FOR A
DECLARATORY JUDGMENT**

(Arts. 110 and 453 C.C.P.)

PLAINTIFF HYDRO-QUÉBEC RESPECTFULLY SUBMITS AS FOLLOWS:

I. INTRODUCTION

1. Hydro-Québec is faced with two genuine problems related to the rights and obligations of the Parties under a Contract entitled "*Power Contract*" (**Contract**), which it entered into on May 12, 1969 with Churchill Falls (Labrador) Corporation Limited (**CF(L)Co**). The subject of the Contract is the Hydro-Québec's electricity supply from the power and energy generated by a hydropower complex situated on the upper course of the Churchill River, called the Upper Churchill (**Generating Station**), in the province of Newfoundland and Labrador (**Newfoundland**).
2. The Contract comprises two parts, applied successively. The first part took effect upon the signing of the Contract and is to expire on August 31, 2016, namely 40 years after the commissioning of all the Generating Station's generating units (**Original Contract**). The second part, all the terms of conditions of which were established by the Parties at the same time as those in the Original Contract, will take effect automatically on September 1, 2016, for a term of 25 years, and shall expire August 31, 2041 (**Renewed Contract**). The Contract therefore has a total term of over 65 years.
3. Under both the Original Contract and the Renewed Contract, Hydro-Québec has the exclusive right to purchase almost all the power and energy output of the Generating Station as well as the right to operational flexibility so that it can plan and coordinate the operation of the Generating Station with that of its entire generating fleet. The recent stance taken by CF(L)Co respecting

the Renewed Contract threatens the integrity of Hydro-Québec's afore-mentioned rights as well as survival up to expiration thereof on August 31, 2041. CF(L)Co in effect claims that under the Renewed Contract, Hydro-Québec is only entitled to blocks of energy subject to a monthly cap to be established based on "*Continuous Energy*" (defined hereinbelow). The first genuine problem that Hydro-Québec seeks to have resolved by this Motion is the result of CF(L)Co having taken such a stance.

4. Moreover, according to another recent CF(L)Co position, it claims that it may sell to third party amounts of power beyond the 300 MW Limit (defined hereinbelow) associated with its recapture rights on a 300 MW Block (defined hereinbelow), under both the Original Contract and the Renewed Contract. This position, unprecedented in the conduct of the Parties, is the source of the second genuine problem facing Hydro-Québec, resolution of which it seeks by this Motion.
5. These two positions adopted by CF(L)Co are part of the various attempts by the Government of Newfoundland, which, since 1976, has been trying to alter the contractual balance agreed upon between Hydro-Québec and CF(L)Co when the Contract was signed in 1969. In the last few decades, these attempts have involved the Parties in frequent litigation that have resulted in judgments confirming the illegality of Newfoundland's actions aimed at attacking the integrity of the Contract.
6. Both genuine problems resulting from these stances raise issues with consequences already being felt in Hydro-Québec's planning activities and supply strategies, thus confirming its interest in having them resolved by this Motion. Both genuine problems must be resolved as soon as possible and, in any event, before the Renewed Contract takes effect, namely before September 1, 2016.
7. By this Motion, instituted in time for judgment to be rendered before the effective date of the Renewed Contract, Hydro-Québec raises the following two questions:
 - Under the Renewed Contract, does Hydro-Québec have the exclusive right to purchase all the power and energy generated at the Generating Station, with the exception of the power and energy associated with the Twingo Block (defined hereinbelow) and the 300 MW Block (defined hereinbelow), and the right to dispose of it in accordance with the same terms and conditions as those that apply under the Original Contract?
 - Under the Contract, can CF(L)Co sell to a third party amounts of power beyond the 300 MW Limit (defined hereinbelow)?
8. Pursuant to Clause 1.2 of the Original Contract and of the Renewed Contract, the Contract is governed by the laws of the Province of Québec, and the Superior Court of Québec sitting in the district of Montréal has exclusive jurisdiction to decide all "*disputes between the parties arising out of this Contract*".

II. THE PARTIES AND THEIR AFFILIATES

A. Hydro-Québec

9. Hydro-Québec is a Québec government corporation created by the *Act respecting Hydro-Québec*, R.S.Q., c. H-5. Its mandate is to generate, transmit and distribute power and pursue endeavors in energy-related research and promotion, energy conversion and conservation, and any field connected with or related to power or energy.

B. CF(L)Co

10. CF(L)Co was incorporated on January 31, 1958. Basically, its mission consists in operating the Generating Station, the financing and construction of which were made possible as a result of Hydro-Québec's participation and its entering into the Contract under which the genuine problems that are the subject of this action have arisen.
11. As of the date of this Motion, Newfoundland & Labrador Hydro (**NLH**), a Newfoundland crown corporation, which is a wholly-owned subsidiary of Nalcor Energy (**Nalcor**), holds 65.8% of the common shares of CF(L)Co and Hydro-Québec holds the remaining 34.2%.
12. Nalcor is a Newfoundland government corporation created in 2007 under the *Energy Corporation Act*, S.N.L. 2007, c. E-11.01, whose mission is to oversee all Newfoundland's activities in the energy sector.

III. THE MAIN CONTRACTS BINDING THE PARTIES

13. Hydro-Québec and CF(L)Co are parties to three main contracts that govern their relations, including respecting the operation of the Generating Station, and which all expire on August 31, 2041. These three contracts complete each other and form a contractual framework.

A. The Contract

14. Firstly, the Parties are parties to the Contract, a copy of which is communicated as **Exhibit P-1**.
15. As stated above, the Contract is composed of the original Contract and the Renewed Contract, which form an indivisible whole. Clause 1.5 of the Original Contract further provides that the Renewed Contract (Schedule III) forms an integral part of the Contract.
16. Successive application of the Original Contract and the Renewed Contract reflect two distinct phases of the Upper Churchill hydropower project.
17. The first phase thereof, which corresponds to the application period of the Original Contract, required, for the purpose of building the Generating Station, that CF(L)Co enter into a contract for substantial debt financing, largely guaranteed by Hydro-Québec. Therefore, in addition to the provisions pertaining to supplying Hydro-Québec with power and energy, the Original Contract contains many provisions related to the construction of the Generating Station, the financing of the project, repayment of the CF(L)Co debt and the guarantees furnished by Hydro-Québec so that the Upper Churchill development project could be carried out.
18. The second phase of the Upper Churchill project, which only concerns the operation of the Generating Station, corresponds to the application period of the Renewed Contract, which is to take effect automatically on September 1, 2016, when the debt will have been fully repaid. This is why the Renewed Contract basically only contains provisions pertaining to Hydro-Québec's power and energy supplies.

B. The GWAC

19. Hydro-Québec and CF(L)Co are also parties to a contract entitled "*Churchill Falls Guaranteed Winter Availability Contract*" (**GWAC**), entered into on June 18, 1999 but with retroactive effect to November 1, 1998. Pursuant to the GWAC, in exchange for payment in addition to that owing under the Contract, CF(L)Co agreed to guarantee that during the months of November to March, [translation:] "an additional capacity of 682 MW" would be made available to Hydro-Québec. That "additional capacity" is a key concept of the Contract and which is explained in Part V. A. of this Motion.

20. The GWAC will expire the same time as the Contract, namely on August 31, 2041. A copy of the GWAC and an amendment thereto dated March 29, 2000 are communicated together as a single document as **Exhibit P-2**.

C. The Shareholders Agreement

21. NLH, Hydro-Québec and CF(L)Co are parties to a contract entitled "*Shareholders Agreement*" entered into on June 18, 1999 (**Shareholders Agreement**), which will expire the same time as the Contract and the GWAC, namely on August 31, 2041. A copy thereof is communicated as **Exhibit P-3**.

IV. CHRONOLOGICAL SUMMARY OF THE CONCLUSION OF THE CONTRACT

22. In 1953, Newfoundland granted to British Newfoundland Corporation Limited (**Brinco**) options for the exploration and development of large portions of the territory of the province, including an option to explore and develop the Churchill River, which, when exercised, would give Brinco an exclusive right and concession over that water way for a period of 99 years, renewable for a further 99 years.
23. On June 30, 1958, Brinco assigned to CF(L)Co (a subsidiary that it had just incorporated for the purpose of making it the assignee of its rights respecting the Churchill River) all the rights and options that it held respecting the Upper Churchill (but not respecting the Lower Churchill).

