TRANSPORTATION, COMMUNICATION AND
THE CONSTITUTION
THE SCOPE OF FEDERAL JURISDICTION

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The maintenance of transport and communication facilities adequate to Canadian needs has historically been regarded as a vital factor in securing the economic and political viability of Canada as a federal union. It is surprising, therefore, that there is a dearth of literature on the subject of the constitutional basis for the regulation of transport and communication. This article, though not attempting in any comprehensive way to fill that void, does have the more limited purpose of examining the scope of federal jurisdiction in relation to transport and communication.

I. The Constitutional Setting Outlined.

1. Interprovincial Works and Undertakings.

Of the classes of legislative competence in the British North America Act\(^1\) which concern transportation and communication, section 92, paragraph 10 is of primary importance and forms the focus of this article. The section, headed "Exclusive Powers of Provincial Legislatures", lists under the tenth paragraph or head:

Local Works and Undertakings other than such as are of the following Classes:
(a) Lines of Steam and 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;

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\(^1\) 1867, 30 & 31 Vict., c. 3, as am.
(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.

The local works and undertakings entrusted to the Provinces would seem to be equally covered by two other apparently more general heads of section 92, that is “Property and Civil Rights in the Province” (section 92(13)) and “Generally all Matters of a merely local or private Nature in the Province” (section 92(16)). Indeed it is only in rare instances that section 92(10) has been relied on by itself as establishing Provincial competence over a particular subject matter of legislation.

While it is arguable that the exceptions in sub-paragraphs (a) and (b) of section 92(10) are properly confined to works and undertakings of a transport and communication variety, no such limitation need be read into the principal clause of section 92(10). 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.

The real impact of section 92(10) on constitutional development has been in respect of its exceptions. Those classes withdrawn from Provincial competence are in effect incorporated into section 91 of the British North America Act by paragraph 29

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2 See, for one of the few examples, Le Procureur Général Du Canada v. Les Services d'Hôtelierie Maritimes Ltd., [1968] C.S. 431 (jurisdiction with respect to a permanently moored vessel used as a hotel held under s. 92(10)). The principal clause of s. 92(10) was invoked as one of two or more heads of jurisdiction on the basis of which Provincial legislation was upheld in McGregor v. Esquimalt and Nanaimo Ry. ... (1907) A.C. 462; T.T.C. v. Acqua Taxi Ltd. (1956), 6 D.L.R. (2d) 271 (Ont. H.C.) and Underwater Gas Developers Ltd. v. Ont. L.R.B. (1960), 24 D.L.R. (2d) 673 (Ont. C.A.), affg (1960), 21 D.L.R. (2d) 345. Arguments for Provincial competence based primarily on s. 92(10) were unsuccessful in Queddy River Driving Boom Co. v. Davidson (1883), 10 S.C.R. 222 and Toronto Railway Co. v. Toronto, [1920] A.C. 426.

3 Infra.

4 See Union Colliery Co. v. Bryden, [1899] A.C. 580 in which Lord Watson, at p. 580, states by way of dicta that the general regulation of coal mines falls within s. 92(10) as well as s. 92(13).

5 E.g.:
(a) The acquisition and development of lands for public parks and squares (but including also highways) through the Federal District Commission Act, S.C., 1926-27, c. 55, s. 12 (now R.S.C., 1952, c. 112, s. 15) consid'd in Rex v. Red Line Ltd. (1930), 66 O.L.R. 53 (Ont. S.C., App. Div.).
thereof. Hence they are treated on the same footing as the other enumerated classes of subjects in section 91 which are entrusted to the exclusive authority of the central Parliament.\(^6\)

Among those other classes are two which directly concern transport and communication, specifically in the form of water transport, namely “Navigation and Shipping” (section 91(10)) and “Ferries between a Province and any British or Foreign Country or between Two Provinces” (section 91(13)).\(^7\) It would appear that, to a large degree, these heads complement section 91(29), as read with section 92(10), as well as one another.\(^8\)

On the other hand the federal trade and commerce power (section 91(2)) and the section 92(10) exceptions have come to be regarded as mutually exclusive.\(^9\) This has been the result of treating the specific enumeration in section 91 of auxiliary elements of trade and commerce such as shipping (section 91(10)), banking (section 91(15)), bills of exchange (section 91(18)) and the works and undertakings mentioned in the subparagraphs of section 92(10) (as read with section 91(29)) as limiting inferentially the scope of the trade and commerce power.\(^10\)

There are several varieties of interprovincial works and undertakings that have been held to fall within the first two exceptions


\(^{(c)}\) Works for the production, refining or treatment of atomic substances through the Atomic Energy Control Act, R.S.C., 1952, c. 11, s. 18, consid’d in Bachmeier Diamond v. Beaverlodge (1962), 35 D.L.R. (2d) 241 (Sask. C.A.).

\(^{(d)}\) And, of questionable connexion with transport and communication (see infra), the works of a power company through its Act of incorporation, S.C., 1902, c. 107, s. 2, consid’d in Toronto and Niagara Power Co. v. North Toronto Corp., [1912] A.C. 834, at p. 839.


\(^7\) See also s. 91(9), “Beacons, Buoys, Lighthouses and Sable Island”, and s. 91(11), “Quarantine and the Establishment and Maintenance of Marine Hospitals”.


\(^9\) But compare the view of Rand J. in Winner v. S.M.T. (Eastern) Ltd., [1951] S.C.R. 887, at p. 923 (judgment varied by the Privy Council sub nom. A.G. for Ont. v. Winner, [1954] A.C. 541). See also the introduction of the Hon. I. C. Rand, written after his retirement from the bench, to Smith, op. cit., footnote 9, p. x, suggesting that the enumeration in s. 91 of auxiliary elements of trade and commerce, “can be taken to indicate not limitations but the peripheral reaches intended to be included in
of section 92(10). (The expression "interprovincial" is used here and hereafter as a short-hand description for the characteristic of interprovincial or extraprovincial connexion or operation which works or undertakings must satisfy to fall within the terms of section 92(10)(a) or (b).) Some of the varieties are specifically enumerated, namely lines of steam and other ships, lines of steam ships, railways, canals, and telegraphs.

The more general expression, "other works and undertakings" also appears in the sub-section, immediately following a series of specific enumerations. From time to time the courts have attempted to give some definition to the terms, "works" and "undertakings". It has been stated, for one thing, that the terms must be read disjunctively so that the characteristics of the one but not both need be found in any particular case in order to render the expression applicable. Needless to say this envisages a distinction between the two terms.

"Works" have been viewed, on the one hand, as "physical things, not services". But, unlike a "work" an "undertaking" has been described as other than a physical thing, though it is "an arrangement under which, of course, physical things are used". It has been equated variously with the words, "organization" and "enterprise". At times, however, the terms "works"
and “undertakings” have been used interchangeably. This equation makes little difference in the application of sub-paragraph (a) but when imported in respect of sub-paragraph (c) it may well give a more expansive scope to the federal declaratory power, which refers to “works” but not “undertakings”, than would be justified if the distinctions stated above were recognized and applied.

The words, “and other works and undertakings . . .” in section 92(10)(a) follow the more specific enumerations; “lines of steam and other ships, railways, canals, telegraphs”. It would seem appropriate, in this context, to read “other works and undertakings” ejusdem generis with the previously listed subjects. Courts have, on occasion, recognized this and, accordingly, viewed “other works and undertakings” as confined to those of a transport or communication nature, a description which fits all the enumerated

with apparent approval by Kellock J. in the Stevedoring reference, supra, footnote 8, at p. 556.


