

The author argues that the federal government should empower the National Energy Board to regulate transmission access on provincial electricity systems including the authority to order a provincial utility to construct new facilities, for the purpose of creating a truly national electricity system and facilitating interprovincial and international electricity sales. First, because Canada needs a national regulator who can address the creeping Americanization of the Canadian electricity sector arising from the U.S. legislation and decisions of the Federal Energy Regulatory Commission. Second, because Canada needs a national body to facilitate the movement of non-greenhouse gas sources of electricity to markets where it can displace fossil-fired electricity; and, third, because Canada needs a neutral regulator to decide transmission-access disputes between utilities in different provinces. In showing why the federal government can do this, the author analyzes the constitutional provisions and jurisprudence on federal and provincial jurisdiction over electricity. He points out that the recently discussed Quebec-New Brunswick deal provides a perfect rationale for conferring this jurisdiction on the National Energy Board.

L'auteur allègue que le gouvernement fédéral devrait donner à l'Office national de l'énergie le pouvoir de réglementer l'accès à la transmission sur les réseaux électriques provinciaux, notamment le pouvoir d'ordonner à une société publique provinciale de construire de nouvelles installations afin de mettre en place un réseau électrique véritablement national et de faciliter les ventes d'électricité interprovinciales et internationales. Il avance trois motifs. Premièrement, le Canada a besoin d'une autorité nationale de réglementation pour contrer l'américanisation insidieuse du secteur canadien de l'énergie qui résulte des lois américaines et des décisions de la Federal Energy Regulatory Commission des États-Unis. Deuxièmement, le Canada a besoin d'un organisme national pour faciliter le transport d'électricité propre (provenant de sources qui ne produisent pas de gaz à effet de serre) jusqu'aux marchés où elle peut remplacer l'électricité produite à partir de combustibles fossiles. Enfin, le Canada a besoin d'une autorité de réglementation impartiale qui tranchera les différends entre les services publics des diverses provinces. En expliquant pourquoi le gouvernement fédéral peut donner ce pouvoir à l'Office national de l'énergie, l'auteur analyse les dispositions constitutionnelles et la jurisprudence sur les compétences fédérales et provinciales en matière d'électricité. Il souligne que la transaction entre le Québec et le Nouveau-Brunswick dont il a récemment été question constitue une justification idéale pour accorder ce pouvoir à l'Office national de l'énergie.

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Introduction

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Introduction

Three interrelated issues facing Canada's electricity sector require timely federal leadership and action. First, there is the creeping Americanization of Canada's electricity systems which has taken place since 1995. Second, there is the integration of the North American electricity grid and the need to transmit new non-GHG (greenhouse gas) sources of electricity generation, including hydro, tidal and wind power, across provincial and international borders to markets burning fossil fuels. Third, there is the potential of deals like the recently cancelled Quebec-New Brunswick deal¹ which would have allowed Hydro-Québec to effectively control the electricity interfaces between Canada and the United States in eastern Canada.

Instead of ten separate but ineffective provincial responses to these challenges, Canada needs to create a national electricity regulator which can administer the national electricity grid, develop a national electricity policy and resolve transmission access issues.

I. *Historical and legislative background*

Canada has no national electricity grid, as such. Each province operates its own electricity system, and with the exception of Alberta,² Nova Scotia³ and Prince Edward Island,⁴ the principal utilities are owned by provincial

1. Shawn McCarthy & Rhéal Séguin, "N.B., Quebec's ambitions for power fizzle out" *The Globe and Mail* (25 March 2010).

2. In Alberta, the electricity utilities include ATCO Electric Ltd., EPCOR Energy and TransAlta Utilities.

3. In Nova Scotia, Nova Scotia Power owned by EMERA Inc. provides about 97% of all electricity and transmission.

4. In P.E.I., Maritime Electric Limited owned by Fortis Inc. provides virtually all of the electricity and transmission. It purchases some 52 MW of wind generation from private sector wind farms.

governments.⁵ In every province, electricity utilities are regulated by a provincially-constituted regulatory authority.⁶

Provincial governments have considered their electricity systems to be fiefs to be exploited for provincial revenue, provincial economic development and occasional patronage purposes. Since 1961, they have resisted federal attempts to create multi-provincial or national electricity organizations in Canada.⁷ The best example of a provincial claim of complete control of its electricity system is, arguably, Premier Jean Lesage's 1965 statement about Quebec's condition for co-operation with Newfoundland in developing Labrador's Churchill Falls electricity potential:

[T]he primary and absolute condition is that all energy that will enter Quebec becomes property of Hydro-Québec.

That condition ... has always been the same, and we will never negotiate from another base. We will never permit, under any condition, others to build a transmission line on Quebec territory, or let others transport the energy produced at Churchill Falls whatever the destination of that energy, whether it be the United States or the other provinces.⁸

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5. Newfoundland and Labrador: Newfoundland and Labrador Hydro, owned by Nalcor, the provincially-owned energy company.
New Brunswick: The publicly-owned NB Power Group, consisting of Holdco, Genco, Nuclearco, Transco and Disco, all separate corporations.
Quebec: Publicly-owned Hydro-Québec divided into Hydro-Québec Production, Hydro-Québec TransEnergie and Hydro-Québec Distribution, all separate corporations.
Ontario: Publicly-owned Ontario Power Generation and Hydro One Networks, separate corporations. In addition, Ontario has other generators including Bruce Power Inc., Algonquin Power, Epcor Power, Enwave Energy Corporation, TransCanada Energy and several municipal distribution with their own generation and several small wind farms and cogeneration projects.
Manitoba: Publicly-owned Manitoba Hydro, still a vertically-integrated utility.
Saskatchewan: Publicly-owned Saskatchewan Power, still a vertically-integrated utility.
British Columbia: Publicly-owned BC Hydro, BC Transmission Corporation and British Columbia Power Exchange, separate corporations.
 6. Newfoundland and Labrador – Board of Commissioners of Public Utilities
Prince Edward Island – Island Regulatory and Appeals Commission
Nova Scotia – Nova Scotia Utility and Review Board
New Brunswick – Energy and Utilities Board
Quebec – Régie de l'énergie
Ontario – Ontario Energy Board
Manitoba – Public Utilities Board
Saskatchewan – Rate Review Panel
Alberta – Alberta Utilities Commission
British Columbia – British Columbia Utilities Commission
 7. This story is told in Karl Froschauer, *White Gold, Hydroelectric Power in Canada* (Vancouver: UBC Press, 1999) at 22-54.
 8. *Ibid.* at 37, quoted from *Le Devoir*.

This position, along with similar claims to provincial autonomy from Ontario when it embarked on its nuclear program, have likely discouraged federal thoughts about trying to regulate the electricity sector more closely in the Canadian public interest and this history will be a challenge for the recommendations in this paper.

The *National Energy Board Act*⁹ is the only federal legislation that regulates electricity utilities. Part III.1 of the Act prescribes the process for obtaining approval of international power lines and allows provincial approval processes to apply to the construction of the portion of the international power line lying within the province. It also allows a utility to elect to have the whole international power line approved by the NEB.¹⁰

Only one section deals with interprovincial power lines. Section 58.4, enacted in 1990, states:

Interprovincial Power Lines

58.4 (1) The Governor in Council may make orders

- (a) designating an interprovincial power line as an interprovincial power line that is to be constructed and operated under and in accordance with a certificate issued under section 58.16; or
 - (b) specifying considerations to which the Board shall have regard in deciding whether to issue such a certificate.
- (2) No person shall construct or operate any section or part of an interprovincial power line in respect of which an order made under subsection (1) is in force except under and in accordance with a certificate issued under section 58.16.¹¹

Section 58.4 has never been used. It requires the federal cabinet to make an order-in-council before the NEB can act. The federal cabinet can legally make an order-in-council with respect to any new interprovincial interconnection and the NEB would then have jurisdiction to grant or deny approval.

