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Smallwood, Churchill Falls, and the Power Corridor through Quebec

THE PERSISTENT ANIMOSITY IN NEWFOUNDLAND towards Quebec over the 1969 Churchill Falls contract is well known.[1] That contract is between Hydro-Quebec and the Churchill Falls Labrador Corporation (CFLCo); the former is a Quebec Crown corporation and the latter was a private sector entity at the time (but has been under Newfoundland government majority ownership since 1974). What is involved is the sale by CFLCo of a huge amount of electricity to Hydro-Quebec under increasingly onerous terms until 2041. But this essay is not about those terms.[2] Rather, it is about one theory that has been put forward to explain why those terms turned out to be so one-sided. Specifically, there is a general perception in Newfoundland that the federal government failed the province by not intervening to permit the transmission of electricity from Churchill Falls across Quebec to markets elsewhere.

This indictment of the federal government has surfaced in a number of forums. In an extensive study, for instance, of the evolution of federal government electricity policy and its relationship to the Churchill Falls negotiations during the 1960s, Jason Churchill concluded: "The Newfoundland government was unable to convince the federal government to invoke relevant sections of the British North America Act (BNA Act) to secure access through Quebec territory."[3] In 2003, Newfoundland's provincial Royal Commission on Renewing and Strengthening Our Place in Canada agreed with that perspective. In its final report, the commission stated:

> The federal government placed Hydro-Québec in a monopolistic position during the Churchill Falls negotiations of the 1960s by not enacting legislation that would have allowed for a power corridor through Québec. Without such legislation, negotiations on the Churchill Falls project took place in a situation in which virtually all of the power and energy had to be sold to Hydro-Québec. Consequently, it was in a position to dictate a low price, an insignificant recall of power for use in Newfoundland and Labrador and an unprecedented time frame (65 years) governing the power contract.[4]

1 Herein "Newfoundland" refers to the Province of Newfoundland and Labrador. I am grateful to Melvin Baker, Douglas M. Brown, Christopher Dunn, Stephen Tomblin, and three anonymous referees for helpful comments. Any errors or omissions remain my responsibility solely.

2 For a recent perspective in that regard, see James P. Feehan and Melvin Baker, "The Renewal Clause in the Churchill Falls Contract," *Dalhousie Law Journal* 30, no.1 (Spring 2007): 207-57.

3 Jason L. Churchill, "Pragmatic Federalism: The Politics Behind the 1969 Churchill Falls Contract," *Newfoundland Studies* 15, no. 2 (Fall 1999): 215.

4 *Report of the Royal Commission on Renewing and Strengthening Our Place in Canada* (St. John's, NL: The Queen's Printer, 2003), 123.

James P. Feehan, "Smallwood, Churchill Falls, and the Power Corridor through Quebec," *Acadiensis* XL, no. 2 (Summer/Autumn 2011): 112-27.

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Additionally, there is a long-standing belief that during the 1960s a planned Newfoundland government request to the federal government for a power corridor was thwarted by a personal appeal from Canada's prime minister not to do so for the good of national unity. Former premier Danny Williams put it as follows: "At the time of the Upper Churchill contract, the Prime Minister of the day told our Premier that the price of doing otherwise could have been civil unrest in Quebec. Sounds extreme. But the reality is that we made the sacrifice for the sake of national unity."[5]

Given the significance of the Churchill Falls contract in both Newfoundland's recent history and its political landscape, and considering the substantial amount of archival material that is available, it is surprising that there has been so little scholarly research on the validity of these claims of federal government complicity. That research void was the impetus for this paper. To that end, this research note addresses two key questions. First, did the Newfoundland government ever call for federal intervention under the constitution? Secondly, did the prime minister of Canada actually undercut such a request?

Background and context

Due to the efforts of Premier J.R. (Joey) Smallwood, during the early 1950s a group of major financial and industrial interests formed a consortium known as the British Newfoundland Corporation (Brinco).[6] Smallwood had lobbied in the United Kingdom for such a group to be the catalyst for economic development in Newfoundland. At the time Newfoundland, like Quebec, had a province-building agenda – albeit with different strategies. The former sought from outside what it lacked internally – expertise and capital – whereas the latter drew from the indigenous strength of the Quiet Revolution, which provided new Québécois political leadership, technical expertise, and institutions.

As incentives, Brinco received extensive land and mineral rights. One asset with great hydro-electric potential was the waterfalls on the upper portion of the Churchill River, known as the Hamilton River at the time. The falls were located in the then very isolated and unpopulated western Labrador region of the province. The cost of developing that hydro-electric project was so huge that Brinco would need a customer willing to make a long-term commitment to purchase a substantial amount of the energy before the project was built. Otherwise, lenders would not be willing to provide financing. Initially, there were three main possibilities: exporting to Ontario, exporting to Quebec, or selling to the energy-intensive aluminum industry.[7] These were explored in the early-to-late 1950s, but little progress was made.

In 1958, Brinco created CFLCo as a subsidiary. It was 80 per cent owned by Brinco while Quebec-based Shawinigan Engineering Company held the remaining 20 per cent. CFLCo's mandate was to develop Churchill Falls. CFLCo officials generally held positions in Brinco as well, so references to either are generally interchangeable. CFLCo made efforts to attract Hydro-Quebec as a buyer, and in

5 Premier Danny Williams, Speech to the Economic Club of Toronto, 3 May 2007, www.releases.gov.nl.ca/releases/speeches/2007/premiermay3.htm.

6 A far more extensive and detailed account is available in Philip Smith, *Brinco: The Story of Churchill Falls* (Toronto: McClelland and Stewart, 1975).

7 Smith, *Brinco*, 64.

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1961 the latter did consider an offer but opted for development of a new source within Quebec. However, new possibilities arose the following year. In September 1962, in the speech from the throne, the federal government announced that it would permit long-term contracts for exports of electricity from Canada. This was to encourage major power projects that were too large for domestic markets to absorb. For CFLCo and Smallwood this new federal export policy was welcome news. It made the United States market an option for the first time, and the Consolidated Edison Company of New York was soon found to be interested.