1. The October 13, 1966 Memorandum of Understanding

24. On October 13, 1966, Hydro-Québec and CF(L)Co signed a Memorandum of Understanding (**Memorandum of Understanding**), a copy of which is communicated as **Exhibit P-4**. The Memorandum of Understanding records both Hydro-Québec's commitment and right to purchase and CF(L)Co's correlative obligation to sell to Hydro-Québec [translation:] "all the electric power that becomes available for sale as a result of development of the hydroelectric potential" of the Churchill River as soon as a definitive contract for the sale and purchase of energy is entered into.
25. As an exception to Hydro-Québec's commitment and right to purchase, and CF(L)Co's obligation to sell to Hydro-Québec [translation:] "all the electric power" generated at the Generating Station, the Memorandum of Understanding provided that CF(L)Co could recapture a maximum block of 300 MW to supply the Labrador native load (**300 MW Block**) and that [translation:] "any unused surplus" of the 300 MW Block was to be sold to Hydro-Québec as [translation:] "surplus energy".
26. The Memorandum of Understanding provided that the contemplated definitive contract would be for a term established according to the longer of the following two periods: 44 years from the [translation:] "date the Generating Station energy becomes available on a commercial basis" or 40 years from the date of installation of the 10 generating units used to generate the rated capacity of the Generating Station.
27. The Memorandum of Understanding also records Hydro-Québec's right to renew the definitive energy contract to be entered into between the Parties. The renewal clause in the Memorandum of Understanding reads as follows:

[Translation:]

11.1 Renewal of the Contract

Hydro-Québec shall be entitled to renew the definitive energy contract for a further period of years from the expiration date, on such terms and conditions as may be mutually agreed to regarding amount and price. It shall also be entitled to a right of first refusal regarding any contract that CFLCo may then be prepared to sign with a third party respecting energy consumption within Québec.

28. Thus, pursuant to the Memorandum of Understanding, the Parties agreed that renewal of the Definitive contract would be optional for Hydro-Québec and that it would be governed by such terms and conditions to be agreed upon at a later date by the Parties regarding the amounts of energy to be the subject of the Renewed Contract, and regarding the term and price thereof.

2. Contract negotiations

29. Contract negotiations were spread out over a period of close to three years, from the signing of the Memorandum of Understanding until May 12, 1969.
30. For the purposes of this Motion, Hydro-Québec sets forth two significant aspects of the contract negotiations, both of which occurred between the fall of 1967 and the spring of 1968.
31. The first concerns scheduling rights respecting the Generating Station's output. Up to the initial months of 1968, the Parties contemplated entering into a contract granting CF(L)Co all scheduling rights regarding the Generating Station's capacity, as appears, inter alia, from Clause 9 of a draft contract dated September 19, 1967 on its cover page, a copy of which is communicated as **Exhibit P-5**.
32. At that stage of the contract negotiations, the Parties contemplated granting all scheduling rights to CF(L)Co based on the concept of "*Forecast Quarterly Supply*". The concept meant that CF(L)Co on a quarterly basis could determine the amounts of energy to be made available to Hydro-Québec. According to that scenario, Hydro-Québec would at all times be obliged to purchase amounts of energy varying between 90% and 110% of the "*Forecast Quarterly Supply*" determined by CF(L)Co.
33. Hydro-Québec informed CF(L)Co that the "*Forecast Quarterly Supply*" concept would thwart Hydro-Québec's intention to integrate the Generating Station into its generating fleet for operating and planning purposes, as appears from a memo dated October 3, 1967 sent by the Secretary of the CF(L)Co Board of Directors to the CEO of CF(L)Co, a copy of which is communicated as **Exhibit P-6**.
34. An excerpt of that CF(L)Co memo clearly states the objectives then sought by Hydro-Québec in negotiating the contract:

A real concern seems to be developing with respect to the application of the split tariff and supply forecast. Our concern under Clause 9 Operation of Plant with Hydro electing to take in excess of forecast amounts seems to be diametrically opposite to their concern which appears to be that they cannot permit us to forecast on a + or - 10% as they contend we could forecast consistently on the + side and force them to buy energy they cannot use. The period from June to November in each year seems to be their main concern. They would like to do the forecasting themselves within good utility practices, i.e., no spill, or alternatively have the right to bank forecasted energy in excess of the base for up to six months. Furthermore, they contend that although there is no penalty on energy action on our part in forecasting on the + side would, they concede, be related to reasonable and efficient water management, but nevertheless they could not do anything if we forecasted above what we were able to deliver during the times when we knew they could not use all the forecasted amounts. They feel our plant should be fully integrated into their own system.

Our reaction to Mr. Fournier's argument was that this did not represent the agreement as disclosed and this view was also shared by the other members of the Hydro-Québec committee. The solution would appear to be a matter for a negotiating team. [Emphasis added]

35. Hydro-Québec subsequently demanded, under the Contract, that practically all rights pertaining to scheduling the Generating Station's output.
36. In April 1968, CF(L)Co agreed to accede to Hydro-Québec's demand and proposed to eliminate the "*Forecast Quarterly Supply*" concept and to grant Hydro-Québec all scheduling rights respecting the Generating Station's output, as appears from a CF(L)Co memo dated April 17, 1968 as well as the draft clauses of the Contract submitted two days later to Hydro-Québec by CF(L)Co, a copy of which is communicated together as a single document as **Exhibit P-7**.
37. Hydro-Québec agreed to the clauses proposed by CF(L)Co in April 1968, as illustrated by the wording of clauses 4.2.1 of the Original Contract and 4.1.1 of the Renewed Contract. Those provisions effectively grant Hydro-Québec broad rights related to the operation, output scheduling and the planning of the Generating Station, which the Parties described in the Contract as rights pertaining to operational flexibility.
38. The second pertinent fact for the purposes of this Motion concerns the term of the Contract.
39. Up to the spring of 1968, Hydro-Québec and CF(L)Co negotiated the terms and conditions related to the term of the Contract based on the provisions of the Memorandum of Understanding. Project costs proved to be higher than initially projected, and given that the price of power and energy are related to project costs, the average price of energy payable to CF(L)Co had, as a result thereof, increased substantially beyond the price contemplated in 1966, as appears from the minutes of a joint meeting of the executive committees of Brinco and CF(L)Co held April 10, 1968, a copy of which is communicated as **Exhibit P-8**.
40. An excerpt from those minutes reports the context of the agreement reached by the Parties regarding the terms and conditions of renewal ultimately stipulated in the Contract:
- Hydro-Quebec wished to be able to project a lower mill rate than the present draft of the contract permitted. Due to increased costs and escalation the effect of the present term of 44 years from first delivery or 40 years from completion indicated an average mill rate considerably in excess of that contemplated in 1966. Accordingly, they had requested a 25 year extension of the contract on a flat mill rate basis suggested at two mills per kilowatt/hour. They wished this to be in the form of an option. This would produce a gross revenue of \$60-65 million per annum. There would be no debt outstanding. Should CFLCo attempt to qualify the rate by the addition of escalators or make any provision for its tax position, the purpose of the extension would be defeated. Although the Churchill [sic] project was marginally more attractive than [sic] nuclear power today, it was conceivable that it would not be in 40 years' time. It was obvious that a commitment on the extension was preferable to an option [...].
[Emphasis added]
41. Thus, it is clear that Hydro-Québec wanted to be able "*to project a lower mill rate than the present draft of the contract permitted*", through an extension of the Original Contract at a lower fixed price. Hydro-Québec therefore proposed that the renewal be the subject of an option, exercisable by Hydro-Québec, at a fixed price of 2.0 mills/kWh.
42. However, CF(L)Co preferred an automatic renewal clause, considered more advantageous from its perspective, specifically to protect itself against the risk of a decrease over time of the price of energy from alternative sources.
43. The Parties ultimately agreed that renewal of the Contract would be automatic, for a term of 25 years and at fixed price of 2.0 mills/kWh.

3. The signing of the Contract

44. In the summer of 1968, Hydro-Québec approved the signing of the Contract, which was took place on May 12, 1969, some three years after the signing of the Memorandum of Understanding.

V. THE MAIN TERMS AND CONDITIONS OF THE CONTRACT

45. For the purposes of this Motion, Hydro-Québec sets forth four of the main terms and conditions of the Contract.

A. The amounts of power and energy sold to Hydro-Québec

46. The Generating Station has a rated capacity of approximately 5,428 MW.
47. The Contract grants Hydro-Québec the right to purchase almost all the 5,428 MW as well as the energy associated therewith. As the Supreme Court of Canada noted in the *Reference re Upper Churchill Water Rights Reversion Act*, a decision rendered at the end of litigation between Hydro-Québec and CF(L)Co in Newfoundland, a copy of which is communicated as **Exhibit P-9**, "[u]nder the contract CFLCo agreed to supply and Hydro-Quebec agreed to purchase virtually all of the power produced at Churchill Falls".
48. This exclusive right to purchase "virtually all the power produced at Churchill Falls" is the result of two undertakings by CF(L)Co pursuant to clauses 6.4 of the Original Contract and 5.2 of the Renewed Contract, the wording of which reads as follows:

6.4/5.2 Firm Capacity

The Firm Capacity shall be available at all times when Hydro-Quebec has requested it. In addition whenever additional capacity can, in the opinion of CFLCO, be made available, such capacity shall also be available to Hydro-Québec on request. [...] [Emphasis added]

49. On the one hand, on demand by Hydro-Québec, CF(L)Co must "*at all times*" make available to Hydro-Québec an amount of power corresponding to what the Parties described as "*Firm Capacity*" (from the Generating Station's rated capacity. Considering the adjustments related to the CF(L)Co's recapture of the 300 MW Block¹ and the existence of a Block of 225 MW reserved to CF(L)Co to satisfy its "*existing obligations*" towards its subsidiary, Twin Falls Power Corporation Limited (**Twinco Block**), the Firm Capacity corresponds to 4,082.6 MW for the months of October to May and 3,863.5 MW for June to September.
50. CF(L)Co's "*existing obligations*" to Twinco Block terminate December 31, 2014. In the Shareholders Agreement, Hydro-Québec waived its rights pertaining to Twinco Block and, subject to the conditions set forth therein, agreed that as of January 1, 2015, CF(L)Co may sell the Twinco Block "*for distribution and consumption in Labrador West*". The Twinco Block therefore remains one of two exceptions to Hydro-Québec's right to "virtually all the power produced at Churchill Falls", until August 31, 2041.

