Constitutional law imposes a set of constraints that might significantly affect the development of a common regional energy policy. The following text attempts to provide an overview of these constraints.

1. PRINCIPLES OF DISTRIBUTION OF POWERS

The Constitution Act of 1867 (link) grants **exclusive jurisdiction** to the federal and provincial governments to legislate on specific subjects. For example, the provinces have jurisdiction over property, local works and undertakings, while the federal government has power over navigation. The exclusive character of the jurisdictional heads of power means that an order of government (e.g. provincial) cannot legislate on a subject granted to the other order of government (e.g. federal).

The 1867 Constitution is considered **exhaustive**, which means that any matter is under the jurisdiction of either the federal or the provincial governments. However, the text of the Constitution is silent on a number of subjects. When a subject was omitted at the time and is not expressly mentioned in the Constitution, as is the case for aviation, the Courts interpret the text to give jurisdiction to the order of government most closely linked to it. In addition, many of the developments that took place since the Confederation were unforeseeable. When this is the case, as for the development of nuclear energy, the federal government is competent.

Some subjects that are not mentioned in the Constitution, such the environment, cannot be apportioned between federal and provincial orders and so have a **dual aspect**. For example, environmental impacts resulting from boating may be regulated by the federal government due to its jurisdiction over navigation. These environmental impacts are also local and relate to property. For example, invasive species may contaminate a lake and damage the riparian properties around it, which means that the provinces have jurisdiction to control these environmental impacts. Despite the principle of exclusivity, jurisdiction over the environment has a dual aspect and is shared by the federal and provincial governments.

2. DISTRIBUTION OF POWERS BETWEEN THE FEDERAL AND PROVINCIAL GOVERNMENTS

The Constitution Act of 1867 (link) grants jurisdiction to either the federal government or the provinces to legislate on specific subjects. The exclusive heads of jurisdiction are apportioned mostly by articles 91 and 92 of the 1867 Constitution.

Under section 92, the **provinces** have jurisdiction to legislate over a number of specific subjects relevant to the energy sector, including direct taxation for provincial purposes (§2), the management and sale of provincial public lands (§5), municipalities (§5), local works and undertakings as well as local matters (§§10, 16), as well as property and civil rights (§13). The laws of each province apply only on their respective territories – this is the **principle of territoriality** applicable to provincial jurisdiction. The provinces also own the natural resources within their territories (section 106), and so can make rules about the use of these resources as any owner could with respect to his property.

The **federal government** has competence over all issues that have a purely national or international dimension (international treaties, etc.), issues that straddle 2 or more provinces, or matters that are not comprised within the territory of a province (one of the northern territories, the territorial sea, etc.). In addition, under section 91,

Ottawa has jurisdiction to legislate over a number of specific subjects relevant to the energy sector, including federal public property (§1A), the regulation of trade and commerce (§2), taxation, money and credit (§3 & 4), navigation and shipping (§10), Indians and reserves (§24), among others. Finally, section 92§10 grants power to the federal government over transportation and communication undertakings in more than one province – local undertakings remain under provincial jurisdictions.

- In ***Westcoast Energy Inc. v. Canada*** (link), the principal issue was whether a number of proposed natural gas processing plants and compressor facilities formed part of a federal natural gas pipeline transportation undertaking. While the proposed processing plants and compressor facilities were entirely located on 2 specific sites in British Columbia, the system to which they were connected was considered on the whole to be a federal undertaking: raw natural gas was received from production fields located in the Yukon, the Northwest Territories, Alberta and British Columbia, transported to processing plants in British Columbia and then shipped through the mainline transmission pipeline to delivery points within British Columbia, Alberta and the United States. The Court concluded that the proposed plants and facilities were under federal jurisdiction and stated the applicable tests:

  "It is well settled that the proposed facilities may come within federal jurisdiction under s. 92(10) (a) in one of two ways. First, they are subject to federal jurisdiction if the Westcoast mainline transmission pipeline, gathering pipelines and processing plants, including the proposed facilities, together constitute a single federal work or undertaking. Second, if the proposed facilities do not form part of a single federal work or undertaking, they come within federal jurisdiction if they are integral to the mainline transmission pipeline.

  More specifically, the Court found that the undertakings were under federal jurisdiction because they constituted a single federal work as they met the following conditions:

  "In order for several operations to be considered a single federal undertaking for the purposes of s. 92(10) (a), they must be functionally integrated and subject to common management, control and direction. Professor Hogg states, at p. 22-10, that "[i]t is the degree to which the [various business] operations are integrated in a functional or business sense that will determine whether they constitute one undertaking or not". He adds, at p. 22-11, that the various operations will form a single undertaking if they are "actually operated in common as a single enterprise". In other words, common ownership must be coupled with functional integration and common management. A physical connection must be coupled with an operational connection. A close commercial relationship is insufficient."