Based on these new prospects, CFLCo and Hydro-Quebec discussed various sale configurations. One early idea was for CFLCo to build a transmission line through Quebec to New York State. Electricity in excess of Quebec's needs would be sold under long-term contract to Consolidated Edison, a rental fee for the route would be paid to Quebec, and Quebec would have an option to purchase the transmission line. Smallwood discussed this approach with Quebec Premier Jean Lesage on 18 December 1962, and emphasized that Quebec would "remain the boss" over the transmission line within its borders.[8] Smallwood was, therefore, seeking Quebec approval for crossing that province with the transmission line. He was far from presuming an automatic right-of-way, was not demanding one, and was merely suggesting a means of development that Lesage might find attractive.[9]

In January 1963, Lesage indicated his preferred approach at a meeting with Brinco chairman H. Greville Smith. He told Smith that he wanted Hydro-Quebec to buy the power at the provincial border and re-sell any surplus.[10] The Quebec premier publicly reiterated his position in the Quebec legislature on 30 April 1963. He stated that Hydro-Quebec would buy all the power at the Newfoundland-Quebec border, and export whatever amount of it was surplus to Quebec's needs.[11] Apparently, Smallwood and the Brinco/CFLCo leadership were agreeable to this approach. In August 1963, the president of Hydro-Quebec, Jean-Claude Lessard, told A.W. Southam, Brinco's president, that Lesage was convinced that Smallwood and others had "firmly agreed that Hydro-Quebec would alone deal with Con. Ed. and other potential purchasers of power surplus to Quebec's needs." Lessard went on to suggest that this would not be a problem for CFLCo as long as Hydro-Quebec paid CFLCo in enough US dollars to allow it to meet its US debt obligations arising from the project. Southam replied to Lessard: "I would personally be surprised if this problem developed into a stumbling block."[12] Implicit in this arrangement was the notion that Hydro-Quebec would build, own, and operate the transmission lines from the border across Quebec. That was made

8 Smith, *Brinco*, 151.

9 Lesage did not make any commitment at that meeting with Smallwood. Smith, in *Brinco* (151-2), suggests that this was because 11 days later, on 29 December, Lesage would be announcing the nationalization of all private electricity companies in Quebec and the take-over of Shawinigan's interest in CFLCo.

10 "Note on Discussion between Premier Lesage and H. Greville Smith, Quebec City – January 29th, 1963," Newfoundland and Labrador Hydro Corporation Records, GY-116, Premier of Quebec, 1963, vol. VI, The Rooms Provincial Archives Division (TRPAD).

11 Smith, *Brinco*, 157.

12 "Note by AWS on a talk with J-C Lessard on Tuesday 6 August 1963," CFLCo Papers, MG 28, III, vol. 37, file 8, Library and Archives Canada (LAC).

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explicit in early September 1963 in Clause 12 of CFLCo's first presentation of a draft proposed letter of intent to Hydro-Quebec.[13]

Talks on finalizing the letter of intent would take more than three years, and they turned out to be very difficult negotiations. They were also complicated by politics. One such problem was Smallwood's anger over the decision by the Quebec government to compel Shawinigan Engineering to sell its shares in CFLCo as part of that province's 1962 nationalization plan for its private electricity utilities; those shares were vested with Hydro-Quebec. Another touchy political matter was the border between Newfoundland and Quebec in the Labrador Peninsula; suggestions by Lesage to link changes in that boundary to the letter of intent created very public problems between him and Smallwood from time to time.[14] Finally, Hydro-Quebec was required to have Quebec government authorization before it could sign any agreement. This brought the Quebec premier closely into the commercial negotiations and thus politicized the process for Hydro-Quebec more so than for CFLCo, which was not a Crown corporation and did not need Newfoundland authorization to sign an agreement.

The search for alternatives

In July 1964 the negotiations came to a particularly difficult impasse. The price of electricity was the key problem. CFLCo could not bring its price down to what was being demanded. At the same time, the two premiers were on poor terms. On 13 April 1963 Smallwood was questioned in the provincial legislature about whether he had had discussions with Quebec about the border. He replied that an exchange of territory had been discussed, but insisted that it was "no more than a thought" and that he had told Lesage that this matter and the Churchill Falls development were separate matters.[15] Then, on 23 April in the Quebec legislature, Lesage announced that he expected to soon present a resolution on a territorial exchange. No such resolution was ever presented, but the whole episode was embarrassing for Smallwood and further worsened the relationship with Lesage.[16]

Considering the political situation and the commercial terms demanded by Hydro-Quebec, Brinco determined that the conditions needed to reach an agreement did not exist. It decided that other alternatives should be explored and that, in light of interest expressed by Ontario Hydro and the continuing interest of Consolidated Edison, there should be "an attempt to secure permission to transmit the power

13 "Proposal by Hamilton Falls Power Corporation Limited to the Quebec Hydro-Electric Commission" (draft of 3 September 1963), CFLCo Papers, MG 28, III 73, vol. 37, file 2.04.003, LAC. Note that CFLCo was initially known as the Hamilton Falls Power Corporation, but the name was changed when the Hamilton River was renamed the Churchill River.

14 At one point the idea was to swap portions of southern Labrador for Quebec territory adjacent to northern Labrador. This border issue turned nasty at times, with the two premiers trading barbs through the media. Smith, in *Brinco*, provides extensive background on the timing and nature of those clashes.

15 "Smallwood-Lesage Talks: May Swap Territory With Quebec," *Moncton Daily Times*, 14 April 1964.

16 Debates of the Quebec Legislative Assembly, 3rd-Session, 27th Legislature, Wednesday, 8 July 1964, vol.1, no.103, p. 4523, CFLCo Papers, MG 28, III, 73, vol. 37, file 2.04.003, LAC.

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across the Province of Quebec."[17] Negotiations on a sale agreement with Hydro-Quebec were considered to be at an end. Any talks now would be limited to obtaining a route through Quebec.

