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## Some Comments on Subsection 92(10) of the *Constitution Act, 1867*

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Beneath a deceptively simple appearance, subsection 92(10) of the *Constitution Act, 1867* conceals a scheme for the distribution of legislative power which is subtle, sophisticated, and powerful. The author examines some of the leading decisions from the large body of case law and finds that confusion and conceptual uncertainty have long been obstacles to a clear understanding of the provision. A fundamental distinction, for example, must be made between "works" and "undertakings". Jurisdiction over the one does not necessarily give jurisdiction over the other. The author argues that distinctions between intra- and inter-provincial *undertakings* should be drawn by examining the nature of the undertaking's function. On the other hand, a functional analysis is not an appropriate method for dividing intra-provincial *works* from inter-provincial ones. While the conceptual distinctions enunciated are at times subtle, the author concludes that they are fundamental to a clear analysis of subsection 92(10), and unless they are carefully understood and applied, confusion and inconsistency will continue to plague discussion of this basic constitutional provision.

Derrière une apparente simplicité, l'article 92(10) de la *Loi constitutionnelle de 1867* cache un mécanisme de distribution du pouvoir législatif subtil, complexe et puissant. L'auteur examine la jurisprudence et y découvre une certaine confusion et un manque de clarté conceptuelle qui empêchent une compréhension juste de cette disposition. Une distinction fondamentale, par exemple, doit être faite entre les « travaux » et les « entreprises ». La juridiction sur les uns ne comprend pas nécessairement la juridiction sur les autres. L'auteur prétend que la distinction entre les *entreprises* intra- et inter-provinciales doit se faire selon la fonction d'une activité donnée. Par contre, cette analyse fonctionnelle ne constitue pas une méthode adéquate pour différencier les *travaux* intra- et inter-provinciaux. Bien que l'auteur reconnaisse le caractère parfois subtil de ces distinctions, il conclut qu'elles forment la base d'une analyse claire de l'article 92(10). A moins que ces distinctions ne soient comprises et appliquées de façon rigoureuse, la confusion et l'illogisme seront la règle plutôt que l'exception sous cet article.

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#### I. *General Introduction*

Subsection 10 of section 92 of the *Constitution Act, 1867*<sup>1</sup> is a deceptively simple provision. Beneath the surface of its apparently straightforward language lies a scheme for the distribution of legislative jurisdiction that is both subtle and powerful. This essay attempts to lay bare some of the essential structure of that scheme and, where necessary, restore an appreciation for its sophistication.

##### A. *Constitution Act, 1867*

For the reader's convenience, the relevant provisions of the *Constitution Act, 1867* are set out below.

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 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, . . .

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

And 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

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<sup>1</sup>30 & 31 Vict., c. 3 (U.K.). For the reader's convenience, no further citations for this *Act* will be given. Any reference to a statutory provision not supported by a citation may be assumed to be to the *Constitution Act, 1867*.

local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after 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. . . .

13. Property and Civil Rights in the Province. . . .

16. Generally all Matters of a merely local or private Nature in the Province.

In gross terms, the structure of subsection 92(10) is simple enough. Legislative jurisdiction over all local works and undertakings is assigned to the various Provincial legislatures, and then certain of these works and undertakings are excepted from this general grant of jurisdiction. These excepted works and undertakings are assigned to the exclusive legislative jurisdiction of the Parliament of Canada both by implication and by the express terms of subsection 91(29) and the “deeming clause” at the end of section 91.<sup>2</sup>

Many years ago, Vincent C. MacDonald suggested that:

[N]o problem presented by the B.N.A. Act will be more barren of satisfactory result than the attempt to construe s. 92(10)(c) . . . by the traditional legalistic formula of discovering the intention only from the words as written.<sup>3</sup>

Mr MacDonald’s suggestion might as easily be applied to the subsection as a whole. It seems beyond argument, for example, that paragraphs (a) and (b) do not sit comfortably in subsection 92(10):

It will be observed that paragraph 10 is not well expressed. The sub-paragraphs *a*, *b* and *c* are stated as exceptions from “local works and undertakings,” but the works and undertakings mentioned in sub-paragraphs *a* and *b* are not local, and it is only in sub-paragraph *c* that any local works are described. The drafting

<sup>2</sup>On the “deeming clause” and its relationship to the rest of ss 91 and 92, see G. Browne, *The Judicial Committee and the British North America Act* (1967). Professor Browne’s untimely death was a great loss to Canadian constitutional scholarship.

<sup>3</sup>MacDonald, *Parliamentary Jurisdiction by Declaration* [1934] 1 D.L.R. 1, 2.

would have been improved by transferring sub-paragraphs *a* and *b* directly to the enumerations of s. 91.<sup>4</sup>

### A. *Quebec Resolutions*

In point of fact, this was more or less the original arrangement of the provisions. The relevant sections of the Quebec Resolutions are:

29. The general Parliament shall have power to make laws for the peace, welfare, and good government of the federated provinces (saving the sovereignty of England), and especially laws respecting the following subjects: . . .

(8) Lines of steam or other ships, railways, canals and other works, connecting any two or more of the Provinces together or extending beyond the limits of any Province.

(9) Lines of steamships between the federated provinces and other countries.

(10) Telegraphic communication and the incorporation of telegraphic companies.

(11) All such works as shall, although lying wholly within any Province, be specially declared by the Acts authorizing them to be for the general advantage. . . .

(18) Ferries between any province and a foreign country, or between any two provinces. . . .

(37) And generally respecting all matters of a general character, not specially and exclusively reserved for the local Governments and Legislatures. . . .

43. The local Legislatures shall have power to make laws respecting the following subjects: . . .

(13) Local works. . . .

(18) And generally all matters of a private or local nature, not assigned to the general Parliament.<sup>5</sup>

Why items 29(8) and 29(9) of the Quebec Resolutions should have been transferred to section 92 of the *Constitution Act, 1867* while item 29(18) should have been left in the enumerated heads of federal jurisdiction as subsection 91(13) is entirely mysterious. Indeed, the logical conundrum posed by the actual arrangement of the provisions put the Judicial Committee through some polite analytic contortions in *Winner*.<sup>6</sup> With great respect, their Lordships' "explanation"<sup>7</sup> is less than satisfactory, and they might have done better by bluntly conceding that the subsection was so ineptly drafted that a literal reading would lead to an absurdity.

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<sup>4</sup>E. Newcombe, *The British North America Acts* (1908) 103.

<sup>5</sup>W. Clement, *The Law of the Canadian Constitution*, 3<sup>rd</sup> ed. (1916) 968-72.

<sup>6</sup>*A.G. Ontario v. Winner* [1954] A.C. 541, [1954] 3 All E.R. 177, [1954] 4 D.L.R. 657 (P.C.). The Board comprised Lord Porter, Lord Oaksey, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen.

<sup>7</sup>*Ibid.*, 574.

### C. *Ejusdem Generis*

Less obvious (but rather more difficult) problems arose as the courts attempted to sort out the extent to which the terms "works" and "undertakings" should be read *ejusdem generis*. After some early uncertainty, it now seems well settled that when used in the introductory words of the subsection, the phrase "works and undertakings" refers to all types of works and undertakings, and not merely to those in the fields of transportation and communication.

This is borne out by the fact that sub-paragraph (c), apparently referring back to the principal clause, speaks of "such works" and in reliance on the sub-paragraph Parliament has, with judicial approval, made declarations in respect of works which are quite unrelated to transport and communication.<sup>8</sup>

On the other hand, when used in paragraph (a), the phrase is properly interpreted *ejusdem generis* and confined to works and undertakings in these fields. In practical terms, the effect of this limitation is a good deal less important than might at first appear to be the case. By its express terms, paragraph (a) applies only to works and undertakings that "connect" or "extend". Very few works will extend beyond the limits of a province without connecting it to another, and it is hard to see how a work may connect one province with another unless it serves as a transportation or communication link. This, at any rate, appears to be the approach generally taken by the courts. If a work "connects", then the courts seem to treat that fact as conclusive evidence that the work is within the described *genus*.<sup>9</sup> Much the same might be said concerning connecting undertakings.

In effect, the real significance of the *ejusdem generis* construction is to prevent the subsection from operating with respect to undertakings that extend beyond the limits of a province without actually connecting it to any other. While a transportation or communication *work* might extend into another province (physically) without actually connecting it to any other (functionally),<sup>10</sup> it seems fairly clear that a transportation or communication *undertaking* cannot "extend" without "connecting".

The practical importance of this limitation will, of course, vary inversely with the scope of federal jurisdiction under the trade and commerce power described in subsection 91(2); although it might be that any federal

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<sup>8</sup>McNairn, *Transportation, Communication and the Constitution: The Scope of Federal Jurisdiction* (1969) 47 Can. Bar Rev. 355, 356.

<sup>9</sup>See *ibid.*, 359-60, where the major cases are collected.

<sup>10</sup>See the discussion following note 142, *infra*.

jurisdiction over “extending” undertakings pursuant to subsection 92(10) would have been curtailed by judicial interpretation much as the jurisdiction conferred in subsection 91(1) has been.<sup>11</sup>

#### *D. Effect*

The classic description of the effect of subsection 92(10), (when read in conjunction with subsection 91(29)), was given by Lord Atkinson on behalf of the Judicial Committee in the *Montreal Street Railway* case.<sup>12</sup>

It is admitted that by this declaration the railway to which it refers was withdrawn from the jurisdiction of the provincial Legislature, that it passed under the exclusive jurisdiction and control of the Parliament of Canada, and, small and provincial though it was, stood to the latter in precisely the same relation, as far as the enactments upon the true construction of which this case turns, as do those great trunk lines, also federal railways, which traverse the Dominion from sea to sea. . . .<sup>13</sup>

Now the effect of sub-s. 10 of s. 92 of the British North American Act is, their Lordships think, to transfer the excepted works mentioned in sub-heads (a), (b), and (c) of it into s. 91, and thus place them under the exclusive jurisdiction and control of the Dominion Parliament.

These two sections must then be read and construed as if these transferred subjects were specially enumerated in s. 91, and local railway as distinct from federal railway were specifically enumerated in s. 92.<sup>14</sup>

The important proposition that the “transferred subjects” should be treated as if they had been specifically enumerated in section 91 is made explicitly in the third of the passages quoted above. Implicit in the first of these passages is the equally important proposition that there is no distinction in this respect between the jurisdiction conferred on the Parliament of Canada under paragraphs (a) or (b) and the jurisdiction conferred under paragraph (c). Taken together, these two propositions lead to the conclusion that the application of provincial laws to “transferred” works or undertakings is governed by the ordinary rules of constitutional interpretation, irrespective of whether federal jurisdiction stems from paragraph (a), paragraph (b) or paragraph (c).

Although this analysis seems now to be accepted without argument, some earlier commentators suggested that different considerations should

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<sup>11</sup>See the passages from the judgment of Rinfret J., cited in the text at note 49, *infra*.

<sup>12</sup>*City of Montreal v. Montreal Street Railway* [1912] A.C. 333, (1912) 10 E.L.R. 281, (1912) 1 D.L.R. 681 (P.C.). The Board comprised Earl Loreburn L.C., Lord Macnaghten, Lord Atkinson, Lord Shaw of Dunfermline and Lord Robson.

<sup>13</sup>*Ibid.*, 339.

<sup>14</sup>*Ibid.*, 342.

come into play with respect to works transferred to federal legislative jurisdiction by virtue of a declaration under paragraph (c). Mr Hanssen took the following approach:

For example, assume that a power dam which would otherwise be within provincial jurisdiction is the subject of a declaration under 92(10)(c) and therefore within federal jurisdiction; the provincial government could probably take jurisdiction on the basis of 92(13), property and civil rights in the province, or 92(16), generally all matters of a merely local or private nature in the province. The validity of the provincial legislation would depend on whether there was in existence federal legislation which had dealt with the matter with which the provincial legislation purported to deal. If the federal government had not occupied the field, then the provincial legislation would be valid.<sup>15</sup>

While it may well be that the full extent of the "deeming clause" at the end of section 91 is not entirely clear, the clause most certainly would operate to foreclose any possibility of provincial jurisdiction on the basis of subsection 92(16).<sup>16</sup>

As for the application of subsection 92(13), a logical extension of Mr Hanssen's analysis would appear to give provincial legislatures jurisdiction over "Beacons, Buoys and Lighthouses"<sup>17</sup> (to cite but one example) to the extent that these have not been dealt with in federal legislation. This position is in conflict with the orthodox analysis, expressed succinctly by Lord Watson on behalf of the Judicial Committee in *Union Colliery*:<sup>18</sup>

The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power assigned to the Dominion by s. 91 of the Act of 1867.<sup>19</sup>

Phineas Schwartz, while conceding the weight of the orthodox view as expressed by Lord Watson, suggested that the rather unusual nature of the declaratory power would justify a different treatment of the resulting legislative jurisdiction:

Considering that the legislative power involved is power that the Dominion gave itself by declaration, . . . [Lord Watson's] statement would allow the Dominion to place an area of control in limbo, in a forbidden category, by making

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<sup>15</sup>Hanssen, *The Federal Declaratory Power Under the British North America Act* (1968) 3 Man. L.J. 87, 92-3. Although the passage is not entirely clear, it seems that Mr. Hanssen was referring only to Provincial legislation enacted *after* the declaration. He may, however, have been of the view that "post-declaration" and "pre-declaration" legislation stood on the same footing.

<sup>16</sup>*Supra*, note 2.

<sup>17</sup>Sub-s. 91(9).

<sup>18</sup>*Union Colliery Co. v. Bryden* [1899] A.C. 580, (1899) 68 L.J.P.C. 118. The Board comprised Lord Watson, Lord Hobhouse, Lord Macnaghten, Sir Richard Couch and Sir Edward Fry.

<sup>19</sup>*Ibid.*, 588.

a declaration over a particular work and not legislating on that work. . . . [I]f we accept the unoccupied field approach because of the essential difference between this interpolated part of s. 91 and the rest of s. 91, there will always be provincial legislation ready for application if the Dominion does not utilize its jurisdiction. On the other hand, if we treated interpolated 10(c) as any other part of s. 91, there is the danger that valid provincial interests will be overlooked.