¹ In September 1998, CF(L)Co and Hydro-Québec agreed to a "*Notice of Recapture and Waiver*" retroactive to March 9, 1998, whereby CF(L)Co formally gave notice to Hydro-Québec of its intention to immediately recapture the portion of the 300 MW Block that it still not had recaptured since the signing of the Contract, namely 130.7 MW.

Hydro-Québec is at all times obliged to purchase and take delivery of the energy associated with an amount of power corresponding to what the Parties called "*Minimum Capacity*". Considering the deductions stipulated by the Contract resulting from CF(L)Co's recapture of the 300 MW Block, the Minimum Capacity at all times corresponds to 900 MW.

51. Therefore, Hydro-Québec must, on a monthly basis, purchase amounts of energy resulting from an output varying between the Minimum Capacity and the Firm Capacity. This is d'Hydro-Québec's sole obligation pertaining to amounts of power and energy purchased monthly under the Contract. Apart from that obligation, Hydro-Québec retains full and absolute discretion to determine when and how it will dispose of "virtually all the power produced at Churchill Falls" until August 31, 2041.
52. On the other hand, CF(L)Co must make available to Hydro-Québec, on demand, all the Generating Station's additional capacity, i.e. all capacity available beyond the Firm Capacity, the 300 MW Block and the Twinco Block, when CF(L)Co considers that it can be made available from the Generating Station's rated capacity. Upon the signing of the GWAC, the Parties agreed that an additional capacity of 682 MW would be guaranteed to Hydro-Québec during the months of November to March, until August 31, 2041.
53. Hydro-Québec's exclusive right to purchase "virtually all the power produced at Churchill Falls", resulting from its exclusive right to purchase all the capacity available at the Generating Station, subject to CF(L)Co's rights regarding the 300 MW Block and Twinco Block, is illustrated in a diagram, a copy of which is communicated as **Exhibit P-10**.

B. The terms and conditions related to price and payment

55. The price of the energy sold to Hydro-Québec under the Contract was agreed to based on final project costs, mutually established by the Parties at \$900 million.
56. As at the date of this Motion, the price of the energy sold to Hydro-Québec under the Original Contract is 2.5426 mills/kWh. Throughout the term of the Renewed Contract, the price of energy will be 2.0 mills/kWh.
57. One of the main terms and conditions related to payment of the energy sold under the Contract concerns the "*Take or Pay*" guarantee given to CF(L)Co by Hydro-Québec. To implement that guarantee and, specifically, the terms and conditions of payment agreed to under the Contract, the Parties used the following concepts:

[Translation:]

"Annual Energy Base" (AEB):

The AEB is a key concept related to the terms and conditions of payment for the energy sold to Hydro-Québec under the Original Contract. The AEB is an average amount of energy intended, for payment purposes, to reflect the annual value of the Generating Station's output capacity namely: (i) the energy delivered to Hydro-Québec, (ii) the energy associated with water spilled resulting from the supply schedules submitted to CF(L)Co by Hydro-Québec, as well as (iii) the energy potential of the water volumes stored by Hydro-Québec in the Generating Station's reservoirs.

When the Contract was entered into, the amount of that energy was assessed by CF(L)Co and Hydro-Québec as 31.5 billion kWh. Notwithstanding that the Generating Station is new and has no operating history, the Original Contract nevertheless provided that from 1984, the AEB should be reviewed every four years to take into account the runoff history of the Generating Station's reservoirs. That review is likely to result in a monetary

adjustment in accordance with to Clause 8.5.2 of the Original Contract.

From a projected amount of energy, the AEB has thus been replaced by an amount of energy corresponding to the possible energy output based on the average runoff from the Generating Station's reservoirs since the commissioning date of all the Generating Station's generating units, namely September 1, 1976 (**Effective Date**).

The Renewed Contract provides that the AEB between September 1, 2016 and August 31, 2041 shall be the AEB in effect on expiration of the Original Contract, without four-year adjustments. As at the date of this Motion, determination of the AEB to be in effect on expiration of the Original Contract is the subject of discussions between the Parties.

"Basic Contract Demand":

"Basic Contract Demand" corresponds to a pro-rated monthly AEB during the term of the Original Contract. It therefore is a key concept related to the terms and conditions of payment thereunder. As explained hereinbelow, the "Basic Contract Demand" is aimed at implementing the "Take or Pay" guarantee furnished by Hydro-Québec under the Original Contract.

"Continuous Energy":

Under the Renewed Contract, "Continuous Energy" corresponds to the pro-rated monthly AEB in effect on expiration of the Original Contract. Therefore under the Renewed Contract, it is the equivalent of the "Basic Contract Demand" under the Original Contract. "Continuous Energy" is a key concept related to the terms and conditions of payment of the Renewed Contract. It is aimed at implementing the "Take or Pay" guarantee furnished by Hydro-Québec under the Renewed Contract.

Insofar as the AEB in effect on expiration of the Original Contract will be 29.84 billion kWh, as proposed by Hydro-Québec in discussions ongoing as at date of this Motion, "Continuous Energy" will be approximately 2,500 GWh per month throughout the application period of the Renewed Contract, the whole subject to slight variations on the basis of the number of days in a given month.

"Energy Payable":

"Energy Payable" is, under the Original Contract, a monthly amount of energy resulting from the sum of the energy delivered to Hydro-Québec based on its demands (which may not be less than the energy associated with the Minimum Capacity) and the energy equivalent to the water discharges in a given month.

58. Under the Original Contract, Hydro-Québec must, on a monthly basis, pay the price resulting from adding together a fixed component and a variable component. The calculation is as follows:

"Basic Contract Demand" * 2/3 of the "applicable rate"² (**Fixed Component**)

+

"Energy Payable" * 1/3 of the "applicable rate" (**Variable Component**)

² The "applicable rate" is the rate stipulated by the Parties in clause 8 of the Original Contract, which is reduced successively.

59. Under the Original Contract, Hydro-Québec has an obligation to pay monthly to CF(L)Co the Fixed Component, which implements the "Take or Pay" guarantee furnished by Hydro-Québec under the Original Contract. This guarantee guarantees monthly payments to CF(L)Co by Hydro-Québec, regardless of the amounts of energy that CF(L)Co made available to Hydro-Québec or that Hydro-Québec demanded delivery of in a given month.
60. The undertaking to pay the Fixed Component to CF(L)Co means that under the Original Contract, Hydro-Québec agreed to assume a significant part of the risks related to the runoff fluctuations of the Generating Station's reservoirs, since it agreed to make a payment related to the energy that CF(L)Co could not guarantee delivery of.
61. Hydro-Québec also has the obligation, under the Original Contract, to pay on a monthly basis CF(L)Co the Variable Component, the value of which will fluctuate according to the amount of energy actually delivered on demand to Hydro-Québec (which may not be less than the energy associated with the Minimum Capacity) as well as that corresponding to the water discharges resulting from the supply schedules that Hydro-Québec submits to CF(L)Co, pursuant to Clause 4.2.6 of the Original Contract.
62. The Parties stipulated different terms and conditions of payment under the Renewed Contract.
63. Under the Renewed Contract, Hydro-Québec must pay to CF(L)Co monthly consideration equal to the product of "*Continuous Energy*" multiplied by the price agreed upon in Clause 7.1, namely 2.0 mills/kWh, regardless of the amounts of energy made available by CF(L)Co in a given month, unless the payment is modulated by failures within the meaning of Clause 7.1 or by penalties imposed under Clause 8.
64. Thus, "*Continuous Energy*" is payable monthly by Hydro-Québec to CF(L)Co under the Renewed Contract, like the Fixed Component under the Original Contract, which is based on "*Basic Contract Demand*".
65. The changes between the Original Contract and the Renewed Contract as regards the terms and conditions of payment will take effect the same time as the Renewed Contract, when the debt contracted by CF(L)Co to finance construction of the Generating Station has been fully repaid and when over more than 40 years of experience of the Original Contract will have provided, through the notion of the AEB, a long history of the energy made available to Hydro-Québec.