- These principles raise questions about the true character of provincial electricity transmission systems and undertakings connected to the continental grid (**Hydro-Quebec?**). Could it be that some technical hurdles to continental integration actually facilitate the affirmation of provincial jurisdiction?

A number of Supreme Court of Canada decisions in the 1970s applied such principles to strike down attempts by the provinces to regulate their energy industries. The result of these decisions was significant discontent in the provinces who perceived their constitutional authority was being eroded in favor of the federal government. As a solution to this dispute between Canada and the provinces, **section 92A** was negotiated into the 1982 Constitution to grant some measure of authority to the provinces over their energy industries, including the management and control, taxation, and export of energy assets:

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

a) exploration for non-renewable natural resources in the province;

b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

c) development, conservation 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 primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

(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.

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province. […]

Section 92A has given more legislative power to the provinces. However, section 92A has not necessarily increased the probability of cooperation between different governments to develop a common energy policy. For example, section 92A has long been touted as a basis for Newfoundland to take unilateral action in the **Churchill/Muskrat Falls dispute**, according to DEPARTMENT OF NATURAL RESOURCES, *Legal Options: S92A, Good Faith and Regulatory Proceeding*, Saint-Jean, Newfoundland and Labrador, 2012 (link):

"Since 1982, various suggestions have been made as to how Newfoundland and Labrador might use the powers provided under section 92A to gain access to electricity from the Upper Churchill. One proposal is that the Government of Newfoundland and Labrador use the powers provided by section 92A to require CFLCo to deliver enough of the Upper Churchill's hydroelectric production to meet the future energy needs of the province. In the context of the debate around the proposed Muskrat Falls development, it is suggested that this is an alternative to Muskrat Falls. Further, it has been suggested that the price that would have to be paid for such power, if any, would be so low that this option would be superior to the economics of the proposed Muskrat Falls development.

Any use by the Government of section 92A to access power from the Upper Churchill hydroelectric development would have to pass three tests in order to be feasible. First, the mechanism (whether it was legislation, regulation etc.) would have to be upheld by the courts as being constitutional. Second, the cost of the electricity involved would have to be low enough to make it preferable to other options. Finally, the mechanism would have to provide now the required level of certainty to Government and Nalcor that the power would be delivered as and when required."

3. MECHANISMS TO RESOLVE UNCERTAINTY IN THE DISTRIBUTION OF POWER

The principles of exclusivity and exhaustiveness combined with the difficulty in linking many subjects to one order of government have generated judicial uncertainty and conflicts: when one of the applicable principles is not observed, a specific law may be struck down by the Courts as unconstitutional. To ascertain the constitutionality of a law, the Courts have devised the following process:

i) **Determine the pith and substance of a law**: This initial analysis consists of an inquiry into the true nature of the law in question for the purpose of identifying the matter to which it essentially relates among the matters listed at sections 91 and 92 and other articles previously mentioned. To determine the pith and substance, 2 aspects must be examined: the purpose and the effect of the law or provisions. At

this stage, only primary or dominant effects must be taken into account to determine the validity of a law, not secondary effects.

The result of this analysis is either: the law is attached to a matter allocated to the legislature that enacted it and valid; or, the law is unrelated to a matter allocated to the legislature that enacted it and invalid.

ii) If the law is invalid because unrelated to a matter allocated to the legislature that enacted it, it might still be saved by the **ancillary power doctrine**. The development of the ancillary power comes from the recognition that a degree of jurisdictional overlap is inevitable. The validity of measures that lie outside a legislature's competence is accepted if these measures constitute an integral part of a broader legislative scheme within *bona fide* jurisdiction. To decide whether the doctrine can actually save the law: 1) the law has to have a rational and functional link with *bona fide* jurisdiction; and 2) the law must actively further a purpose within *bona fide* jurisdiction.

iii) If the law is attached to a matter allocated to the legislature that enacted it and valid, does the provision violate **interjurisdictional immunity**? The doctrine of interjurisdictional immunity relates to the principle of exclusivity and means that each order of government is sovereign within its own jurisdiction. If a law has incidental effects that impair a vital or essential part of a jurisdiction granted to the other order of government, then the principle of interjurisdictional immunity is violated and the law is inapplicable.

iv) If the law is attached to a jurisdictional matter allocated to the legislature that enacted it and valid, and there is no violation of interjurisdictional immunity, the courts must still assess whether it conflicts with another valid and applicable law. In these instances, the doctrine of **federal parmamoutcy** applies. According to the doctrine of federal paramountcy, when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility. The doctrine applies not only to cases in which the provincial legislature has legislated pursuant to its ancillary power to trench on an area of federal jurisdiction, but also to situations in which the provincial legislature acts within its primary powers, and federal Parliament pursuant to its ancillary powers.