This question has its practical ramifications in the consideration of the status of any provincial legislation when the Dominion removes its declaration, or even, for that matter, narrows it. If the "unoccupied field" theory with its concomitant concept of dormant provincial legislation is applicable, then any surrender by the Federal Parliament of authority by declaration would instantaneously revive the dormant provincial legislation. On the other hand, if we take the view that a declaration nullifies provincial legislation applicable to the work before the declaration, then of necessity the province would be obligated to repass desirable legislation.<sup>20</sup>

To some extent, of course, Mr Schwartz's analysis raises political rather than legal questions. However, in his discussion of the legal position of "pre-declaration" provincial laws, Mr Schwartz failed to consider what seems to be the most precise interpretation. The transfer of legislative jurisdiction from a provincial legislature to the Parliament of Canada should not, it is submitted, "nullify" existing provincial legislation; indeed, it should have no effect whatsoever on such legislation. The general rule of Canadian constitutional law would appear to be that the transfer of legislative jurisdiction does not affect the validity of previously-enacted legislation, provided that such legislation was validly enacted in the first instance by a competent legislative body.<sup>21</sup>

If this were not the rule then, for example, any Imperial statutes still in force in Canada as of April 17, 1982 which have not been re-enacted by the Parliament of Canada or the appropriate provincial legislature would have lost their legal authority in Canada with the coming into force of the *Constitution Act, 1982*<sup>22</sup> (assuming that this Act effected a complete transfer of legislative jurisdiction from the U.K. Parliament to the appropriate Canadian legislative bodies). The better view would seem to be that such a result was neither intended nor achieved.

Thus, if the Parliament of Canada were to make a declaration over a particular work, but not otherwise provide for it, provincial legislation would

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<sup>20</sup>Schwartz, *Fiat by Declaration — S. 92(10)(c) of The British North America Act (1960)* 2 Osgoode Hall L.J. 1, 15.

<sup>21</sup>In other words, s. 129 of the *Constitution Act, 1867* is, in large part, declaratory only. For example, see J. Clarence-Smith & J. Kerby, *Private Law in Canada* (1975) vol. 1, 135-9 for the history of early land grants under the authority of the Nova Scotia legislature in parts of that Province which subsequently became New Brunswick and Prince Edward Island.

<sup>22</sup>Schedule B of the *Canada Act, 1982*, c. 11 (U.K.).

continue to apply.<sup>23</sup> Naturally, the same result would obtain with respect to federal legislation after the revocation or limitation of a declaration. Otherwise validly-enacted federal legislation would continue to apply until such time as the provincial legislature in question chose to exercise its newly-re-acquired jurisdiction.<sup>24</sup>

## II. Works and Undertakings

Subsection 92(10) distributes legislative jurisdiction over “works” and “undertakings”: these are the basic units, or objects, of jurisdiction. A clear understanding of what these two terms mean is therefore essential to a clear understanding of the subsection as a whole. Regrettably, confusion, rather than clarity, is the rule. “At times, . . . the terms ‘works’ and ‘undertakings’ have been used inter-changeably”,<sup>25</sup> and the cases are full of references to works that “form part of” undertakings and to undertakings that “form part of” works. As the discussion of legislative jurisdiction later in this essay tries to show, inaccuracies of this sort can give rise to badly mistaken holdings.<sup>26</sup> A restatement of some fundamental points about the nature of a work, the nature of an undertaking and the relationship between the two is therefore not without value.

It must always be kept in mind that the two terms, “work” and “undertaking”, refer to two different orders of reality. A work “is a physical thing.”<sup>27</sup> It has a concrete existence in the tangible world. An undertaking, on the other hand, “is *not* a physical thing, but is an arrangement under

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<sup>23</sup>See A. Lefroy, *Canada's Federal System* (1913) 364-71, for some early comments on the question.

<sup>24</sup>A. Lajoie, *Le Pouvoir déclaratoire du Parlement* (1969) 77, puts the position thus: La compétence demeure, mais, elle devient inopérante quant à l'objet, tant que la déclaration reste en vigueur. . . . En effet, l'exercice du pouvoir déclaratoire n'a pas pour conséquence l'annulation de la législation provinciale ni la suppression permanente de la compétence provinciale: il en paralyse seulement l'exercice. [Emphasis omitted].

Although Ms. Lajoie's conclusions are, in general, deserving of the highest respect, here she seems to have understated the effect of a declaration on Provincial legislative competence. The better view would seem to be that Provincial competence is actually cradicated (in the sense of having been completely transferred), albeit only for so long as the declaration remains in force. Admittedly, this distinction may be of little more than academic interest: in practice, the two analyses would appear to arrive at the same conclusion as to a declaration's legal effects.

<sup>25</sup>McNairn, *supra*, note 8, 358-9.

<sup>26</sup>See the discussion following note 63, *infra*; and see McKercher, *Parliament's Declaratory Power* (1955) 20 Sask. Bar Rev. 3, for a very clear treatment of the problem as it arises under paragraph (c).

<sup>27</sup>*Montreal Street Railway, supra*, note 12, 342.

which of course physical things are used".<sup>28</sup> An undertaking has no concrete existence in the tangible world, but exists only as a construct of the legal imagination. While a work is a part of the physical world around us, an undertaking is really nothing but a product of legal theory.

Put another way, although a work must always be a *res*, an undertaking may be nothing more than a *spes* — as the Board's opinion in *Winner* made clear:

Their Lordships are not prepared to accept the contention that an undertaking has no existence until it is carried into effect or is capable of being lawfully carried out. It may be an undertaking at any rate if the promoter has done everything which was necessary on his part to put it in motion, and has made all the essential arrangements.<sup>29</sup>

It is somewhat remarkable that in spite of these clear judicial pronouncements there continues to be considerable confusion as to whether or not the meanings of these two terms may overlap in some way. This confusion is even more surprising when it is remembered that the two terms are used together in the subsection and it has been authoritatively established that they are to be read disjunctively.<sup>30</sup>

#### A. Works as "Parts of" Undertakings

The inaccurate reading of "undertaking" may, in part, have its roots in 19th Century English company law cases (especially railway debenture cases) where the term was usually held to embrace what might otherwise be described as "works".<sup>31</sup> However, even in that context, where an instrument referred both to an undertaking and to the lands owned by that undertaking, it was held that lands were not included in the meaning of the

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<sup>28</sup>*In Re Regulation and Control of Radio Communication in Canada* [1932] A.C. 304, 315, [1932] 2 D.L.R. 81, [1932] 1 W.W.R. 563 (P.C.) [hereinafter cited to A.C. as *Radio*] [emphasis added]. The Board comprised Viscount Dunedin, Lord Blanesburgh, Lord Merrivale, Lord Russell of Killowen and Sir George Lowndes.

<sup>29</sup>*Supra*, note 6, 575. See also *Colonial Building and Inv. Association v. A.G. Quebec* (1883) 9 A.C. 157, 164-5 (P.C.); *Corporation of Toronto v. Bell Telephone Co. of Canada* [1905] A.C. 52, 58-9 (P.C.) It does seem a little ironic that "a promoter" may find himself embroiled in a constitutional battle for legislative jurisdiction over his "undertaking" even before he has an insurable interest in it, but this appears to be the state of the law. Strictly speaking, there is a conceptual distinction between the "undertaking", (an activity, business, enterprise, or organization), and its "promoter" (the operator, owner, or undertaker), an artificial or natural person. However, the term is conventionally used in both senses, and any attempt to introduce a more precise terminology would likely produce more ambiguity than it would eliminate.

<sup>30</sup>*Supra*, note 6, 571-4.

<sup>31</sup>For example: *Re Panama, New Zealand, and Australian Royal Mail Co.* (1870) 5 Ch. App. 318.

term “undertaking”.<sup>32</sup> Simply as a matter of construction, then, it seems only sensible to conclude that in subsection 92(10), “undertakings” do not include “works”: two terms are used because the subsection deals with two distinct and completely separate kinds of entity.<sup>33</sup>

Of course, in practical terms, the physical things owned or used by an enterprise are very much a “part of” that enterprise, and ordinary or commercial usage reflects this practical reality. As is often the case, however, what leads to clarity in ordinary usage can lead to profound confusion in constitutional interpretation. If works were to be considered, in constitutional terms, as forming “part of” the undertakings that owned or used them, then legislative jurisdiction over a work could be determined only by reference to the jurisdiction over the undertaking of which it was a part. In other words, subsection 92(10) would operate to assign legislative jurisdiction over works, as such, only insofar as these works were unowned and unused. At the very least, such a reading of the subsection seems artificial and inelegant.

All of which is not to say that jurisdiction over an undertaking does not, in any sense, give rise to control over its works.<sup>34</sup> However, the extent of an undertaking — what it includes or does not include — and the degree to which jurisdiction over that undertaking includes regulatory authority over its works are two conceptually distinct questions.

### ***B. Undertakings as “Parts of” Works***

To read the term “works” as if it might include what would otherwise be described as undertakings seems even more eccentric. Yet such a reading has been suggested, not only in the context of paragraph (c), but also in the context of paragraph (a).

#### **1. Paragraph (c)**

Despite explicit authority to the contrary,<sup>35</sup> commentators have felt obliged to suggest that “works” in paragraph (c) includes undertakings because the effect of a declaration over a work pursuant to paragraph (c) appears to be “to bring within federal authority not only the physical shell or facility but also the integrated activity carried on therein; in other words,

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<sup>32</sup>*Wickham v. New Brunswick & Canada Railway* (1865) 1 L.R.P.C. 64, (1865) 16 E.R. 158 (N.B.).

<sup>33</sup>See *Architectural Institute of British Columbia v. Lee's Design and Engineering Ltd* (1979) 96 D.L.R. (3d) 385 (B.C. S.C.); E. Driedger, *Construction of Statutes* 2<sup>nd</sup> ed. (1983) 109-11.

<sup>34</sup>See the discussion preceding note 62, *infra*.

<sup>35</sup>*Supra*, note 12, 342.

the declaration operates on the work in its functional character.”<sup>36</sup> Later in this essay, an attempt will be made to demonstrate that one need not stretch the meaning of the term “works” in order to explain this result.<sup>37</sup> The Parliament of Canada may enjoy considerable control over the undertakings that use a declared work, even though these undertakings are not “part of” the work.

## 2. Paragraph (a)

### a. *Radio Reference*

Insofar as paragraph (a) is concerned, the major source of confusion is the following passage from the Judicial Committee’s opinion in the *Radio* reference:

Their Lordships cannot but think that much of the argument depends on an unwarranted deduction taken from a sentence to be found in the judgment delivered by Lord Atkinson in the case of *City of Montreal v. Montreal Street Ry. Co.* His Lordship, after saying “the matters thus transferred are . . .,” quotes the sections (a), (b) and (c) and then adds: “These works are physical things, not services.” Mignault J.<sup>38</sup> in the aviation case assumed that this sentence applied not only to (c) which deals with “works” only, but also to (a) and (b), and this view has obviously influenced the conclusions of the minority in this case. Now in the first case their Lordships see no reason why the word “works” should not be referred to the same word standing alone in (c) and not be extended to (a) where it is conjoined with “undertaking,” and to (b) where it is not used at all. But if their Lordships’ surmise as to the view of the Board as expressed by Lord Atkinson is wrong, then they are not bound by and would not agree with the widened proposition. In the wider sense it was in no way necessary for the judgment in the case.<sup>39</sup>

Mr Schwartz has correctly summarized the effect of this passage:

Lord Atkinson in an imprecise reference to s. 92(10) stated [in *Montreal Street Railway*], “These works are physical things, not services”. Clarifying the exact reference, Viscount Dunedin [in the *Radio* reference] surmised that the use of “works” in 10(c) is other than in 10(a) and that the meaning of works in (c) is physical things in contradiction to “undertakings” which is “not a physical thing but is an arrangement under which of course physical things are used.” Referring to Cannon J. who assumed that Lord Atkinson’s equation of “works” and “physical things” applied to all of s. 92(10), Viscount Dunedin held this definition applied only to 92(10)(c). On the other hand, this definition

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<sup>36</sup>B. Laskin, *Canadian Constitutional Law*, 4<sup>th</sup> ed. (1975) 480. See also P. Hogg, *Constitutional Law of Canada* (1977) 324 and 330-1; McNairn, *supra*, note 8, 358-9; Lajoie, *supra*, note 24, 58-66; Schwartz, *supra*, note 20, 7-8; Hanssen, *supra*, note 15, 93-5; *contra*, McKercher, *supra*, note 26.

<sup>37</sup>See the discussion following note 93, *infra*.

<sup>38</sup>This should be Cannon J.

<sup>39</sup>*Supra*, note 28, 315.

of "undertakings" applies to the whole of head (10). It would appear then, from these cases that while "works" in 10(c) is limited to physical things, "works" in 10(a) is not so restricted.<sup>40</sup>

On its face, Lord Atkinson's *dictum* is not at all imprecise, and its meaning seems quite clear: the term "works", wherever it appears in subsection 92(10), means "physical things, not services". However, a rather peculiar misinterpretation of the *dictum* had taken hold in Canada. Clement, for example, wrote that "the works *and undertakings* covered by these classes have been described by the Privy Council as 'physical things, not services'."<sup>41</sup> Why Lord Atkinson should have been thought to mean "works and undertakings" when he said only "works" is not at all clear, but this was a common reading of the *dictum*; and, on this basis, a number of Canadian judges had concluded that paragraph (a) could not be applied at all unless some "physical thing" provided an inter-provincial connection.

The example provided by Viscount Dunedin in the *Radio Reference* is an apt one. Here, from the *Aeronautics* reference,<sup>42</sup> is Cannon J.'s reason for holding that subsection 92(10) could not be applied to aviation:

[A]viation, even if designated as aerial navigation, is not a subject enumerated in section 91, or in subsection 10 of s. 92. The works *and undertakings* connecting a province with another province or extending beyond the limits of the province are "physical things, not services", as pointed out by Lord Atkinson in *City of Montreal v. Montreal Street Railway. The airlines cannot be assimilated to railways or physical things* and [thus] this authority applies with singular force to exclude federal control of aviation, unless the latter is assimilated to inter-provincial lines of navigation.<sup>43</sup>

Now this bizarre misinterpretation could easily have been corrected if Viscount Dunedin had simply made it clear that Lord Atkinson had said "works" and had meant "works" — not "works and undertakings". However, rather than clarify the meaning of Lord Atkinson's *dictum* in this

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<sup>40</sup>*Supra*, note 20, 7.

<sup>41</sup>*Supra*, note 5, 747 [emphasis added]. In fairness to Clement, he did later write: "It is obvious that a continuous or even actual physical connection is not contemplated in some of the classes mentioned. . . and, perhaps, the use of the word 'undertaking' indicates that physical connection between the different parts of the undertaking is not essential, so long as the undertaking as a whole has to do with physical things worked and controlled as one, though spread over different provinces." *Ibid.*, 748. However, even in this passage, the link with "physical things" is seen as vital.

<sup>42</sup>*Re Regulation and Control of Aeronautics in Canada* [1930] S.C.R. 663, [1931] 1 D.L.R. 13.