At this time Brinco's chairman and chief executive officer was Robert Winters, who had been a Liberal cabinet minister in the 1950s. Following Brinco's decision to explore other alternatives, he wrote to his former Liberal Party colleague and now prime minister, Lester Pearson, in order to give an update on the situation. Winters confirmed that negotiations had ended and mentioned the possible alternatives of transmitting power through Quebec, either with Hydro-Quebec building and operating the line under contract or with CFLCo building its own line, or going around Quebec entirely. Winters made no formal request and his letter closed by saying that he would welcome a chance to discuss any suggestions that Pearson might have as to how to proceed.[18]

The next month two of Brinco's directors met with Lesage to review the situation and gauge his position. When they asked him about the possibility of a right-of-way through Quebec, Lesage "replied very emphatically that he would never agree to such a proposal."[19] This response appears to be inconsistent with the Section 92.10(a) of the British North America Act of 1867, now known as the Constitution Act, 1867.[20] It states that in any province, the federal government has jurisdiction over "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." Yet, Lesage's refusal to agree to a right-of-way through his province was hardly vacuous. He also had constitutional cards to play. Under Section 92.13 of the Constitution Act, property rights within a province fall under provincial jurisdiction. Thus, at the practical level, without the Quebec government agreeing to use its power of expropriation it would have likely been impossible or prohibitively expensive for CFLCo to acquire all the land needed for its transmission lines. Additionally, Quebec's position at the time was that electricity transmission was under provincial jurisdiction.[21] Indeed, in the early 1960s the federal government had not exerted its authority with respect to interprovincial power lines and provincial governments did dominate the field. The National Energy Board (NEB) had only been created by the federal government in 1959, at which time the NEB Act had been "deliberately designed to avoid the assertion of inter-provincial control of electricity by the Board, because of provincial susceptibilities."[22]

17 "Minutes of the Thirty-ninth Meeting of the Board of Directors of Brinco," 15 July 1964, CFLCo Papers, MG 28, III, 73, vol. 37, p. 6, LAC.

18 Robert Winters to L.B. Pearson ("Personal"), 29 July 1964, Robert Winters Papers, MG 32, B24, LAC.

19 "Memorandum of a Meeting between Premier Lesage and Messrs Bourget and Monast at the Prime Minister's Office, On Thursday, 27th of August 1964," CFLCo Papers, MG 28, III, 73, vol. 37, file 2.04.003, LAC.

20 Canada, Department of Justice, *A Consolidation of The Constitution Acts 1867 to 1982* (Ottawa, ON: Supply and Services Canada, 1983), 32.

21 Churchill, "Pragmatic Federalism," 224.

22 R.G. Robertson, "Memorandum for the Prime Minister, Action by the Federal Government with regard to electric power," 15 January 1965, Lester Pearson Papers, MG 26, N3, vol. 206, file 558.1 Conf., p. 1, LAC.

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Despite this jurisdictional ambiguity, the federal government did possess a tool to settle the matter. It was Section 92.10 (c) of the Constitution Act, which gives the Parliament of Canada the authority to override provincial governments in areas of exclusive provincial jurisdiction when it comes to "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."[23] The use of Parliament's declaratory power in an area that had been conceded to the provinces up to that time, however, would likely have angered a number of provincial governments and particularly provoked Quebec. Still, it was an option to which the federal government was not totally blind. In May of 1964, the clerk of the Privy Council advised Pearson that in any effort to help resolve the Churchill Falls impasse he should not refer to constitutional action, not even to say that the federal government did not intend to use it, because the mention of it might be interpreted as an implicit threat by Quebec and because the government might have to turn to it "as a last resort and therefore should not be given away in advance."[24] And, around this time, the federal government was also doing some related technical investigation. Specifically, following a discussion between the chairman of the NEB and the federal minister of Trade and Commerce, the NEB studied the economic and engineering feasibility of the federal government developing the Churchill Falls project itself in a possible scenario where 92.10(c) was invoked.[25]

Where did Smallwood stand in all of this? According to Philip Smith in *Brinco: The Story of Churchill Falls*, the negotiations were deteriorating during the spring of 1964 and Brinco's Robert Winters had a conversation with federal Minister of Finance Walter Gordon.[26] Gordon said that as an agreement had become more unlikely, he expected that Brinco might have proposed that the federal government build the line across Quebec and buy the power from Brinco. Winters replied by saying Quebecers would never tolerate such action and that this was an impractical approach. More interestingly, Winters recounted that conversation to Smallwood who responded by dismissing the idea entirely, telling Winters that he would be opposed to such action in Quebec just as he would if it were contemplated for Newfoundland.[27] This view is consistent with Smallwood's memoirs in which he writes: "Property and civil rights, under Canada's written constitution, are of exclusive provincial jurisdiction. Accordingly, Quebec would be within its rights to forbid the use of its soil for a transmission line."[28]

23 Department of Justice, *Consolidation of The Constitution Acts*, 32.

24 R.G. Robertson, "Memorandum for the Prime Minister: Hamilton Falls," 26 May 1964, Lester Pearson Papers, MG 26, N3, vol. 80, file 3.31.2.02 Winters, LAC.

25 The letter concluded that federal government development of the project appeared to be feasible in terms of engineering and economics. See R. Howland, vice-chairman of the NEB, to Mitchell Sharp, federal minister of Trade and Commerce, "Development of Churchill (Hamilton) Falls as a Federal Government Project," 25 May 1965, RG20, Department of Trade and Commerce, Mitchell Sharp, vol. 1525, file Development of Hamilton Falls, LAC.

26 Gordon was familiar with the negotiations. Earlier in the year, Winters had written him to advocate for the exemption of CFLCo from federal corporate tax so that a lower price could be offered to Hydro-Quebec; see Robert Winters to Walter Gordon, 12 February 1964, Walter Gordon Papers, MG 32, B44, vol. 21, Taxation, 1963-65, LAC.