Part VI of the NEB Act regulates electricity exports from Canada, and Part VII provides for NEB regulation of the interprovincial oil and gas

9. R.S.C. 1985, c. N-7, as amended [*NEB Act*].

10. National Energy Board.

11. *Supra* note 9 at s. 58.4.

trade should the federal cabinet opt to authorize it. There is, however, no similar mechanism to authorize the NEB to regulate the interprovincial electricity trade. Nor are there any provisions authorizing the NEB to regulate rates or tariffs for interprovincial or international power lines even though Part IV of the *NEB Act* authorizes it to regulate those very matters for natural gas and oil pipelines. Instead, rates and tariffs on interprovincial and international power lines are regulated by the ten separate provincial regulatory authorities.¹²

II. *Americanization*

At the present time, all Canadian electricity utilities follow rules of the United States, Federal Energy Regulatory Commission (FERC).¹³ Why is that?

Canadian utilities have always wanted to export surplus electricity to markets in the United States. The United States, however, has had a much different electrification history than we have had in Canada. Where Canadian utilities have grown into large publicly-owned, province-wide entities, United States utilities were broken up into smaller investor-owned companies.¹⁴ In the 1970s, Congress deemed this structure to be inefficient and to have resulted in electricity prices that were too high for United States electricity consumers.

In 1978, the United States Congress enacted the *Public Utilities Regulatory Policies Act* (PURPA).¹⁵ It intended PURPA to encourage more energy-efficient and environmentally-friendly energy production, and to lower electricity prices. For the first time, electricity utilities in the United States were required to buy non-self-generated electricity. Immediately, transmission access issues arose regarding interstate transmission systems when non-utility generators wished to use a utility's transmission system to sell to customers in that utility's or another utility's service area. Section 205(b) of the United States *Federal Power Act* (FPA)¹⁶ prohibited a utility from subjecting any person to any undue disadvantage in respect of transmission, but did not provide a mechanism FERC could use to overcome such disadvantage.

In 1992, Congress remedied this situation when it enacted the *Energy Policy Act of 1992*.¹⁷ Title VII – Electricity added sections 211 to 213 to

12. *Supra* note 9.

13. Created by the *Department of Energy Organization Act, 1977*, Pub. L. No. 95-91, 91 Stat. 569.

14. For how this happened, see: U.S. Energy Information Administration, *Public Utilities Holding Company Act of 1935: 1935-1992* (January, 1993).

15. Pub. L. No. 95-617, 92 Stat. 3117 (1978).

16. U.S.C. tit. 16 § 824d (1935).

17. Pub. L. No. 102-486, 106 Stat. 2779.

the FPA which gave FERC the authority to grant third parties access to a utility's transmission system in order to deliver electricity to loads either within that utility's own service area or in that of another utility.

Section 211 was wide enough to apply to Canadian utilities who wanted access on interstate transmission lines. In 1994, however, FERC staff began to complain about Canadian utilities (at that time all vertically integrated) obtaining access to United States transmission lines when they did not grant reciprocal rights to other electricity shippers in Canada.¹⁸ On April 24, 1996, FERC issued Order No. 888¹⁹ requiring all public utilities that owned, controlled or operated facilities used for transmitting electric energy in interstate commerce to have on file Open Access Transmission Tariffs (OATTs) that contained minimum terms and conditions of non-discriminatory service. FERC said that its goal was to remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to American electricity consumers.

Meanwhile, despite the hostile FERC staff, Canadian electricity utilities had been happily selling electricity into the United States electricity market. Then on 23 October 1995, while the Order No. 888 rule-making was in play, FERC surprised everyone with *Energy Alliance Partnership*²⁰

Energy Alliance Partnership was owned one-third by Hydro-Québec Energy Services (U.S.) Inc. It had filed an application with FERC under section 205 of the FPA for authorization to act as an electricity marketer at market-based rates. Hydro-Québec Energy Services (U.S.) Inc. was wholly-owned by Services d'Énergie H.Q. Inc., in turn wholly-owned by Hydro-Québec, which, as FERC noted, was wholly-owned by the government of Quebec. Energy Alliance argued that it did not intend to act as Hydro-Québec's agent nor to market Hydro-Québec electricity, and that executives and employees would be independent of Hydro-Québec, dealing with it only at arm's length. It argued that if Hydro-Québec sold electricity to Energy Alliance, the transmission, interconnection, and other services necessary to deliver it through Canada into the United States would be provided through negotiated transmission agreements drawn up in accordance with Canadian law. FERC, however, found that Hydro-

18. Record of the author's 1994 telephone discussion with Mr. Bud Ford, then a lawyer with Ontario Hydro.

19. FERC Orders No. 888, Docket No. RM 95-8-000 and RM 94-7-001 (March 1996). Since 1946, s. 553 of the *Administrative Procedure Act*, U.S.C., c. 5, requires all United States government agencies, including FERC, to publish a public notice of a new proposed regulation in the United States Federal Register, hold a proceeding respecting the proposed new rule and give interested persons an opportunity to be heard about it. The period between publication and going into force must be at least thirty days. FERC Orders contain the text of the new regulations.

20. 73 FERC 61019 (1995).

Québec exercised too much market power and dismissed the application, saying:

We disagree that Hydro-Québec's facilities are irrelevant to our analysis. The fact that these transmission facilities are located in Canada does not diminish the possibility that Energy Alliance's competitors may require transmission service from Hydro-Québec to reach United States markets. The Commission's concern is not transmission service to serve Canadian loads – it is transmission to serve United States loads. Entities may wish to locate in Canada, but sell to United States utilities, or entities may wish to market Canadian power in the United States, and they may require Hydro Quebec's transmission service in order to do so.²¹

FERC thereby applied domestic United States law to a Canadian utility because of the way it was organized in Canada!

About six weeks after Order No. 888, FERC approved TransAlta Energy Corporation's²² application under section 205 of the *Federal Power Act* to sell electricity in the United States at market-based rates. FERC noted that the electricity utility business in Alberta had been restructured in 1995 and that there was an Alberta Independent System Operator which addressed any market power concerns. On 15 January 1997, FERC in *BC Power Exchange Corporation*²³ rejected Powerex's application under section 205 to sell electricity at market-based rates because of BC Hydro's market power as a vertically-integrated electricity utility. On 31 March 1997, FERC in *Ontario Hydro Interconnected*²⁴ rejected Ontario Hydro's application under section 205 to sell electricity at market-based rates because of Ontario Hydro's transmission market power. On 9 May 1997, in *H.Q. Energy Services (U.S.) Inc.*,²⁵ FERC again rejected a Hydro-Québec subsidiary's request under section 205 to sell electricity at market-based rates, again because of concerns about Hydro-Québec's generation market power.

These decisions sent a clear message to all Canadian electricity utilities: if they wanted to sell electricity in the United States, they had to organize within Canada in a way that removed their generation and transmission "market power." These decisions were made against Canadian-owned companies, based on the way they were organized in Canada. That form of organization, the vertically-integrated electricity utility, was what had allowed the economies of scale and efficiencies, resulting in Canada's

21. *Ibid.* at 61,031.