<sup>43</sup>*Ibid.*, 716 [emphasis added]. The somewhat cryptic reference to "lines of navigation" seems to be directed to subsection 91(10).

fashion, Viscount Dunedin dealt with the problem by restricting the application of the *dictum* to paragraph (c).<sup>44</sup> As Mr Schwartz has pointed out, the result of this approach is that while in paragraph (c), “works” means only “physical things,” in paragraph (a) “works” may mean more than just “physical things”. In other words, “works” has a much broader meaning in paragraph (a) than it does in paragraph (c).

Logically, it would seem the converse would be more reasonable inasmuch as “works” in 10(a) is accompanied by “undertakings” which would by definition cover the usage of the “works”, while in 10(c) “works” stands alone without the crutch of “undertakings”, and one would think that by itself its meaning would be broader.<sup>45</sup>

To understand why Viscount Dunedin preferred this illogical construction of the subsection, it will be necessary to examine some of the arguments put forward by the provinces in the *Radio* case itself.

Before the Supreme Court, the provinces had conceded that there might be a limited federal role in the regulation of radio communications but had vigorously asserted that there remained room for a strong provincial presence in the field. At the heart of this contention was the assertion that all radio receiving sets (and possibly even some transmitting stations) were essentially local works. Rinfret J. had combined this argument with the misreading of Lord Atkinson’s *dictum* to produce a powerful case for provincial dominance in the field.

En soi, l’appareil émetteur et l’appareil récepteur sont des objets de propriété “d’une nature locale” situés dans la province, au sens de l’article 92.<sup>46</sup> . . . [J]e ne crois pas qu’on puisse prétendre que, par le seul fait que ces travaux ont une répercussion au delà des frontières d’une province, ils perdent leur caractère local.

Je suppose un phare qui serait érigé sur le territoire d’une province mais suffisamment près de la frontière pour que ses feux et sa lumière soient projetés sur le territoire d’une autre province. Il me semble que l’on ne pourrait en conclure que ce phare cesse d’être un ouvrage d’une nature locale au sens du paragraphe 10 de l’article 92.<sup>47</sup> . . .

Mais on objecte que le sujet dont il s’agit n’est pas l’appareil émetteur ou l’appareil récepteur en soi, que la véritable question est la communication qui s’établit entre les deux appareils et que, comme il est impossible de restreindre cette communication aux limites d’une province, il en résulte qu’elle tombe dans le domaine fédéral.<sup>48</sup>

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<sup>44</sup>Contemporary authors had no doubt that this was the effect of Viscount Dunedin’s remarks: see MacDonald, *supra*, note 3, 12.

<sup>45</sup>*Supra*, note 20, 7.

<sup>46</sup> *Re Regulation and Control Radio Communication* [1931] S.C.R. 541, 556, [1930] 1 D.L.R. 141.

<sup>47</sup>*Ibid.*, 557.

<sup>48</sup>*Ibid.*, 558.

The learned judge then went on to consider how far the exceptions in subsection 92(10) could have application. Paragraphs (b) and (c) obviously had no bearing, so Rinfret J. turned his attention to paragraph (a):

L'interprétation souveraine qui doit nous guider dans la portée qu'il faut donner à ce sous-paragraphe a été donnée par le Conseil Privé dans la cause de *Montreal v. Montreal Street Railway*. Il y est dit, en référant aux travaux dont il s'agit dans ce sous-paragraphe: "These works are physical things, not services." Or, la distinction fondamentale entre la radiocommunication et la communication par télégraphe, téléphone ou autres travaux du même genre auxquels s'applique le sous-paragraphe (a) du paragraphe 10 est précisément que la radiocommunication peut être un "service", mais elle n'est pas un "physical thing".

En outre, il n'existe pas de connexion physique entre l'appareil émetteur et l'appareil récepteur, comme le fil qui, dans le télégraphe et le téléphone, relie l'endroit d'où sont émis les sons ou les signaux à l'endroit où ils sont reçus.

A la rigueur, une ligne de radiocommunication établie par une firme commerciale pour le service du public partant d'une ou de plusieurs stations d'émission fixes qu'elle posséderait dans une province et qui transmettrait des messages de toutes natures à l'aide des ondes hertziennes à des stations de réception fixes, dont la firme serait également propriétaire, et qui seraient situées dans d'autres provinces, constitueraient un "undertaking" tombant sous la juridiction fédérale. Il semblerait cependant que, dans ce cas, le pouvoir fédéral procéderait non pas du sous-paragraphe (a) du paragraphe 10 de l'article 92, mais du paragraphe 2 de l'article 91 concernant "The regulation of trade and commerce".<sup>49</sup>

As Rinfret J.'s rigorous treatment of the question makes plain, in terms of subsection 92(10) there are four potential elements in radio communication: (i) the transmitting work; (ii) the transmitting undertaking; (iii) the receiving work; and (iv) the receiving undertaking.

Viscount Dunedin and his colleagues made no secret of their desire to avoid dividing legislative jurisdiction over these elements between the Dominion Parliament and the provincial legislatures. In practical terms, this meant bringing all these elements under federal control because, as even the provinces conceded, some aspects of radio communication would necessarily fall within the federal ambit no matter how restrictively the jurisdiction of the Dominion Parliament was described. The argument put forward by Rinfret J. clearly outlined the difficulties facing the Board if it attempted to accomplish its self-appointed task (complete federal control) using conventional constitutional analysis.

This may be one of the reasons that the Board chose to stress the importance of the 1927 *International Radiotelegraph Convention*. The Board may have felt that the Convention would provide a broader base for federal

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<sup>49</sup>*Ibid.*, 558-9.

jurisdiction, especially in light of the recently-issued opinion in the *Aeronautics* reference.<sup>50</sup> Nonetheless, it soon became clear that the terms of the Convention could not, by themselves, provide a fully convincing rationale for complete federal control.

To be sure, the regulation of transmitting works was clearly covered by the Convention and so brought within federal competence, and the regulation of transmitting undertakings might also be brought within its terms. However, it was next to impossible to see how performance of its duties under the Convention would require the Dominion Parliament to regulate receiving works and undertakings. Rather reluctantly, the Board therefore moved from a consideration of the Convention back to an examination of subsection 92(10). This meant, of course, that the Board had to meet the arguments put forward by Rinfret J.

In terms of subsection 92(10) the Board could bring the first and third elements (the “undertaking” elements) within federal jurisdiction by making it clear that Lord Atkinson’s *dictum* applied only to works, and not to works and undertakings. If undertakings were not physical things, but rather, were “arrangements under which physical things are used”, it would follow that for the purposes of subsection 92(10), their “connection” could be considered in functional rather than physical terms. Once the Board had established that paragraph (a) could be applied to “connecting” undertakings even in the absence of a physical link, it then became possible to say that radio broadcasters and their listeners were all engaged in an inter-provincial communications undertaking connecting provinces, functionally, by the inter-provincial transmission of messages. Given that the same transmission signals would, in theory, reach both intra- and extra-provincial listeners; and given that all listeners would, in theory, have access to both intra- and extra-provincial signals, it could be argued that the “undertaking of broadcasting” could not be divided into separate intra- and inter-provincial components.

However, even if all of this very broadly defined “undertaking” of broadcasting fell with federal jurisdiction under subsection 92(10); and even if transmitting works could be brought under federal control by virtue of the Convention, this would still leave the fourth element, the radio receiving work, within provincial jurisdiction.

The heart of the provincial argument advanced by Rinfret J. had been that radio works were local works, and so within the provincial sphere.

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<sup>50</sup>*Re Regulation and Control of Aeronautics in Canada* [1932] A.C. 54, [1932] 1 D.L.R. 58, [1931] 3 W.W.R. 625 (P.C.). For a vehement contemporary reaction to this aspect of the Radio Board’s opinion, see Ewart, *The Radio Case* (1932) 10 Can. Bar Rev. 298.

Considered as "physical things", radio receivers undoubtedly were (and are) local works because they do not physically extend beyond the limits of a single province. The fact that these local works might be used by the inter-provincial "undertaking of broadcasting" would not, of itself, suffice to bring them within the exclusive legislative jurisdiction of the Parliament of Canada any more than the use of intra-provincial roads or railways by inter-provincial carriers suffices to bring these local works under federal jurisdiction.<sup>51</sup> In short, in order to bring radio receivers entirely within federal jurisdiction, the *Radio Board* would have to:

- (i) hold that these apparently local works were "part of" an inter-provincial undertaking; or
- (ii) hold that these apparently local works were "part of" an inter-provincial work.

The Board itself had effectively foreclosed the first possibility by making it clear that the term "undertaking" was not to be interpreted as referring to physical things themselves, but only to the "arrangements" for their use. However, if it could be said that the term "works" might include a "non-physical" element, then the second option might well be exercised. It might be said that *physically* unconnected local works could be *functionally* connected in such a way that they formed a single inter-provincial work — at least for constitutional purposes.

Obviously, Lord Atkinson's *dictum* to the effect that "works" did not include "services" presented a formidable obstacle to this interpretation of paragraph (a), and so Viscount Dunedin and the Board proceeded to hold that the *dictum* should be applied only to paragraph (c).

Caught between the Scylla of an artificial construction and the Charibdis of divided control over radio communication, the *Radio Board* opted for an artificial construction. As a result, the Board was able to find that radio communication involved not only an inter-provincial undertaking (broadly conceived):

Their Lordships have therefore no doubt that the undertaking of broadcasting is an undertaking "connecting the Province with other Provinces and extending beyond the limits of the Province."<sup>52</sup>

but also, as the next sentence in the opinion makes clear, an inter-provincial work in the form of a telegraph (broadly conceived):

But further, as already said, they think broadcasting falls within the description of "telegraphs." No doubt in everyday speech telegraph is almost exclusively

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<sup>51</sup>*Winner, supra*, note 6.

<sup>52</sup>*Radio, supra*, note 28, 315.

used to denote the electrical instrument which by means of a wire connecting that instrument with another instrument makes it possible to communicate signals or words of any kind. But the original meaning of the word "telegraph", as given in the Oxford Dictionary, is: "*An apparatus for transmitting messages to a distance, usually by signs of some kind.*"<sup>53</sup>

So the four elements became two, and both came entirely within federal jurisdiction. The first section of this passage served to bring the first and third elements of radio communication (the transmitting and receiving undertakings) together under federal legislative jurisdiction. The second section of the passage ensured that the second and fourth elements (the transmitting and receiving works) were joined and placed securely within the federal sphere. Both findings were essential to the complete assertion of federal authority in the field. Viscount Dunedin and his colleagues were keenly aware that radio receiving works could not be brought completely under federal control except by establishing that they were not merely local works. So, two otherwise intra-provincial works connected functionally (but not physically) by an inter-provincial undertaking became one inter-provincial work; a telegraph, more or less.

The treatment of the Board's opinion on the *Radio* reference by later Boards and in the Canadian courts is a fascinating topic in its own right. However, for the purposes of this essay, only two of these later "clarifications" of the holding in *Radio* need be considered.

#### *b. Labour Conventions*

The *Labour Conventions*<sup>54</sup> Board was especially anxious to reject the view that the *Radio* Board had relied upon the 1927 *International Radiotelegraph Convention* to support federal legislative authority in the field of radio communication; and despite the unambiguous language of the earlier opinion, it did just that. However, in the process, the *Labour Conventions* Board also cast doubt on the whole of the *Radio* Board's analysis of subsection 92(10).

Lord Atkin admitted that the holding in *Radio* presented "some difficulties":

But when that case [the *Radio Reference*] is examined it will be found that the *true ground of the decision* was that the convention in that case dealt with classes of matters which did not fall within the enumerated classes of subjects

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<sup>53</sup>*Ibid.*, 315-6 [emphasis added].

<sup>54</sup>*A.G. Canada v. A.G. Ontario* [1937] A.C. 326, [1937] 1 D.L.R. 673, [1937] 1 W.W.R. 299 (P.C.) The Board comprised Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright M.R. and Sir Sidney Rowlett.

in s. 92, or even within the enumerated classes in s. 91. Part of the subject-matter of the convention, namely — broadcasting, *might* come under an enumerated class, but if so it was under a heading “Inter-provincial Telegraphs,” expressly excluded from s. 92.<sup>55</sup>

In essence, the *Labour Conventions* Board was suggesting that subsection 92(10) did not apply at all, but that if it did apply, it did so because of the existence of “Inter-Provincial Telegraphs”. The existence of an inter-provincial “undertaking of broadcasting” was never mentioned as a possible basis for federal jurisdiction.

### c. *Winner*

By way of contrast, the *Winner* Board accepted that the *Radio* case involved an inter-provincial undertaking, but expressly denied that there could have been an inter-provincial work:

In the *Radio* case there was no connecting work, only a connecting undertaking, unless the somewhat fanciful suggestion were to be adopted that the flow of an electric discharge across the frontier of a province is to be regarded as a physical connexion.<sup>56</sup>

This is as clear a repudiation of the *Radio* Board’s “functional connection” analysis as could be found. For the purposes of subsection 92(10), the extent of a work is to be measured only in terms of its physical attributes. A work that does not physically extend beyond the limits of a province is not an inter-provincial work, no matter how intimate a functional connection it may have with other works in other provinces.

On the basis of this very clear statement in *Winner*, it seems safe to say that Viscount Dunedin’s highly artificial interpretation of Lord Atkinson’s *dictum* has been discarded. Freed from the illogical constraints imposed upon it by the *Radio* reference, the statement applies with equal force throughout subsection 92(10), from the introductory words through to paragraph (c). Throughout subsection 92(10), “works are physical things, not services”.

## III. Legislative Jurisdiction

### A. *Introduction*

It should be quite clear from the foregoing that for constitutional purposes a work can never — in any circumstances — properly be said to “form part of” an undertaking (or *vice-versa*). In other words, a work and

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<sup>55</sup>*Ibid.*, 351 [emphasis added].

<sup>56</sup>*Supra*, note 6, 574.

an undertaking can never be bound up together in such a way that legislative jurisdiction over the one would, *ipso facto*, give rise to legislative jurisdiction over the other. However, this is not to say that legislative jurisdiction over a work does not give rise to some degree of legislative control over the undertakings that use the work; or that legislative jurisdiction over an undertaking does not give rise to some degree of legislative control over the works used by that undertaking.

For example, where an intra-provincial undertaking uses an inter-provincial work, then that undertaking may fall under federal control to the extent of that use, but it must be kept in mind that this regulatory power arises out of the legislative jurisdiction over the work, not out of any legislative jurisdiction over the undertaking as such. Thus, federal control over the undertaking extends only so far as it is necessarily incidental to the exercise of legislative jurisdiction over the work.