23 Several Dominion Acts contain declarations in respect of “undertakings” or “works and undertakings”, see for example:


(b) Federal District Commission Act, supra, footnote 5, consid’d in Rex v. Red Line Ltd., supra, footnote 5.

(c) Atomic Energy Control Act, supra, footnote 5, consid’d in Bachmeier Diamond v. Beaverlodge, supra, footnote 5.


This practice explains the reference in the application section of a number of federal Acts to “works and undertakings” declared to be for the general advantage of Canada, see the following:

Industrial Relations and Disputes Investigation Act, R.S.C., 1952, c. 152, s. 53(g);
Female Employees Equal Pay Act, S.C., 1956, c. 38, s. 2(b)(viii);
Canada Labour (Standards) Code, S.C., 1964-65, c. 38, s. 3(1)(h).

But as to the appropriateness of such language Rand J. said in the Stevedoring reference, supra, footnote 8, which concerned the first of these Acts, that undertakings existing without works cannot be the subject of a s. 92(10)(c) declaration (at p. 553).

24 The expression, “and other licences” appears in s. 92(9) also following a series of specific enumerations, which, however, cannot be as easily seen, as those in s. 92(10)(a), to share a common genus. While an ejusdem generis construction of “other licences” has never been specifically rejected the scope of the expression has not been significantly confined by force of the preceding terms, see Brewers & Maltsters Assoc. of Ont. v. A.G. for Ont., [1897] A.C. 231, at p. 237, and Shannon v. Lower Mainland Dairy Products Bd., [1938] A.C. 708, at p. 722.
categories. There are, however, instances in which the expression, “other works and undertakings” has been judicially applied to electrical systems which do not, of themselves, readily fall within the category of transport or communication. But it could be argued that, though no tangible article moves through electric wires, “energy” is indeed transported and the criterion is therefore satisfied.

The “other works and undertakings” have been held to include telephone systems, radio communication, community antenna television, electrical systems, pipelines, bridges and motor transport. Of the principal media of transport and communication only air transport has been held to fall under federal jurisdiction without any basis in section 92(10).

2. Incorporation of Interprovincial Transportation and Communication Companies.

The residue of legislative powers in Canada is entrusted to the Dominion by the opening “peace, order and good government”

impact as his example of an interprovincial undertaking clearly outside the communication and transportation field is an oil or gas pipeline, which has since been held to be within s. 92(10)(a) in Campbell-Bennett Ltd. v. Comstock Midwestern Ltd., [1954] S.C.R. 207.)


28 In Re Regulation and Control of Radio Communication, supra, footnote 19 (the regulation of radio communication was also held to fall within the general peace order and good government clause of s. 91).


30 See cases cited supra, footnote 26.

31 Campbell-Bennett Ltd. v. Comstock Midwestern Ltd., supra, footnote 25.


33 A.G. for Ont. v. Winner, supra, footnote 10. In actual fact the regulation of interprovincial motor transport has been delegated to Provincially constituted highway transport boards, where they exist, by the Motor Vehicle Transport Act, S.C., 1953-54, c. 59 (upheld as unobjectionable from a constitutional point of view in Coughlin v. Ontario Highway Transport Bd., [1968] S.C.R. 569). See, however, the National Transportation Act, S.C., 1966-67, c. 69, part III which provides for the eventual return of this jurisdiction to federal authority through the Canadian Transport Commission.

34 Aeronautics as a subject of legislation has been held to be within federal competence as falling within the s. 132 treaty power at the time an Empire Treaty was in effect (In re Regulation of Aeronautics, [1932] A.C. 304) and, more recently, within the peace, order and good government clause of s. 91 (Johannesson v. West St. Paul, [1952] 1 S.C.R. 292).
clause of section 91. Judicially, this federal general or residuary power has been given a limited scope of operation.\textsuperscript{35} However, it has been held to include the authority to incorporate certain types of companies. Since an enumerated head of Provincial powers is "The Incorporation of Companies with Provincial Objects" (section 92(11)), the balance of incorporation jurisdiction, which may be termed, "the incorporation of companies for objects other than Provincial", is considered as falling to the Dominion under the general residuary clause of section 91.\textsuperscript{36}

Therefore the creation of corporate entities with the object of carrying on a work or undertaking mentioned in the first two exceptions of section 92(10) rests with the Dominion.\textsuperscript{37}

An argument might also be made that a federal incorporation could be supported by direct reference to an enumerated federal


\textsuperscript{37} This proposition can be explained in either of two ways, depending on the interpretation one gives to the expression, "with Provincial objects" in s. 92(11), i.e.:

(a) since the object is non-Provincial in the sense that it envisages territorial operation outside a single Province, the incorporation of this type of company falls under the federal residual power, or

(b) since the object is non-Provincial in the functional sense, in that the proposed activity does not fall to be regulated under any Provincial head of legislative jurisdiction (which may be, though not necessarily, for territorial reasons), then the incorporation of this type of company falls under the federal residual power.

The arguments and authorities supporting the territorial and functional views of the expression, "with Provincial objects" have been recently examined by Professor Ziegel in Constitutional Aspects of Canadian Companies in Ziegel (ed.), Studies in Canadian Company Law (1967), at pp. 188-190. Professor Ziegel appears to favour the functional view largely on the basis of the legislative history of s. 92(11). The Privy Council decision in Bonanza Creek Gold Mining Co. v. The King, [1916] 1 A.C. 566 renders the differences in the theories, in many circumstances, less important from a practical standpoint, but it does not, as Professor Ziegel points out, clearly resolve the controversy. While the decision seems to favour a territorial limitation (see esp. pp. 583-584), this does not rule out the existence as well of a functional limitation (But compare the views of Professor Lederman set out in Corporate Bodies and Public Monopolies in Lang (ed.), Contemporary Problems of Public Law in Canada (1968), at pp. 115-118).

While the incorporation of a company with the object of operating a work or undertaking within s. 92(10)(a) or (b) is jurisdictionally a matter for the Dominion on either of the above views, the same is not true if the object is to operate a work which has been the subject of a declaration under s. 92(10)(c). Such a work would be territorially within a single Province though functionally subject to the jurisdiction of Parliament rather than a Provincial Legislature. It is suggested that there is a functional as well as a territorial limitation implicit in "with Provincial objects" and accordingly only the Dominion could incorporate a company with objects to operate a s. 92(10)(c) work.
head. To take a particular instance, the federal power over inter-provincial railways might be interpreted as involving necessarily the power to incorporate companies to carry on such works and undertakings. This would certainly appear to be a tenable view of the scope of the specific federal power, though not one which appears to have received any substantial judicial support in the highest courts.

The extent to which the Dominion may enter upon the regulation of the activity of a company through the detail of the corporate powers conferred has not been, in any general way, authoritatively decided. It has, however, been suggested by way of dicta in John Deere Plow Co. v. Wharton, that a specific Dominion head may complement the federal general incorporation power so as to enable Parliament to prescribe the extent to which objects of a Dominion company may be exercised and to impose limitations thereon.

Subject to this suggested complementary operation of powers, the authority of the Dominion to regulate certain types of activities and to incorporate companies to carry out these activities have been regarded as based on distinct, though obviously related, sources of legislative competence. It would seem to follow that there is a hiatus in the legislative control Parliament may exercise over a company between the stage of incorporating it and the point in time at which its operations assume a character which subjects them to federal jurisdiction under an enumerated head of section 91, if by the nature of the objects this is ever possible.