22. FERC Documents, Docket No. ER 96-1316-000.

23. FERC Documents, Docket No. ER 97-556-000.

24. FERC Documents, Docket No. ER 97-852-000.

25. FERC Documents, Docket No. ER 97-851-000.

low-cost electricity. They thus hit at Canada's competitive advantage in electricity.

So in 1997, Hydro-Québec decided to cede complete control of its transmission system, and obtained provincial approval of an OATT²⁶ in the form prescribed by FERC.²⁷ FERC subsequently agreed that H.Q. Energy had satisfied "the Commission's standards for MBR authority."²⁸ In 1997, B.C. Hydro too issued an OATT identical in all material respects to the FERC pro forma transmission tariff. FERC therefore granted Powerex's renewed application under section 205 to sell electricity in the United States at market-based rates.²⁹ In 1998, Ontario reorganized its electricity system to conform to FERC norms in the *Electricity Act, 1998*³⁰ and the *Ontario Energy Board Act, 1998*.³¹ FERC then found that Ontario Energy Trading International Corp., a subsidiary of Ontario Power Generation, satisfied the Commission's standards for market-based rates authority.³²

Since 1998, all other Canadian electricity utilities have filed and, where applicable, obtained approval of OATTs.³³ In 1999, FERC backed off slightly during its Regional Transmission Organization proceedings when it was proposing rules that seemed to consider Canada as part of the United States. Natural Resources Canada, through the Canadian Embassy, reminded FERC of Canadian sovereignty³⁴ and FERC modified

26. O.C. 276-97, G.O.Q. 1997.II.971.

27. One wonders what Jean Lesage would have thought.

28. FERC Documents, Docket No. ER 97-851-015.

29. FERC Documents, Docket No. EL 98-64-000.

30. S.O. 1998, c. 15, Sched. A.

31. S.O. 1998, c. 15, Sched. B.

32. E.g., Docket No. ER 08-580-000.

33. In 1997, Manitoba Hydro published an OATT but never submitted it for approval to either the Manitoba Public Utilities Board or the NEB. The Public Utilities Board has directed Manitoba Hydro to file its OATT for approval but to date Manitoba Hydro has demurred. Manitoba's OATT is almost identical to the FERC Pro Forma OATT. In 2001, SaskPower published an OATT but it was not subject to any third party approval. It is almost identical to the FERC Pro Forma OATT. On June 21, 2002, NB Power requested provincial approval of its OATT. On March 13, 2003, it was approved by the New Brunswick Board of Public Utility Commissioners to go into effect on September 30, 2003. It is almost identical to the FERC Pro Forma OATT. On May 12, 2004, Nova Scotia Power Inc. requested provincial approval of its OATT. On May 9, 2005, the Nova Scotia Utilities and Review Board approved it. It is almost identical to FERC Pro Forma OATT. On October 3, 2007, Maritime Electric filed an OATT. On February 26, 2009, it was approved by The Island Regulatory and Appeals Commission (Order UE09-01). It is almost identical to FERC Pro Forma OATT.

34. Department of Natural Resources Canada, *Commentary on The Notice of Proposed Rulemaking—Regional Transmission Organizations* (19 August 1999) in letter from Raymond Chrétien, Ambassador to the United States to James Hoecker, Chairman of the FERC (18 August 1999) in FERC Docket No. RM 99-2-000.

its rules.³⁵ FERC rules subsequent to 1999, however, have been followed by provincial utilities.³⁶

Commenting on these developments in 2001, J. Owen Saunders made the following observations:

The more general point is that the FERC, through its rulings on reciprocity of access, has had an important influence on the structuring of the Canadian electricity industry (for example, in the restructuring of Hydro-Québec in response to the above-noted litigation). Moreover, it has exercised this influence while all the time insisting that it was deferring to the jurisdiction of Canadian regulators in Canada. What the FERC was essentially doing in its rulings, however, was overruling the principle of national treatment set out in the NAFTA (and the GATT) and replacing it with the principle of reciprocity. Put differently, it was replacing the principle of free trade with the principle of fair trade, with FERC as the adjudicator of what is fair.

...

A number of solutions exist to deal with the growing potential for transnational regulatory disputes. An international treaty, while holding some attraction owing to the legal certainty it would introduce, may for various reasons not prove possible. However, there are other options which do hold some potential. One such option would be the conclusion of a non-binding Memorandum of Understanding (MOU) between the United States and Canada that would set in place some process for at least recognizing the international character of some energy regulatory actions.³⁷

We will return to this suggestion of a Canada-U.S. MOU below.

III. *Integration and the need to move to non-GHG sources of electricity*³⁸

Despite being administered by ten separate entities, Canadian electricity utilities are physically interconnected with each other and with adjoining U.S. states and are part of the integrated North American electricity grid. An NEB vice-chair has noted the increasing interconnectedness of the

35. FERC Order 2000, December 20, 1999, 18 CFR 35.28.

36. E.g. FERC Order 2004, November 25, 2003 and FERC Order 717, May 29, 2007 re Standards of Conduct.

37. J. Owen Saunders, "North American Deregulation of Electricity: Sharing Regulatory Sovereignty" (2001) 36 *Tex. Int'l L.J.* 167 at 171-173.

38. I am indebted to William K. (Bill) Marshall, P.Eng. with whom I had the pleasure of working when he was at NB Power, for inspiring and assisting with this section.

North American grid and the need for strong reliable practices.³⁹ This need was accentuated by the 14 August 2003 North American blackout.⁴⁰

As a result of this blackout and the Recommendations of the U.S.-Canada Power System Outage Task Force, Congress added section 215 to the United States *FPA* creating an Electric Reliability Organization and directing FERC to choose one.⁴¹ FERC chose NERC Corp., a wholly owned subsidiary of the North American Reliability Council.⁴² In Canada, the NEB and every province subsequently chose NERC Corp. as their reliability organization as well.⁴³

Because of the interconnections between provinces and with the United States operating on the same reliability standards, Canada has one physically integrated electricity grid. But, again, this system is regulated by ten different regulatory authorities, each pursuing its own rather than the national interest.

At the same time, the pressure by utilities in one province to transmit electricity across the provincial boundaries of other provinces has never been greater. P.E.I., New Brunswick and Nova Scotia want to transmit electricity from their wind farms to displace fossil fuel in markets outside their provinces. Nova Scotia also wants to transmit tidal electricity some day. Newfoundland and Labrador want to be able to transmit hydro electricity from the Lower Churchill in Labrador to markets elsewhere in Canada or the United States. If we truly believe in the need to confront climate change with available non-GHG electricity, then it is indisputably in the Canadian public interest that these interprovincial transfers be facilitated and allowed to take place.

39. Sheila Leggett, "Interprovincial and International Electricity Transmission" (Presented to the Canadian Nuclear Society, Calgary, 3 June 2009) [unpublished].

40. U.S.-Canada Power System Outage Task Force, *Final Report on the Implementation of the Task Force Recommendations* (Natural Resources Canada, U.S. Department of Energy, September 2006).

41. *Energy Policy Act of 2005* Pub. L. No. 109-58, [2005] U.S.C. C.A.N. 119 Stat. 594, s. 1211(a).