27 Smith, *Brinco*, 183.

28 Joseph R. Smallwood, *I Chose Canada: The Memoirs of the Honourable Joseph R. "Joey" Smallwood* (Toronto: Macmillan of Canada, 1973), 454.

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Nevertheless, Smallwood bitterly resented Quebec's refusal to allow any power from Churchill Falls to be transmitted across that province for sale to customers elsewhere.[29] He had a solution, but it did not involve the use of Parliament's declaratory power. It was an entirely different approach. Smallwood strongly advocated that Quebec territory be bypassed altogether. To that end, he favoured the so-called Anglo-Saxon or Maritime route, which would use subsea cables to deliver power to the island of Newfoundland and then to the Maritimes Provinces and subsequently to the US northeast. As negotiations dragged on, and probably also motivated by the boundary issues raised by Lesage, Smallwood's government and Brinco funded a preliminary study of this option. Its results were encouraging enough for the Newfoundland government to pay for a more extensive investigation and, by May of 1964, Smallwood was making public statements about the attractiveness of the Maritime route.[30] Over the remaining months of 1964, Smallwood continued to push this alternative and was quite explicit about his resentment of Quebec. In one interview, he stated that Newfoundland was now free, "having escaped the clutches of Quebec," and went on to say that he viewed Lesage's proposals for a sale of power to Quebec "with contempt" and ruled out any negotiations with Quebec.[31] As he put it to Edmund de Rothschild, Brinco's deputy chairman, only if this alternate route proved impractical would he "crawl on his belly" back to Quebec.[32]

By early 1965, it was clear that Smallwood's cherished Maritime route was not practical. It was technologically feasible but uneconomic.[33] Brinco/CFLCo ruled it out and refocused on either going through Quebec or pursuing a sale agreement with Hydro-Quebec. The federal government was sounded out about possible relief from federal corporate income tax, and attempts were made to reconcile Smallwood with the idea of dealing with Quebec. With respect to the latter, with Smallwood's agreement, in February Winters began quietly assessing Quebec's willingness to discuss allowing power across its territory for sale elsewhere.[34] In addition to Winters's attempts to bring Smallwood on side, the federal government came into the picture. On 26 February 1965, Smallwood met in Ottawa with Prime Minister Pearson and two federal cabinet ministers, Walter Gordon and Jack Pickersgill (whose parliamentary seat was in Newfoundland). In his daybook, Smallwood wrote

29 Smallwood did not place much importance on whether CFLCo would actually own the transmission lines. This was because he recognized that the Quebec government could always expropriate them.

30 "Smallwood Says Cable Feasible," *Montreal Star*, 12 May 1964.

31 "Hydro Line in Spring Joey Says," *Montreal Star*, 28 November 1964.

32 "Memorandum of a meeting with J.R. Smallwood," attached to Edmund de Rothschild to Robert Winters, 26 October 1964, Newfoundland and Labrador Hydro Corporation Records, GY113, Premier 1964, TRPAD.

33 "Review of pertinent considerations on alternates for the development of Hamilton Falls Power," January 1965, CFLCo Papers, MG 28, III, 73, vol. 46, file 12.400.201, LAC.

34 Winters assured Smallwood that he would act "informally and with the utmost delicacy," and would avoid making direct overtures to the Quebec government; see Robert Winters to Hon. J.R. Smallwood, 3 February 1965, Joseph R. Smallwood Papers, Collection 285, file 14.06.105, Centre for Newfoundland Studies Archive at Queen Elizabeth II Library, Memorial University of Newfoundland (CNSA).

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that during the meeting Pearson and Gordon told him that Canada was anxious to see the development of Churchill Falls. Smallwood's memoir and daybook do not mention any discussion of the use of Parliament's declaratory power at that time, but he does record that the next day he phoned Winters to come to St. John's for talks.[35]

On 10 March, following Smallwood's invitation, Winters met with Smallwood and his cabinet and argued for a return to negotiations with Hydro-Quebec.[36] After that meeting, Smallwood announced in the House of Assembly that Brinco and the provincial government were in agreement. In his statement Smallwood said that there would be transmission to the island part of the province, but he did not mention a link to the Maritimes. He simply said that Brinco would investigate the most economic way of transmitting power to other provinces. Thus, without admitting it explicitly, Smallwood was no longer ruling out a Quebec deal. Accordingly, on 1 May 1965, Winters made a proposal to Hydro-Quebec to return to negotiations based on either an arrangement to sell all of the power through Quebec if it did not want to purchase any of it or a direct sale agreement in which CFLCo would be allowed to transmit some power across Quebec for sale to other customers.[37]

While Hydro-Quebec and CFLCo negotiated, the month of May was fraught with very public disagreements between Lesage and Smallwood. Smallwood had announced publicly that a new deal would entail sales to customers other than Quebec, but Lesage countered this. He asserted that Quebec would never permit anyone to build a transmission line or let others transport electricity from Churchill Falls through Quebec. Speaking to the media, the Quebec premier put his position as follows: "The absolute first condition since the beginning of negotiations, and this has never changed, is that Hydro-Quebec shall become the owner of all electricity from Churchill Falls that travels through the Province of Quebec at its entry point into the Province of Quebec. We will negotiate on no other ground than this."[38] It is worthwhile to note, however, that this position was inconsistent with the Constitution Act. In particular, Section 121 states "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."[39] Instead, Lesage was asserting that if there was a transmission line in place to the border then Churchill Falls power would not be admitted free into Quebec; it had to be sold to Hydro-Quebec.[40]

35 Smallwood, *I Chose Canada*, 461.

36 Technically, Winters did not need the permission of the Newfoundland government to return to negotiations; but there would have been enormous practical difficulties in proceeding without Smallwood's approval. The project was in Newfoundland and subject to its provincial laws. At times, Smallwood had even threatened Brinco with expropriation; see Smallwood, *I Chose Canada*, 467.

37 Robert Winters to The President and Commissioners, Quebec Hydro-Electric Power Commission, 1 May 1965, Supreme Court of Newfoundland, Court of Appeal, 1983 no. 120, Record Submitted on Behalf of the Second Defendant-Respondent, Quebec-Hydro Electric Commission, vol. I, tab 25, pp. 206-9.