38 Certainly jurisdiction to incorporate banks is so founded, incorporation of banks being specifically mentioned in s. 91(15).
39 Compare the position under the U.S. Constitution, the federal incorporation power (which has, however, been rarely exercised) being held to rest under "the necessary and proper" clause of art. 1, s. 8 as necessarily incidental to the enumerated powers: *McCulloch v. Maryland* (1819), 4 Wheat. 316. While there is no express necessary and proper clause included in the distribution of legislative powers under the B.N.A. Act, the judicially developed "aspect" and "ancillary" or "necessarily incidental" doctrines (see e.g. Hodge v. the Queen (1883), 9 A.C. 117, at p. 130 and A.G. of Ont. v. A.G. for Can., [1894] A.C. 189) serve a similar, though less pervasive, role.
40 See Wegenast, Canadian Companies (1931), p. 29.
41 *Supra*, footnote 36, at p. 340.
42 The specific Dominion head there referred to was s. 91(2), "The Regulation of Trade and Commerce".
43 It may be that the objects are simply to carry on a particular trade in more than one Province, in which case federal legislation providing for this specific company's incorporation would be valid because the objects are not of the character that could be conferred by a Province under s. 92 (11) as they envisage operation in more than one Province. However, when the company goes into business in several Provinces Parliament could not (apart from the suggestion in the John Deere case) assume to
Indeed, the second stage may never be reached since a federally incorporated company may never extend itself to the full scope of its permitted objects in a manner that would bring its activities under federal control.44

This apparent hiatus raises the most intractable problems when one considers the position of companies incorporated with the object of carrying on a work or undertaking within the first two exceptions in section 92(10). One of the criteria of federal jurisdiction in respect of the work or undertaking is that it connects the Province with another or extends beyond the limits of a Province (sub-paragraph (a)) or operates between the Province and any British or foreign country (sub-paragraph (b)). It may be that for some time after incorporation the corporate activities do not possess these characteristics. In the meantime, while for example the Provincial portion of a proposed interprovincial railway is under construction, is Parliament without jurisdiction over the work or undertaking? Must Parliament then, to assure its continuous control, make a declaration under section 92(10)(c) in respect of any local works, that will ultimately form part of an interprovincial work? The Privy Council decision in Toronto v. Bell Telephone Co.45 provides negative answers to both these questions.

In that case it was held that the City of Toronto could not prevent the Bell Telephone Company from using city streets for its wires absent municipal consent, Provincial legislation purporting control its activities simply because of its multi-Provincial operations since the regulation of a trade or business within a Province falls within Provincial jurisdiction and not under the federal trade and commerce power (s. 91(2)) (See Citizens Insurance Co. v. Parsons, supra, footnote 36, at p. 113. The proposition stated therein that Parliament could not, under s. 91 (2), regulate the contracts of a particular trade or business was subsequently re-formulated to preclude federal regulation of a particular trade or business, see for example A.G. for Can v. A.G. for Alta., [1916] 1 A.C. 588, at p. 596). Many of the early cases concerned with the validity of federal incorporations involved this type of situation in which the objects were non-Provincial but only in the sense that the trading operations were not to be territorially limited to a single Province, and not because the proposed activity would, apart from any geographical limitation, be outside the scope of any Provincial head and within a federal head. It is undoubtedly for this reason that the possibilities of a federal incorporation power derived directly from the enumerated federal heads were never fully explored and developed.

44That this state of affairs would not affect the constitutional validity of the incorporation of the company is clear from Colonial Building and Investment Association v. A.G. of Quebec (1883), 9 A.C. 157, at p. 164.
45Supra, footnote 16. See also the decision of the court below (the Ontario Court of Appeal), which was affirmed by the Judicial Committee, reported at (1903), 6 O.L.R. 335. Both Garrow J.A. and McLennan J.A. gave the example that has been suggested here of an interprovincial railway at the stage of construction, arguing that it would be intolerable if
to introduce a consent condition being, to this extent, _ultra vires._ Rather, the federal Act incorporating the company, which gave it the power, _inter alia_, to construct and maintain its lines along, across or under any public highways subject to certain safeguards, was said to confer on the company, "all that was necessary to enable it to carry on its business in every province of the Dominion and... no provincial legislature was or is competent to interfere with its operations as authorized by the Parliament of Canada". It mattered not that there might be, at this stage, only a "paper connexion" (one authorized in the instrument creating the corporation) between different Provinces.

This decision has the practical merit that it fills the somewhat illogical hiatus which would otherwise exist in federal control over a company of the nature of the Bell Telephone. On the other hand it opens the door for the Dominion to exercise a very far-reaching control, through the detailing of rights and restrictions in the corporate powers in federal statutes or charters of incorporation, over some purely local works and undertakings with no prospect of becoming anything but local, a position which is hardly consistent with the allocation of exclusive Provincial jurisdiction under the principal clause of section 92(10), as well as under section 92(13) and section 92(16).

The actual basis for the Bell decision is difficult to discern, particularly whether it was exclusively an incorporation authority under the federal general power, a notion which had been but superficially explored at that time, exclusively section 92(10) (a), as read with section 91(29) (either as embodying an incorporation power or as simply regulation of a truly interprovincial work or undertaking), or a combination of both, after the

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46 The actual decision of the case was effectively reversed by an Act amending the Railway Act, S.C., 1906, c. 42, s. 35 (s. 378(2) of the Railway Act, R.S.C., 1952, c. 234 is a successor of this provision): _County of Haldimand v. Bell Telephone Co._ (1912), 25 O.L.R. 467 (Ont.C.A.).

47 S.C., 1880, c. 67, as am. by S.C., 1882, c. 95, see esp. s. 3.

48 Supra, footnote 16, at p. 57.

49 The Bell case was decided after the _Parsons_ case, _supra_, footnote 36, which suggested this basis for federal incorporation but before the two landmark decisions of _John Deere_ and _Great West Saddlery_, _supra_, footnote 36, both of which followed _Parsons_ in this respect. Davies J. in _Hewson v. Ontario Power Co._, _supra_, footnote 26, seems to put the Bell decision on the basis of the federal incorporation power...

manner subsequently suggested in the *John Deere* case.\(^{51}\)

The formulae of later cases concerning the extent of the federal incorporation power might, at first blush, appear to have been *à propos* in the *Bell* case; that a Province could not exercise its powers so as to destroy "the status and powers of a Dominion company as such"\(^ {52}\) or so that a Dominion company is "sterilized in all its functions and activities" or "impaired in a substantial degree" in "its status and essential capacities".\(^ {53}\) However, though the principle has been broadly worded, it has never been suggested that a federal company may exercise its powers as of right in any Province and without regard to otherwise valid Provincial laws which regulate in relation to some Provincial aspect and do not effectively prohibit the company's essential activities\(^ {54}\) or without regard to Provincial laws of general application, such as those imposing taxes, relating to mortmain, requiring licences for certain purposes or as to forms of contracts.\(^ {55}\) The Provincial legislation considered in the *Bell* case seems to fall, therefore, within the exceptions to the principle. The retrospective application of later constitutional doctrine to provide a neater classification for an earlier decision is, in any case, a speculative exercise at best. It would seem that the appropriate classification of the *Bell* decision and its proper rationalization with many ostensibly similar cases must remain a matter of some speculation.

3. Other Constitutional Provisions Concerning Transportation and Communication.

Among its miscellaneous provisions, the British North America Act imposed a duty on the Government and Parliament of Canada to build the Intercolonial Railway between Halifax, Nova Scotia

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\(^{51}\) *Supra*.