42. In proceeding Docket No. RR06-1-000.

43. The MOUs signed with NERC Corp. by Canadian entities may be summarized as follows:

NEB – MOU signed September 14, 2006

Nova Scotia – MOU signed December 22, 2006

New Brunswick – MOU signed October 3, 2008

Quebec – MOU signed May 8, 2009

Ontario – By legislation on May 14, 2008

Manitoba – By legislation in June, 2009

Saskatchewan – Undated MOU

Alberta – By regulation

British Columbia – By legislation on May 1, 2008

IV. *The Quebec-New Brunswick deal*

On 29 October 2009 Quebec and New Brunswick took Canadians by surprise by announcing that they had been exploring opportunities for co-operation in the areas of accessibility, transmission and market opportunities and had reached agreement under which Hydro-Québec would acquire substantially all of the assets of NB Power, except for the Belledune and Coleson Cove generation units, and most importantly, NB Power's transmission facilities. The independent New Brunswick System Operator (NBSO) who ensures non-discriminatory transmission access would be eliminated and its functions taken over by Hydro-Québec. In return, Hydro-Québec would pay \$4.75 billion, an amount sufficient to discharge NB Power's debt. Electricity rates would be fixed for five years for residential and commercial classes and reduced for large industry, and tolling agreements would be entered into with the retained generation facilities.⁴⁴ Due to public opposition to this deal within New Brunswick, the agreement was modified to allow Hydro-Québec to acquire NB Power's generation assets with their firm transmission rights in return for \$3.2 billion. Now NB Power would retain ownership of the distribution business and maintain its rate reductions. Transmission would remain in NB Power's hands with its operation under the independent but probably Finlandized NBSO. Hydro-Québec would act as a wholesaler for NB Power which will remain but in a much diminished form.⁴⁵ On 24 March, 2010, Premier Graham announced that the deal had been cancelled due to disagreement about additional demands from Quebec.⁴⁶

While the deal would have been advantageous for New Brunswick⁴⁷ and Quebec, it would have meant that Hydro-Québec would have effectively controlled all the electricity interfaces between provinces in eastern Canada and between the northeast United States and eastern Canada. This was deeply disquieting to the government of Newfoundland and Labrador⁴⁸ whose ability to sell electricity from the Lower Churchill in Labrador depends upon transmission access through either Quebec or New Brunswick and has had a historically poisonous relationship with

44. *Memorandum of Understanding between the Government of New Brunswick and the Government of Quebec* (29 October 2009).

45. "Quebec's NB Power deal cut to \$3.2B" *CBC News* (20 January 2010), online: [CBC News <http://www.cbc.ca/canada/new-brunswick/story/2010/01/20/nb-power-hydro-quebec-deal.html>](http://www.cbc.ca/canada/new-brunswick/story/2010/01/20/nb-power-hydro-quebec-deal.html).

46. "Quebec balked at NB Power sale costs" *CBC News* (24 March 2010), online: [CBC News <http://www.cbc.ca/canada/new-brunswick/story/2010/03/24/nb-nbpower-graham-1027.html>](http://www.cbc.ca/canada/new-brunswick/story/2010/03/24/nb-nbpower-graham-1027.html).

47. New Brunswick and Quebec, "Final Report of the Advisory Panel on the Proposed New Brunswick-Quebec Electricity Transaction" (1 February 2010) at 6.

48. *Ibid.* at 15.

Quebec and Hydro-Québec as a result of Quebec's position on Churchill Falls electricity since the 1960s.⁴⁹

It is unlikely that Canada has heard the last of this deal because the stakes for Quebec are too high for it to give up completely.

At the time of writing, Nalcor, Newfoundland and Labrador's public energy company, is in a dispute with Hydro-Québec respecting electricity from the proposed Lower Churchill development. Because of the dysfunctional relationship between Quebec and Newfoundland and Labrador,⁵⁰ this current dispute will have unpleasant national dimensions. Appearing before Quebec's Régie de l'Énergie ("Régie"), Nalcor argued that Hydro-Québec was making it difficult for Nalcor to get transmission access on Hydro-Québec's system. As alluded to earlier, Nalcor wants to build a \$6.5-billion hydroelectric project called Lower Churchill, downstream from Churchill Falls, and sell the bulk of the electricity produced there to markets in the United States Northeast, Ontario and New Brunswick. It wants to secure access, for export purposes, on Hydro-Québec's and NB Power's transmission systems, under their Open Access Transmission Tariffs.

If the Hydro-Québec and NB Power agreement were to come into operation, Nalcor and electricity producers from other provinces would be competing with an interprovincial Hydro-Québec and what could be described as an adjunct NB Power.

V. *Constitutional issues and jurisprudence*

An integrated electricity grid or the combined Hydro-Québec and NB Power electricity systems would fall under federal jurisdiction. This is because of two provisions of the *Constitution Act, 1867*: first, the combined effect of sections 92(10)(a) and 91(29); and second, section 91(2).

At first glance, electricity systems appear to be local works and undertakings within provincial jurisdiction under section 92(10) of the *Constitution Act, 1867*. It states:

49. See: For example, Bertrand Marotte, "Nalcor's last-ditch effort for a better hydro deal" *Globe and Mail* (24 February 2010) 39.

50. See: *R. in Right of Newfoundland v. Commission Hydro-Électrique de Québec*, [1982] 2 S.C.R. 79; *Reference Re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297; *Hydro-Québec v. Churchill Falls (Labrador) Corp.*, [1988] 1 S.C.R. 1087.

Exclusive Powers of Provincial Legislatures

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

10. Local Works and Undertakings other than such as are of the following classes: -

- a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
- b. Lines of Steam Ships between the Province and any British or Foreign Country:
- c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.⁵¹

Section 92(10)(a), however, excludes from provincial jurisdiction “Lines of Steam or other Ships, Railways, Canals, and other Works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.” Section 92(10)(c) also excludes nuclear facilities in Ontario, Quebec and New Brunswick since they have been declared to be works for the general advantage of Canada.⁵² These excepted facilities then fall under exclusive federal jurisdiction under section 91(29) of the *Constitution Act, 1867*. It states:

VI. DISTRIBUTION OF LEGISLATIVE POWERS

Power of the Parliament

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the

51. *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3.

52. *Nuclear Energy Act*, S.C. c. A-16, s. 18; *Ontario Hydro* infra note 78 at 362-363.

exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,-

1.

29. Such Classes of Subjects are as expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Any matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.⁵³

Section 91(29) and the closing words of section 91 establish that the exceptions to provincial jurisdiction over works and undertakings are within exclusive federal jurisdiction.

In applying sections 92(10)(a) and 91(29), the courts have held that natural gas and oil pipelines,⁵⁴ telephone companies,⁵⁵ cable television systems,⁵⁶ and railways⁵⁷ crossing provincial boundaries (or integrally-connected with similar enterprises that do cross provincial boundaries) all fall under federal jurisdiction.

This jurisprudence has established a set of principles to be applied when trying to determine whether facilities, say, an electricity system which appears to be under provincial jurisdiction, really is under federal jurisdiction. The key ones are as follows:

- An activity conducted on facilities located entirely within a province is *prima facie* a "local work or undertaking" within provincial jurisdiction.⁵⁸ Parliament may assert jurisdiction over such an activity though when it is also an integral part of something within federal

53. *Supra* note 52 at s. 91.