C. Hydro-Québec's right to benefit from operational flexibility

66. Although it does not personally operate the Generating Station, Hydro-Québec enjoys broad rights under the Contract allowing to requiring CF(L)Co to operate it in compliance with the supply schedules that Hydro-Québec sends to CF(L)Co, the contents of which may only be determined by Hydro-Québec.
67. These rights stem from what the parties have described in the Contract as being the operational flexibility that Hydro-Québec enjoys in respect of its own generating fleet. In that vein, sections 4.2.1 of the Original Contract and 4.1.1 of the Renewed Contract provide the following:

[ORIGINAL ENGLISH]

4.2.1/4.1.1 Operational Flexibility

The parties hereto acknowledge that it is desirable for Hydro-Quebec to have the benefit of operational flexibility of CFLCo's facilities in relation to the Hydro-Quebec system.
Accordingly:

(i) Hydro-Quebec may request CFLCo to operate the Generating Station so as to supply Hydro-Quebec schedule of power requirements, provided that no such request shall be

less than the Minimum Capacity or, except as provided in Section 6.4/5.2, more than the Firm Capacity;

(ii) Hydro-Quebec may require deliveries which have the effect of varying the amount of water to be carried in storage at any time, provided that, in so doing, sufficient water is left for storage so that Minimum Capacity can always be maintained;

(iii) CFLCo agrees to make available to Hydro-Quebec information relating to the hydrology of the drainage basis and the levels of the reservoirs and the measurements and metering of any spillage from the reservoirs, and to co-operate fully with Hydro-Quebec in the forecasting of energy which can be made available. [emphasis added]

68. In concrete terms, the conditions of this crucial right allow Hydro-Québec to reach the objective it set for itself when negotiating the Contract, namely integrating the Generating Station into its own generating fleet: the Generating Station is interconnected with the Hydro-Québec system, and it is the latter that plans and schedules its power generation, taking into consideration the levels in reservoirs at the Generating Station and Hydro-Québec's power needs throughout its generating fleet.
69. Operational flexibility allows Hydro-Québec to, among other things, reduce its supplies in summer and fall so as to accumulate water in the Generating Station's reservoirs. This seasonal flexibility allows it to benefit from sufficient quantities of power generated by the Generating Station in the winter season, when power demands are strongest in Québec.
70. The operational flexibility that Hydro-Québec enjoys under the Contract also allows it, over a period of several years, to adjust its supplies generated by the Generating Station to reflect the natural variability of input and thus at all times maintain an adequate volume of water in the Generating Station's reservoirs. This multi-year flexibility is one of the main attributes of the rights to operational flexibility that Hydro-Québec enjoys under the Contract.
71. Thanks to this operational flexibility, Hydro-Québec can plan and demand energy deliveries from the Generating Station in a manner similar to the procedure it uses with the generating stations belonging to its own generating fleet. This flexibility implies that Hydro-Québec can demand that deliveries be made on request, with the possibility of varying its supply schedules at any time.
72. The chief benefit that this operational flexibility confers on Hydro-Québec is the capacity to plan and coordinate, on a seasonal and multi-year basis, how it uses the Generating Station alongside its entire energy generating fleet, with a view to optimizing all of the hydraulic resources.
73. The only elements tempering this essential right is Hydro-Québec's obligation to at all times maintain a sufficient amount of water in the Generating Station's reservoir to ensure that Minimum Capacity can always be maintained, as well as the obligation not to require CF(L)Co to operate the Generating Station in a manner that would compromise availability of the Twinco Block and the 300 MW Block.

D. CF(L)Co's right to recapture the 300 MW Block monthly

74. The Contract provides that CF(L)Co has the right to withhold the 300 MW Block, provided it sends Hydro-Québec prior written notice of no less than three years.
75. Sections 6.6 of the Original Contract and 5.4 of the Renewed Contract specifically provide the following:

[ORIGINAL ENGLISH]

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 thereunder and hereunder of 2.362 billion kilowatthours per year [...].

5.4 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 and after taking into account recaptures made by CFLCo under the original Power Contract, 300,000 kilowatts for a maximum withholding thereunder and hereunder of 2.362 billion kilowatthours per year [...]. [emphasis added]

76. In concrete terms, the fact of “recapturing” the 300 MW Block allows CF(L)Co to sell the energy associated with that block of power to a third party instead of Hydro-Québec. Like that of the Twinco Block, the energy of the 300 MW Block is an exception to Hydro-Québec’s right to purchase “[TRANSLATION] virtually all of the power generated at Churchill Falls”.
77. The Contract explicitly provides that CF(L)Co’s right to recapture the 300 MW Block is conditional on the energy associated therewith being destined for consumption outside Québec. This can be explained by the fact that the 300 MW Block was, in keeping with the parties’ intent upon entering into the Contract, destined to supply Labrador’s native load.

VI. OBJECT OF THIS ACTION

78. As explained in the introductory section of this motion, Hydro-Québec is asking that a judgment be rendered on a timely basis before the Renewed Contract comes into force on September 1, 2016 providing a judicial determination in respect of the two following real difficulties:
 - Under the Renewed Contract, does Hydro-Québec benefit from the exclusive right to purchase all of the capacity and energy generated at the Generating Station, with the exception of the capacity and energy associated with the Twinco Block and 300 MW Block, as well as the right to dispose thereof under the same terms and conditions as those that apply under the Original Contract?
 - Under the Contract, may CF(L)Co sell amounts of power exceeding the 300 MW Limit (defined below) to a third party?

79. In the following sections, Hydro-Québec will examine the challenges specific to each of these two real difficulties.

VII. HYDRO-QUEBEC’S RIGHTS UNDER THE RENEWED CONTRACT

80. The first real difficulty that Hydro-Québec would like to resolve relates to the amount of capacity and energy to which it is entitled under the Renewed Contract. Considering that the Renewed Contract will be taking effect shortly, this first real difficulty entails challenges the consequences of which are already being felt in Hydro-Québec’s planning of supplies beyond the September 1, 2016 deadline.
81. Hydro-Québec wants confirmation that under the Renewed Contract, it does indeed enjoy the exclusive right to purchase all of the capacity and energy of the Generating Station, with the exception of the capacity and energy associated with the 300 MW Block and Twinco Block, and to dispose thereof under the same terms and conditions as those that apply under the Original

Contract. As explained at greater length below, CF(L)Co is therefore wrong in claiming that it can deny Hydro-Québec these rights.

A. Provisions of the Contract

82. As explained at greater length in paragraphs 57 through 65 of this motion, the parties have stipulated different payment terms under the Original Contract and the Renewed Contract. Those that apply under the Original Contract are associated with the notions of Basic Contract Demand and Energy Payable, whereas those that apply under the Renewed Contract are exclusively based on the notion of Continuous Energy.
83. However, neither the Basic Contract Demand nor the Energy Payable have any impact on the monthly amounts of energy to which Hydro-Québec is entitled under the Original Contract. The same also holds for Continuous Energy under the Renewed Contract.
84. As defined in Section 1.1 of the Renewed Contract, Continuous Energy means the amount, expressed in kilowatt hours, obtained using the following calculation:

$$\text{AEB upon expiry of the Original Contract} * (\text{number of days during the month in question})$$

(number of days during the year in question)

85. At the time of reaching the Contract, the parties completely dissociated the value of the monthly consideration that would be payable to CF(L)Co from the amount of energy that CF(L)Co would make available to Hydro-Québec during a given month under the Renewed Contract.
86. This dissociation was designed to allow CF(L)Co to collect stable and foreseeable monthly revenues established based on the AEB in force upon expiry of the Original Contract, while allowing Hydro-Québec to fully enjoy its right to benefit from operational flexibility as it did under the Original Contract.

B. Explanation of CF(L)Co's position and the real difficulty resulting therefrom

87. Hydro-Québec was recently confronted by CF(L)Co's position, according to which the Renewed Contract supposedly only entitles Hydro-Québec to purchase blocks of energy subject to a monthly cap the amount of which, established based on Continuous Energy, would remain more or less fixed throughout the year. In this motion, the expression "**Block Theory**" is used to refer to this position adopted by CF(L)Co.
88. Hydro-Québec discovered this new and unusual theory when it examined a request presented by Nalcor before the Board of Commissioners of Public Utilities (**PUB**) in Newfoundland. The request, dated November 10, 2009 (a copy of which is filed as **Exhibit P-11**), sought to establish a water management agreement in respect of the Churchill River between Nalcor and CF(L)Co, and contained, among other things, the following affirmations by Nalcor respecting Hydro-Québec's rights under the Renewed Contract:

[ORIGINAL ENGLISH]

CF(L)Co sells approximately 85% of the energy produced at Churchill Falls to HQ pursuant to an agreement dated May 12, 1969 (the HQ Power Contract) (Exhibit 3). The HQ Power Contract has an initial term that runs to August 31, 2016. Thereafter, the HQ Power Contract is renewed for a further term of 25 years from September 1, 2016 to August 31, 2041 in accordance with Schedule III to the contract. [...] Schedule III to the HQ Power Contract alters the manner in which the [Annual Energy Basel will be supplied to HQ by CF(L)Co Upon renewal, HQ will become entitled to receive Continuous Energy [...]