4. EXAMPLE OF CONSTITUTIONAL LAW'S IMPACT ON THE ENERGY SECTOR: INTERPROVINCIAL PIPELINES

[This part of the text relies on Penny BECKLUMB, *Provincial Jurisdiction over Interprovincial Pipelines*, HillNote Number 2013-13-E, Library of Parliament Research Publications (link)]

Although the federal government has jurisdiction over interprovincial pipelines based, *inter alia*, on its international and interprovincial trade and commerce legislative power, provinces may also have some influence over pipelines that cross their boundaries.

Indeed, numerous matters related to interprovincial pipelines – provincial Crown land, property and civil rights, and direct taxation in a province – fall within provincial jurisdiction. Hence, a province may enact laws relating to provincial matters that incidentally affect an interprovincial pipeline. For example, it might pass a tax law that happens to apply to pipelines in the province.

Environmental assessment legislation is an example of valid provincial legislation that could affect an interprovincial pipeline. Each province has enacted environmental assessment legislation to protect components of the environment under its jurisdiction.

- For example, the ***Environmental Impact Assessment Regulation*** (New Brunswick), NB Reg 87-83, Annex A, h)ii) – renders applicable to "all pipelines exceeding five kilometres in length" (link) the assessment procedure provided under New Brunswick law.

Under such legislations, the administrative authority performing the assessment may have the power to refuse a permit authorizing the pipeline project, or may have the power to impose very onerous conditions on the pipeline project further to the assessment.

That said, if the provincial terms and conditions were strict enough to render the project unfeasible, a court reviewing the matter could find that the provincial decision affected a "vital part" of the pipeline. On that basis, the court would rule that the provincial decision did not apply to the pipeline.

- This is in line with the findings of the Supreme Court in ***Quebec (Attorney General) v. Canadian Owners and Pilots Association*** (link), according to which even if a provincial enactment were valid, a court could rule that the law did not apply to an interprovincial pipeline if the law would affect a "vital part" of the pipeline and, therefore, unacceptably interfere with the project.

- On September 19, 2014 in ***Bank of Montreal v. Marcotte*** (link), the Supreme Court made the following remarks to qualify the application and extent of the doctrine of interjurisdictional immunity:

  "Interjurisdictional immunity operates to prevent laws enacted by one level of government from impermissibly trenching on the "unassailable core" of jurisdiction reserved for the other level of government… While interjurisdictional immunity remains an extant constitutional doctrine, this Court has cautioned against excessive reliance on it. A broad application of the doctrine is in tension with the modern cooperative approach to federalism which favours, where possible, the application of statutes enacted by both levels of government. As such, this Court in Canadian Western Bank v. Alberta, 2007 SCC 22, [2007] 2 S.C.R. 3, held that the doctrine must be applied "with restraint" and "should in general be reserved for situations already covered by precedent" (paras. 67 and 77)… In the rare circumstances in which interjurisdictional immunity applies, a provincial law will be inapplicable to the extent that its application would "impair" the core of a federal power. Impairment occurs where the federal power is "seriously or significantly trammel[ed]", particularly in our "era of cooperative, flexible federalism": Quebec (Attorney General) v. Canadian Owners and Pilots Association, 2010 SCC 39, [2010] 2 S.C.R. 536 ("COPA"), at para. 45." (paragraph 69 is also relevant)

Thus, to a certain extent, the application of provincial laws may constrain interjurisdictional pipeline projects, and generate delays or impose conditions in addition to federal regulation.

- Parallels can be made with the recent **"beluga" case in Québec** (*Centre québécois du droit de l'environnement* c. *Oléoduc Énergie Est* – link (in French)), where an environmental NGO succeeded in obtaining a preliminary injunction against TransCanada to halt exploratory drilling operations for deep water harbor construction in the St-Lawrence Estuary due to Quebec Minisrty of the Environment's failure to provide to TransCanada a legally valid permit authorizing the drillings. In this case, the interjurisdictional immunity doctrine could have come in play to inhibit provincial law not on the basis of the federal trade and commerce competence, but rather on federal jurisdiction over navigation.

5. EXAMPLE OF CONSTITUTIONAL LAW'S IMPACT ON THE ENERGY SECTOR: HYDROCARBONS IN THE GULF OF ST LAWRENCE

The federal government has jurisdiction of international, national and interprovincial issues, while the Provinces only have jurisdiction over their respective territories according to the principle of territoriality.