54. *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207; *Saskatchewan Power Corp. v. TransCanada Pipelines Ltd.*, [1979] 1 S.C.R. 297; *Flamborough (Township of) v. National Energy Board et al.* (1984), 55 N.R. 95 (F.C.A.) [*Flamborough*].

55. *Toronto (City of) v. Bell Telephone Co.*, [1905] A.C. 52; *Alberta Government Telephones v. C.R.T.C.*, [1989] 2 S.C.R. 225.

56. *Capital Cities Comm. v. C.R.T.C.*, [1978] 2 S.C.R. 141; *Public Service Board v. Dionne*, [1978] 2 S.C.R. 191 [*Dionne*].

57. *Luscar Collieries Ltd. v. McDonald*, [1927] A.C. 925 (P.C.); *R. v. Board of Transport Commissioners*, [1968] S.C.R. 118 [*Board of Transport*].

58. *Re Ontario Energy Board* (1986), 57 O.R. (2d) 281 (Div.Ct.) at 290.

competence.⁵⁹

- The person asserting federal jurisdiction has the onus to show that the activity in question is so integrated with a federal work or undertaking that it falls under federal jurisdiction.⁶⁰
- Mere physical connection between two facilities, only one of which is under federal jurisdiction, is not sufficient by itself to bring the other facility within federal jurisdiction.⁶¹
- Ownership or control of aspects of an operation which occurs in more than one province is not, by itself, determinative.⁶²
- Common control, direction and management of an intra provincial collection and gathering system that is an integral part of an interprovincial system will put the intra provincial system under federal jurisdiction.⁶³
- If it can be said that there is, in reality, one interprovincial undertaking, the entire activity will fall within federal jurisdiction. The question is not whether one portion can be stripped away without interfering with the whole, but rather whether the activity, as it is in fact being carried on, is really one undertaking.
- Under another test, the court will consider whether one set of facilities is a "link in the chain" of an interprovincial undertaking. Under this test, though, it may be necessary that the various links of the chain be in the same or related operational control.⁶⁴ It must either be an interprovincial work or undertaking (the primary instance) or be joined to an interprovincial work or undertaking through a necessary nexus (the secondary instance).⁶⁵

To this point we have seen how sections 92(10)(a) and 91(29) of the *Constitution Act, 1867* operate to bring facilities within a province under federal jurisdiction. In the jurisprudence from which the above principles

59. *Northern Telecom Ltd. v. Communications Workers.*, [1980] 1 S.C.R. 115 at 132, Dickson J.; *Re Ontario Energy Board*, *ibid.* at 290-291.

60. *Re Ontario Energy Board*, *ibid.* at 291.

61. *British Columbia Electric Ry. Co. Ltd. v. Canadian National Ry. Co.*, [1932] S.C.R. 161 at 170; *Re Ontario Energy Board*, *ibid.* at 292.

62. *McAfee v. Irving Refining Ltd.* (1970), 17 D.L.R. (3d) 729 (N.B.A.D.) at 735; *Dome Petroleum Ltd. v. National Energy Board* (1987), 73 N.R. 135 (F.C.A.) [*Dome*] at 139; *Consolidated Fastfrate* *infra* note 84.

63. *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] S.C.R. 322 at paras. 77-79.

64. *Luscar Collieries Ltd. v. McDonald*, [1927] A.C. 925 (P.C.) at 932-933; *Capital Cities Communications v. CRTC*, [1978] 2 S.C.R. 141 at 153-163; *Dionne*, *supra* note 56 at 196-198.

65. *Re National Energy Board Act*, [1988] 2 F.C. 196 (C.A.) at 216.

have been distilled, an important factor favouring federal jurisdiction was the presence of federal legislation which regulated the works in issue and “occupied the field.”

Jurisprudence on the electricity sector has not been as extensive as that on pipelines, railways, telephones and cable television. This has given some support to the position of the provinces that their electricity systems are under provincial jurisdiction. Is this really so?

For example, in *Hull Electric*,⁶⁶ Hull City Council granted the Ottawa Electric Company a franchise to supply electricity in Hull. Ten years later, in 1897, it also granted a franchise to the Hull Electric Company. The city by-law granting the 1897 franchise was subsequently incorporated into a Quebec statute. The Judicial Committee of the Privy Council (JCPC) held that the Hull Electric’s rights were paramount. It said:

The scheme in favour of which By-law No. 61 was passed was a purely local undertaking. As such it came within the exclusive jurisdiction of the provincial legislature, and not the less so because in such cases it is usual and probably essential for the success of the undertaking to exclude for a limited time the competition of rival traders.⁶⁷

Hull Electric, therefore, established that an electricity system within a province is a local work or undertaking under provincial jurisdiction.

In a second example, *Hewson*,⁶⁸ the Ontario Power Company had been incorporated under a federal special act which stated that it was a company for the general advantage of Canada or for two or more provinces. Mr. Hewson, fighting expropriation under the company’s statutory rights to take property for its works, argued that no federal act could authorize someone to construct a purely intra-provincial project, in this case, a power canal between the Welland and Niagara Rivers in Ontario.

Davies J. disagreed and said as follows:

Mr. Lafleur felt himself obliged to contend that the local legislature could grant similar powers of connection, and I was disposed at the argument to agree with him. But a closer examination of the clauses of the British North America Act, 1867, has led me to entertain very grave doubts that this is so. It seems clear to me that the legislature could not grant a local company power to connect its wires with those of a local company in any of the other provinces. If it could each company would cease to be one of a “local or private nature” and become interprovincial and general. How then could the legislature grant power to connect the wires of the company it was creating with those of the companies of a foreign

66. *Hull Electric Co. v. Ottawa Electric Co.*, [1902] A.C. 237 (P.C.).

67. *Ibid.* at 247.

68. *Hewson v. Ontario Power Co.* (1905), 36 S.C.R. 596.

country. The local or private company on such connection taking place would at once cease to be “local or private” within the British North America Act, 1867, and become international.

....

It is not necessary, however, for me to decide whether a grant by the legislature of the province to a company created by it to connect its wires with those of a foreign corporation, at the frontier, would be necessarily beyond its powers or would invalidate the charter altogether or simply in part. That question was not argued excepting incidentally because the validity of a provincial charter was not an issue on this appeal. Whether there exists a concurrent jurisdiction in the Dominion and the province to confer such a power I am not called upon now to decide. I do hold the power to exist in the Dominion Parliament; and that, because of its exercise with respect to this special corporation and also because of the general extent of the powers granted, the Act of incorporation here in question is legal and valid.

Hewson established that the Parliament of Canada has jurisdiction over an interprovincial electricity utility. It held that Parliament can regulate the facilities of such a utility even if they are wholly within a province.

Two other developments were decisions of the Ontario Court of Appeal: *Ottawa Valley*⁶⁹ and *Beauharnois*.⁷⁰ In these cases Ontario Hydro had negotiated power purchase and joint facility development agreements with Ottawa Valley Power and Beauharnois Light respectively, both investor-owned utilities in Quebec. Everyone borrowed substantial amounts and commenced construction. After the 1934 Ontario election, however, the Hepburn Liberals had the Ontario legislature enact statutes which purported to nullify the agreements. The companies contended that these deal-ending statutes were invalid. The Attorney General of the province replied that the Ontario legislature had never had the jurisdiction to authorize Ontario Hydro to enter into the agreements in the first place because the joint facilities were section 92(10)(a) and 91(29) works under federal jurisdiction – not a weak argument!