As a result, HQ will be entitled to essentially equal amounts of energy during each month after renewal. However, HQ will remain entitled to schedule the hourly deliveries of its monthly entitlement of Continuous Energy at any time during the month. [emphasis added]

89. At the time Nalcor filed this request, Hydro-Québec had no information to the effect that CF(L)Co, as party to the Contract, endorsed this reductive and unusual interpretation of Hydro-Québec's rights under the Renewed Contract.
90. However, Hydro-Québec obtained this confirmation in June 2012, when CF(L)Co clearly expressed to Hydro-Québec, at a meeting of the Network Operating Committee³ held June 7, 2012, its disagreement with the five-year Churchill Falls supply plan that Hydro-Québec had submitted to it for the June 2012 to May 2017 period. A copy of this five-year plan and the minutes of the meeting of the Network Operating Committee is filed en liasse in support hereof as **Exhibit P-12**.
91. Subsequently, CF(L)Co made official its disagreement with Hydro-Québec's supplies forecasted for after September 2016, namely as of the effective date of the Renewed Contract, by sending two emails dated November 29, 2012 and December 5, 2012, respectively, in which it refused the supply schedules that Hydro-Québec had submitted in accordance with its five-year Churchill Falls supply plans for the periods beginning September 2012 and ending August 2017, on the one hand, and beginning December 2012 and ending November 2017, on the other. A copy of these two emails and two five-year plans are filed en liasse as **Exhibit P-13**.
92. The reasons that CF(L)Co gives for its refusal in the two P-13 emails was that "[ORIGINAL ENGLISH] [t]he forecast provided for this time period is not in line with the renewed Power Contract and the application of Continuous Energy under the terms of that Contract".
93. The refusals expressed in the P-13 emails unequivocally indicate that CF(L)Co endorses the Block Theory that Nalcor invoked in 2009, the effect of which would be to reduce the scope of Hydro-Québec's rights under the Renewed Contract.
94. The Block Theory is based on the claim that, under the Renewed Contract, Hydro-Québec does not enjoy the exclusive right to purchase "all energy generated at the Generating Station", with the exception of the capacity and energy associated with the Twinco Block and the 300 MW Block, and the right to dispose thereof in accordance with the same terms and conditions as those that apply under the Original Contract, but instead enjoys a limited right, namely that of purchasing energy blocks subject to a monthly cap that would be established based on Continuous Energy.
95. According to CF(L)Co's unilateral and new position, the monthly amounts of energy to which Hydro-Québec is entitled under the Contract would be radically amended starting September 1, 2016.
96. The Block Theory is incompatible with a number of provisions of the Contract, is contrary to the intent of the parties to automatically renew the Original Contract upon its expiry, would disrupt the Contract's economy and undermine Hydro-Québec's rights thereunder.
97. In light of the above, it is obvious that Hydro-Québec and CF(L)Co have adopted irreconcilable positions regarding the scope of Hydro-Québec's rights under the Renewed Contract as well as regarding the meaning and application of the notion Continuous Energy set forth in Section 2.1 of the Renewed Contract.
98. This leads to a real difficulty that has an immediate effect on the capacity and energy supply planning and strategies of Hydro-Québec.

³ The Network Operating Committee is a structure on which two representatives of Hydro-Québec and two representatives of CF(L)Co sit, and which was created under the Interchange Manual, a manual described at greater length in section VII.F.1 of this motion.

C. Operational Impact of the Block Theory

99. In sections D through F below, Hydro-Québec reveals the many incongruities that would result from implementing the Block Theory as of the effective date of the Renewed Contract. Before this, however, it would be appropriate to explain what operational consequences CF(L)Co's interpretation of the Renewed Contract would have.
100. From an operational perspective, implementing the Block Theory would give Hydro-Québec at least two monthly supply options with the Generating Station throughout the effective term of the Renewed Contract:
- supply itself by continuing to schedule the Firm Capacity and additional capacity based on its needs, as Hydro-Québec is currently doing under the Original Contract, up to the day in a given month in which the amount of energy corresponding to the Continuous Energy is reached (**Day X**) and, as of Day X, cease supplying itself from the Generating Station until the beginning of the following month (**Continuous Option**); or
 - supply itself by rationing its supplies throughout each month in order to reach the amount of energy corresponding to the Continuous Energy at the end of the month. Such rationing would require Hydro-Québec to significantly amend its past operating patterns, and this not only with the Generating Station but also the vast majority of the plants making up its generating fleet, in order to adapt them to the daily fluctuation in its clients' power needs (**Rationed Option**).
101. A copy of the tables illustrating these two options is filed en liasse as **Exhibit P-14**.
102. As Hydro-Québec will explain below, neither of these two options is compatible with the provisions of the Renewed Contract, the mutual intent of the parties to automatically renew the Original Contract for a 25-year term upon its expiry, the long-term objectives sought by Hydro-Québec when it entered into the Contract, or with the conduct of the parties that has always been based on the continuation of Hydro-Québec's essential rights upon renewal of the Original Contract on September 1, 2016.

D. Block Theory is incompatible with the provisions of the Renewed Contract

103. As explained below, the Block Theory proposed by CF(L)Co is directly contradicted by the existence, wording and object of several provisions of the Renewed Contract.

1. Provisions recording the intent to renew the Original Contract

104. The Block Theory is based on the premise that the coming into force of the Renewed Contract will mark a significant change of the rights and obligations of the parties under the Contract.
105. However, it is obvious that such a contention contradicts the intent of the parties to automatically renew the Original Contract for a 25-year term upon its expiry, namely as of September 1, 2016, as recorded in sections 3.2 of the Original Contract, 3.1 of the Renewed Contract and in the definition of AEB contained therein.

2. Provisions recording Hydro-Québec's essential rights

106. As is the case with the rights conferred upon it under the Original Contract, Hydro-Québec enjoys two essential rights under the Renewed Contract, namely:
- the right to require CF(L)Co to make available to Hydro-Québec, at all times, all of the capacity and energy of the Generating Station, with the exception of the capacity and energy associated with the Twinco Block and 300 MW Block (sections 4.1.1 and 5.2 of the Renew Contract); and

- the right to enjoy the operational flexibility associated with operating, scheduling and planning for the Generating Station, including the right to at all times vary its requests for energy deliveries resulting from generation oscillating between the Minimum Capacity and the Firm Capacity or, where available, additional capacity (section 4.1.1 of the Renewed Contract).
107. The provisions of the Renewed Contract conferring on Hydro-Québec these two essential rights are identical to those found in the Original Contract that confer on Hydro-Québec these two same essential rights (sections 4.2.1 and 6.4 of the Original Contract), confirming the joint intent of Hydro-Québec and CF(L)Co to renew the Original Contract upon its expiry on September 1, 2016.
- a) Right to purchase “[TRANSLATION] virtually all energy generated at Churchill Falls”**
108. Hydro-Québec's essential right to require, under the Renewed Contract, that CF(L)Co at all times make available to it all capacity and energy of the Generating Station (with the exception specifically provided for by the parties, namely the capacity and energy associated with the Twinco Block d 300 MW Block), is conferred on Hydro-Québec by section 5.2 of the Renewed Contract, the wording of which is identical to section 6.4 of the Original Contract.
109. However, the Block Theory would deny Hydro-Québec its right to “[TRANSLATION] virtually all energy generated at Churchill Falls”, and this both in terms of the Continuous Option as well as the Rationed Option.
110. The Continuous Option would not allow Hydro-Québec to at all times schedule the Firm Capacity and, where applicable, the additional capacity on request, contrary to what the parties have agreed. Hydro-Québec would effectively have to cease supplying itself from the Generating Station between Day X and the beginning of the following month, a breach of its rights under section 5.2 of the Renewed Contract, especially since Hydro-Québec would be unwillingly breaching its obligation to at all times purchase and receive energy associated with the Minimum Capacity.
111. Nor would the Rationed Option allow Hydro-Québec to at all times schedule the Firm Capacity and, where applicable, the additional capacity on demand, contrary to what the parties had agreed. By its very nature, the Rationed Option would force Hydro-Québec to disrupt its past operating patterns in order to significantly reduce its supplies from the Generating Station at certain times in order to ensure adequate supply during peak consumption periods.
112. Moreover, implementation of the Block Theory proposed by CF(L)Co would lead to the additional incongruity arising from the unavailability of the Firm Capacity at all times, thus exposing CF(L)Co to payment of penalties under the Renewed Contract. Section 8 of the Renewed Contract provides, in fact, that Hydro-Québec has the right to demand the payment of penalties when CF(L)Co is unable to make the Firm Capacity available at any given time, subject to the exceptions set forth therein.
- b) Right to benefit from operational flexibility**
113. Under section 4.1.1 of the Renewed Contract, Hydro-Québec has the right to benefit from operational flexibility as regards the operations, scheduling and planning for the Generating Station, including the right to at all times vary its requests for energy deliveries resulting from generation oscillating between the Minimum Capacity and Firm Capacity or, where available, any additional capacity.
114. The nature and scope of the essential rights that Hydro-Québec enjoys under the Renewed Contract, namely to benefit from operational flexibility, are identical to those it enjoys under the Original Contract, as confirmed by the identical wording of section 4.1.1 of the Renewed Contract and in section 4.2.1 of the Original Contract.