\(^{53}\) *A.G. for Man.* v. *A.G. for Can.*, [1929] A.C. 260, at pp. 266-267, but incorrectly attributed to the judgment in *Great West Saddlery Co.* v. *the King*, *supra*, footnote 36 by Lord Atkin in *Lymburn v. Maryland*, [1932] A.C. 318, at p. 324. The last two of these cases and *Colonial Building and Investment Association v. A.G. of Quebec*, *supra*, footnote 44 were cited by Lord Porter in *A.G. for Ont.* v. *Winner*, *supra*, footnote 10, a case concerning the competence of a Province to exercise controls over the Provincial phases of an interprovincial motor bus operation. Even if incorporation authority were relevant to such a determination, on one view of the *Bell* case, the interprovincial operator in that case was not a Dominion corporation but an individual, with American citizenship, and hence the relevance of the cited cases must be seriously questioned.

\(^{54}\) A possible exception to this general statement is *B.C. Power Corp. Ltd.* v. *A.G. for B.C.*, *supra*, footnote 26, a decision which has been criticized in this respect, see Laskin, *Canadian Constitutional Law* (3rd ed., 1966), pp. 586-588.

\(^{55}\) *Great West Saddlery Co.* v. *the King*, *supra*, footnote 36, at p. 100.
and the St. Lawrence River. The line was subsequently completed and operated as a government enterprise.

Under the property provisions of the British North America Act the four original Provinces retained the public lands belonging to them prior to Confederation except certain specified works and property. The Dominion acquired title by transfer to the excepted subjects. Among them were some transport facilities—canals, certain vessels, railways and military roads. The division of proprietary interests however was effective as between the Dominion and the original, and also the later Provinces to which the provisions were applied, at the moment of each Province’s entry into the Union. As transportation was in a stage of infancy at the relevant dates, Dominion proprietary rights acquired by transfer from the constituent colonies have not proven to be significant factors in the regulation of transportation and communication. On the other hand the fact that highways are generally Provincial Crown property has sometimes been invoked in support of Provincial claims to regulate motor transport.

The Terms of Union of British Columbia, Prince Edward Island and Newfoundland imposed certain obligations upon the federal government in respect of transportation and communication facilities. For example, paragraph 11 of the terms under which the colony of British Columbia was admitted required that the Government of Canada secure the construction of a transcontinental railway, to which end British Columbia was to grant the Dominion lands which came to be known as the "rail-

57 See Glazebrook, A History of Transportation in Canada (1938), vol. II, c. 6 (references herein are to the 1964 reprint of this volume).
58 Ss 109, 117 and s. 108 incorporating the Third Schedule of the Act.
59 I.e. British Columbia, Prince Edward Island and Newfoundland. The property provisions were applied, however, subject to any qualifications in the relevant terms of union, as e.g. term 11 in the British Columbia terms of union, considered infra.
60 See, for example, A.G. for Can. v. Ritchie Contracting and Supply Co., [1919] A.C. 999, holding “public harbours” to be those established as such in 1871 when British Columbia entered Confederation.
61 See, for example, the arguments of the Provincial Attorneys General in A.G. for Ont. v. Winner, supra, footnote 10.
62 Schedule to Order in Council of May 16th, 1871 (U.K.), pursuant to s. 146 of the B.N.A. Act, 1867, reprinted in R.S.C., 1952, vol. VI, at p. 5261 et seq., see especially arts 4, 5 and 11.
63 Schedule to Order in Council of June 26th, 1873 (U.K.), pursuant to s. 146 of the B.N.A. Act, 1867, reprinted in R.S.C., 1952, vol. VI, at p. 6272 et seq.
64 Schedule to B.N.A. Act, 1949, 12-13 Geo. VI, c. 22, appr’d by S.C., 1949 (1st Session), c. 1, see especially arts 31 and 33.
The execution of this undertaking, unlike that of the Intercolonial Railway, was entrusted essentially to a private company, the Canadian Pacific Railway, induced by the promise of substantial land subsidies in aid of its project.

It is questionable whether the terms on which colonies were admitted to the Union after 1867 are entrenched to the extent that they cannot be altered either by federal or Provincial initiative alone and whether, indeed, they have any constitutional significance. Certainly the Dominion, exhibiting, in that era, a very paternalistic attitude towards the Provinces, maintained the sole right to fix the terms of admission of new Provinces. And as to the alteration of the terms there appear to be conflicting judicial views to the effect that the terms may be altered by legislation within the scope of Provincial or Dominion competence under the British North America Act, 1867, or that the terms may not be reached by such legislation. It has been held that, unlike other constitutional provisions of similar import, terms of union cannot be raised in the course of an action by any litigant in order to question the validity of legislation.

The three prairie Provinces, Manitoba, Alberta and Saskatchewan, were created out of federal territories and established as Provinces by federal Acts. These Dominion-fathered Provinces, unlike the others, did not have the administration of Crown lands within their boundaries entrusted to them. The Dominion retained the lands to use for settler grants and in furtherance of

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65 The building of the Pacific railway is related in Glazebrook, op. cit., footnote 57. The romance of the venture is captured in verse by E. J. Pratt, Towards the Last Spike (1952).
66 Incorporated by S.C., 1880-81, c. 1.
67 British Columbia (and also Manitoba), for instance, was granted larger representation in Parliament than its population warranted, by the theretofor established ratio, over the claims of other Provinces of the right to be consulted, see the Report of the Royal Commission on Dominion-Provincial Relations, 1940 (Rowell-Sirois Report), Bk. I, p. 49. (As to the three prairie Provinces the representation granted by Dominion Acts finds confirmation in the B.N.A. Act, 1886, 49 & 50 Vict., c. 35, and see A.G. for P.E.I. v. A.G. for Can., [1905] A.C. 37, esp. at p. 47.)
69 Reference re Water and Water Powers, supra, footnote 15, at p. 216.
70 Regina v. Point (No. 2) (1957), 22 W.W.R. 527 (B.C.C.A.).
71 Rupert's Land and the North-western Territory which comprised the federal territories had been transferred to the Dominion and admitted to the Union by an Imperial Order in Council of June 23rd, 1870 pursuant to s. 146 of the B.N.A. Act, 1867 and the Rupert's Land Act, 1868, 31-32 Vict., c. 105.
72 Manitoba Act, S.C. 1870, c. 3, boundaries extended by S.C., 1880-81, c. 14, consented to by Manitoba in S.M., 1881, c. 1; Alberta Act, S.C., 1905, c. 3; Saskatchewan Act, S.C., 1905, c. 42.
its railway land subsidy policy, and did not turn the ungranted lands over to the three Provinces until 1930.\textsuperscript{73}

One of the terms incorporated into the Alberta Act, the Saskatchewan Act and the Act extending the boundaries of Manitoba beyond the "postage stamp" Province of 1870,\textsuperscript{74} is the tax exemption (from Dominion, Provincial and Municipal taxes) that had been granted the Canadian Pacific Railway in respect of its property in the Northwestern Territory by clause 16 of its contract, added as a schedule to its statute of incorporation.\textsuperscript{75} The British North America Act, 1871\textsuperscript{76} affirmed the creation by the Dominion of new Provinces out of federal territories, recognizing wide powers to make provision for the constitution of such Provinces and "for the passing of laws for the peace, order and good government" of such Provinces.\textsuperscript{77} The Imperial Act provides that, with the consent of a Provincial Legislature, the boundaries of a Province may be altered upon such terms and conditions as agreed to by the said Legislature.\textsuperscript{78} But, except as so provided, Parliament is declared to be incompetent, subject to limited reservations, to alter the provisions of any Act establishing new Provinces.\textsuperscript{79} Accordingly, the tax exemption, repealed in the 1906 revision of the Canadian Pacific Railway's statute, has been treated as having the character of a constitutional provision and hence as continuing in effect, subject only to modification by Imperial legislation.\textsuperscript{80} Recently the Canadian Pacific Railway has given an undertaking to phase out its exemption from municipal taxes.