38 "Brinco Seizure by Smallwood Quebec Rumor," *Globe and Mail*, 5 May 1965.

39 Department of Justice, *Consolidation of The Constitution Acts*, 43.

40 Following the breakdown in negotiations in 1964, Winters pointed out to Pearson that Lesage's position was contrary to Section 121; see Robert Winters to L.B. Pearson, 10 September 1964, Lester Pearson Papers, MG 26, N3, vol. 80, file 3.13.2.02, LAC.

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Lesage's statement was also much to the chagrin of Smallwood, who understood that Winters's re-opening of negotiations with Hydro-Quebec was based on the principle that CFLCo would be permitted to transmit some power through Quebec for sale to customers elsewhere. Smallwood was further aggravated some days later when Lesage stated publicly that he wanted an exchange of territory before he would authorize any final commercial agreement; Smallwood responded that he would never tolerate any change to the provincial border.[41]

Everything came very close to breaking down in mid-May. On 14 May Winters wrote to Smallwood, advising him that an agreement was near. Winters also informed Smallwood that Lesage would be telephoning him in a few days; the implied topic was the border. The Newfoundland premier immediately replied with a lengthy and very angry letter in which he chided Winters for deviating from Smallwood's own understanding of Brinco's negotiating position. Smallwood's letter went on to denounce Lesage's recent public statements, making clear that Lesage should not contact him.[42]

Prospects were bleak at this point, but a flurry of activity followed. Winters immediately telephoned Smallwood to allay his fears of a sell-out. The next day Lesage made a phone call to Smallwood, a call that the Newfoundland premier described as conciliatory.[43] Thereafter, more communications followed involving these and other players, including federal cabinet ministers. Everyone gave ground. Lesage agreed to back off on the border issue; it was replaced with the idea of allowing Quebec some access to the headwaters of some rivers.[44] Winters reassured Smallwood that CFLCo's profits and Newfoundland revenues and other interests were not being sacrificed in the new arrangements.[45] Smallwood accepted the notion of a sale of all the power at the border, which made the issue of Lesage's conflict with Section 121 moot. Additionally, the federal government provided a financial incentive; it agreed to make corporate income tax concessions that would allow CFLCo to offer an even lower price to Hydro-Quebec.

With a consensus taking shape, Smallwood met with Lesage on 7 June and then proceeded to Ottawa for a meeting with Pearson. He informed the prime minister that all was agreed. In consultation with Pearson and Pickersgill, Smallwood wrote a letter to Pearson to confirm that everything had been resolved.[46] Smallwood's letter was dated 7 June 1965.[47] The next day, probably reflecting more harmonious

41 "Labrador Land Trade Holds Key," *Montreal Star*, 13 May 1965.

42 J.R. Smallwood to Robert Winters, 15 May 1965, Newfoundland and Labrador Hydro Corporation Records, GY-113, Premier 1964-66, TRPAD.

43 Smallwood, *I Chose Canada*, 463.

44 The five rivers in question have their headwaters in southern Labrador but flow south through Quebec's North Shore. To develop their hydro-electric potential, Hydro-Quebec needed access to the headwaters. Ultimately, there was no formal agreement on this matter. The issue appears to have receded as negotiations moved from the letter of intent to a final contract.

45 Smallwood's concern was that if Hydro-Quebec took all the power then it would be able to sell whatever was surplus to its needs to other markets at a substantial profit. Smallwood wanted CFLCo to share in that profit because Newfoundland revenues from Churchill Falls were proportional to CFLCo's profits.

46 Smallwood, *I Chose Canada*, 464.

47 J.R. Smallwood to prime minister, 7 June 1965, Lester Pearson Papers, MG 26, N3, vol. 205, file 552, LAC.

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relations at the commercial level, Hydro-Quebec sent a complete draft of a letter of intent to Brinco for consideration.[48] In July the federal government announced there would be tax rebate for private electric utilities, which was the tax policy change that Brinco had advocated for CFLCo. Thus, by the summer of 1965, the political conflicts appeared resolved and the commercial negotiations looked promising.

It is important to emphasize that throughout the acrimony of the preceding 14 months or so, the Newfoundland government had made no request for the use of Parliament's declaratory power. The idea of doing so seems to have been far removed from Smallwood's thinking during this time. Throughout this period and earlier, he had not been shy in making public comments about the project, Quebec, Brinco, the border, exports beyond Quebec, Quebec cabinet ministers such as René Lévesque, the Maritime route, and Lesage, but he made no mention of the declaratory power.[49] His reaction to Winters's conversation with Gordon about approaching the federal government to build a line across Quebec, and his opinion about provincial jurisdiction over property rights, imply that Smallwood did not see that approach as having any merit at the time. The next year, however, things changed.

The Smallwood gambit

Despite the positive atmosphere of June 1965, negotiations to finalize an agreement on the letter of intent went slowly. This made Smallwood impatient. In January of 1966, according to notes made in his daybook, Smallwood told Winters that he would consider provincial nationalization of the Churchill Falls project if another year was to be lost.[50] However, by April 1966 Hydro-Quebec and CFLCo had a letter of intent agreement. Hydro-Quebec strongly supported the agreement, but Lesage decided to delay authorizing it until that year's provincial election was over. That election took place in June; Lesage lost to the Union Nationale, and Daniel Johnson became premier. On 6 July, Hydro-Quebec's Jean-Claude Lessard asked the newly elected government for permission to proceed. Two weeks later, he wrote again and, after highlighting the substantial benefits to Quebec of the agreement, he urged Johnson to allow Hydro-Quebec to sign as soon as possible.[51] Instead, the new government decided to institute its own review process.