This most important point was expressed with admirable clarity by Kerwin J. in *Quebec Railway, Light & Power Company v. The Town of Beauport*<sup>57</sup> in the context of a declaration under paragraph (c):

Upon the declaration being made that the works of the Company were for the general advantage of Canada,

the effect of subsection 10 of s. 92 of *The British North America Act* is . . . to transfer the . . . works mentioned . . . into s. 91 and thus to place them under the exclusive jurisdiction and control of the Dominion Parliament. *City of Montreal v. Montreal Street Ry. Co.*

It is the “works”, however, and not the Company that is thus brought within the jurisdiction of the Dominion. Section 2 of the 1895 Act<sup>58</sup> cannot by itself effect any such result but the “works” being considered as an enumerated head

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<sup>57</sup>[1945] S.C.R. 16, [1945] 1 D.L.R. 145 [hereinafter cited to S.C.R. as *Beauport*].

<sup>58</sup>The first two sections of the *Act* in question, S.C. 1895, c. 59, read as follows (s. 1 is arguably the most notorious paragraph (c) declaration in Canadian constitutional history):

1. The undertaking of the Quebec, Montmorency and Charlevoix Railway Company, a body incorporated as mentioned in the preamble, and hereinafter called “the Company,” is hereby declared to be a work for the general advantage of Canada.

2. The Company as now organized and constituted under the said Acts of the province of Quebec is hereby declared to be a body politic and corporate within the legislative authority of the Parliament of Canada; and this Act and *The Railway Act* of Canada shall apply to the Company and its undertaking, instead of the said Acts of the province of Quebec and *The Railway Act* of Quebec: Provided that nothing in this section shall affect anything done, any rights or privilege acquired, or any liability incurred under the said Acts of the province of Quebec prior to the time of the passing of this Act, — to all which rights and privileges the Company shall continue to be entitled and to all of which liabilities the Company shall continue to be subject.

of section 91, Parliament may enact such further legislation as is necessarily incidental to the exercise of its jurisdiction over them [the works].<sup>59</sup>

Similarly, in the exercise of its legislative jurisdiction over inter-provincial undertakings, the Parliament of Canada may acquire considerable control over some intra-provincial works. However, the works themselves are not independently the objects, as it were, of federal legislative authority. The object of federal jurisdiction is the undertaking: the work may be controlled only so long as it is used by the inter-provincial undertaking, and only to the extent that such control is necessarily incidental to the exercise of federal legislative jurisdiction over the undertaking.

Undoubtedly, confusion on these points is common. The cases frequently assert that a work forms part of an undertaking<sup>60</sup> or that an undertaking forms part of a work,<sup>61</sup> and Kerwin J. is one of the few to have recognized that jurisdiction over the one does not necessarily give jurisdiction over the other (even though it may give rise to extensive control). Of course, at first glance, this lack of precision may not seem to have much practical importance.<sup>62</sup> This initial appearance is deceptive.

### 1. *GO Train*

Consider, for example, the facts of the *GO Train* case.<sup>63</sup> The Province of Ontario wished to operate a commuter train service entirely within the limits of that Province. The service would be operated using rolling stock owned by the Province of Ontario, but the trains would run over an inter-provincial work — the C.N.R.'s main line along the Great Lakes.

The narrow question in dispute was: "Whether the tolls to be charged by Ontario in respect of the Commuter Service are subject to the jurisdiction of the Board of Transport Commissioners."<sup>64</sup> The parties were agreed that the Commissioners had jurisdiction over any "tolls" within the definition of that term in the then *Railway Act*,<sup>65</sup> and the Supreme Court held that the statutory definition properly covered the amounts Ontario was to charge the commuters. This conclusion is unquestionably correct.<sup>66</sup>

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<sup>59</sup>*Supra*, note 57, 33.

<sup>60</sup>For example, see *ibid.*, 24 (*per* Rinfret C.J.), 29 (*per* Davis J.).

<sup>61</sup>For example, see *ibid.*, 22 (*per* Rinfret C.J.).

<sup>62</sup>McNairn, *supra*, note 8, 359, writes: "This equation [of "works" with "undertakings"] makes little difference in respect of sub-paragraph (a). . .".

<sup>63</sup>*The Queen in Right of Ontario v. Board of Transportation Commissioners* [1968] S.C.R. 118, (1967) 65 D.L.R. (2d) 425 [hereinafter cited to S.C.R. as *GO Train*].

<sup>64</sup>*Ibid.*, 122.

<sup>65</sup>R.S.C. 1952, c. 234.

<sup>66</sup>See the discussion following note 85, *infra*.

However, the Court was also asked the broader question: "Whether the Commuter Service comes within the legislative jurisdiction of the Parliament of Canada".<sup>67</sup> After reciting and summarizing some of the evidence on how the service was to operate, the Court restated the issue before it in the following terms:

On the basis of what has just been said as to the nature of the Commuter Service it remains to be seen whether it can be said to be *a local work or undertaking* within the meaning of head 10 of s. 92 of *The British North America Act*.<sup>68</sup>

Now it should be obvious that while a commuter service may own works, or operate works, or make use of works, a commuter service itself cannot possibly be said to *be* a work. Lord Atkinson's *dictum* bears repeating: "These works are physical things, *not services*."<sup>69</sup> A commuter service, then, can only be said to be an undertaking. Just as the C.N.R. and C.P.R. are both undertakings and not works (though both own, operate and make use of numerous and extensive works), so too with the "Commuter Service" under examination in the *GO Train* case. Thus, what "remained to be seen" in *GO Train* had nothing to do with the status of the Commuter Service as a *work* of any sort, local or otherwise. The issue before the Court was whether the Commuter Service was an inter- or intra-provincial *undertaking*.

This is not merely a linguistic quibble. There was conceptual confusion at the heart of the analysis in the *GO Train* judgment, and the following passages demonstrate the kind of fundamental errors which were committed as a result of this confusion:

Counsel for appellant did not contend that the Commuter Service wholly escaped federal legislative jurisdiction, he [*sic*] conceded that for such matters as signals and safety, the commuter trains would be subject to the same rules as other trains. . . .

Counsel for appellant also felt obliged to concede that the train crews would be subject to federal labour laws not provincial. This cannot be true on any other basis than that the commuter service<sup>70</sup> is not a distinct undertaking but part of the railway operations from the physical point of view. *The criterion for the application of the labour laws as well as for the application of the safety rules is the same: whether the undertaking connects the province with any other.*<sup>71</sup>

Now insofar as it applies to the regulation of labour relations, the proposition advanced in the emphasized sentence is eminently orthodox. It is

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<sup>67</sup>*Supra*, note 63, 122.

<sup>68</sup>*Ibid.*, 126 [emphasis added].

<sup>69</sup>*Montreal Street Railway, supra*, note 12, 342 [emphasis added].

<sup>70</sup>It is almost certain that there is no significance to the fact that this is the only place in the report where the words "commuter service" appear without being capitalized.

<sup>71</sup>*Supra*, note 63, 128 [emphasis added].

well settled that jurisdiction over an undertaking generally includes jurisdiction over its labour relations. Therefore, if the undertaking is inter-provincial in range, the Parliament of Canada has jurisdiction over its labour relations, but if the undertaking is intra-provincial, then jurisdiction lies with a provincial legislature.<sup>72</sup>

However, to assert that the same criterion should be used to determine the application of safety rules is to contradict a long line of solidly-established judgments. Jurisdiction over safety rules has always been held to be part of the jurisdiction over the work, and quite independent of jurisdiction over the undertaking. If the work is inter-provincial, the Parliament of Canada will have legislative jurisdiction over safety rules regardless of the character of the undertaking against which these rules are to be enforced.<sup>73</sup> Similarly, even inter-provincial undertakings must comply with the provincial safety rules when they use intra-provincial works.<sup>74</sup> The inter-provincial undertaking in *Winner* came under federal legislative authority, and so its labour relations would have been governed by federal legislation. Yet, as the Judicial Committee made perfectly clear, there could be no doubt that the undertaking was subject to provincial road regulations:

It would not be desirable, nor do their Lordships think it would be possible, to lay down the precise limits within which the use of provincial highways may be regulated [by the province]. Such matters as speed, the side of the road upon which to drive, the weight and lights of vehicles are obvious examples. . . .<sup>75</sup>

Of course, the distinction between jurisdiction over a work and jurisdiction over an undertaking cannot be drawn if works can form part of undertakings and *vice-versa*; and, as the passages already quoted suggest, in the *GO Train* judgment the Supreme Court was perfectly content to accept this fusion of the corporeal and incorporeal realms. This reading of the

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<sup>72</sup>*Re Eastern Canada Stevedoring Co.* [1955] S.C.R. 529, 592, [1955] 3 D.L.R. 721 (*per* Abbott J.) [hereinafter cited to S.C.R. as *Stevedores*]; *Commission du salaire minimum v. Bell Telephone Co.* [1966] S.C.R. 767, 772, (1966) 59 D.L.R. (2d) 145 [hereinafter cited to S.C.R. as *C.s.m. v. Bell Telephone*]; *Agence maritime Inc. v. Conseil canadien des relations ouvrières* [1969] S.C.R. 851, 859-60, (1969) 59 D.L.R. (2d) 145. Naturally, this analysis speaks only to the position under subsection 92(10). The labour relations of even purely intra-provincial undertakings may fall under Federal jurisdiction where that jurisdiction derives from some other provision of the *Constitution Act, 1867*. Such is the case with aeronautics or banking undertakings, for example.

<sup>73</sup>*Corporation of Toronto v. Canadian Pacific Railway* [1908] A.C. 54, (1908) 7 C.R.C. 282 (P.C.); *Toronto Railway v. Corporation of Toronto* [1920] A.C. 426 (P.C.).

<sup>74</sup>*Winner*, *supra*, note 6.

<sup>75</sup>*Ibid.*, 576.

earlier passages is explicitly confirmed by the summary of the holding in *Luscar Collieries*<sup>76</sup> that appears near the end of the *GO Train* judgment:

The decision in [*Luscar Collieries*] shows that even a work which is of itself local, such as a provincial railway, may become a part of a federal undertaking by being put under the same management through an agreement with the latter.<sup>77</sup>

Having lost sight of the distinction between works and undertakings, the Court (and counsel, too, apparently) naturally found it difficult to keep in mind the essential difference between jurisdiction over safety rules (which follows legislative jurisdiction over the work) and jurisdiction over labour relations (which follows legislative jurisdiction over the undertaking). By conceding federal legislative jurisdiction over safety rules, counsel conceded nothing of importance — the parties were in agreement that the work fell under federal jurisdiction. But, by conceding federal jurisdiction over labour relations, counsel in effect conceded the main issue in dispute — primary jurisdiction over the undertaking itself.<sup>78</sup>

### ***B. Character of the Jurisdiction over Undertakings***

On the level of first principles, the outlines of the jurisdiction over an undertaking are clear enough. Similar formulations may be found in several cases, among them *C.s.m. v. Bell Telephone*:

In my opinion all matters which are a vital part of the operation of an interprovincial undertaking as a going concern are matters which are subject to the exclusive jurisdiction of the federal parliament within s. 91(29).<sup>79</sup>

Although there is in theory no reason to suppose that the character of the jurisdiction over a work should be any different, there is little express authority on the question in the modern cases.

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<sup>76</sup>*Luscar Collieries, Ltd v. McDonald* [1927] A.C. 925, [1927] 4 D.L.R. 85 (P.C.).

<sup>77</sup>*Supra*, note 63, 128.

<sup>78</sup>In fairness to counsel, the labour relations question was by no means a straightforward one. "It was stated in the application that the train crews on the Commuter Service would be those of the Canadian National Railways performing services for the Ontario Government on an agency basis under terms and conditions to be provided for in a formal agreement to be entered into in the near future." *Ibid.*, 121-2. Counsel may well have concluded that the link between the crews and the GO Train service management would not be sufficiently strong to establish an employment relationship. If the crews remained C.N.R. employees, then jurisdiction over their labour relations would, of course, remain with the Parliament of Canada.

<sup>79</sup>*Supra*, note 72, 772.

## C. Character of the Jurisdiction over Works

### 1. Montcalm Construction

The nearest thing to explicit consideration of the point is found in the following extract from the reasons of Beetz J. in *Montcalm Construction*:<sup>80</sup>

To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern. . . Similarly, the design of a future airport, its dimensions, the materials to be incorporated into the various buildings, runways and structures, and other similar specifications are, from a legislative point of view and apart from contract, matters of exclusive federal concern.<sup>81</sup>

What Beetz J. seems to be suggesting is that legislative jurisdiction over a work is confined to those matters that relate to the physical structure of the work, and to those matters alone.

### 2. Notre Dame de Bonsecours

In the course of his reasons,<sup>82</sup> Beetz J. supported his analysis by quoting the following passage from the opinion delivered by Lord Watson on behalf of the Judicial Committee in the *Notre Dame de Bonsecours* case:<sup>83</sup>

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<sup>80</sup>*Construction Montcalm Inc. v. Commission du salaire minimum* [1979] 1 S.C.R. 754, (1978) 93 D.L.R. (3d) 641, (1978) C.L.L.C. 14 [hereinafter cited as S.C.R.].

<sup>81</sup>*Ibid.*, 770-1, per Beetz J. The learned judge had earlier remarked that: "The issue was also discussed as if the Mirabel Airport were a federal work or undertaking, and it could indeed be argued that an international airport is a work which forms part of an undertaking connecting a Province with a foreign country or extending beyond the limits of a Province." *Ibid.*, 769. Apart from the unfortunate phrase "forms part of", the passage raises complex questions concerning the distinction between jurisdiction over works and undertakings pursuant to sub-s. 92(10), and jurisdiction over the same pursuant to the general (residuary or POGG) power. Beetz J. seems to treat the two as equivalent, but this is probably not the case.

<sup>82</sup>*Ibid.*, 772.

<sup>83</sup>*Canadian Pacific Railway v. Corporation of Notre Dame de Bonsecours* [1899] A.C. 367 (P.C.). The Board comprised the Lord Chancellor, Lord Watson, Lord Hobhouse, Lord Macnaghten, Lord Morris, Lord Shand and Lord Davey. Put briefly, the case turned on the applicability of a provincial statute which required the cleaning of drainage ditches. The C.P.R. had argued that there were valid federal provisions covering the same matter and that, in any case, provincial legislation of this sort was not applicable to it or to its railway ditches, because these were matters within the exclusive jurisdiction of the Parliament of Canada. Thus, the case dealt with the extent of legislative jurisdiction over both works (which is of concern here) and undertakings. Although the Board's theoretical exposition of the law seems perfectly sound, the actual result is more than a little difficult to justify on a theoretical level. The simplest rationale may be the best: the Board felt that the cleaning of ditches had as much to do with property and civil rights in the province as it did with the operation of an inter-provincial work or undertaking (*ie.*, that this was an area of concurrent jurisdiction); and that none of the applicable federal legislation conflicted with the provincial statute.