115. As confirmed by the parties' practice since the Generating Station was commissioned, Hydro-Québec's essential right to benefit from operational flexibility implies that it can: (i) require CF(L)Co to comply with its requests for capacity and energy in accordance with the supply schedules that Hydro-Québec submits to CF(L)Co, (ii) require energy deliveries that could have the effect of at any time varying the volume of water stored in the reservoirs, which Hydro-Québec does in order to optimize the use of its generating fleet, and (iii) receiving from CF(L)Co any information pertaining to the hydrology of the reservoirs.
116. However, the essential right to benefit from operational flexibility would be robbed of its substance by the Block Theory, the effect of which would notably be to:
- allow CF(L)Co to refuse Hydro-Québec's supply schedules on the grounds that it is not provided for in the Renewed Contract, this in a context where the parties specifically provided, in sections 4.1.2 and 4.1.3, for exhaustive limits on Hydro-Québec's rights to benefit from operational flexibility; and
 - limit Hydro-Québec's right to at any time vary its request for energy delivery resulting from generation between the Minimum Capacity and Firm Capacity or, where available, additional capacity, including the capacity whose availability is guaranteed under the GWAC until expiry of the Renewed Contract.
117. The Continuous Option could force Hydro-Québec to supply itself from other plants making up its generating fleet or even from external markets as of Day X, which would force it, throughout the term of the GWAC, including the Key Period, to revise its global operating strategies and change the coordination of its entire generating fleet. For its part, the Rationed Option would force Hydro-Québec to radically change its operating patterns in order to "save" the monthly energy block corresponding to the amount of Continuous Energy in order to have enough reserve to last until the end of a given month.
118. For Hydro-Québec, the implementation of the Block Theory would therefore impose, starting September 1, 2016, a major infringement on its right to benefit from seasonal and multi-year flexibility under the Renewed Contract, in a context where it would nonetheless remain bound by the obligation to at all times purchase and receive energy associated with the Minimum Capacity.
119. A table presenting the monthly supplies of Hydro-Québec from Churchill Falls between 1976 and 2012 is filed as **Exhibit P-15**. Graphs comparing the monthly supplies that would result from implementation of the Block Theory with Hydro-Québec's monthly supplies from Churchill Falls between 1976 and 2012, on the one hand, and between 1998 (as of the full recapture of the 300 MW Block) and 2012, on the other hand, are also filed en liasse as **Exhibit P-16**.
120. Moreover, the Block Theory would force Hydro-Québec to supply itself from CF(L)Co throughout the entire term of the Renewed Contract based on annual energy amounts corresponding specifically to the AEB in force upon expiry of the Original Contract, namely on September 1, 2016. Depending on the natural inputs that occur between 2016 and 2041, this could have the effect of unduly emptying the reservoirs of the Generating Station during periods of low hydraulicity, thus placing CF(L)Co at risk of not being able to make the Continuous Energy available each month and, conversely, in periods of high hydraulicity, of making the Generating Station's reservoirs overflow, resulting in undesired spillovers.

3. Section 5.4 on available energy associated with the 300 MW Block

121. Paragraph 5.4(ii) of the Renewed Contract specifically provides that Hydro-Québec has the right to purchase from CF(L)Co any available energy associated with the 300 MW Block, namely any amount of energy associated with this block that is not used by CF(L)Co, at a price of 1.0 mill/kWh.
122. If the parties had intended to limit Hydro-Québec's rights under the Renewed Contract through the notion of Continuous Energy, they would not have provided for the possibility that Hydro-Québec

purchase monthly amounts of energy in excess of the Continuous Energy at half the price that would otherwise be payable by Hydro-Québec.

E. The Block Theory is incompatible with the long-term objectives sought by Hydro-Québec at the time of negotiating the Contract

123. The Block Theory presumes that Hydro-Québec was inclined to agree to an automatic renewal of the Original Contract for a 25-year term based on terms and conditions considerably less advantageous than those provided for in the Original Contract.
124. The terms and conditions of the Renewed Contract were negotiated concurrently with the negotiation of the Original Contract. The same Hydro-Québec representatives negotiated the Original Contract and the Renewed Contract. It is therefore impossible to dissociate the long-term objectives sought by Hydro-Québec during the negotiations of either of the contracts.
125. The Block Theory supposes that Hydro-Québec agreed to a “renewal” depriving it of the possibility of purchasing, under the Renewed Contract, virtually all of the energy generated by the Generating Station and the right to dispose thereof in accordance with the same terms and conditions as those applicable under the Original Contract. The Block Theory therefore implies that Hydro-Québec, under the Renewed Contract, waived two of its chief rights under the Original Contract.
126. The Block Theory also supposes that Hydro-Québec was inclined to assume, under the Renewed Contract, virtually all of the hydraulic risks, without inasmuch benefitting from the operational flexibility allowing it to manage these risks.

F. The Block Theory is at odds with the conduct of the parties, which always presumed that the Original Contract would be renewed until August 31, 2041

127. As explained below, the parties have taken significant actions since the implementation of the Contract that were necessarily based on the assumption that Hydro-Québec’s essential rights would be renewed for a 25-year term upon expiry of the Original Contract. These actions are in direct contradiction with the Block Theory recently put forth by CF(L)Co.

1. The Interchange Manual

128. The Interchange Manual, a copy of which is filed as **Exhibit P-17**, is a manual that describes the Generating Station’s operating procedures. Section 4.2.8 of the Contract provides that the parties should mutually agree on the terms of said manual and revise same periodically in light of the experience acquired regarding operation of the Generating Station.
129. On or about June 8, 1988, Hydro-Québec and CF(L)Co agreed on the terms and conditions of the Interchange Manual, which has since been revised six times to reflect, among other things, the making of the GWAC.
130. The Interchange Manual applies continuously until expiry of the Renewed Contract, the GWAC and the Shareholders Agreement, namely until August 31, 2041. The manual contains no provision contemplating the introduction of the Block Theory starting September 1, 2016. On the contrary, it confirms Hydro-Québec’s exclusive right, throughout the term of the Renewed Contract, to purchase the energy generated by the Generating Station and to dispose thereof in accordance with the same terms and conditions as those that apply under the Original Contract.
131. Sections 5.9 and 6.3 of the Interchange Manual provide that:

[TRANSLATION]

5.9 Guaranteed capacity and minimum capacity

[...]

During the months of October, November, December, January, February, March, April and May, a capacity of 4,382.6 MW must be available at the point of delivery at any time at Hydro-Québec's request.

In the months of June, July, August and September, a capacity of MW 4,163.5 must be available at the point of delivery at any time at Hydro-Québec's request.

[...].

6.3 Annual planning

At least four times per calendar year, the generation planning unit of Hydro-Québec establishes and sends to CF(L)Co the generation plan for the Churchill Falls generating station and the resulting reservoir regulating curve based on the most recent forecasts for the hydrological loads and inputs, as well as the maintenance programs contemplated for both systems.

The generation plan covers the twelve next months at the least, broken down into weeks. According to this plan, Hydro-Québec indicates the amounts of energy it intends to take over the course of the months in question. Once the consent of CF(L)Co is obtained, the amounts prescribed for each month constitute the monthly schedules. [...] [emphasis added]

132. These provisions of the Interchange Manual, which govern without distinction the performance of the Original Contract and the Renewed Contract, provide a concrete illustration that the parties' intent has always been that the Contract would be executed without interruption until August 31, 2041.

2. The GWAC

133. As explained above, the GWAC is a contract that was entered into on June 18, 1999 between Hydro-Québec and CF(L)Co, under which the latter undertook, in consideration for a payment that would be made in addition to the one owing to CF(L)Co under the Contract, guaranteeing Hydro-Québec the availability of an additional capacity of no more than 682 MW during the months of November through March.
134. The additional capacity corresponds to the amount of capacity obtained by subtracting the Firm Capacity from the total generating capacity of the Generating Station. Under the Contract, the additional capacity must be made available solely to Hydro-Québec, but only where CF(L)Co believes that the said capacity can be made available.
135. The GWAC guarantees Hydro-Québec the availability of an additional capacity of no more than 682 MW the months of November through March. The GWAC therefore secures Hydro-Québec's energy supplies during the period of the year where demand among Québec consumers is at its highest, more specifically the period beginning December 15 and ending February 15. The GWAC moreover defines these two months that are crucial to Hydro-Québec's supplies from the Generating Station as being the Key Period.
136. Based on its terms and conditions, the GWAC applies continuously from the date of its coming into force until August 31, 2041, without any distinction whatsoever between the Original Contract and the Renewed Contract. The terms of the GWAC do not contemplate any change whatsoever in the rights and obligations of the parties on September 1, 2016.