This additional delay provided Lesage, now the opposition leader, with the opportunity to attack Johnson. At the end of August, Lesage criticized the government for its procrastination and indecision. He warned the provincial

48 J.-C. Lessard to M.F. Nicholson, vice-president and general manager of Brinco, both the 21-page draft dated 31 May 1965 and a covering letter dated 8 June 1965, Supreme Court of Newfoundland, Court of Appeal, 1983 no. 120, Record Submitted on Behalf of the Second Defendant-Respondent, Quebec-Hydro Electric Commission, vol. I, tab 32, pp. 257-78.

49 Hugh Whalen, formerly of Memorial University's Department of Political Science, kept an extensive private collection of press clippings from a cross-section of Canadian newspapers dealing with Churchill Falls that appeared from 1964 to 1969. A large number contain remarks by Smallwood, but in none does he even hint at the use of the declaratory power.

50 Smallwood, *I Chose Canada*, 465.

51 J.-C. Lessard to Premier Daniel Johnson, 22 July 1966, Supreme Court of Newfoundland, Court of Appeal, 1983 no. 120, Record Submitted on Behalf of the Second Defendant-Respondent, Quebec-Hydro Electric Commission. vol. II, tab 48, pp. 529-35.

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government that unless it could make a decision, the federal government might intervene. In an interview with the *Globe and Mail* newspaper, Lesage explicitly referred to the possibility of federal intervention contained within Section 92.10(c) and said that he always had this in the back of his mind in regard to the project. He also went on to state that neither Pearson nor Smallwood had ever suggested the possibility of such federal intervention.[52]

This whole delay had further frustrated Smallwood, and he, too, now saw a use for Section 92.10(c). On 13 September 1966 his cabinet passed an order-in-council to authorize him to make a formal request to the federal government to declare the project "to be in the national interest and to take such action as may be necessary to enable such development to be commenced without delay" if the Quebec government did not authorize Hydro-Quebec to sign the letter of intent by 22 September.[53] Once the order-in-council was passed, Smallwood phoned Donald McParland, CFLCo's president and CEO, to tell him of this development; McParland was now the key negotiator for the project as Winters had returned to federal politics in late 1965. He told Smallwood that he would get word of Smallwood's deadline to Johnson.[54] Thus, Smallwood was using the threat of constitutional confrontation to add to the pressure on Johnson to authorize the letter of intent.[55]

Despite the trigger date of 22 September, Smallwood did not make any request to the federal government at that time. It was not until 28 September, one day before he was to leave the country on a vacation to destinations in Asia, that Smallwood drafted – but did not send – his request letter to Pearson. In it, he wrote that an agreement was not possible and went on to make the following specific appeal:

> The Government of Newfoundland requests the Government of Canada to invoke Paragraph (c) of Clause 10 of Section 92 of the British North America Act. If the Government of Canada would proceed forthwith to build a transmission line from Churchill Falls to a point where it would tie in with power grids in Eastern Canada it would ensure an immediate start on the construction of the Churchill Falls power project itself.[56]

There is little doubt that if the federal government had asked Parliament to make such a declaration, it would have been seen in Quebec – especially at a time of growing nationalism there – as highly provocative. Some other provinces, too, would have been alarmed at, and opposed to, such heavy-handed use by the federal

52 "Urges Quebec Decision, Ottawa may move in on Brinco deal: Lesage," *Globe and Mail*, 1 September 1966.

53 Government of Newfoundland and Labrador, Executive Council, Order-in-Council 661-'66, 13th September 1966.

54 Daybook of J.R. Smallwood, 13 September 1966, Joseph R. Smallwood Papers, Collection 075, CNSA.

55 Roland Grioux, an advisor to Johnson, warned McParland that if any word of Smallwood's order-in-council leaked out then it would ruin the deal; see Smith, *Brinco*, 246.

56 J.R. Smallwood to L.B. Pearson (unsigned and undated), Joseph R. Smallwood Papers, Collection 075, file 3.10.061, CNSA.

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government of its constitutional powers. A serious federal-provincial conflict would have likely ensued, and perhaps the matter would have been brought before the Supreme Court of Canada. These possible scenarios alone would surely have deterred the federal government from concluding that acting on Smallwood's request would be to the general advantage of Canada. Additionally, Section 92.10(c) requires an explicit declaration by Parliament.[57] At the time, Pearson led a minority government and almost half of his Liberal members in the House of Commons represented ridings in Quebec.

In any case, Smallwood's letter was never sent. Why it was never sent has been a matter of some historical ambiguity, but there is enough evidence to clear that up.[58] According to one explanation, the Smallwood letter was never sent because Pearson asked Smallwood not to do so. This account was reported in 1996 by Cabot Martin, a former policy advisor to Newfoundland Premier Brian Peckford during the 1980s. It stems from a visit Martin made to Smallwood in October 1984. Smallwood was retired by that time, and his provincial Liberal Party government had been replaced by the Progressive Conservative Party in 1972. Martin met with Smallwood following the ruling by the Supreme Court of Canada that Newfoundland's Water Rights Reversion Act, which was an attempt to overturn the Churchill Falls contract, was ultra vires. He asked the former premier why he had not delivered the formal request to the federal government to intervene.

Smallwood's answer, as recounted by Martin, starts with him being in Montreal, driving from there to Ottawa by car with his letter, and then meeting Pearson and two unnamed cabinet ministers. Martin reports that, according to Smallwood, at the start of the meeting, the prime minister said:

> Joe, I know why you are here and if you ask me I'll have to say yes, otherwise we would not really have a country. But I'm asking you not to ask me because we will not be able to keep the towers up.

Martin's account then returns to his discussion with Smallwood and continues:

> Joey paused, then looked at me as if to ask, "What would you have done?" and said, "So I didn't ask him."
>
> After the shock passed, I could only sympathize. Today, it's easy to say Joey should have demanded that Mr. Pearson discharge his responsibility to protect Newfoundland and remind him that he couldn't run a country on fear and threats.
>
> But back in 1966, the bombs in Quebec had started exploding even while Canada still saw itself as the "peaceable kingdom." The War Measures Act had not yet conditioned us to accept the possibility of using force to combat violence. Can Newfoundlanders fault Joey for refusing the mantle of national leadership that Mr. Pearson wouldn't wear?