The British North America Act, whilst it gives the legislative control of the appellants' railway quâ railway to the Parliament of the Dominion, does not declare that the railway shall cease to be a part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company. . . .<sup>84</sup>

In many respects, this is a most difficult passage to interpret. On the one hand, it might be suggested that the passage serves to limit jurisdiction over a work to those matters which involve the physical structure of the work. Though the point is not made precisely in these terms, this seems to be the interpretation favoured by Beetz J. in *Montcalm Construction*. At the other extreme, if the reference to the "dictation" of the "constitution and powers of the company" is taken to refer to the scope of jurisdiction over a work, then it is hard to see any matter which might fall outside its range. It would appear, however, that both of these interpretations involve a distortion of Lord Watson's intended meaning.

The term "railway" (or its twentieth-century synonym "system") is often used in a somewhat ambiguous manner. The term can, of course, be used to mean:

- (i) railway works — that is to say, tracks, rolling stock and other equipment; or
- (ii) railway undertakings — that is to say, the entities which own, operate or make use of these works.

In many of the cases, it is all but impossible to determine whether the term "railway" should be taken as meaning works, undertakings or both. However, in the *Notre Dame de Bonsecours* case, Lord Watson was very careful to distinguish between the appellants (the C.P.R., a railway undertaking) and the appellants' railway "quâ railway" (a work). Throughout the Board's opinion, the term "railway" is used only to refer to railway works. It therefore seems reasonable to suggest that the grammatical division of the key sentence is not accidental, but reflects Lord Watson's intention to deal with two sources of legislative jurisdiction.

On this reading, the first section of the sentence describes the scope of federal jurisdiction over a work, while the second section of the sentence describes the scope of federal jurisdiction over an undertaking. The Parliament of Canada thus has the "exclusive right":

1. to prescribe regulations

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<sup>84</sup>*Ibid.*, 372.

- (a) for the construction, repair, and alteration of *the railway* and
- (b) for *its* management; and
- 2. *to dictate*
  - (a) the constitution [of *the company*] and
  - (b) [the] powers of *the company*.

In other words, although Lord Watson did not intend to imply that jurisdiction over a work could include such company law matters as the “constitution and powers of the company”, his Lordship did recognize that jurisdiction over a work is not confined merely to matters involving its physical structure, but also includes matters concerning “its management”. On the whole, then, Lord Watson’s *dictum* seems to confirm that jurisdiction over works and jurisdiction over undertakings may be similarly described: each is limited to those matters which go to essential aspects of the structure, operation or management of the work or undertaking, as the case may be.

In general terms, this theoretical position is not problematic. As might be expected, however, problems will arise when it becomes necessary to allocate a particular matter to one jurisdiction or another.

#### D. *Exclusive and Concurrent*

It is not always immediately obvious whether a given matter should be more properly thought of as falling within the jurisdiction over a work, or within the legislative jurisdiction over the undertaking using the work. Very few of the decided cases have found it necessary to address the question because most of the conflicts that have come before the courts have involved railways, and in this area of activity, the work and the undertaking are usually both inter-provincial. Indeed, on the basis of the case law, all that can be said with any certainty is that safety regulations (or “traffic” regulations) fall within the jurisdiction over the work, and that labour relations regulations fall within the jurisdiction over the undertaking.<sup>85</sup>

##### 1. General Approach

Beyond the bounds of explicit authority, the proper approach to any analysis of the question is suggested by W.R. Lederman’s treatment of the general problem of “exclusive” and “concurrent” fields of jurisdiction.

If the federal features of the challenged law are deemed clearly to be more important than the provincial features of it, then the power to pass that law is exclusively federal. In other words, for this purpose the challenged law is classified by its leading feature, by its more important characteristic, by its pith and substance. And if, on the other hand, the provincial features are deemed

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<sup>85</sup>See, *supra*, notes 72-3.

clearly more important than the federal ones, then power to pass the law in question is exclusively provincial.<sup>86</sup> . . .

Accordingly, if there is sufficient contrast in relative importance between the competing federal and provincial features of the challenged law, then in spite of extensive overlap the interpretative tribunal can still allot exclusive legislative power one way or the other. Once exclusive power has been determined to exist for either legislature, then the so-called doctrine of abstinence simply expresses the implication of this negatively. If the federal parliament does not choose to use its power of regulation in a particular *exclusive* federal field, nevertheless a province cannot enter the field with provincial legislation. The activity concerned simply remains unregulated.

But what if the federal and provincial aspects of the challenged law seem to be of equivalent importance? What if there is no real contrast in this respect? This leads to the second main interpretive situation.

If . . . it develops that the federal and provincial aspects of the challenged law are of equivalent importance — that they are on the same level of significance — then the allocation of *exclusive* power one way or the other is not possible. . . .

Accordingly, the idea of mutual exclusion if practical, but concurrency if necessary, explains much of Canadian constitutional law.<sup>87</sup>

## 2. Some Examples

Labour relations, for example, “has everything to do with”<sup>88</sup> the regulation of an undertaking, but virtually “nothing to do with”<sup>89</sup> the regulation of a work. There being, in effect, no overlap, regulation of labour relations falls “exclusively” within the jurisdiction over the undertaking.

In the area of traffic or safety regulations there is, of course, some overlap. It would no doubt inconvenience an inter-provincial bus undertaking if its buses had to run on the right-hand side of the road in one province and on the left-hand side in another. However, much more than inconvenience would result if some of the buses on a province’s roads ran on the left-hand side while some ran on the right.<sup>90</sup> Deciding the direction of travel on public roads is, in relative terms, of much greater importance to the operation of the work than it is to the operation of the undertaking. Thus, despite the overlap, traffic or safety regulations fall exclusively within the jurisdiction over the work.

In the case of “tolls”, to take a final example, the conflicting claims of the two jurisdictions would appear to be evenly balanced. The charging of

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<sup>86</sup>Lederman, *The Concurrent Operation of Federal and Provincial Laws in Canada* (1963) 9 McGill L.J. 185, 187.

<sup>87</sup>*Ibid.*, 188.

<sup>88</sup>*Montcalm Construction, supra*, note 80, 771.

<sup>89</sup>*Ibid.*

<sup>90</sup>A point grasped by Davis J. in *Beauport, supra*, note 57, 30.

tolls is obviously an essential element in the "management" of a work: indeed, it is hard to see how a legislative body could be said to have jurisdiction over the management of a work if it was not competent to regulate the tolls charged or paid for the use of the work. However, an equally strong case can be made that the regulation of tolls to be charged or paid by an undertaking is a vitally important aspect of the jurisdiction over that undertaking. Thus, regulation of tolls seems to be a matter falling within both jurisdictions.

### 3. Conflicts

Given that a concurrent sphere or field has been established, what if both the federal parliament and the provincial legislatures have entered the field with statutes? What if "the two legislations meet"?<sup>91</sup>

The answer to this question appears to have been given with some precision in the *McCutcheon* case<sup>92</sup> and need not be dealt with here in any detail.

#### E. Paragraph (c)

Some commentators have felt compelled to suggest that where paragraph (c) is concerned, a different analysis must prevail. Either the term "work" must be read, as Viscount Dunedin read it, to include services as much as physical things; or, in the alternative, the jurisdiction over a work subject to a declaration under paragraph (c) must, in some respects, be significantly broader than that which would attach to a work subject to federal jurisdiction by virtue of paragraph (a).<sup>93</sup> Professor Hogg combined these two propositions in the following analysis:

The distinction between works and undertakings is further blurred by the fact that the effect of a declaration over a work "must surely be to bring within federal authority not only the physical shell of the activity [*sic*; or the facility] but also the integrated activity carried on therein; in other words, the declaration operates on the work in its functional character". That this is correct is demonstrated by cases in which the declaration has been followed by an assertion of regulatory jurisdiction over the activity related to the work. Perhaps the clearest examples are the declarations that grain elevators and various kinds of mills and warehouses are works for the general advantage of Canada. The purpose of these declarations was to assume the regulatory jurisdiction over the grain trade which had been denied to the federal Parliament by *The King v. Eastern Terminal Elevator Co.* (1925). It has been held that these declarations are effective to authorize federal regulation of the delivery, receipt, storage and

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<sup>91</sup>Lederman, *supra*, note 86, 189.

<sup>92</sup>*Multiple Access Ltd v. McCutcheon* [1982] S.C.R. 161, (1982) 138 D.L.R. (3d) 1, (1982) 44 N.R. 181.

<sup>93</sup>See, *supra*, note 36.

processing of the grain, that is to say, the activities carried on in or about the "works".<sup>94</sup>

However, properly understood, federal jurisdiction over the declared works would seem broad enough to reach any of the activities carried on in the works (although perhaps not all that might be carried on "about" the works) without this jurisdiction having any special character. Nor is it necessary to blur the distinction between works and undertakings in order to explain this result. One may accept that jurisdiction to some extent "operates on the work in its functional character" — that is to say, operates on "its management" — and yet refuse to accept that "a change in function would destroy the effect of the declaration and require the making of a new one to maintain federal jurisdiction."<sup>95</sup> Jurisdiction over a work of necessity includes an element of control over its uses, whatever these uses may be: but jurisdiction over a work merely extends to these uses, it does not stem from them.

The only cases in this area which cause real difficulty are those which seem to involve what might be called the company law aspects of jurisdiction over paragraph (c) works. Of these, two in particular have been relied upon by commentators. Therefore, although a full treatment of all the relevant cases would be impractical, a closer examination of these two decisions might be worthwhile.

#### 1. *Kettle River*

Ms. Lajoie, for example, takes a rather broad view of federal jurisdiction over company law matters with respect to provincially-incorporated companies that are incorporated to own or operate works subsequently made subject to a declaration.

En ce qui concerne la législation provinciale postérieure à la déclaration, la position des compagnies créées par les autorités provinciales diffère selon qu'il s'agit de compagnies qui ont pour seul objet une entreprise ou des travaux déclarés à l'avantage général du Canada, ou au contraire, de compagnies formées pour la réalisation d'une ou plusieurs fins provinciales autres que l'ouvrage déclaré.

Dans le premier cas, la situation est exactement la même que celle des compagnies créées par le parlement fédéral. Dans le second cas, les compagnies restent sujettes à la réglementation provinciale pour tout ce qui concerne leurs activités relatives à d'autres fins provinciales que l'objet de la déclaration.<sup>96</sup>

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<sup>94</sup>Hogg, *supra*, note 36, 330-1.

<sup>95</sup>Laskin, *supra*, note 36, 480.

<sup>96</sup>Lajoie, *supra*, note 24, 85-6.

In support of her first proposition, Ms. Lajoie cites the *Kettle River* case,<sup>97</sup> “où il a été décidé qu’après une déclaration concernant l’entreprise d’une compagnie de ce genre, la Législature n’avait plus la compétence de modifier la charte qui avait antérieurement été emise sous son autorité.”<sup>98</sup>

The dispute giving rise to the *Kettle River* case is a long and complex one, and a brief summary of its history may help put the judgment in proper perspective. The Vancouver, Victoria and Eastern Railway and Navigation Company (“V.V. & E.”) had been provincially incorporated in 1897. In 1898, the Parliament of Canada declared all the works “which the company by its said Act of incorporation is empowered to undertake and operate” to be works for the general advantage of Canada. Sometime later, the Great Northern Railway Company (“Great Northern”) gained control of the V.V. & E. The V.V. & E. then began to assemble land to construct a line that would cross the tracks of a provincial railway, the Grand Forks and Kettle River Railway Company (“Kettle River”). The purpose of all this was, practically speaking, to extend the Great Northern system up from the town of Marcus, in the United States, to the town of Republic, British Columbia. As Walkem J. said in one of the many judgments generated as a result of this project, “it is common knowledge that such a scheme, if permitted, would have the effect of diverting the business of smelting in the Boundary district and placing it in the hand of our American neighbours.”<sup>99</sup>

The Kettle River company, no doubt for commercial as much as for patriotic reasons, launched a series of legal actions to delay or arrest the Great Northern’s plans. One of these actions struck at the V.V. & E.: Kettle River attempted to have the V.V. & E.’s charter revoked. Before Walkem J., Kettle River succeeded on its application for an order permitting an action, *ex rel.*, against the V.V. & E. The matter came before Irving J. for reconsideration because the V.V. & E. had not been represented at the original hearing.

By section 4 of the Crown Franchises Regulation Act, the Provincial Attorney-General is authorized to bring an action against any corporation, (1.) “Contravening or offending against its act of incorporation. . .” or (4.) “Misusing a franchise or privilege conferred upon it by law”. . .<sup>100</sup>

The points raised against the Company on the application for leave were:

(1.) That it had not confined itself to the line of railway prescribed by the

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<sup>97</sup>*A.G. British Columbia Ex Rel. Kettle River Valley Railway v. Vancouver, Victoria and Eastern Railway and Navigation Co.* (1902) 9 B.C.R. 338 (S.C.) [hereinafter cited as *Kettle River*].

<sup>98</sup>Lajoie, *supra*, note 24, 86n. The case is also discussed in Lefroy, *supra*, note 23, 365.

<sup>99</sup>*Yale Hotel Co. v. Vancouver, Victoria and Eastern Railway and Navigation Co.* (1902) 9 B.C.R. 66, 69-70 (S.C.) [hereinafter cited as *Yale Hotel*]. The preceding summary of facts is drawn principally from the reports of this case and of *Kettle River*.

<sup>100</sup>*Kettle River, supra*, note 97, 340-1.