137. As explained above, the Block Theory supposes that Hydro-Québec should, each month throughout the term of the Renewed Contract, including the term of the GWAC and even during the Key Period, cease supplying itself from the Generating Station after having reached the monthly cap that will be established based on the notion of Continuous Energy.
138. Consequently, accepting the Block Theory would imply recognizing that Hydro-Québec chose to enter into the GWAC and by the same token agreed to pay CF(L)Co a monthly consideration for power effectively made available in addition to the price stipulated in the Contract, without knowing whether the energy associated with any capacity guaranteed under the GWAC would be made available to it at the point of delivery throughout the entire term of the Renewed Contract, namely until August 31, 2041.

G. Conclusion

139. When the Renewed Contract is interpreted as a whole, it is clear that it gives Hydro-Québec the exclusive right to purchase all the power and energy produced at the Generating Station, with the exception of the power and energy associated with the Twinco Block and the 300 MW Block, and that of disposing of it according to the same terms as those applicable under the Original Contract.
140. This interpretation of Hydro-Québec's rights under the Renewed Contract is consistent with the common intention of the parties to automatically renew the Original Contract for 25 years following its expiry, in sections 4.1.1 and 5.2 of the Renewed Contract which sets out Hydro-Québec's essential rights thereunder, and the prior conduct of the parties based on a renewal of the Original Contract until August 31, 2041.
141. Contrary to what CF(L)Co claims through the Block Theory, the notion of continuous energy has no impact on the monthly quantities of power and energy to which Hydro-Québec is entitled pursuant to the Renewed Contract. This notion relates to the terms of payment intended to provide CF(L)Co with stable and foreseeable monthly income throughout the period during which the Renewed Contract applies.
142. Accordingly, CF(L)Co is wrong to claim that Hydro-Québec's rights under the Renewed Contract are limited to the purchase of blocks of energy subject to a monthly ceiling, the quantity of which would be established based on the notion of continuous energy.

VIII. Sales by CF(L)Co over and above the 300 MW block

143. The second real difficulty Hydro-Québec would like to have resolved pursuant to this motion relates to the limits associated with CF(L)Co's right to recapture the 300 MW Block.
144. More specifically, this real difficulty involves the limits associated with CF(L)Co's right to sell to a third party, in this case NLH, quantities of power and energy produced at the Generating Station over and above the clearly defined quantities which are available to CF(L)Co during the term of the Contract.

A. The Contract terms

145. It appears from the wording of sections 6.6 of the Original Contract and 5.4 of the Renewed Contract that, contrary to the power and energy sold to Hydro-Québec pursuant to the Contract, the right of CF(L)Co to recapture the 300 MW Block is limited to the purchase of blocks of power and energy of which the quantity is topped at two levels, according to the following terms:
- a limit of 300 MW of power applicable at all times (**300 MW Limit**); and
 - a monthly energy limit (**Monthly Limit**) determined according to the following calculation:

$$300 \text{ MW} \times 24 \text{ hours} \times (\text{number of days in a given month}) \times 90\% \text{ use factor}$$

146. Since the 300 MW Block constitutes one of the two exceptions to Hydro-Québec's exclusive right to purchase "practically all the energy produced at Churchill Falls", CF(L)Co's right to recapture the 300 MW Block is limited: CF(L)Co cannot, at any time prior to the expiry of the Contract, sell to a third party, including NLH, quantities of power which exceed the 300 MW Limit or quantities of power greater than the Monthly Limit.

B. Statement of CF(L)Co's position and the real difficulty resulting therefrom

147. The quantities of power recaptured by CF(L)Co since June 2012 have frequently exceeded the 300 MW Limit, as it appears from a table identifying some of these exceedances, a copy of which is communicated as **Exhibit P-18**.
148. Hydro-Québec is certain that the 300 MW Limit is transgressed by CF(L)Co when NLH resells on the markets quantities of power and energy which exceed 300 MW. A copy of a report setting out certain quantities of power exchanged at the delivery point between NLH and certain neighbouring networks is filed as **Exhibit P-19**.
149. On July 31, 2012, Hydro-Québec's representative sitting as principal member on the Technical Committee⁴ sent an e-mail to his counterpart at CF(L)Co in which he asked for an explanation of these recurring exceedances of the 300 MW Limit.
150. Far from denying the existence of such exceedances, CF(L)Co's representative sitting as principal member on the Technical Committee attempted to justify their legality, mentioning in an e-mail sent on August 1, 2012 to his counterpart at Hydro-Québec that "any power above 300 MW is interruptible, and [...] it is not preventing Hydro-Québec from scheduling its firm capacity requirements".
151. Those emails, a copy of which is communicated together as a single document as **Exhibit P-20**, attest to CF(L)Co's claim that it is entitled to sell quantities of power which exceed the 300 MW Limit provided such sales occur, according to it, on an interruptible basis. They also suggest that CF(L)Co plans to continue to sell such quantities to NLH on a supposedly interruptible basis.
152. On November 19, 2012, Hydro-Québec sent CF(L)Co a letter, a copy of which is communicated as **Exhibit P-21**, in which it asked it to cease any recapture of quantities of power exceeding the 300 MW Limit, which it considers contrary to the Contract.
153. In a letter dated November 30, 2012, a copy of which is communicated as **Exhibit P-22**, CF(L)Co responded to Hydro-Québec that its operation of the Generating Station complied with the Contract.
154. At the beginning of the summer of 2013, after noticing new exceedances of the 300 MW Limit, Hydro-Québec asked CF(L)Co again to cease any recapture of quantities of power exceeding the 300 MW Limit, as it appears from a letter it sent for such purpose on June 25, 2013, a copy of which is communicated as **Exhibit P-23**.
155. On July 8, 2013, CF(L)Co failed to make available, at the delivery point, the entire supply program which Hydro-Québec had submitted to it in accordance with the Contract, as it appears from a supply program review notice issued by Nalcor the same day, a copy of which is communicated as **Exhibit P-24**. It appears that CF(L)Co sold NLH quantities of power exceeding the 300 MW Limit on the very same day.
156. In a letter dated July 12, 2013, a copy of which is communicated as **Exhibit P-25**, Hydro-Québec reiterated its demand that CF(L)Co refrain from recapturing quantities of power exceeding the 300 MW Limit. In that same letter, Hydro-Québec also indicated that the interruption of its supply

⁴ Like the Operating Committee, the Technical Committee is a structure whose existence stems from the *Interchange Manual* on which three representatives of Hydro-Québec and three representatives of CF(L)Co sit.

program which occurred on July 8, 2013 refuted CF(L)Co's claim set forth in emails P-20 that sales exceeding the 300 MW Limit were occurring on an interruptible basis and that, as a result, none of them breached Hydro-Québec's rights under the Contract.

157. As it appears from the foregoing, Hydro-Québec and CF(L)Co disagree on the issue of whether CF(L)Co can sell to a third party quantities of power which exceed the 300 MW Limit at any time before the expiry of the Contract, whether under the Original Contract or the Renewed Contract. The second real difficulty which Hydro-Québec wishes to have resolved by this motion stems from this disagreement.

C. Illegality of sales over and above the 300 MW Limit with respect to the Contract terms

158. CF(L)Co does not have the right at any time whatsoever during the term of the Original Contract or the Renewed Contract to sell to a third party, on either a firm basis or an allegedly interruptible bases, any quantity whatsoever of power exceeding the 300 MW Limit since any quantity of power exceeding the 300 MW Limit vests exclusively in Hydro-Québec under the Original Contract and the Renewed Contract.
159. In addition, any sale over and above the 300 MW Limit significantly breaches Hydro-Québec's right to benefit, according to the terms of the Contract, from the operational flexibility relating to the operation of the Generating Station, as well as its right to purchase any available energy associated with the 300 MW Block.

1. Hydro-Québec's right to Firm Capacity at any time and to any additional capacity

160. Based on the emails P-20, CF(L)Co's position on sales over and above the 300 MW Limit assumes that, starting with the nominal power of the generating station, there are quantities of power which have not been allocated to anyone under the Contract and which could therefore be sold to a third party on a supposedly interruptible basis.
161. However, pursuant to sections 6.4 of the Original Contract and 5.2 of the Renewed Contract, Hydro-Québec is entitled to the Firm Capacity at all times and to all additional capacity on demand. This is why the Supreme Court observed that under the Contract, Hydro-Québec is entitled to "virtually all of the hydro-electric power produced at Churchill Falls".
162. It follows that the quantities of power which are the subject of sales over and above the 300 MW Limit therefore correspond to quantities of power which, pursuant to the Contract, belong to Hydro-Québec as, depending on the case, Firm Capacity or additional capacity.
163. To repeat the terms used by the Newfoundland Supreme Court General Division in the judgement it rendered at the beginning of the 1980s, following the first dispute provoked by Newfoundland in order to disrupt the Contract equilibrium, "CF(L)Co cannot sell [...] what it does not have", i.e. it cannot legally appropriate or sell to anyone, including NLH, quantities of power and energy forming part of the "pool reserved for sale to Hydro-Québec". A copy of that judgement is communicated as **Exhibit P-26**.
164. CF(L)Co has already acknowledged that sales over and above the 300 MW Limit were prohibited, as it was power forming part of the "pool reserved for sale to Hydro-Québec". On March 4, 1988, the President of CF(L)Co sent a letter to the General Secretary of Hydro-Québec in which he asked Hydro-Québec not to consider that short exceedances of the 300 MW Limit, which had occurred inadvertently at various times since November 1987, constituted breaches of Hydro-Québec's rights under the Contract. A copy of that letter as well as Hydro-Québec's response to CF(L)Co dated August 8, 1988 is communicated as **Exhibits P-27** and **P-28**.