\textsuperscript{73} The lands were transferred pursuant to the B.N.A. Act, 1930, 20-21 Geo. V, c. 26 and natural resources agreements, embodied as schedules thereto. In addition this Act also provided for a re-transfer to British Columbia of all unalienated "railway belt" lands in that Province and also a large "Peace River block" acquired by the Dominion at the same time.

\textsuperscript{74} These three Acts are referred to supra, in footnote 72.

\textsuperscript{75} Supra, footnote 66.

\textsuperscript{76} 34-35 Vict., c. 28.

\textsuperscript{77} Ss 2, 4 & 5.


\textsuperscript{79} S. 6.

\textsuperscript{80} A.G. for Man. v. C.P.R., supra, footnote 78, at p. 755. The Minister of Transport, the Hon. J. W. Pickersgill, expressed the view in the course of the debate on the National Transportation Act, Bill no. C-231, that the C.P.R. tax exemption is part of the constitution of Canada and of the constitutions of the Provinces of Manitoba, Saskatchewan and Alberta: H. of C. Deb., Sess. 1966-67, p. 8211.
in the three Western Provinces over three years after the enactment of modernizing railway legislation.81

II. The Preservation and Extension of Dominion Railway Jurisdiction.

In aid of its programme of regulation of railroads the Dominion made use of two exceptional powers which appear rather incongruous in a federal constitutional setting, disallowance and reservation82 and the declaratory power under section 92(10)(c) of the British North America Act, 1867. The former enables the federal government, through the Governor General in Council, to disallow a Provincial Act, without specification of reasons, within a year of its enactment. Alternatively, the federally appointed Lieutenant Governor of a Province may reserve a Provincial Bill for the Governor General's assent, which becomes, therefore, essential to the Bill becoming law.

There are at least eighteen instances of the Dominion disallowing or, after reservation, refraining from giving assent to Provincial Acts or Bills relating to railway construction, or the incorporation of railway companies.83 The majority of these were Acts and Bills which had been introduced in the Manitoba Legislature between the years 1871 and 1888.84

The reasons advanced (gratuitously) for the federal action before 1888 in respect of railway legislation of Manitoba or other Western Provinces included, ultra vires by virtue of section 92(10)(a), tendency to encourage diversion of rail traffic through United States systems contrary to Dominion government policy and inconsistency with the limited monopoly position in the West promised by clause 15 of the Canadian Pacific Railway's contract embodied in its 1881 statute.85 Faced with much bitterness on the part of Manitoba, the Dominion in 1888 abandoned its use of disallowance and non-assent on reservation as a principal safeguard to its Western railway policies, repealed the Canadian

81 Ibid., p. 8210. Presumably the National Transportation Act, S.C., 1966-67, c. 69 satisfies the stipulated condition.
82 See ss 56-57 and 90 of the B.N.A. Act, 1867. These powers are considered in La Forest, Disallowance and Reservation of Provincial Legislation (1955).
83 Vide La Forest, op. cit., ibid., see appendices A and B.
84 Ibid.
85 Ibid. The company was protected by the monopoly clause for 20 years against Dominion authorization of railway lines within 15 miles of latitude 49 or constructed at or near the C.P.R. line to the south except such as run to the south-west or the west of south-west (cl. 15, schedule to the C.P.R.'s statute of incorporation, supra, footnote 66).
Pacific Railway's limited monopoly clause, and left Manitoba free to build and charter local lines. The disallowance and reservation powers have now fallen into disuse. The frequent resort to them in the early years of Confederation is nonetheless significant as it headed off possible constitutional determinations by the courts on the validity of Provincial legislation relating to local feeder railways. In its negative way it preserved the Dominion's exercise of powers under section 92(10)(a) (as read with section 91(29)) and its incorporation powers as so related without the necessity of a determination either:

(a) that some ostensibly intraprovincial works or undertakings were so related to an interprovincial work or undertaking so as to be subject, by an inclusive extension of the scope of the interprovincial work or undertaking, to federal jurisdiction; or
(b) that a particular aspect of the control of a local work or undertaking was so integral to or necessarily incidental to the regulation of a distinct interprovincial work or undertaking as to fall within federal jurisdiction.

Parliament has also made extensive use of its unusual power under section 92(10)(c) to declare railways works for the general advantage of Canada. It is not intended to examine in detail the operation of this declaratory power since this has been done admirably elsewhere and since the power, like that of disallowance and reservation, is not significantly open to the Dominion as a practical matter in the current political climate because of the repercussions that would follow from its unilateral exercise. Importantly, though, declarations have been made to enable far-reaching legislative control by the Dominion over Canadian railways which might otherwise have been questioned on constitutional grounds.

86 By S.C., 1888, c. 32. Quaere whether cl. 15, though the obligation was somewhat differently worded, was not constitutionally entrenched to the same extent as cl. 16 with respect to the portion of Manitoba added by S.C., 1880-81, c. 14, as read with the B.N.A. Act, 1871, see supra.
87 Glazebrook, op. cit., footnote 57, p. 115.
88 The most recent initiation of these procedures occurred in 1961 when the Lieutenant Governor of Saskatchewan, acting on his own authority, reserved a Bill for the signification of the pleasure of the Governor General. The government in Ottawa was rather embarrassed by the Lieutenant Governor's action and assent to the Bill was quickly given (see Mallory, The Lieutenant Governor's Discretionary Powers: The Reservation of Bill 56 (1961), 27 Can. J. Ec. & Pol. 518).
89 See generally part III of this article.
90 See generally part IV of this article.
91 Laskin, op. cit., footnote 54, in a note p. 504 et seq.; MacDonald, Parliamentary Jurisdiction by Declaration, [1934] 1 D.L.R. 1; Schwartz, Fiat by Declaration—s. 92(10)(c) of the British North America Act
The availability of section 92(10) (c) was remarked upon by the Privy Council in Montreal v. Montreal Street Ry. in holding Dominion "through traffic" legislation ultra vires as applied to the Montreal Street Railway albeit that the latter connected with and its cars ran over a railway declared to be for the general advantage of Canada. The sub silentio suggestion appears to be that in the absence of a resort to the declaratory power in respect of the street railway it could hardly be consistently maintained that it was necessarily incidental to the control of "federal railways" that local railways be coerced to enter rate agreements concerning through traffic with railways subject to Dominion jurisdiction.

An 1883 amendment to the Consolidated Railway Act contained a far-reaching declaration for the general advantage of Canada bringing within the Act, for many purposes at least, all railways connecting with certain named interprovincial railways. This declaration was narrowed in 1903 to such interconnecting works only in respect of the connexion or crossing or their through traffic, effectively relinquishing a degree of control over the then connecting local railways. In the 1906 general consolidation and revision of the statutes the control over the connexion, crossing or through traffic was significantly reworded and asserted in the absence of any declaration. The "through traffic" term was dropped in the 1919 revision of the Act, presumably out of deference to the decision in the Montreal Street Ry. case, and a declaration provision was introduced by section 6(c) which is preserved in identical form in the present Act. The declaration of section 6(c) extends to every railway or portion thereof "now


92 Supra, footnote 6, at p. 345.
93 The ample source of Dominion powers under this sub-section was also remarked on by Duff J. in R. v. Eastern Terminal Elevator Co., supra, footnote 5, at p. 448.
94 S.C., 1883, c. 24, s. 6.
95 S.C., 1903, c. 58, s. 7. See Hamilton, Grimsby & Beamsville Ry. v. A.G. for Ont., [1916] 2 A.C. 583. It is difficult to understand why the section as subsequently modified in the 1906 consolidation of the Railway Act, infra, footnote 96, was not considered in this case.
96 Railway Act, R.S.C., 1906, c. 37, s. 8, consid'd in Montreal v. Montreal Street Ry., supra, footnote 11.
97 S.C., 1919 (1st Sess.), c. 68.
98 Supra, footnote 6.
99 Railway Act, R.S.C., 1952, c. 234, s. 6(c). Subsection (2) has been added to make it clear that (c) does not extend to Provincially authorized street railways, electric suburban railways and tramways not otherwise declared to be for the general advantage of Canada (by S.C., 1920, c. 65, s. 1).
or hereafter" owned, controlled, leased or operated by either a company within the legislative authority of Parliament or a company operating a railway within such authority. The Judicial Committee of the Privy Council has, on more than one occasion, declared that the validity of this generic, open-ended declaration remains an open question. The general Railway Act declaration has been supplemented by more than three hundred Parliamentary declarations bringing specific local railways under Dominion jurisdiction.