Provincial charter; (2.) That it had not been commenced within two years; (3.) That no map of the whole line, as contemplated by the Provincial charter, had been filed, but merely sections, or parts of the line; (4.) That it was part of the Great Northern Railway, and that in permitting the Great Northern Railway to acquire shares in the Company there had been a contravention of the requirement of section 21 of the Provincial Act of incorporation. It is on the fourth ground only that I find any difficulty in disposing of the case, because the first, second and third grounds are purely matters relating to the physical construction of the road, and are dealt with by the Dominion Railway Act.<sup>101</sup>

Irving J. expressed the grounds for his judgment setting aside the original order in the following way:

I am inclined to the opinion that when the Dominion authority declared that the undertaking was one for the general benefit of Canada, it wholly removed the Company from the Provincial authority, just as if it had been originally incorporated by the Dominion of Canada.<sup>102</sup>

On this wide ground, the decision clearly supports Ms. Lajoie's conclusions and is very much against the analysis offered elsewhere in this essay. If a declaration over its works could serve to remove the company

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<sup>101</sup>*Ibid.*, 341. The provincial *Act* in question is the *Vancouver, Victoria and Eastern Railway and Navigation Company Act, 1897*, S.B.C. 1897, c. 75 [hereinafter referred to as "the provincial *Act*"]. The pertinent section reads:

21. The Company shall not sell, lease or otherwise dispose of or part with the undertaking hereby authorised, or any part thereof, unless it shall have first obtained the consent of its shareholders representing at least two-thirds in value of the subscribed capital of the Company expressed by resolution in an annual or special general meeting thereof called for such purpose, nor unless nor until all the terms, conditions and considerations of such sale, lease or other disposal have been submitted to the Lieutenant-Governor in Council, duly approved, and the consent thereof expressed by Order in Council.

<sup>102</sup>*Ibid.* The federal *Act* in question is *An Act Respecting the Vancouver, Victoria and Eastern Railway and Navigation Company*, S.C. 1898, c. 89 [hereinafter referred to as "the Dominion *Act*"]. Its relevant provisions are:

1. In this Act the expression "the Company" means the body corporate and politic heretofore created by the Act mentioned in the preamble under the name of the Vancouver, Victoria and Eastern Railway and Navigation Company; and the works which the Company by its said Act of incorporation is empowered to undertake and operate are hereby declared to be works for the general advantage of Canada.

3. The Company may lease or sell its works, or any part thereof, to the Canadian Pacific Railway Company, on such terms and conditions, and for such period as is agreed upon between the directors of the said companies: Provided that the lease or sale be sanctioned by the consent in writing of every shareholder of the Company, and by the Governor in Council; or failing such consent of every shareholder, then by two-thirds of the votes of the shareholders present or represented by proxy at a special general meeting duly called for the purpose, and by the approval of the Governor in Council, after notice of the proposed application therefor has been published in the *Canada Gazette*, and in a newspaper published at Vancouver in British Columbia for at least four weeks previous to the hearing of such application; and a duplicate of the said lease or instrument of sale shall, within thirty days after its execution, be deposited in the office of the Secretary of State of Canada, and notice of such deposit shall be given by the Company in the *Canada Gazette*.

(an undertaking) "wholly" from provincial jurisdiction, then the legislative jurisdiction conferred by paragraph (c) would be much more extensive than that conferred elsewhere in subsection 92(10). At the very least, it would appear that "works" in paragraph (c) included "undertakings". However, on its facts, all that the case actually decided is that the Attorney General of a province cannot take action against a company for the improper disposition of a declared work where the mechanism for such a disposition is governed by a federal statute.

Indeed, Irving J. himself expressed the reasons for his judgment somewhat more narrowly in a later passage:

The point on which I decide this application is that the Provincial Legislature, in passing the Crown Franchise Regulation Act, was dealing only with matters within their own legislative powers.

I do not say that the Crown Franchise Regulation Act is *ultra vires*. It is applicable to Provincial Crown franchises, but in my opinion it is inapplicable to the defendant Company by reason of the Dominion legislation in 1898. I think if the learned Judge had had this called to his attention he would have taken the same view as I do, and in that event he would have refused to act under the statute.<sup>103</sup>

Now the "learned Judge" in question (Walkem J.) had been the judge in first instance in an earlier injunction proceeding between these parties,<sup>104</sup> and Irving J. had sat on the appeal from Walkem J.'s order.<sup>105</sup> Irving J. could have had no doubt, then, as to Walkem J.'s general familiarity with the "Dominion legislation in 1898". What Irving J. may have meant is that the learned judge had not had section 3 of the Dominion *Act* recited to him in full. In large measure, section 3 of the Dominion *Act* and section 21 of the provincial *Act* covered the same matters, the sale or lease of the V.V. & E.'s works.

It is certainly arguable, of course, that neither section 21 of the provincial *Act* nor section 3 of the Dominion *Act* actually covered the sale of the V.V. & E.'s shares (as opposed to the sale of its works,) and it would seem that the case could easily have been disposed of on this ground.

However, to the extent that both provisions were applicable, they must be understood to have addressed the matter of the ownership of the company's works,<sup>106</sup> and the better view would seem to be that the regulation

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<sup>103</sup>*Ibid.*, 342.

<sup>104</sup>*Yale Hotel*, *supra*, note 99, 68.

<sup>105</sup>*Ibid.*, 71.

<sup>106</sup>Or to the identity of their operator, at the very least. The term "undertaking" in the Provincial statute seems to have been used in its "company law" sense rather than its "constitutional law" sense; that is to say, it refers both to the business of the company as a going concern and to the company's property.

of the ownership of a declared work is a matter falling with the exclusive jurisdiction over the work.<sup>107</sup> On this basis, the Dominion Parliament had exclusive jurisdiction to legislate with respect to the disposition of the V.V. & E.'s declared works, even though it had no legislative jurisdiction over the V.V. & E. (an undertaking) as such. Thus, section 3 of the Dominion *Act* was validly enacted and served to repeal section 21 of the provincial *Act*.<sup>108</sup> In permitting the Great Northern to acquire control of its works, the V.V. & E. was committing a breach of a Dominion *Act*, and the *Crown Franchises Regulation Act, 1897* of British Columbia<sup>109</sup> was not applicable to such a breach.

Even if it is argued that jurisdiction in this matter is concurrent, the Dominion legislation would still serve to render the provincial provision inoperative. Companies incorporated by special Acts possess only those powers specifically conferred upon them by those Acts. Company actions beyond those powers are *ultra vires*.<sup>110</sup> In section 11 of the provincial *Act* of incorporation the company had been given a general power "to purchase, hold, receive or take land or other property and also to alienate, sell or otherwise dispose of the same".<sup>111</sup> Section 2 of the Dominion *Act* provided only that nothing in it "shall be construed in any way to affect or render inoperative any of the provisions of the said Act of incorporation which authorized the Company to *undertake, own and operate* the said works as aforesaid."<sup>112</sup> The general power to "alienate, sell or otherwise dispose of same" was therefore not preserved. *Expressio unius est exclusio alterius*. Thus, the only authority for the *disposition* of the company's works is, once again, section 3 of the Dominion *Act*, and, once again, the *Crown Franchises Regulation Act, 1897* of British Columbia could not apply to a breach of a Dominion *Act*.

In summary, then, Irving J.'s general statement of the applicable principle should be treated with the utmost caution. To use the words of a prominent English jurist: "In the wider sense it was in no way necessary for the judgment in the case." Considered for what it actually decides, rather than for its unnecessarily broad *dictum*, the *Kettle River* case is not inconsistent with the analysis offered in this essay.

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<sup>107</sup>Lajoie, *supra*, note 24, 97-108, takes the view that jurisdiction in this area is concurrent.

<sup>108</sup>If not explicitly, then by implication. See Driedger, *supra*, note 33, 226-36, and Dr Lushington's classic formulation in *The India* (1864) 33 L.J.P.M. & A. 193, [1861-73] All E.R. Rep. 490 (Adm.).

<sup>109</sup>S.B.C. 1897, c. 9.

<sup>110</sup>On the doctrine of *ultra vires* in company law generally, see L. Gower, *Modern Company Law*, 4th ed. (1979) 161 *et seq.*

<sup>111</sup>S.B.C. 1897, c. 75, sub-s. 11(d).

<sup>112</sup>S.C. 1898, c. 89, s. 2 [emphasis added].

## 2. *Bourgoin*

Ms. Lajoie also uses the *Bourgoin*<sup>113</sup> case to support her analysis of the extent of the legislative jurisdiction created by paragraph (c). Strictly speaking, however, the decision in *Bourgoin* did not involve the declaratory power at all.

The relevant facts of the case may be briefly expressed. The works of a Quebec-based railway company had been made the object of a declaration under paragraph (c). The company subsequently attempted to transfer these works to another corporate entity (using the Province of Quebec as an intermediary) and then wind up its affairs. Ultimately, the transaction was struck down by the Judicial Committee, but not because of the declaration. To be sure, the relevant Dominion statute did indeed contain a declaration pursuant to paragraph (c) in respect of the company's then existing works, but:

By the 5th section of the same statute it was enacted that the continuations of the line thereby authorized should be deemed to be railways or a railway to be constructed under the authority of a special Act passed by the Parliament of Canada, and that the company should be deemed to be a company incorporated for the construction and working of such railways and railway. . . .<sup>114</sup>

As the title of the statute recounts,<sup>115</sup> the continuations "thereby authorized" were to reach from Quebec into Ontario. Thus, the company had been federally incorporated for the purposes of constructing and operating an inter-provincial railway, and was authorized to do so by the same enactment. Federal jurisdiction over this incorporation and authorization therefore derived from paragraph (a), not paragraph (c).<sup>116</sup>

In the event, the company was either unable or unwilling to complete these inter-provincial extensions to its line and apparently wished to free itself from federal regulation. The transfer of the undertaking and its works from federal to provincial jurisdiction was to be accomplished by a sophisticated transaction "between the company and the Government of *Quebec* which is embodied in the notarial act or deed of the 16th of November,

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<sup>113</sup>*Bourgoin v. La Compagnie du chemin de fer de Montréal* (1880) 5 A.C. 381 (P.C.). The Board comprised Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith and Sir Robert P. Collier. See Lajoie, *supra*, note 24, 47-8, 81, and 85-6.

<sup>114</sup>*Ibid.*, 403.

<sup>115</sup>*An Act to empower the Montreal Northern Colonization Railway Company to extend its line from Deep River to a point of intersection with the proposed Canadian Pacific Railway; and also to extend its line to Sault Ste. Marie, the Georgian Bay and Lake Superior, or to unite its line with any line of Railway extending to the points above mentioned*, S.C. 1873, c. 82.

<sup>116</sup> See *Corporation of Toronto v. Bell Telephone Co. of Canada*, *supra*, note 29.

1875, and in Act 39 Vict. c. 2, of the Legislature of *Quebec*".<sup>117</sup> Their Lordships were of the view that the transaction as a whole could not be supported:

The combined effect, therefore, of the deed and of this statute, if the transaction was valid, was to transfer a federal railway, with all its appurtenances, and all the property, liabilities, rights, and powers of the existing company to the *Quebec* Government, and, through it, to a company with a new title and a different organization; to dissolve the old federal company, and to substitute for it one which was to be governed by, and subject to, provincial legislation.

It is contended on the part of the Appellants that this transaction was invalid, and altogether inoperative to affect the obligation of the company. They insist that, by the general law and by reason of the special legislation which governed it, the company was incompetent thus to dissolve itself, to abandon its undertaking, and to transfer that, and its own property, liabilities, powers, and rights to another body, without the sanction of an Act of a competent Legislature; and, further, that the Legislature of *Quebec* was incompetent to give such sanction. This contention appears to their Lordships to be well founded.<sup>118</sup>

Insofar as the company's corporate organization was concerned, their Lordships held that these were matters within the exclusive legislative jurisdiction of the Parliament of Canada. The company having been validly incorporated by an Act of the Parliament of Canada, the legislature of *Quebec* naturally had no jurisdiction to effect its dissolution. As noted earlier, this branch of the judgment in no way relied upon federal jurisdiction pursuant to a declaration under paragraph (c).

The other ground on which the judgment [under appeal] proceeds, and which has been chiefly insisted upon here, is more plausible. It is that the company had power, under the second sub-section of the 7th section of the *Railway Act*, 1868, to "alienate, sell, and dispose of its lands;" that the transaction of 1875, even if invalid as a whole, is severable, and that the company must be taken to have sold by it their land to the Government of *Quebec* in the exercise of that power.<sup>119</sup>

Their Lordships held that the contract was not severable, and so the purported sale, though it might otherwise have been good, could not be allowed to stand in the particular circumstances of the case.<sup>120</sup> In short, the transaction in *Bourgoin* was set aside on the basis of paragraph (a) and the ordinary principles of contract law. Nothing in the case is relevant to a consideration of federal jurisdiction pursuant to paragraph (c).

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<sup>117</sup>*Bourgoin*, *supra*, note 113, 398.

<sup>118</sup>*Ibid.*, 402.

<sup>119</sup>*Ibid.*, 406-7.

<sup>120</sup>*Ibid.*, 407.

#### IV. *Intra-Provincial* and *Inter-Provincial*

While it may be true that the courts and the commentators have not always realized the importance of making a clear distinction between works and undertakings (or between the jurisdiction over each), the distinction between intra- and inter-provincial works or undertakings has long been an important focus of attention.

Despite this, the cases in this area are, taken as a group, the most unsatisfactory of any in Canadian constitutional law. No attempt will be made here to reconcile all these cases on their own terms: the various *dicta* are simply too confused, confusing and contradictory to be harmonized in any global sense. However, it is possible to arrange the results of the major cases, considered on their particular facts, into a coherent whole, and an attempt will be made to do this.

##### A. *Works*

As a first step, a practical difference in the acquisition of jurisdiction over works under paragraph (a) and under paragraph (c) should be noted. The jurisdiction over works assigned in paragraph (a) is both automatic and expansive. The Parliament of Canada need do nothing to acquire jurisdiction over a work pursuant to paragraph (a). Once an inter-provincial work comes into existence, jurisdiction over it is automatically vested in the Parliament of Canada by virtue of subsections 92(10) and 91(29). Furthermore, any additions to the work, if they form part of it, also automatically fall within federal jurisdiction as they are built.

In contrast, federal jurisdiction over paragraph (c) works is discretionary and limited. Even if a work is, in fact, for the general advantage of Canada, the Parliament of Canada acquires no jurisdiction over it until it is declared to be so by that Parliament. Federal jurisdiction derives from the declaration — and only from the declaration — and its limits are the limits found in the declaration itself. Thus, additions or extensions to the declared work will come within Federal jurisdiction only if they come within the terms of the declaration. It follows that where federal legislative authority derives from paragraph (c), a single work may fall in part under federal jurisdiction and in part under provincial jurisdiction.

Which leads to a related point concerning the operation of paragraphs (a) and (c). For constitutional purposes, all works must be classified as being intra- or inter-provincial in range, and, of course, all works must come under either provincial or federal jurisdiction. However, while these two groupings often overlap, they are not completely congruent. Put another way, all inter-provincial works come under federal jurisdiction, but not all works under

federal jurisdiction are inter-provincial works. Similarly, all works under provincial jurisdiction are intra-provincial works, but not all intra-provincial works come under provincial jurisdiction.