As a result, the federal government undoubtedly has exclusive jurisdiction over the exploration and exploitation of the natural resources on and in the continental shelf (extending at least 200 nautical miles from the ocean shore) adjacent to the Atlantic Provinces. Also, the federal government probably has exclusive jurisdiction over the territorial sea, which comprises the sea enclosed by New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, and Quebec (Gulf of St Lawrence).

- In ***Reference Re: Offshore Mineral Rights*** (link), the Supreme Court of Canada stated the following:

*"**As to the Continental Self**. The rights now recognized by international law to explore and exploit the natural resources of the continental shelf do not involve any extension of the territorial sea. The superjacent waters continue to be recognized as high seas. There is no historical, legal or constitutional basis upon which the province of British Columbia could claim the right to explore and exploit or claim legislative jurisdiction over the resources of the continental shelf. There are two reasons why British Columbia lacks there rights: (i) the continental shelf is outside the boundaries of British Columbia, and (ii) Canada is the sovereign state which will be recognized by international law as having the rights stated in the 1958 Geneva Convention, and it is Canada that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by that convention."*

*"**As to the Territorial Sea.** The sovereign state which has the property in the bed of the territorial sea adjacent to British Columbia is Canada. At no time has British Columbia, either as a colony or a province, had property in these lands. It is the sovereign state of Canada that has the right to explore and exploit these lands.*

Canada has exclusive legislative jurisdiction in respect of these lands either under s. 91(1)(a) of the B.N.A. Act or under the residual power in s. 91. British Columbia has no legislative jurisdiction since the lands in question are outside its boundaries. The lands under the territorial sea do not fall within any of the enumerated heads of s. 92 since they are not within the province. Legislative jurisdiction with respect to such lands must, therefore, belong exclusively to Canada, for the subject matter is one not coming within the classes of subjects assigned exclusively to the legislatures of the provinces within the meaning of the initial words of s. 91 and may, therefore, properly be regarded as a matter affecting Canada generally and covered by the expression "the peace, order and good government of Canada". The mineral resources of these lands are of concern to Canada as a whole and go beyond local or provincial concern or interests."

- These findings have been confirmed and detailed with respect to the Continental Shelf adjacent to Newfoundland and Labrador in ***Reference re Newfoundland Continental Shelf*** (link).
- Federal legislation reflects the findings of the Supreme Court: see ***Oceans Act*** (link).
- However, some parts of the Gulf of St Lawrence, might still, in theory, fall under provincial jurisdiction. In ***Reference re: Ownership of the Bed of the Strait of Georgia and Related Areas*** (link), the Supreme Court found that the land and waters between Vancouver Island and the mainland were within British Columbia. Moreover, in *Re mineral and natural resources of the continental shelf*, the Court of Appeal of Newfoundland and Labrador found that Newfoundland and Labrador has jurisdiction over a 3 nautical mile territorial sea.

As a result, provincial rights and powers over marine resources generally depend on federal consent and concessions.

Nevertheless, the provinces have claimed jurisdiction and control over the Gulf of St Lawrence for most of the last century.

- According to André TURMEL, *Oil and Gas in the Gulf of St. Lawrence: From Exploration to Production*, Energy Law Bulletin, August 17, 2011 (link):

  "In 1964, the Maritimes and the provinces of Newfoundland and Labrador and Québec established their frontiers within the Gulf of St. Lawrence and agreed to have mutually exclusive rights to deliver licences to explore for hydrocarbons within their respective portions of the Gulf. However, the federal government never recognized this Joint Statement. […]

  An agreement with the federal government was then necessary in order for the provinces to exploit the hydrocarbons in the Gulf of St. Lawrence. Following the discovery of the Sable Island natural gas reserve (Venture) a first agreement between Nova Scotia and the federal government was entered into 1982. In

1985, after the discovery of the Hibernia oil reserve, the Atlantic agreement with Newfoundland was also signed.

In 2001, arbitration between Nova Scotia and Newfoundland established the frontier between the two provinces. The arbitration process was provided for in the agreements. The arbitrators underlined the non-binding nature of the 1964 Joint Statement. The 1964 Joint Statement was not considered a definitive agreement resolving their offshore boundary, particularly the boundary between Nova Scotia and Newfoundland."

At present, a number of **bilateral agreements** have been signed between the Atlantic Provinces, including Quebec most recently, and the Federal Government to put in place mirror legislations at federal and provincial levels.

These agreements have not resulted in a coordinated approach to the development of the Gulf's resources. For example, Newfoundland and Labrador has completed its own environmental impact assessment process jointly with the Federal Government, while Quebec is has forged ahead alone with a similar process.