2. The right to the benefit of operational flexibility

- 165. According to emails P-20, CF(L)Co's position with respect to sales over and above the 300 MW Limit is based on the premise that CF(L)Co is entitled to sell certain quantities of power to NLH that it made available to Hydro-Québec but that Hydro-Québec did not program.
- 166. However, any sale over and above the 300 MW Limit infringes Hydro-Québec's fundamental right to benefit from operational flexibility relating to the operation, programming and planning of the Generating Station, which is conferred on it by sections 4.2.1 of the Original Contract and 4.1.1 of the Renewed Contract.
- 167. This is the case because Hydro-Québec's choice, at various times, not to program quantities of Firm Capacity or additional capacity which CF(L)Co made available to it at the delivery point constitutes a key attribute of operational flexibility.

3. The right to purchase all available energy associated with the 300 MW Block

- 168. Sales over and above the 300 MW Limit also contravene sections 6.6(ii) of the Original Contract and 5.4(ii) of the Renewed Contract, which give Hydro-Québec the right to purchase all available energy associated with the 300 MW Block at a price of 1.0 mill/kWh.
- 169. If the parties had actually intended to allow CF(L)Co to exceed the 300 MW Limit at any time during the term of the Contract, they would not have provided that any available energy associated with the 300 MW Block would return as of right to Hydro-Québec. On the contrary, CF(L)Co would have minimally ensured that the Contract set forth its right to recapture, at a future time, any available energy associated with the 300 MW Block.
- 170. Thus, the fact that the Contract does not allow CF(L)Co to "accumulate" or "recapture" the available quantities of energy associated with the 300 MW Block confirms not only the exceptional nature of the 300 MW Block in terms of Hydro-Québec's right to purchase "practically all the energy produced at Churchill Falls", but also confirms that any sale over and above the 300 MW Limit is not permitted given the clear rights Hydro-Québec enjoys under the Original Contract and the Renewed Contract.

D. Sales over and above the 300 MW Limit constitute an actual withholding of power and energy not authorized under the Contract

- 171. As set forth above, CF(L)Co is attempting to justify the legality of the sales to NLH which exceed the 300 MW Limit by claiming that these sales occur on an interruptible basis.
- 172. Whether such sales are on a firm or supposedly interruptible basis is irrelevant since CF(L)Co does not have the right, at any time whatsoever during the term of the Original Contract or the Renewed Contract, to sell to a third party, including NLH, any quantity of power exceeding the 300 MW Limit.
- 173. In any event, experience and the realities specific to the market rules with which Hydro-Québec's transmission network must comply show that there cannot be any sale of power and energy between CF(L)Co and NLH on a basis which is truly interruptible. Any sale between these two entities is therefore firm and constitutes in fact "withholding" within the meaning of sections 6.6 of the Original Contract and 5.4 of the Renewed Contract, which is prohibited as being contrary to the terms of the Original Contract and the Renewed Contract prescribing the 300 MW Limit.

E. Sales over and above the 300 MW Limit are not provided for in any of the contracts entered into in accordance with CF(L)Co's right to recapture the 300 MW Block

174. Since the Contract took effect, Hydro-Québec, CF(L)Co and NLH have entered into various contracts relating to the quantities of power and energy associated with the 300 MW Block.
175. All these contracts are based on the common understanding of Hydro-Québec and CF(L)Co that their terms must be strictly in keeping with the limits of CF(L)Co's right to recapture the 300 MW Block. None of these contracts is compatible with the idea that CF(L)Co is entitled to sell to a third party, even on an allegedly interruptible basis, any quantity of power over and above the 300 MW Limit.

1. The contracts entered into between CF(L)Co and NLH

176. On September 1, 1976, CF(L)Co and NLH entered into a contract to expire in 2041 pursuant to which CF(L)Co agreed to sell to NLH part of the 300 MW Block. This contract, a copy of which is communicated as **Exhibit P-29**, only covered part of the 300 MW Block since the region of Labrador, which at the time was the market for which such power and energy were intended, had needs which went beyond the 300 MW Block.
177. On March 9, 1998, Hydro-Québec waived, without financial compensation, the three-year prior notice to which it was entitled pursuant to sections 6.6 of the Original Contract and 5.4 of the Renewed Contract in the case of the recapture by CF(L)Co of any quantity of power related to the 300 MW Block, which allow CF(L)Co to immediately recapture all the said 300 MW Block.
178. On March 9, 1998, CF(L)Co and NLH entered into a contract, a copy of which is communicated as **Exhibit P-30**, pursuant to which CF(L)Co agreed to resell to NLH the entire power and energy stemming from the recapture of the 300 MW Block made through the waiver by Hydro-Québec of the prior notice mentioned above (Recall PSA). The Recall PSA, which replaced contract P-29, will expire at the same time as the Renewed Contract, i.e. on August 31, 2041.
179. Subject to sections 5.01 relating to the Twingo Block, it appears from contract P-29 and the Recall PSA that the parties never envisaged CF(L)Co being able to sell to NLH, at any time before the expiry of the Renewed Contract, any quantity whatsoever of power exceeding the 300 MW Limit.
180. This is confirmed by section 3.01 of the Recall PSA, which reads as follows:

3.01 The Amount of Power on Order is 300,000 kilowatts and the Load Factor is ninety percent (90%). The aggregate amount is not to exceed 2.362 billion kilowatthours in a year.

181. CF(L)Co thereby confirms that the only quantities of power and energy it can sell to NLH during the term of the Recall PSA are, subject to the exception stipulated in section 5.01 thereof, the quantities associated with the 300 MW Block, the whole in accordance with sections 6.6 of the Original Contract and 5.4 of the Renewed Contract.

2. The Purchase and Sale Agreements entered into between Hydro-Québec and NLH

182. On March 9, 1998, NLH and Hydro-Québec entered into a contract entitled "Purchase and Sale Agreement" (**PSA 1998**) for the purpose of the sale to Hydro-Québec, until March 8, 2001, of the power and energy associated with the 300 MW Block which would not be used by NLH in the Labrador region. A copy of the PSA 1998 is communicated as **Exhibit P-31**.
183. When it expired, the PSA 1998 was replaced by a contract entitled "Amended and Restated Purchase and Sale Agreement" dated February 19, 2001 (**PSA 2001**), which was also replaced when it expired by a contract entitled "Purchase and Sale Agreement" dated March 31, 2004

which expired on March 31, 2009 (**PSA 2004**). A copy of those two PSAs is communicated as **Exhibits P-32** and **P-33**.

184. The introductory section of each of these three PSAs, in which CF(L)Co intervened, contains a “whereas” acknowledging the different limits related to CF(L)Co’s rights to recapture the 300 MW Block under the Contract. For example, the PSA 2004 provides that:

WHEREAS the Intervenant has recaptured a quantity of power and energy in the amount of 300 MW or 2.362 TWh per year, being the maximum quantity of power and energy available for recapture by the Intervenant pursuant to Section 6.6 of the Power Contract, dated March 12, 1969, signed by HQ and the Intervenant (the “Contract”).

185. Accordingly, the three PSAs contain a recognition by CF(L)Co that sales of power and energy to NLH must be in keeping with the limits associated with CF(L)Co’s right to recapture the 300 MW Block under the Contract.

F. Conclusion

186. The second real difficulty which is the subject of this action relates to the limits associated with CF(L)Co’s right to recapture the 300 MW Block, under both the Original Contract and the Renewed Contract. As alleged, since June 2012 CF(L)Co has been recapturing power beyond the limits allowed by the Contract, and it claims it can do so.
187. As set forth above, any sale exceeding the limits associated with CF(L)Co’s right to recapture the 300 MW Block under the Contract breaches Hydro-Québec’s exclusive right to purchase “practically all the energy produced at Churchill Falls” until August 31, 2041. The object of such sales is property belonging to another, in this case Hydro-Québec.
188. In addition, sales over and above the 300 MW Limit breach Hydro-Québec’s fundamental right to benefit from operational flexibility under the Contract, contravene the spirit of sections 6.6(ii) of the Original Contract and 5.4(ii) of the Renewed Contract and are not provided for under the agreements entered into in accordance with CF(L)Co’s right to recapture the 300 MW Block.
189. Accordingly, CF(L)Co wrongly claims that it is entitled, at any time prior to the expiry of the Contract, on August 31, 2041, to sell to a third party, including NLH, any quantity of power exceeding the 300 MW Limit, regardless whether such sales are, according to it, on a supposedly interruptible basis.