In *Beauharnois*, Rose C.J.H.C. followed the Court of Appeal’s decision in the companion *Ottawa Valley* case, and said:

It was contended that neither the Commission nor the company, each of them being a provincial corporation, had capacity to enter into the agreements; that the Province of Ontario had not, by The Power

69. *Ottawa Valley Power Co. v. The Hydro-Electric Power Commission*, [1937] O.R. 265.

70. *Beauharnois Light, Heat and Power Co. Ltd. v. The Hydro-Electric Power Commission of Ontario*, [1937] O.R. 796.

Commission Act, professed to endow the Commission with such capacity; that, regard being had to sec. 92(10)(a) of The British North America Act, a province cannot confer power to carry on the operation of transmitting electrical energy across the boundary between two provinces; and that what one province cannot do separately two provinces acting in concert cannot accomplish. But the Court decided that the Power Contract was valid and enforceable; and that decision settles for a trial Judge in Ontario the question as to the initial validity of the contract sued upon in the present case. If it was within the power of the Commission to enter into the Power Contract, tied up as it was with the Joint Development Agreement, by which the Commission bound itself to join in the development and utilization of the water power of an interprovincial river, and with the Operating Contract, by which the Commission bound itself to operate a plant in Quebec, there can be no question of the power of the Commission, by the contract sued upon in this action, to bind itself to pay for power kept available for it and, if demanded, delivered to it by the Beauharnois Company.⁷¹

Beauharnois and *Ottawa Valley* stand for the proposition that provincial electricity utilities in different provinces may enter into agreements with each other for joint facilities development. Once such agreements are entered into, however, the legislature of one of the counter-parties is not competent to abrogate them because they create rights in the other province beyond its reach. *Beauharnois* and *Ottawa Valley* were followed by the Supreme Court of Canada in *Re Upper Churchill Water Rights Reversion Act*⁷² when Newfoundland tried to use legislation to withdraw water rights supporting the Churchill Falls agreement with Hydro-Québec.

In *Fulton*,⁷³ the Supreme Court of Canada had to decide whether a transmission line in southern Alberta built for the purpose of interconnecting with BC Hydro was under federal or provincial legislative jurisdiction. The interconnection with BC Hydro was to provide several system benefits to both parties. In addition, it would facilitate the export of electricity to the United States. Each company was to construct separately its transmission line to the British Columbia-Alberta border. Each company was to retain control of, and responsibility for, its transmission line together with the ability to connect or disconnect it to the rest of its system at will. Laskin C.J.C., after considering the sections 92(10)(a) and 91(29) jurisprudence cited above, held that the proposed power line and other works “may

71. *Ibid.* at 812.

72. [1984] 1 S.C.R. 297 at 329-331.

73. *Fulton v. Energy Resources Conservation Board*, [1981] 1 S.C.R. 153.

properly be regarded as local works for the purposes of the application that was before the [Alberta] Energy Resources Conservation Board.”⁷⁴

In effect, *Fulton* authorized provincial electricity utilities to construct interconnection facilities with interprovincial and international trade purposes. Laskin C.J.C. emphasized, however, that he so held only because there was no operative federal legislation which occupied the field. He accepted that such federal legislation would be valid and paramount if enacted by Parliament.⁷⁵

This brings us to section 92A of the *Constitution Act, 1867* added to the Constitution in 1982. The relevant portions state:

92A. (1) In each province, the legislature may exclusively make laws in relation to

- (c) development, ... and management of sites and facilities in the province for the generation and production of electrical energy.
- (2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the production from facilities in the province for the generation of electrical energy
- (3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.⁷⁶

74. *Ibid.* at 166.

75. *Ibid.* at 161-65. As an essential read, see also: Nigel D. Bankes, Constance D. Hunt & J. Owen Saunders, “Energy and Natural Resources - The Canadian Constitutional Framework” in Mark Krasnick, ed., *Case Studies in the Division of Powers* (Toronto: University of Toronto Press, 1986) 53 at 97-100. Here the authors discuss the *Fulton* case in a manner similar to the way I have done, but go on to make the point that former section 90.1 of the *NEB Act*, superseded by the present and similar section 58.4 quoted above and referred to in footnote 11, was added to the *NEB Act* at the request of Calgary Power. They also observed that it did not give the NEB any authority over existing interprovincial transmission lines and that the reasoning behind the federal government’s decision not to give the NEB such authority:

“seems a little thin in the light of a dispute [the 1980 Newfoundland-Quebec dispute] that clearly raises the question of the national economic interest and free passage of good and resources through provinces”

76. *Canada Act 1982* (U.K.), 1982, c.11, s. 50.

La Forest J. explained section 92A in *Ontario Hydro*.⁷⁷ The issue in this case was the question as to who had jurisdiction over the employees of Ontario Hydro's nuclear generating stations: the Canada Labour Relations Board or the Ontario Labour Relations Board. For the majority, La Forest J. held that the jurisdiction was federal because labour relations are an integral component of the operation and management of a federal work.⁷⁸

Important for present purposes are his comments about section 92A. He said:

It must be confessed that s. 92A(1), including para. (c), do not, at least at first sight, appear to add much to the broad and general catalogue of provincial powers; see P.W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992) vol. 1 at p. 29-19. So it is tempting to seek additional meaning from the provision. It may be, however, that s. 92A(1) is merely preliminary to the provisions that follow, although, as I will indicate, it, at a minimum, fortifies the pre-existing provincial powers. There is reason to think this was one of its major goals.

Most commentators mention only these issues in describing the background against which s. 92A was enacted, but there were others, specifically in relation to the generation, production and exporting of electrical energy, that must have been seen as a threat to provincial autonomy in these areas. In most of the provinces, at least, the generation and distribution of electrical energy is done by the same undertaking. There is an integrated and interconnected system beginning at the generating plant and extending to its ultimate destination. There was authority that indicated that even an emergency interprovincial grid system might effect an interconnection between utilities sufficient to make the whole system a work connecting or extending beyond the province, and so falling within federal jurisdiction within the meaning of s. 92(10)(a) of the *Constitution Act, 1867*; see *British Columbia Power Corp. v. Attorney General of British Columbia* (1963), 44 W.W.R. 65 (B.C.S.C.). More importantly, provincial power commissions supply electrical energy to other provinces and the United States on "a regular and continuing basis", which a number of cases in other areas have held to be sufficient to make an integrated undertaking fall within federal legislative competence: see, for example, *Re Tank Truck Transport Ltd.* (1960), 25 D.L.R. (2d) 161 (Ont. H.C.), aff'd [1963] 1 O.R. 272 (C.A.). There was danger, then, that at least the supply system and conceivably the whole undertaking, from production to export, could be viewed as being a federal undertaking. For a discussion of these problems as they appeared in the period preceding the enactment of s. 92A, see G.V. La Forest and Associates, *Water Law in Canada* (1973) at pp. 46 *et seq.*,

77. *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327 at 375 [*Ontario Hydro*].

78. *Ibid.* at 478.

esp. at pp. 50-1, 53-6. While a number of commentators, including myself, did not share this view of the law, the result on the authorities was by no means certain. The express grant of legislative power over the development of facilities for the generation and production of electrical energy (s. 92A(1)(c)), coupled with the legislative power in relation to the export of electrical energy offers at least comfort for the position that, leaving aside other heads of power, the development, conservation and management of generating facilities fall exclusively within provincial competence. The nature of provincial electrical generating and distribution systems at the time of the passing of s. 92A must have been appreciated.