It is most important that these elementary points be kept in mind when examining the cases in this area because there is a regrettable tendency in some of the commentaries to focus on the “connection” question as if it were invariably relevant to the question of jurisdiction. While this may well be so with respect to paragraph (a), where paragraph (c) is concerned, the question “is there one work or two?” is often irrelevant and always secondary.

### 1. *Montreal Street Railway*

The interaction among these various considerations is well illustrated in the first major “connection” case, *Montreal Street Railway*:

There are in the city of Montreal and the adjacent township two so-called railways. One of these is the . . . Park Railway, and the other the . . . Street Railway. These railways being constructed on the island in the St. Lawrence on which the city of Montreal stands are, of course, situate wholly within the province of Quebec. They connect physically at several points both within and near the limits of the city, and arrangements have been entered into between the companies owning them by which the cars of each railway run over the lines of the other, and passengers are conveyed from points on one system to points on the other over the permanent way of both.<sup>121</sup>

The Park Railway apparently provided a less convenient and more expensive service to the residents of the Mount Royal Ward than it provided to the residents of the town of Notre Dame de Grace, and a complaint to that effect was filed with the Board of Railway Commissioners. The works of the Park Railway had been the object of a paragraph (c) declaration.<sup>122</sup> Thus the Commissioners certainly had jurisdiction to regulate the use of those works. However, the Commissioners not only ordered the Park Railway to remove the discrimination in rates and services, but they also ordered that the Street Railway should “enter into any agreement or agreements that may be necessary to enable” the Park Railway to carry out the other provisions of the order.<sup>123</sup> The Street Railway successfully appealed against

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<sup>121</sup>*Supra*, note 12, 338.

<sup>122</sup>*An Act Respecting the Montreal Park and Island Railway Company*, S.C. 1894, c. 84. If the lines of the Park Railway and the lines of the Street Railway formed a single work at the time, it may be that the declaration was invalid. It is certainly arguable that Parliament’s declaratory power must be exercised over a work as a whole, and cannot be exercised against only a portion of a work.

<sup>123</sup>(1910) 43 S.C.R. 197.

this order to the Supreme Court of Canada and succeeded again before the Judicial Committee. The question of law to be considered was:

Whether upon the true construction of sections 91 and 92 of the British North American Act, and of section 8 of the Railway Act of Canada, the Montreal Street Railway is subject in respect of its through traffic with the Montreal Park and Island Railway Company, to the jurisdiction of the Board of the Railway Commissioners of Canada.<sup>124</sup>

Now there can be little doubt that the lines of the Park Railway and the lines of the Street Railway formed a single work. Although the two lines were separately owned, they were physically connected and, as the Judicial Committee's opinion makes clear, to a significant degree the two lines were operated as a single unit: "the cars of each railway run over the lines of other and passengers are conveyed from points on one system to points on the other over the permanent way of both". However, the "connection question" was never addressed by the Judicial Committee, let alone decided, because it was irrelevant to the resolution of the legal issue in dispute.

Insofar as federal jurisdiction pursuant to paragraph (a) was concerned, it made no difference at all whether the lines of the Park Railway and the lines of the Street Railway formed one work or two. Even if the two lines did form a single work, that work remained an intra-provincial one, because neither line ran off the island of Montreal. It must be remembered that paragraph (a) applies to works connecting a "Province with any other or others of the Provinces, or extending beyond the limits of the Province". The fact that a work connects with or is part of a work which comes under federal jurisdiction does not, of itself, serve to bring the work within this description. Paragraph (a) applies only to inter-provincial works. All intra-provincial works, whether under federal jurisdiction or not, are beyond its scope.

Insofar as paragraph (c) was concerned, the declaration had been made only with respect to the works of the Park Railway. Even if the two lines formed a single work, the declaration, by its terms, applied only to that part of the work belonging to the Park Railway. Thus, there could be no federal jurisdiction over the lines of the Street Railway on the basis of the declaration under paragraph (c).

After dismissing the general power and the trade and commerce power as possible bases for federal jurisdiction in the matter, the Judicial Committee neatly expressed the above conclusions:

It follows, therefore, that the Act and Order if justified at all must be justified on the ground that they are necessarily incidental to the exercise by

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<sup>124</sup>*Supra*, note 12, 340.

the Dominion Parliament of the powers conferred upon it by the enumerated heads of s. 91. Well, the only one of the heads enumerated in s. 91 dealing expressly or impliedly with railways is that which is interpolated by the transfer into it of sub-heads (a), (b) and (c) of sub-s. 10 of s. 92. Lines such as the Street Railway are not amongst these.<sup>125</sup>

The Judicial Committee recognized that traffic passed freely between the two lines, but quite properly rejected the suggestion that such an interchange should, of itself, be sufficient to give the Parliament of Canada jurisdiction "to exercise control over the 'through' traffic of such a purely local thing as a provincial railway properly so called, if only it be connected with a federal railway".<sup>126</sup> Insofar as the through traffic "is carried on over the federal line, it can be controlled by the Parliament of Canada, [and] so far as it is carried over a non-federal provincial line it can be controlled by the provincial Legislature".<sup>127</sup>

It is clear that the result in *Montreal Street Railway* would have been correct even if one were to assume that the two lines were being run by a single undertaking. Because the undertaking would have been intra-provincial in range, it would not have come under federal jurisdiction pursuant to paragraph (a), and federal jurisdiction over the undertaking pursuant to paragraph (c) would have been strictly confined to its activities in respect of the declared work only. Federal jurisdiction under paragraph (c) is jurisdiction over works: the undertakings which own, operate or make use of declared works are not themselves objects of federal jurisdiction. Thus, federal control over such undertakings does not extend to their operation of undeclared works. This is precisely the point taken up by the Supreme Court of Canada in the *B.C. Electric Railway* case.<sup>128</sup>

## 2. *B.C. Electric Railway*

For the purposes of this essay, the somewhat complicated relationships among the various parties need not be explored in detail. Suffice it to say that the British Columbia Electric Railway Company ("B.C.E.R.") operated a number of railways in the Province, all by electric (as opposed to steam) locomotion. Among these were the Central Park line and the Lulu Island line. The Central Park line was owned by the B.C.E.R., but the Lulu Island line was not. It was owned by the Vancouver and Lulu Island Railway Company ("V. & L.I."), a provincially-incorporated company which appears

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<sup>125</sup>*Ibid.*, 344.

<sup>126</sup>*Ibid.*, 344-5.

<sup>127</sup>*Ibid.*, 346.

<sup>128</sup>*British Columbia Electric Railway v. Canadian National Railway* [1932] S.C.R. 161; rev'g (*sub nom. North Fraser Harbour Commissioners v. British Columbia Electric Railway*) (1929) 35 C.R.C. 384 (Bd Ry Comm'rs). The summary of facts that follows is drawn from both reports.

to have become a wholly-owned subsidiary of the C.P.R. In 1901, the V. & L.I. leased its lines to the C.P.R. (for 999 years), and shortly thereafter, all of the V. & L.I.'s works were declared to be for the general advantage of Canada. The declaration thus covered only the Lulu Island Line, and not the Central Park Line. Some years after the declaration, the C.P.R. engaged the B.C.E.R. to operate the Lulu Island Line on the C.P.R.'s behalf.

The Central Park line (owned and operated by the B.C.E.R.) connected at one end with the tracks of the C.N.R. and, at the other, with the tracks of the Lulu Island line (operated but not owned by the B.C.E.R.). At its other end, the Lulu Island line connected with the tracks of the C.P.R.

A number of local businessmen successfully petitioned the Board of Railway Commissioners for an order directing that the C.N.R. and the B.C.E.R. publish and file "between stations on the Vancouver and Lulu Island Railway and points on the Canadian National Railways via direct connection between the companies [*i.e.*, via the Central Park line], joint rates on the same basis as those now published between said Vancouver and Lulu Island points and stations on the Canadian Pacific Railway".<sup>129</sup> On appeal to the Supreme Court of Canada it was held that the Commissioners did not have jurisdiction to issue the order.

As noted earlier, the regulation of tolls is a matter falling concurrently within the jurisdiction over a work and the jurisdiction over an undertaking. Therefore, the order would have been good if either the work or the undertaking had been within Federal jurisdiction. Both points were taken up by the court, which first rejected the argument that all of the B.C.E.R.'s operations fell under Federal jurisdiction merely because a part of its operations involved the use of a declared work:

It does not follow that the Board acquired jurisdiction over . . . [the whole of the B.C.E.R.'s operations]. . . by virtue merely of its operation also of another line of railway which is under Dominion jurisdiction. There is nothing abnormal about its being under provincial jurisdiction in connection with its operation of the one, and under Dominion jurisdiction in connection with its operation of the other. . . .<sup>130</sup>

It is, however, urged that, by virtue of the *British North America Act*, section 92, head 10 (*a*), jurisdiction is conferred on the Board over this company in connection with its operation of the provincial or Central Park line, or part of it, because that part forms a connecting link between two lines of railway admittedly under the jurisdiction of the Board, *one of which extends beyond the limits to the province*, and because it handles traffic over its provincial lines to and from lines of railway under Dominion jurisdiction, *extending beyond*

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<sup>129</sup>*North Fraser Harbour Commissioners, ibid.*, 391-2.

<sup>130</sup>*Supra*, note 128, 167.

*the limits of the province*, pursuant to agreements with companies owning and operating those lines under Dominion jurisdiction.<sup>131</sup>

Again, there can be little doubt that the Central Park line and the Lulu Island line formed a single work. Although separately owned, the two lines were physically connected and were operated as a unit by the same undertaking, using rolling stock owned by that undertaking. However, once again, the resulting work was not therefore elevated into the position of a paragraph (a) work. Insofar as the Central Line connected with (or was part of) the Lulu Island line, it merely connected with (or was part of) a railway which "was itself nothing more than a local line which had been declared to be a work for the general advantage of Canada".<sup>132</sup>

The only possibility for the application of paragraph (a) to the Central Park line rested on its physical connection with the C.N.R. Apparently relying on *Montreal Street Railway* and *Luscar Collieries*, but without fully articulating its reasons, the court rejected this line of argument.<sup>133</sup> The relevance of the *Montreal Street Railway* holding to a consideration of federal jurisdiction pursuant to paragraph (a) is not entirely clear, because neither of the works in the earlier case was an inter-provincial work. However, the decision in *Luscar Collieries* is very much on point.

### 3. *Luscar Collieries*

Luscar Collieries, Limited ("Luscar") owned a short stretch of railway tracks in Alberta (the "Luscar Branch"). The Luscar Branch had been built by Luscar but it was operated by the C.N.R. Under the terms of the operating agreement, the C.N.R. was to grant Luscar rebates on the coal Luscar shipped over the C.N.R.'s lines, and when the total of the rebates granted had fully

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<sup>131</sup>*Ibid.*, 167-8 [emphasis added].

<sup>132</sup>Ballem, *Constitutional Validity of Provincial Oil and Gas Legislation* (1963) 41 Can. Bar Rev. 199, 223. McNair is apparently of the view that the Lulu Island line could also be considered as an inter-provincial work. "However federal jurisdiction over the declared railway could perhaps also be based on its treatment as an interprovincial railway in view of a number of factors; its connexion with the C.P.R. trunk system, albeit that an electric system-steam system interchange has its functional limitations, its ownership by a wholly owned subsidiary of the C.P.R., and its 999 year lease to the C.P.R.". *Supra*, note 8, 384n. McNair fails to mention the strongest ground for this conclusion, which is that the line seems to have been one of those operated for some years (either prior to or shortly after the declaration, and apparently under steam), by the C.P.R. "directly, as part of its railway system, until these were taken over for electric operation by the B.C.E.R.". *British Columbia Electric Railway*, *supra*, note 128, 164; and see the Commissioners' report, *supra*, note 128, 35 C.R.C. 384, 386. If the declaration was not bad from its inception (as it would be if the joint operation by the C.P.R. occurred prior to it), then the better view would seem to be that the declaration served to fix, for constitutional purposes, the local character of the work so that it could not thereafter be assimilated into an inter-provincial work.

<sup>133</sup>*Supra*, note 128, 169-70.

compensated Luscar for the construction costs of the Luscar Branch, the line was to become the property of the C.N.R. The Luscar Branch connected to the tracks of the Mountain Park Railway which, in turn, connected to the C.N.R.'s tracks. The owners of the Mountain Park Railway had concluded an identical operating agreement with the C.N.R.

Before the conditions for the transfer of the Luscar branch had been met, the owner of a nearby coal lease applied to the Board of Railway Commissioners for an order: (a) "granting him running rights over the [Luscar Branch]. . .and (b). . .requiring the Canadian National Railways to grant permission for the construction of a spur track" connecting his coal lease and the Luscar Branch.<sup>134</sup> The Commissioners decided that they had jurisdiction to issue the order applied for,<sup>135</sup> and Luscar was unsuccessful in its appeal to the Supreme Court on this issue.<sup>136</sup>

When the dispute came before the Judicial Committee, Lord Warrington of Clyffe expressed their Lordships' reasons for concluding that the Commissioners did indeed have jurisdiction to issue the order in question.<sup>137</sup>

Their Lordships agree with the opinion of Duff J. that the Mountain Park Railway and the Luscar Branch are, under the circumstances hereinbefore set forth, a part of a continuous system of railways operated together by the Canadian National Railway Company, and connecting the Province of Alberta with other Provinces of the Dominion. It is, in their view, impossible to hold as to any section of that system which does not reach the boundary of a Province that it does not connect that Province with another. If it connects with a line which itself connects with one in another Province, then it would be a link in the chain of connection, and would properly be said to connect the Province in which it is situated with other Provinces.

In the present case, having regard to the way in which the railway is operated, their Lordships are of opinion that it is in fact a railway connecting the Province of Alberta with others of the Provinces, and therefore falls within s. 92, head 10 (a), of the Act of 1867. There is a continuous connection by railway between the point of the Luscar Branch farthest from its junction with the Mountain Park Branch and parts of Canada outside the Province of Alberta. If under the agreements hereinbefore mentioned the Canadian National Railway Company should cease to operate the Luscar Branch, the question whether

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<sup>134</sup>*McDonald v. Luscar Collieries, Ltd* (1924) 31 C.R.C. 266 (Bd Ry Comm'rs).

<sup>135</sup>The Commissioners took jurisdiction originally on the basis of the *Railway Act, 1919*, S.C. 1919, c. 68, sub-s. 6(c). *Ibid.*, 267.