57 Peter Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Thomson Carswell, 2004), 561.

58 Churchill, in "Pragmatic Federalism" (231-2), dutifully reports the two different explanations for why the letter was never sent, but does not attempt to determine whether either explanation is valid.

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And he concludes as follows:

> From what Joey told me, Newfoundland had greatly weakened its Upper Churchill position in response to a solemn request from the prime minister of Canada.
>
> Joey did it in the interests of national unity, while Quebec flouted the most basic rules of a federation. Doesn't fairness and the national interest count for anything at all?[59]

The preceding account of events puts the federal government in a particularly bad light. It implies that Pearson believed Smallwood was in the right but still pleaded with Smallwood not to ask for action under Section 92.10(c). The picture of Smallwood backing down, sacrificing Newfoundland's interest for the sake of national unity, is striking political imagery. It is accepted as fact by many people and it continues to influence Newfoundland's view of federal governments and the province's place in Canada. For instance, in a tributary volume on Smallwood, William Callahan, a former Smallwood cabinet minister and loyalist, echoes this story of a last-minute appeal from Pearson and states that there has been no federal compensation to Newfoundland for having protected Canada from "total disintegration."[60]

There is another explanation, however, for why Smallwood's letter to Pearson was never delivered. According to Philip Smith in *Brinco*, Smallwood traveled to Montreal on 29 September. He telephoned the CFLCo office in Montreal and left a message asking for a meeting. In response, three senior officials from Brinco and CFLCo met with Smallwood, who also had an entourage of three. It took place early that evening at Smallwood's suite at the Holiday Inn on Sherbrooke Street in Montreal. The premier read the letter to his visitors and threatened to send it, but they were successful in convincing him to hold off – arguing that their information was that the Quebec government's decision would be made by 6 October. Smallwood agreed, but warned them that if the Quebec government did not decide by 7 October then "Churchill Falls would be taken out of the hands of Brinco and Quebec and would become a national project." Smith further reports that, in spite of some political opposition, Johnson announced on 6 October that the Quebec government had authorized Hydro-Quebec to sign the letter of intent. When a *Time* magazine reporter asked Smallwood for a reaction, he replied "Glory Allelujah!"[61] In his daybook, he wrote "Praise be to God!"[62]

This account of events and those reported by Martin are clearly at odds. In one, Smallwood went to Ottawa to see Pearson and was asked to acquiesce for the good of Canada, whereas in the other there is no such meeting and Smallwood succeeded in using his threat as a tactic to get what he and both CFLCo and Hydro-Quebec wanted. As it turns out, there is substantial corroborating evidence in favour of one of these accounts and no such evidence for the other.

59 Cabot Martin, "Footnote to History: The Truth Behind Churchill Falls," *Globe and Mail*, 23 November 1996, reprinted in *The Sunday Telegram* (St. John's), 8 December 1996.

60 William R. Callahan, *Joseph Roberts Smallwood: Journalist, Premier, Newfoundland Patriot* (St. John's, NL: Flanker Press, 2003), 64-5.

61 Smith, *Brinco*, 246-9.

62 Daybook of J.R. Smallwood, 7 October 1966, Joseph R. Smallwood Papers, Collection 285, file 1.10.006, CNSA.

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It never happened

A good starting point is Smallwood's own daybook in which he made handwritten notes of the day's events. According to the entry for 28 September, he drafted his letter to Pearson. He records that he then phoned Jack Pickersgill, the Newfoundland representative in the federal cabinet, and read it to him. His last entry for the day was "Hope I don't have to send it!"[63] The next day Smallwood was in Corner Brook, on Newfoundland's west coast, where he opened a new shopping centre at 11 am and then met with a harbour development committee.[64] Later in the day, he flew to Montreal. His hand-written account of the remainder of the day is as follows:

> Holiday Inn – Henry Borden, Val Duncan, McParland. Told me details of Johnson's cabinet meeting – Johnson sent me a message. Wants me wait til 6 th. I agreed.
> Phoned JWP and told him.
> LRC OLV ARL and I left by BOAC 11 pm for London.[65]

JWP refers to Pickersgill, and LRC, OLV and ARL are the initials of Smallwood's associates: Leslie Curtis, O.L. Vardy, and Arthur Lundrigan. Henry Borden was chairman of Brinco at the time and Val Duncan was a member of its board of directors.

The preceding excerpt is in accord with Smith's account of that meeting. It is also consistent with the recollections of events given by Borden in his personal memoirs.[66] Yet, one might speculate that Smallwood could have changed his mind after the meeting, reneged on what he had just agreed to, and decided to go see Pearson with his letter. But doing so would seem to have been self-defeating. He had just been assured that Quebec authorization of the letter of intent was only days away, and Smallwood wanted that to happen. If it became known that he had requested federal intervention, then the subsequent political ramifications in Quebec would have made authorization much less likely. Still, his account to Martin implies that this is what he did. But did he?

The available evidence supports the hypothesis that Smallwood did not take his letter to Pearson and that there was no meeting between them on that day. First, there was practically no opportunity for a meeting. Smith places Smallwood and his entourage in Montreal at the Sherbrooke Street Holiday Inn in the early evening of 29 September, and the premier's own daybook notes that his flight from Montreal to the UK left at 11 pm.[67] Once the meeting with Borden and the others was over, that left very little time to arrange a car and make a return drive to Ottawa. He would also have had to locate and set up an evening meeting with Pearson. Any discussion between them would have to have been extremely brief in order to allow enough

63 Daybook of J.R. Smallwood, 28 September 1966, Joseph R. Smallwood Papers, Collection 285, file 1.10.006, CNSA.

64 Reports from the Corner Brook newspaper, *The Western Star*, 30 September 1966, confirm Smallwood's activities in Corner Brook on that day.