What is important to note is that the danger to provincial autonomy over the generation of electrical energy did not arise out of the discretion Parliament had or might in future exercise under its declaratory power. The danger, rather, lay in the possible transformation of these enterprises into purely federal undertakings by reason of their connection or extension beyond the province. Section 92A ensures the province the management, including the regulation of labour relations, of the sites and facilities for the generation and production of electrical energy that might otherwise be threatened by s. 92(10)(a). *But I cannot believe it was meant to interfere with the paramount power vested in Parliament by virtue of the declaratory power (or for that matter Parliament's general power to legislate for the peace, order and good government of Canada) over "[a]ll works and undertakings constructed for the production, use and application of atomic energy". This, as already seen, comprises the management of these facilities, displacing any management powers the province might otherwise have had under s. 92A. And a vital part of the power of management is the power to regulate labour relations.*⁷⁹

He held, in effect, that section 92A did nothing to diminish the jurisdiction possessed by Parliament when section 92A was enacted.

In *Westcoast Energy*, the Supreme Court of Canada affirmed this view. For the majority, Iacobucci and Major JJ. said as follows:

In our view, [La Forest, J.'s] comments apply with equal force to Parliament's jurisdiction over interprovincial transportation undertakings under s. 92(10)(a). Section 92A does not derogate from Parliament's jurisdiction under s. 92(10)(a).⁸⁰

It should be noted that *Westcoast Energy* also strongly suggests that transmission lines of a provincial utility from generating stations to load centres would also be under federal jurisdiction if under common

79. *Ibid.* at 376-377 [emphasis added].

80. *Westcoast Energy Inc.*, *supra* note 63 at para. 82.

management, direction and control with interprovincial transmission lines.

In *Maritime Electric*,⁸¹ the Town of Summerside applied to the then P.E.I. Public Utilities Commission for transmission access on the submarine cable connecting New Brunswick with P.E.I. The submarine cable was owned by the province of P.E.I. and leased by Maritime Electric Co. Ltd. The Court held that the P.E.I. legislature did not have jurisdiction over this submarine cable because it was a section 92(10)(a) and 91(29) work.⁸² In distinguishing the *Fulton* case, the court said as follows:

The undertaking here is interprovincial as it not only connects two provinces but passes through territory not under the legislative competence of either province. The fact situation in *Fulton* makes it inapplicable to this case. Neither is the fact that 100% of the output may be used in Prince Edward Island determinative of whether or not the undertaking should be classified as a local undertaking subject to provincial jurisdiction.⁸³

Finally, in *Consolidated Fastfrate*, Rothstein J. said as follows:

The common thread among the enumerated *transportation* works and undertakings in s. 92(10)(a) [– “Lines of Steam or other Ships, Railways, Canals” –] is the interprovincial transport of goods or persons. The enumerated examples are all instruments of or means of facilitating actual transport. There is no reference to, or implication of, third parties connected to the means of actual transport through contract being subject to federal jurisdiction. The genus of transportation works and undertakings contemplated in s. 92(10)(a) as “connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province” consist of those that *physically* connect the provinces through transport, not those that *nationally* connect them through contract. The basket clause “other Works and Undertakings” is to be read *ejusdem generis* with the specific examples which precede it.⁸⁴

Since interprovincial and international transmission lines physically connect one province with another or extend beyond the limits of a province, *Consolidated Fastfrate* supports the principles which we have just reviewed.

From the above analysis it may be concluded that provincial legislatures have exclusive jurisdiction over their non-nuclear generating facilities.

81. *Re Town of Summerside and Maritime Electric Co. Ltd.* (No.2) (1983), 3 D.L.R. (4th) 577 (P.E.I. Sup. Ct., *en banc*).

82. *Ibid.* at 593.

83. *Ibid.* at 585.

84. *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407 at para. 43 [emphasis added].

One may also conclude that provincial legislatures have non-exclusive jurisdiction over transmission lines and distribution lines that are under common control, direction and management with transmission lines and distribution lines in another province.⁸⁵ The combined Hydro-Québec and NB Power facility would be caught by these principles and for that reason would be subject to federal jurisdiction. The presence of section 58.4⁸⁶ of the *NEB Act* is probably as good an indication as any that federal lawyers agree with this conclusion.

Let us now turn to the section 91(2) jurisprudence, which would apply to any interprovincial movement of electricity and to the Hydro-Québec-NB Power undertaking. Section 91(2) (“The Regulation of Trade and Commerce”) applies to inter-provincial trade as has been stated in numerous decisions commencing with *Parsons*⁸⁷. There, the JCPC said that the words “The Regulation of Trade and Commerce” in s. 91(2) included “regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion” but not so as to “comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, ...”.⁸⁸

In *Lawson*,⁸⁹ Duff J. said about s. 91(2):

there is no lack of authority for the proposition that regulations governing external trade... as well as regulations in matters affected with an inter-provincial interest... are within the purview of that head.⁹⁰

In *Natural Products Marketing Act*,⁹¹ Duff C.J.C. said:

the regulation of trade and commerce does not comprise, in the sense in which it is used in section 91, the regulation of particular trades or occupations or a particular kind of business... or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense; while, on the other hand, it does embrace the regulation of external trade and the regulation of interprovincial trade...⁹²

85. As mentioned earlier, the Parliament of Canada has exclusive jurisdiction over nuclear facilities.

86. *Supra* note 9 at s. 58.4.

87. *Citizens Insurance Co. of Canada v. Parsons* [1881] 7 A.C. 96 (P.C.).

88. *Ibid.* at 113.

89. *Lawson v. Interior Tree Fruit & Vegetable Committee*, [1931] S.C.R. 357.

90. *Ibid.* at 366.

91. *Reference Re Natural Products Marketing Act (Canada)*, [1936] S.C.R. 398.

92. *Ibid.* at 410 [emphasis added].

The limits of any provincial regulatory control in this field are emphasized in the words of Duff, C.J.C., “trade which is entirely local and of purely local concern,” and the JCPC approved this view. Lord Atkin said “There can be no doubt that the provisions of the Act cover transactions in any natural product which are completed within the Province, and have no connection with inter-Provincial or export trade.”⁹³

In *Shannon*,⁹⁴ Lord Atkin added:

It is now well settled that the enumeration in s. 91 of “the regulation of trade and commerce” as a class of subject over which the Dominion has exclusive legislative powers does not give power to regulate for legitimate Provincial purposes particular trades or businesses so far as the trade or business is confined to the Provinces....⁹⁵

In *Willis*,⁹⁶ Rinfret C.J.C. stated that the marketing of agricultural products outside the province in interprovincial and export trade were “two subject matters which are undoubtedly within [federal] constitutional authority.”⁹⁷

In *Re The Farm Products Marketing Act*,⁹⁸ the limits on federal and provincial power in the regulation of agricultural trade were further explored. Kerwin C.J.C. said: “Once an article enters into the flow of interprovincial or external trade, the subject-matter *and all its attendant circumstances* cease to be a mere matter of local concern.”⁹⁹

Rand J. said:

The regulation of particular trades confined to the Province lies exclusively with the Legislature subject, it may be, to Dominion general regulation effecting all trade, and to such incidental intrusion by the Dominion as may be necessary to prevent the defeat of Dominion regulation; *interprovincial and foreign trade are correspondingly the exclusive concern of parliament....*

... if in a trade activity, including manufacture or production, there is involved a matter of extra-provincial interest or concern its regulation thereafter in the aspect of trade is by that fact put beyond Provincial power...