Other factors played a part in the centralization of control. The Canadian government itself became involved in railway management by a series of circumstances. In 1903 the Dominion undertook to construct the Eastern portion of a proposed "National Transcontinental" system, the Grand Trunk Pacific Railway to operate it and build and operate the proposed Western section. The Canadian Northern Railway, formed by an amalgamation agreement of 1899, rather suddenly became a trans-Canada trunk railway by the acquisition of numerous local lines and the construction of lines to fill the gaps. While these railways received substantial federal, and also Provincial assistance, they did not receive large land subsidies, except as they succeeded to existing federal subsidies, this policy having been abandoned by the Dominion in 1896. The Western Provinces assisted the two new transcontinental systems in the construction of branch and feeder lines by giving substantial bond guarantees. Many of these enterprises were not successful and the Dominion had to step in to relieve the Provinces of their contingent liabilities.

Before the outbreak of World War I the Grand Trunk, which had numerous lines in the East, the Grand Trunk Pacific, and the Canadian Northern Railways were in serious financial difficulties and the government ultimately had to take them over. In 1923

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100 Luscar Collieries Ltd. v. McDonald, [1927] A.C. 925, at p. 933 (In the court below, the disposition of which was affirmed, the majority had held that the declaration in s. 6(c) did not fall within s. 92(10)(c), see [1925] S.C.R. 460); C.P.R. v. A.G. for B.C., supra, footnote 20, at p. 148 (Empress Hotel case).
101 Vide Pitch, appendix to Hanssen, op. cit., footnote 91.
102 See the National Transcontinental Railway Act, S.C., 1903, c. 71.
103 Confirmed by S.C., 1899, c. 57.
104 Glazebrook, op. cit., footnote 57, p. 122.
105 Consider, for example, the fate of the Great Waterways Railway of Alberta and the Provincial government's constitutionally frustrated attempt to alter the railway's bond liability, the Province being the guarantor, and transfer the proceeds of the bond subscriptions to general Provincial revenues: Royal Bank of Canada v. the King, [1913] A.C. 283.
these companies were placed together with other government railways, the principal one being the Intercolonial, under the control of the Canadian National Railway Company, a federal Crown agency. Since this period the regulation of Canadian railroads has encountered continually recurring economic problems. The industry has been considered in several Royal Commission reports.

The Dominion sphere of railway regulation, protected in the West in the early period by resort to the disallowance power, was so expanded by the exercise of the declaratory power and acquisition of financially embarrassed railroads that the Rowell-Sirois Royal Commission on Dominion-Provincial Relations was able to report in 1940 that, "the railroads of Canada with inconsiderable exceptions ... are under the sole control of the federal authority".

III. The Extent of an Interprovincial Work or Undertaking.

The extra-judicial procedures discussed above have played an important part as centrifugal factors in the evolving scope of federal railway jurisdiction, to some extent postponing, obviating or influencing the judicial role. But the courts have frequently had to elaborate the limits of federal jurisdiction in respect not only of railroads but other works and undertakings of a transport and communication nature. The cases which will be examined in this part concern the question of the extent of an interprovincial work or undertaking.

107 By an Order in Council of Jan. 20th, 1923, P.C. no. 115, also bringing into effect the Act incorporating the Canadian National Railway Company, S.C., 1919 (1st Sess.), c. 13. And see Glazebrook, op. cit., footnote 57, c. 11.

108 Principal of these are the reports of the following:
Royal Commission on Maritime Claims, 1925 (Duncan Commission);
Royal Commission on Railways and Transportation in Canada, 1931-2, chaired by Sir Lyman P. Duff, a Justice of the Supreme Court and later Chief Justice of Canada;
Royal Commission on Dominion-Provincial Relations, 1937-40, (see supra, footnote 67);
Royal Commission on Transportation, 1951 (Turgeon Commission);
Royal Commission on Canada's Economic Prospects, 1957 (Gordon Commission);
Royal Commission on Transportation, 1961 (MacPherson Commission).

109 Supra, footnote 67, Bk. II, p. 200. The most notable exceptions were the Pacific Great Eastern Railway in British Columbia and the Temiskaming and Northern Ontario Railway in Ontario (now the Ontario Northland Railway), both of which are now Provincial Crown agencies and operate under Provincial rather than federal legislative control, though in the case of the Ontario Northland Railway operations extend beyond
It is clear that a work or undertaking falls *in toto* within federal authority if it has some interprovincial extensions in practice since the jurisdiction is referable to the work or undertaking as such and not the interprovincial features thereof. The presence of some interprovincial movement is sufficient to bring an undertaking as a whole under federal competence, provided it is no mere subterfuge to escape Provincial control.\(^{110}\) Put another way, an undertaking cannot be broken down, so as to subject it to different legislative jurisdictions, into separate local and long distance businesses when in fact the two types of operations are carried on as an integrated undertaking.\(^{111}\) Neither the degree nor the nature of integration required is, however, entirely clear.\(^{112}\) But the proposition has been applied to local and long distance telephone operations of a single telephone company,\(^{113}\) long distance transmission and local reception of radio waves,\(^{114}\) the transport of passengers within a Province and the transport of passengers to points outside a Province, in each case on the same scheduled motor buses,\(^{115}\) and a local commuter rail service and the interprovincial service or railway line of another organization, the railroad of which constitutes the only track used for the local service.\(^{116}\)

It is important to keep in mind that the undertaking or work as so conceived will, nonetheless, remain subject to certain general

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\(^{111}\) *Toronto v. Bell Telephone Co.*, supra, footnote 16, at pp. 59-60.

\(^{112}\) The Privy Council in *A.G. for Ont. v. Winner*, supra, footnote 10, for example, left open the question of whether a purely Provincial bus service, even though operated under the aegis of an organization which also ran a service transporting passengers beyond a single Province, could properly be viewed as part of a s. 92(10)(a) undertaking (see p. 583). But see *Retail, Wholesale and Department Store Union v. Reitmier Truck Lines Ltd.* (1966), 57 W.W.R. 104 (B.C.S.C.) in which an interprovincial motor carrier had taken over all the outstanding shares and the operation of an intraprovincial carrier, maintaining the corporate identity of the latter but operating it solely with persons who were employees of the parent company. Munroe J., at p. 109, added that were he wrong on his decision respecting the first two submissions, he found that the local company had not become so integrated with the interprovincial carrier as to bring the labour relations of the former constitutionally within federal jurisdiction.

\(^{113}\) *Toronto v. Bell Telephone Co.*, supra, footnote 16, at pp. 59-60.

\(^{114}\) *In re Regulation and Control of Radio*, supra, footnote 19, at pp. 316-317.

\(^{115}\) *A.G. for Ont. v. Winner*, supra, footnote 10, at pp. 580-582.