65 Daybook of J.R. Smallwood, 29 September 1966, Joseph R. Smallwood Papers, Collection 285, file 1.10.006, CNSA.

66 Henry Borden, *Recollections*, Henry Borden Papers, MG 30, A86, vol. 4, p. 166, LAC.

67 Smith, *Brinco*, 246.

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time for Smallwood to drive to the Montreal airport for his 11 pm flight departure that took him out of Canada until 18 October.[68]

Not only was there practically no opportunity for a meeting, but there is also more compelling evidence: Smallwood's daybook and Pearson's appointment book. The contents of both do not jibe with there being a Smallwood-Pearson rendezvous. In his daybook Smallwood's entries for 29 September included the meeting with Borden, Duncan, and McParland in Montreal, the phone call to Pickersgill, and even the departure time and airline for his flight out of the country, but there is no entry for something as significant as a meeting with the prime minister. Also, in his own memoirs, Smallwood recalled the Montreal meeting with Borden and his agreement not to send the letter, giving an account that is consistent with Smith's. In addition, his memoirs even admit that his letter was a threat that would be "more effectual than the reality."[69] Then there is Pearson's appointment book. Its one-page agenda for 29 September lists his meetings and appointments from 9:45 am until 7:30 pm, at which time he was to attend a dinner hosted by the US Ambassador.[70] Nowhere is there an item to do with Smallwood.

In sum, Smallwood drafted his letter to Pearson on 28 September, was in Newfoundland until the afternoon of the next day, and arrived in Montreal later that day for a flight out of the country in the evening. In the short time that he was in Montreal he met with Brinco officials, leaving practically no opportunity for a return trip to Ottawa for a meeting with Pearson. Neither Smallwood's daybook nor Pearson's appointment book recorded any contact between the two men. There is no corroborating evidence that a meeting took place, and such a meeting at that time would have been contrary to Smallwood's interests. The logical conclusion is that it never happened. Smallwood's letter was never sent, but not because of a national unity appeal from Pearson. Rather, it was not sent because the Quebec government authorized the letter of intent, which is what Smallwood wanted.[71]

Aftermath

The letter of intent was signed on 13 October 1966. It was a comprehensive and extensive document that took a form very similar to a contract. Once signed, the notion of a power corridor or right-of-way through Quebec ceased to be relevant and, in order to deliver power according to Hydro-Quebec's needs, substantial work on the Churchill Falls development began almost immediately.

Yet it was not until May of 1969 that the definitive contract was signed. During the time in between there were extensive negotiations on the contract as well as

68 Daybook of J.R. Smallwood, 18 October 1966, Joseph Smallwood Papers, Collection 285, file 1.10.006, CNSA.

69 Smallwood, *I Chose Canada*, 468.

70 Appointment Book, July-December 1966, Lester Pearson Papers, MG 26, N8, vol. 6, LAC.

71 It seems odd that the "Pearson Appeal" account has gained such widespread acceptance, given that it was based on a private conversation that took place about 18 years after the fact. In reporting that conversation, another 12 years later, Martin stated that he believed what Smallwood had told him but, to his credit, suggested that it should be checked, and pointed out there must be evidence in federal memos and Smallwood's own papers. Until now that fact-checking had not been done. One might speculate that the readiness of many Newfoundlanders to believe that those events took place reflected frustration with how the province was faring in the federation.

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intertwined financial arrangements. It was at this stage that the most controversial aspects of the contract and related financial arrangements came about (i.e., an automatic 25-year renewal contract with a reduced price was added to the term that had been agreed to in the letter of intent, and mechanisms were put in place that could allow Hydro-Quebec to take over ownership of CFLCo if certain milestones were not achieved). Feehan and Baker argue that Hydro-Quebec took advantage of CFLCo's financial circumstances in 1968 in order to obtain these concessions, especially the extraordinary renewal clause.[72] However, that debate is beyond the scope of this essay. It suffices here to point out that neither CFLCo nor the Newfoundland government ever reverted to the idea of a power corridor for Churchill Falls power during the negotiations after October 1966.[73]

Summary and conclusion

The matter of a power corridor is part of the history of the Churchill Falls contract. It was especially relevant during the breakdown in negotiations in 1964. In response to inquiries from Brinco at the time, Quebec premier Lesage indicated that he would never agree to a right-of-way and that all power had to be sold to Hydro-Quebec at the border – a position he had taken consistently and publicly throughout his entire time in office. Thus the option of a power corridor, even in the form of permission to sell some power across Quebec, was denied to CFLCo by Quebec and not the federal government. There is no corroborating evidence that at the time the Newfoundland government ever tried to convince the federal government to use Parliament's declaratory power to create a power corridor through Quebec. Newfoundland made no formal request for a parliamentary declaration that would allow the federal government to take over the project, nor would such a request have obligated the federal government to act, and there is no evidence that Smallwood, as much as he resented Lesage's position, ever seriously contemplated such action. In September 1966, Smallwood did threaten to make such a request to the federal government. However, that was a short-lived tactic. He used the threat of a request to pressure the Quebec government to agree to Hydro-Quebec's request that it authorize the letter of intent. Finally, and very importantly, there is the story that Pearson asked Smallwood, for the good of Canada, not to request the federal government to seek a parliamentary declaration. Despite its powerful imagery and its on-going influence on Newfoundland political culture, that story is no more than a legend.

JAMES P. FEEHAN

72 Feehan and Baker, "The Renewal Clause."

73 This observation does not apply to the possible transmission of electricity from the potential projects at Gull Island and Muskrat Falls on the lower portion of the Churchill River. It is well known that there have been disagreements between the two provinces for decades in this regard, and at times the Newfoundland government has appealed to the federal government to strengthen provisions for interprovincial transmission of electricity; see Karl Froschauer, *White Gold: Hydroelectric Power In Canada* (Vancouver: UBC Press, 1999). As of 2010, disagreements were still in play; see, for example, the Newfoundland governments press release, "Quebec's Refusal of Transmission Access Once Again Demonstrates Its Arrogance and Discriminatory Business Practices," www.releases.gov.nl.ca/releases/2010/exec/0512n09.htm.

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