<sup>136</sup>The Supreme Court divided on the validity of the purported declaration, but sustained the Commissioner's jurisdiction on the basis of paragraph (a). The Judicial Committee pointedly refused to consider the status of the "open-ended" declaration in the *Railway Act, 1919*, S.C. 1919, c. 68, s. 6, and based its decision entirely on paragraph (a). Therefore, the paragraph (c) arguments will not be addressed here. *Luscar Collieries, supra*, note 76, 932-3.

<sup>137</sup>The Board comprised Viscount Haldane, Viscount Sumner, Lord Wrenbury, Lord Darling and Lord Warrington of Clyffe.

under such altered circumstances the railway ceases to be within s. 92, head 10 (a), may have to be determined, but that question does not now arise.<sup>138</sup>

#### 4. A Synthesis

As noted earlier, all the various *dicta* from these cases cannot possibly be harmonized. However, it is possible to extract some coherent principles from their results, if each is considered carefully in light of its particular facts.

Mr Ballem has argued that both *Montreal Street Railway* and *B.C. Electric Railway* can be distinguished from cases such as *Luscar Collieries* (which involve paragraph (a) works) because the two cases first mentioned “involved connections [only] with railway systems that normally would not have been under federal jurisdiction”;<sup>139</sup> that is to say, “systems” subject to Federal jurisdiction pursuant to a declaration under paragraph (c). This is unquestionably true so far as *Montreal Street Railway* is concerned but in *B.C. Electric Railway* there was also a connection with the C.N.R.’s inter-provincial line. As the passages quoted above from the *B.C. Electric Railway* judgment make quite clear, the Supreme Court was well aware that the Central Park line connected with two “Federal” railway lines “one of which extends beyond the limits of the province”<sup>140</sup> and was therefore subject to Federal jurisdiction under paragraph (a).

If *Luscar Collieries* and *B.C. Electric Railway* cannot be distinguished as Mr Ballem has suggested, does it follow that the holdings in these two cases are contradictory or inconsistent, as Mr McNairn seems to have implied:

Common operation is given prominence in *Luscar* yet in the *B.C. Electric Ry.* case the British Columbia company operated the mile section of its line in common with the connecting line that had been declared to be for the general advantage of Canada. To rationalize the two cases one must either attribute greater significance to other unemphasized features of *Luscar*, such as the fact that the Canadian National Railway had a potential proprietary interest in the lines themselves on payment of certain rebates and perhaps, additionally, highlight on the other side the limitations of the connexion between electrical and steam systems.<sup>141</sup>

As the discussion above on the *Montreal Street Railway* decision suggests, common operation of the Central Park line (“the mile section”) and the Lulu Island line (“the connecting line”) could have no possible bearing on the application of paragraph (a) to the case. Neither line was inter-provincial in range. If the Central Park line and the C.N.R.’s line had been

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<sup>138</sup>*Supra*, note 76, 932-3.

<sup>139</sup>Ballem, *supra*, note 132, 224.

<sup>140</sup>*Supra*, note 128, 168.

<sup>141</sup>McNairn, *supra*, note 8, 386.

under common operation, it would indeed be difficult to rationalize the two judgments, but this was not, of course, the situation before the court in *B.C. Electric Railway* — as the court itself was careful to stress.<sup>142</sup>

Thus, *Luscar Collieries* and *B.C. Electric Railway* can properly be rationalized in the following manner: the test for determining whether a “physical thing” is a distinct local work or is an integral part of an inter-provincial work is the presence of both:

1. physical unity; and
2. unity of operation.

In *Luscar Collieries*, both elements were present. In *B.C. Electric Railway*, there was no common operation of the local and inter-provincial works. In that case, common operation extended only over the two local works, one of which, as it happened, fell under federal jurisdiction.

Although there is no explicit authority on point, it is submitted that there is one additional relevant factor: — unity of ownership. This assertion may be derived from first principles and its value may be tested by considering a hypothetical variation on the facts found in *Luscar Collieries*. Suppose that the C.N.R. had in fact acquired the ownership of the Luscar Branch and the Mountain Park Railway, but subsequently, as the coal fields they serviced became exhausted, had decided to cease operating the lines itself and had leased the lines to a local operator to use for short-haul traffic in the area.

It might be said with justice that the work thus put under local operation no longer served to *connect* the province with any others, but could it rightly be said that the work no longer *extended* beyond the limits of the province. The phrase “connecting the Province with any other or others of the Provinces” undoubtedly has a functional connotation, and *Luscar Collieries* and *B.C. Electric Railway* are therefore certainly correct in insisting that for a work to “connect”, there must be both physical unity and unity of operation (sometimes termed “functional unity” or “common operation”). However, the phrase “extending beyond the limits of a Province” has no such connotation and so it seems inappropriate to insist that common operation should be one of the criteria for determining whether a particular “physical thing” is a distinct local work or is an integral part of an inter-provincial work that *extends* beyond the limits of a province. To do so is, in effect, to insist that jurisdiction over a work could flip back and forth between the Parliament of Canada and the provincial legislatures, depending on the range of the use to which the work is being put, even though the physical range of the work remains unchanged.

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<sup>142</sup>*Supra*, note 128, 168-70.

Surely, insofar as works are concerned, it would be thoroughly unsound to elevate the analysis of function to such a controlling position in the allocation of jurisdiction under subsection 92(10). In the *Radio* case, Viscount Dunedin suggested that the *presence* of a functional connection should in and of itself be permitted to establish federal jurisdiction over a work in the *absence* of a physical connection. If it is right to reject this suggestion, then it seems rather eccentric to accept that the *absence* of a functional connection should in and of itself be permitted to destroy federal jurisdiction over a work in the *presence* of a physical connection.

In sum, it is suggested that the proper test for determining whether a given “physical thing” is a distinct local work or is an integral part of an inter-provincial work is the presence of both:

1. physical unity; and either
2. (a) unity of operation, or  
(b) unity of ownership.

“Extending” works will have physical unity and unity of ownership; “connecting” works, on the other hand, will have physical unity and unity of operation. Now it may be that the indicia of “common operation” have yet to be laid out in any detail. Nonetheless, the general outlines of the concept seem clear enough. The test is a simple, functional one: are the physically connected works operated as a unit? The similarity between an investigation of this sort and an examination of the relationship between intra- and inter-provincial undertakings should be evident.

### **B. Undertakings**

The task of distinguishing between intra- and inter-provincial undertakings is, in relative terms, not at all problematic. Federal jurisdiction over undertakings, as such, can arise only pursuant to paragraphs (a) and (b). Undertakings themselves can never be the objects of federal jurisdiction pursuant to a declaration under paragraph (c). Thus, the jurisdictional question is primarily the question, “is there one undertaking or two?” and the dominant consideration will be the existence of a functional connection. The courts need determine only if the activity in question is itself inter-provincial in range; or, if it is intra-provincial in range, whether or not it is functionally connected to some inter-provincial undertaking in such a way as to form part of that undertaking.

On the basis of *Corporation of Toronto v. Bell Telephone Company of Canada* and *Winner* it seems clear that where a single person (natural or artificial) is engaged in one activity — such as the carriage of passengers by bus or the transmission of telephone signals — then the “undertaking in

question is in fact one and indivisible. . .[and] the fact that it might be carried on otherwise than it is. . .[does not make] it or any part of it any the less an interconnecting undertaking".<sup>143</sup> Intra- and inter-provincial manifestations of the same activity should not be considered as "a collection of separate and distinct businesses".<sup>144</sup> In effect, where there is only one activity, the fact that intra- and inter-provincial aspects of the activity are carried on by a single person is taken as conclusive evidence that the two aspects are functionally connected so that there is only one undertaking.

Naturally, this is not to say that all the activities carried on by a single person must necessarily be considered to be parts of a single undertaking, as Lord Porter made clear on behalf of the Judicial Committee in the *Empress Hotel* case: "A company may be authorized to carry on, and may in fact carry on, more than one undertaking".<sup>145</sup> Where there is more than one activity, the fact that these activities are carried on by a single person may be suggestive, but it is certainly not conclusive.

Moreover, the fact that the two activities may be complementary "does not prevent them from being separate businesses or undertakings".<sup>146</sup> It may be that if the local activity is conducted "solely or even principally"<sup>147</sup> as an adjunct to the inter-provincial undertaking, the local activity could be considered as forming a part of that inter-provincial undertaking. However, it seems that the true test centres on the degree to which the local activity is necessary to the functioning of the inter-provincial undertaking.

In the *Stevedores* reference, for example, it was said that the loading and unloading of ships was "part and parcel"<sup>148</sup> of a shipping undertaking, and that the functioning of an inter-provincial shipping undertaking was "entirely dependent"<sup>149</sup> on the stevedoring activity. Now there is, of course, a clear functional distinction between the loading and unloading of cargo at a terminal and the transportation of that cargo to and from such a terminal. However, the transportation activity is completely dependent upon the stevedoring activity, and because of that functional dependence, the stevedoring activity could properly be considered an integral part of the inter-provincial transportation undertaking, despite the fact that the activity was different in character and purely intra-provincial in range.

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<sup>143</sup>*Winner, supra*, note 6, 581.

<sup>144</sup>*Corporation of Toronto v. Bell Telephone, supra*, note 29, 59.

<sup>145</sup>*Canadian Pacific Railway v. A.G. British Columbia* [1950] A.C. 122, 143, [1950] 1 D.L.R. 721, [1950] 1 W.W.R. 220 (P.C.). The Board comprised Lord Porter, Lord Greene, Lord Morton of Henryton, Lord Reid and Rinfret C.J.C.

<sup>146</sup>*Ibid.*, 144.

<sup>147</sup>*Ibid.*

<sup>148</sup>*Supra*, note 72, 537, *per Kerwin C.J.*

<sup>149</sup>*Ibid.*, 534, *per Kerwin C.J.*

In *Northern Telecom (1983)*,<sup>150</sup> there was again a marked functional distinction between the intra-provincial activity (installation of telephone switching and transmission equipment) and the inter-provincial activity (provision of telephone service). Again, though, the Supreme Court held that there was only one undertaking, because the intra-provincial activity was an "essential part of the operations process"<sup>151</sup> of the inter-provincial activity and "vital, in itself, to the continuous operation"<sup>152</sup> of the undertaking.

The key point here is that it must be the inter-provincial undertaking which is dependent upon the otherwise intra-provincial activity. An intra-provincial undertaking will not be considered as forming part of an inter-provincial undertaking where it is the intra-provincial undertaking that is the dependent activity. In the *Cannet* case,<sup>153</sup> for example, an otherwise local freight-forwarding company was entirely dependent on the C.N.R. for the transportation of shipments from the freight-forwarder's terminals in Ontario to destinations in other provinces. The Federal Court of Appeal was quite clear "that the only interprovincial undertaking involved in this case is that of the C.N.R. and that a shipper on that railway from one province to another does not, by such activity, become the operator of an inter-provincial undertaking".<sup>154</sup>

As a final note: if the *GO Train* case is rightly decided, then it may be that where the local activity and the inter-provincial activity are the same, and both are carried on using the same inter-provincial work, then the two activities should be considered as forming parts of a single undertaking, even though they are carried on by entirely different persons. This result seems difficult, albeit not impossible, to reconcile with the cases noted above (especially *Winner*), and it is respectfully submitted that insofar as it concerned the Parliament of Canada's jurisdiction over the Commuter Service as an undertaking (that is to say, with respect to Question 2) the case was wrongly decided.

## Conclusion

The "undertaking" cases demonstrate how easily complicated fact patterns can be analyzed if the basic concepts used in subsection 92(10) are clearly understood. By reading "works and undertakings" in paragraph (a) *ejusdem generis*, it becomes clear that only transportation and communication undertakings are within the scope of the provision. From this it

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<sup>150</sup>*Northern Telecom Canada Ltd v. Communication Workers of Canada* [1983] 1 S.C.R. 733, (1983) 147 D.L.R. (3d) 1, (1983) 48 N.R. 161.

<sup>151</sup>*Ibid.*, 773, *per* Dickson J.

<sup>152</sup>*Ibid.*, 767, *per* Estey J.

<sup>153</sup>*Re Cannet Freight Cartage Inc.* [1976] 1 F.C. 174, (1975) 60 D.L.R. (3d) 473 (C.A.).

<sup>154</sup>*Ibid.*, 178 (*per* Jaccett C.J.), 181 (*per* Heald J.).

follows that undertakings which merely "extend" are not addressed in paragraph (a). Transportation and communication undertakings obviously serve to transport or communicate something from one place to the next. They "connect" different locations in a functional sense. The problem of distinguishing intra- from inter-provincial undertakings is thus a problem of functional analysis.

Where the functioning of an inter-provincial activity is dependent upon the operation of an intra-provincial activity, the courts have recognized that there is only one undertaking, regardless of how many distinct persons are involved in its operation. By the same token, where this dependent relationship does not exist, the courts have properly refused to accept that there must be one undertaking merely because there is only one "undertaker". Of course, where the same activity is carried on both locally and inter-provincially in an integrated manner by one operator, there are sound policy reasons for placing these activities under a single jurisdiction. There being no powerful theoretical objection to such a treatment, the courts have quite sensibly taken this course and held that only one undertaking exists.

There has been a tendency, however, to use functional analysis to resolve problems involving subsection 92(10) works, and this is highly inappropriate. Obviously, physical connection cannot be the sole focus of analysis where paragraph (a) works are concerned: few driveways in the nation would escape federal regulation on that basis. Moreover, given that the provinces are, strictly speaking, already firmly connected to one another, in the sense that they physically join at their borders (with the exception, of course, of Prince Edward Island), it seems clear that connecting works must provide more than a purely physical link. However, physical connection is more than a "mere fact".<sup>155</sup> Works are, after all, physical things and their physical relationship to one another must surely be the most important fact to be considered in determining their constitutional status.

It is submitted, then, that physical unity should raise a presumption in favour of the application of paragraph (a). The presumption may be rebutted by demonstrating that the physically connected works do not have unity of operation or unity of ownership. Where there is no common operation, then for constitutional purposes there will be no connecting work; and where there is no common ownership, for constitutional purposes there will be no extending work.

Here, as in any analysis pursuant to subsection 92(10), it is vitally important to realize that there is a significant conceptual distinction between

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<sup>155</sup>This unfortunate phrase seems to have surfaced for the first time in *British Columbia Electric Railway, supra*, note 128, 170.

works and undertakings, and that jurisdiction over the one does not necessarily give rise to jurisdiction over the other — even though legislative jurisdiction over one may give rise to extensive regulatory control over the other.

Once the conceptual distinctions that subsection 92(10) relies upon are understood, the proper application of its provisions is not problematic. These distinctions are sometimes subtle, but they are clear; and unless they are thoroughly understood and rigourously applied, inconsistency and confusion will be the rule in both the theory and practice of constitutional law in this area.

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