\(^{116}\) *The Queen v. Board of Transport Commissioners* (1968), 65 D.L.R. (2d) 425 (S.C.C.) (*GO Transit case*).
Provincial laws such as those imposing taxes,\footnote{117} or regulating highway traffic in the case of motor carriers\footnote{118} and, in the absence of Dominion legislation, may be governed by such Provincial laws as those dealing with workmen's compensation and contributory negligence.\footnote{119}

A relationship may exist between a work or undertaking (transport, communication or otherwise) and that which forms the minimum content at least of an interprovincial work or undertaking of a transport or communication nature. This situation invites the question of whether the first mentioned work or undertaking is properly to be treated as a part of an interprovincial transport or communication work or undertaking. An answer has already been suggested in the case of two or more clearly integrated activities of the same transport or communication type, distinguished largely by their local or long-distance characteristics, that is that they may be treated as part and parcel of a single interprovincial work or undertaking. This is subject, as indicated, to the persisting problem that the authorities are not clear, except in some very specific instances, of the required degree or aspects of integration.

In the more general situation postulated above one is also faced with the task of assessing the relationship and determining whether it justifies a finding that the work or undertaking, about which some question is raised, is comprehended within the transport or communication work or undertaking that, of itself, is clearly interprovincial. There are indications in the cases that the necessary relationship or, if you will, integration may be found principally in the character of corporate control, organizational operation and physical connexion. The relevance of these factors will now be examined in some detail.

1. The Relevance of the Corporate Organization.

Corporations or organizations of some sort must exist in order to effectively carry out interprovincial works and undertakings. Hence when one proceeds to examine the question of whether a particular activity is sufficiently integral or ancillary to an activity that is clearly interprovincial so as to justify its inclusion as

\footnote{117} C.P.R. v. Corp. of the Parish of Notre Dame de Bonsecours, supra, footnote 14, at p. 372.
\footnote{118} A.G. for Ont. v. Winner, supra, footnote 10, at pp. 576, 579.
part of an interprovincial work or undertaking it is neither un-
natural nor irrelevant to take note of the corporate entity that
carries out the questioned activity. So viewed both the manner
of the exercise of corporate functions and the relationship of the
relevant corporate powers attain a certain significance. But the
fact that a single corporation carries on the two activities should
not, it will be suggested, necessarily conclude the question in
favour of a comprehensive federal jurisdiction. It is suggested
that the Privy Council in the Empress Hotel case has put this
matter in the proper perspective.

In the Empress Hotel decision the Judicial Committee had to
determine whether the hours of work of employees of the Canadian
Pacific Railway hotel in Victoria were subject to the regulation
of the British Columbia Hours of Work Act. The railway com-
pany claimed to be outside the Act's constitutionally permissible
reach, maintaining, inter alia, that the hotel business was part of
its railway works and undertaking connecting British Columbia
with other Provinces. The hotel had been built for the comfort
and convenience of the travelling public but was not built on land
contiguous to nor used as a terminus for its railway line and
was open to the public generally. In summary, the hotel was
so located and operated as to resemble any non-railway hotel.

The Board proceeded from the proposition that "a company
may be authorized to carry on, and may in fact carry on more than
one undertaking". The corporate powers were examined and
found to include the authority to build and operate hotels, "for
the comfort and convenience of the travelling public". This was
interpreted as not excluding entry into the general hotel business
in competition with other hotel keepers. For this reason and the
fact that the actual operation of the Empress Hotel conformed
to this broader aspect of the hotel power, the hotel enterprise was
not considered to be part of the railway works and undertaking.
Accordingly the Provincial Hours of Work Act applied.

Given this clear exposition it is rather surprising to find the

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Ct) holding Provincial construction safety legislation applicable to an
interprovincial bridge.

Supra, footnote 20.
R.S.B.C., 1936, c. 122.
Supra, footnote 20, at p. 143.
late Chief Justice Lett of the Supreme Court of British Columbia, in the course of his lengthy judgment in *British Columbia Power Corp. Ltd. v. A. G. for B.C.*,\(^{123}\) pass so hastily over the relationship of the British Columbia Electric Company's railway and gas business to its bus and electrical systems, which he had found to be within section 92(10)(a).\(^{124}\) The nexus is developed in two sentences. As to the gas system it was said that while it included generally distribution of gas to consumers it also supplied one of the company's thermal electric plants. Yet Lord Reid had pointed out in the *Empress Hotel* case while it might be that the railway business and hotel business there considered helped each other, that did not prevent them from being separate undertakings.\(^{125}\)

While the British Columbia Electric Company carried on its activities through separate divisions of a single company, the Bell Telephone Company of Canada conducts a telephone communication business but a subsidiary, the Northern Electric Company, manufactures the telephone equipment used by the Bell in its enterprise. In *Regina v. Ontario Labour Relations Board ex. p. Dunn*\(^{126}\) McRuer C.J.H.C. held that the labour relations of the employees of Northern Electric's Bramalea plant fell as a matter of constitutional law within Provincial jurisdiction.

In deciding the *Dunn* case the Chief Justice was labouring under a distinct handicap in that the issues before him were raised on a motion and there was only affidavit evidence to go on which, of itself, was deficient in several respects. Accordingly it was impossible to determine accurately the extent of the relationship between the parent company and Northern Electric's Bramalea operations—other than that the cross-bar mechanisms manufactured at Bramalea were largely, if not exclusively, purchased by the Bell. Nor did the evidence indicate generally the extent of integration of the two companies. And such a general inquiry would obviously be necessary if labour relations jurisdiction was not to be treated as variable as between the different plants of Northern Electric, a situation which would be intolerable as a

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\(^{123}\) *Supra*, footnote 26 (B.C. Power case).


\(^{125}\) *Supra*, footnote 20, at p. 732.

practical matter.\textsuperscript{127} Insofar as necessary to avoid such a situation it is clearly desirable that a court take account of the extent of corporate enterprises involved as opposed to simply examining the limits of the work or undertaking viewed apart from its corporate operator(s).

Recognizing these limitations, it is suggested that the court in the \textit{Dunn} case should have examined more closely than it did the corporate powers of the Bell Telephone Company and the dependence in practice of the two activities of manufacture of telephone equipment and operation of a telephone communication network. This was the approach adopted in the \textit{Empress Hotel} case\textsuperscript{128} and it would seem to be equally applicable in this type of case. The first listed power in the Bell's Act of incorporation in fact deals with the manufacture of telephone and related apparatus.\textsuperscript{129} In any case it should not be determinative, as the court in the \textit{Dunn} case seems to suggest, that the crossbar manufacturing process could as well have been performed by any other company.\textsuperscript{130} The federal transport and communication power would be a pretty sterile one if in every case the extent of an interprovincial work or undertaking was limited to those features which did not lend themselves to execution by other than the corporate operator (including related companies) of the essential work or undertaking.

Even in respect of matters of private law the corporate identities of a parent and subsidiary will not always be treated as precluding a court from treating the two as a single enterprise entity or the one as an agent, instrumentality or \textit{alter ego} (to mention but a few of the terms used) of the other.\textsuperscript{131}

\textsuperscript{127} See, in a similar vein, the observations of Rand J., dissenting in part, in the \textit{Stevedoring} reference, \textit{supra}, footnote 8, at p. 551. See also \textit{R. v. Picard} (1967), 65 D.L.R. (2d) 658 (Que. Q.B., App. Side), where the Quebec court had to determine the legislative authority over the industrial relations of longshoremen working in Quebec ports and in the Seaway system some of whom might function only in respect of intraprovincial shipping. It was said that, "there are certain aspects which do not admit of divided responsibility", this being one of them and the authority was accordingly found to be exclusively federal because of the preponderance of international interprovincial shipping involved (per Hyde J., at p. 663).