93. *British Columbia (A.G.) v. Canada (A.G.)*, [1937] A.C. 377 at 386.

94. *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708.

95. *Ibid.* at 719.

96. *P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392.

97. *Ibid.* at 396.

98. [1957] S.C.R. 198.

99. *Ibid.* at 205 [emphasis added].

A producer is entitled to dispose of his products beyond the Province without reference to a provincial marketing agency or price, shipping or other trade regulation; and an outsider purchaser entitled with equal freedom to purchase and export.¹⁰⁰

From the above decisions, it can be easily seen that interprovincial electricity sales and the Hydro-Québec-NB Power utility would also fall under federal jurisdiction under section 91(2) on the grounds that they would be matters of interprovincial and international trade and commerce.

Just because the combined Hydro-Québec and NB Power utility may be *subject to* federal jurisdiction, this does not mean that it will be *under* federal jurisdiction unless Parliament enacts new legislation. In *Fulton*, Laskin C.J.C. said that “[u]nexercised federal authority may give leeway to the exercise of provincial authority in relation to local works and undertakings, and that is how I assess the situation here.”¹⁰¹ He added, “[a]lthough exclusiveness may arise even in the absence of federal legislation, I do not regard the situation presented here as providing a basis for its assertion.”¹⁰² Effectively, he was repeating the fourth rule in *Fish Canneries* which states:

There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see *Grand Trunk Ry. of Canada v. Attorney-General of Canada*.¹⁰³

Therefore, in the absence of new federal legislation, provincial legislation in Quebec and New Brunswick respecting interprovincial and international electricity sales, rates and tariffs and constructing interprovincial facilities would continue to apply to a Hydro-Québec-NB Power interprovincial utility. Currently, there is no new federal legislation on the horizon.

Regardless, we should not shy away from the question of whether such new legislation is required and it is to that topic that we now turn.

VI. *Why should the federal government act?*

Why after all these years should the federal government try to enter the Canadian electricity sector by enacting new legislation? The answer is that Canada needs a national energy regulator, equal in stature to FERC in the United States, to speak for Canada and to regulate in two areas:

100. *Ibid.* at 209-210 [emphasis added].

101. *Supra* note 74 at 162.

102. *Ibid.* at 164.

103. *Canada (A.G.) v. British Columbia (A.G.)*, [1930] A.C. 111 (J.C.P.C.) at 118.

responding to FERC and acting as the national electricity regulator. It is my position that the logical body to fulfill this role is the NEB and that the *NEB Act* should be amended to confer the necessary authority on the NEB to do so. This would achieve the solution suggested by Owen Saunders of obtaining an MOU with the United States respecting transnational regulatory disputes. The NEB is the logical body to enter into a MOU with FERC of the type he advocates because it has entered into a general co-operation MOU with FERC already.¹⁰⁴ The real possibility of a new Quebec-New Brunswick deal presents the perfect opportunity for the federal government to act.

If Parliament were to give the NEB such authority, it would enable it to respond to FERC on behalf of the Canadian electricity sector. Both Canada and the United States would benefit from such a voice.

So empowering the NEB, in conjunction with its powers under Part II of the *NEB Act*, would allow it to consider for the first time whether the FERC rules adopted by provinces since 1995, designed to solve domestic United States problems, are in the Canadian public interest. Electricity economists always point out that the economies in the electricity business lie in the savings from vertical integration; one CEO, one management team, one legal department, one human resources department and system-wide decision-making instead of several such groups and narrow decision-making. Until 1995, Canada's province-wide utilities used that model and made cheap electricity. Adaption of the FERC rules changed it. A discussion of whether those changes have been beneficial to Canada is long overdue.

In addition, empowering the NEB would allow the Canadian electricity sector to speak to FERC with one voice and deliver one message on behalf of Canada instead of having ten separate voices. The FERC decisions described above show that ten separate voices have not served Canada very well. The need to respond to FERC is a Canadian policy issue important to all electricity consumers as well as Canadian nationalists. The Hydro-Québec-NB Power deal presents a perfect occasion for the federal government to address it.

As mentioned, Newfoundland and Labrador, Nova Scotia and Prince Edward Island require access to Hydro-Québec's and NB Power's transmission system to earn export revenue from their hydro, tidal and wind power electricity and it is in the national interest that they should be

104. *Memorandum of Understanding between National Energy Board and Federal Energy Regulatory Commission*, (10 May 2004) online: <<http://www.neb.gc.ca/clf-nsi/rthnb/nwsrls/2007/nwsrls12-eng.html>>.

able to do so. If a new Quebec-New Brunswick deal were to be completed, one utility would in effect control all Canada/United States transmission interfaces east of Cornwall. Disputes would become more frequent, might involve other provinces and be even more contentious. In any case, the federal government will inevitably be faced with having to balance Hydro-Québec's transmission dominance with the economic aspirations of other provinces.

After the acrimonious disputes between Quebec and Newfoundland that have occurred in the past, it is hardly fair to expect Nalcor or electricity producers in other provinces to agree to having their rights in transmission disputes decided by either the Régie or the New Brunswick Energy and Utilities Board.¹⁰⁵ Those authorities are too closely-related to Hydro-Québec and NB Power to appear neutral. They approved the OATTs whose interpretation or amendment may be in issue and all of their members are appointed by the same governments who own and direct either Hydro-Québec or NB Power.

Parties in other provinces certainly would have an arguable claim that there is a reasonable apprehension of bias created by those bodies. Should the Régie or the Energy and Utilities Board ever deny a request for transmission access to another province or impose terms considered onerous, few would consider the process to have been fair. In Canada, we do not allow tribunals to determine rights where they give rise to a reasonable apprehension of bias, unless there is no other alternative. But there is an alternative: this is to make the NEB Canada's national electricity regulator and give it the power to decide all disputes about transmission access on interprovincial transmission lines.

The required new legislation would not need to be extensive. First, the bill should contain an amendment to the *NEB Act* that would make all provisions of part III.1 of the *NEB Act*, Construction and Operation of Power Lines, which now applies only to international power lines applicable, with necessary modifications, to interprovincial power lines. This would allow the NEB to approve new interprovincial interconnections and provide a forum for all stakeholder concerns.

Second, it should contain an amendment to the *NEB Act* that makes the provisions of Part IV of the *NEB Act*, Traffic, Tolls and Tariffs, apply, again with necessary modifications, to interprovincial and international power lines. This would empower the NEB to prescribe, modify, amend or approve transmission tariffs for interprovincial and international transmission lines, resolve transmission access disputes on interprovincial

105. *Supra* note 5.

and international power lines, and in an actual case order the construction of new facilities and apportion the costs of such new facilities. It should be clear that the NEB has the authority to set transmission charges for interprovincial transmission even if they were lower or higher than charges for intra-provincial transmission. It should also confer the authority to reorder the transmission access queue in the public interest. This authority would supersede provincial jurisdiction over interprovincial transmission access and rates for such access.

Conclusion

If these amendments to the *NEB Act* are made, they would not seriously diminish provincial control over electricity utilities or transmission systems. Provincial utilities will still be able to meet their domestic loads and export electricity to the United States. Canadians, however, would have an independent and impartial regulator to decide all interprovincial and national electricity issues and who exports when in the national interest. This would create a true Canadian electricity system. A win/win result for all. What's not to like?