\textsuperscript{128} \textit{Supra}, footnote 20.

\textsuperscript{129} S.C., 1880, c. 67, am. by S.C., 1882, c. 95, see s. 2 of amendment. And see \textit{Industrial Wire & Cable Co. v. Bell Telephone Co.} (1966), 85 C.R.T.C. 221 in which the Board of Transport Commissioners held that Bell was acting within its corporate powers in becoming a majority shareholder in Northern Electric Co.

\textsuperscript{130} \textit{Supra}, footnote 126, at p. 357. See \textit{Blake, op. cit.}, footnote 126, pp. 129-130.

\textsuperscript{131} There is a wealth of relevant authorities, a large number of which
case, the court’s concern being the application of an over-riding instrument against which all legislation must be measured, there are much stronger grounds for disregarding corporate entities and for less compelling reasons than might be requisite in any other class of case.

The Stevedoring reference\(^{122}\) concerned both the validity generally of part I of the federal Industrial Relations and Disputes Investigation Act\(^{123}\) and the applicability of the latter in respect of the labour relations of employees of a stevedoring company. The company supplied stevedoring and terminal services for ships operating on regular schedules between Canada and foreign ports but did not itself own or operate any ships or shipping line. The Supreme Court, in nine separate judgments, concluded in favour of both the general validity of the Act and, with two dissents, its application to the stevedoring company and its employees. The fact that the stevedoring operation was carried on under the aegis of a corporation quite independent of the steamship companies did not preclude the court from finding that it was part and parcel of navigation and shipping (section 91(10)) or interprovincial lines of ships (section 92(10)).\(^{134}\)

The equation of an interprovincial work or undertaking with the enterprise of a single company is suggested by certain federal Acts. The application provisions of the Railway Act for instance have for a long time included, “railway companies . . . within the legislative authority of the Parliament of Canada howsoever incorporated . . .”\(^{135}\) And various Acts declaring particular railway works to be for the general advantage of Canada contain declarations that the company is to be a body corporate within the legislative authority of the Parliament of Canada and then proceed to prescribe corporate features such as capitalization, location of head office, time of annual meeting, number of directors.\(^{136}\) The

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122 Supra, footnote 8.
123 R.S.C., 1952, c. 152.
124 This is rather specifically stated in the opinions of Kerwin C.J. (at p. 536), Estey J. (at p. 569), and Locke J. (at p. 574) and is implicit in the other majority opinions. Compare Retail, Wholesale and Department Store Union v. Reitmier Truck Lines Ltd., supra, footnote 112.
125 R.S.C., 1952, c. 234, s. 5. This provision in somewhat similar terms, but without the qualification “howsoever incorporated”, was first introduced in S.C., 1888, c. 29, s. 3.
126 E.g., S.C., 1894, c. 84, consid’d in Montreal v. Montreal Street Ry., supra, footnote 6, and S.C., 1895, c. 59, consid’d in Quebec Railway Light & Power Co. v. Beauport, supra, footnote 19. Other examples are included in Pitch, appendix to Hanssen, op. cit., footnote 91. Quaere as to whether the declaration of a work to be for the general advantage of Canada
new National Transportation Act requires companies engaged in certain types of interprovincial transportation undertakings to report proposed acquisitions of interests in the business or undertaking of any person engaged principally in transportation whether or not that business or undertaking is subject to the jurisdiction of Parliament. The Canadian Transport Commission is given the power to disallow the acquisition if in the Commission's opinion it will, "unduly restrict competition or otherwise be prejudicial to the public interest". Whether this federal assertion of control over a corporate activity is justified by the fact that one of the companies involved in the arrangement is engaged in an interprovincial undertaking, possibly among other activities, is open to argument.

The cases considered above demonstrate the considerable difficulties that have been encountered in assessing the appropriate constitutional significance of the fact that a particular undertaking is carried on by a particular corporation. The creation of corporations, it has been shown, has a distinct constitutional basis, distribution of function between Province and Dominion depending upon the nature of the corporate objects. Yet the effective implementation of the objects usually depends on the exercise of a supplementary or independently conferred jurisdiction to the extent that the objects purport to confer rights as opposed to privileges and to the extent that the Province or Dominion regulates the activity of the company not qua company but as justified by its jurisdiction over a particular activity. A transportation or communication undertaking is a possible corporate activity but it may or may not be segregated from the total corporate enterprise or it may even be larger in scope than a single corporate enterprise. To determine questions of this nature corporate ob-

affects the Provincial incorporation of the company the objects of which were to operate the declared work. see Quebec Railway Light & Power Co. v. Montcalm Land Co., supra, footnote 23, at p. 558 and Quebec Railway Light & Power Co. v. Beauport, supra, footnote 19. S.C., 1966-67, c. 69.

On at least one previous occasion in the past Provincial authorization has been given to such an acquisition. The 1957 acquisition by the C.P.R. of Smith Transport, an interprovincial motor carrier operating principally in Quebec, was authorized by the Quebec Transport Board, and on condition that the company would submit to the jurisdiction of the Board over the operations of Smith in Quebec, see Currie, Economics of Canadian Transportation (2nd ed., 1959), pp. 515-516 (also referred to in Currie, op. cit., footnote 109, p. 514).

If the section bore more of the elements of criminal law it might, as the Combines Investigation Act, R.S.C., 1952, c. 314, be supportable under the criminal law power, see Goodyear Tire & Rubber Co. v. the Queen, [1956] S.C.R. 303.
jects have a certain relevance. But of primary concern is the integra-
tion of the various corporate activities in practice (including
the corporate organizations themselves if more than one is
involved) and their inherent interdependence.

2. The Relevance of Physical and Operational Connexion.

It is now intended to examine a number of decisions, most
of which concern railway rate regulation, with a view to dis-
covering the relative roles played by physical and operational
connexion in determining the extent of an interprovincial work
or undertaking within section 92(10). Of the two, physical con-
nexion, to the extent that it is relevant, may be expected to have
a greater significance in the case of interprovincial works, which
are physical things and are involved as a base for jurisdiction
in respect of railway regulation for example, than in the case of
those interprovincial undertakings, such as motor transport, which
have no associated interprovincial works.

In Montreal v. Montreal Street Ry., the respondent company,
which operated local transit lines, was ordered by the federal
Board of Railway Commissioners to enter a rate agreement with
another Montreal Island railway, the works of which had been
declared to be for the general advantage of Canada. The lines of
the two systems connected at several points so that by arrange-
ment passengers of each company might be transported over and
to points on the lines of the other. It was not questioned that
this involved "through traffic" upon a street railway connecting
with a railway subject to Dominion jurisdiction and therefore was
literally within the terms of the Railway Act and subject to regu-
lation by the federal Board. However the constitutional validity of
this provision and the order under it were challenged.

It does not seem to have been argued that the street railway
system was so integrated with the railway that had been the sub-
ject of the declaration so as to be of itself part of a section 92(10)
work and subject as such to Dominion control. Such an argument
would of course have been much more tenable had the Dominion
control over the interconnecting railway been by virtue of an
interprovincial characterization (section 92(10)(a)) rather than
dependent upon the declaration. The latter was framed rather

140 Supra, footnote 6. And see the sequel to the case, Normental Mining
141 Compare Luscar Collieries v. McDonald, supra, footnote 100, dis-
cussed infra, which does not so much as mention the Montreal case though
it was cited in argument.
specifically in terms of the "undertaking" of the particular company and additionally the company itself was declared to be a body corporate within the legislative authority of Parliament. One might speculate that the decision that the section was ultra vires might then have been different had the factual situation arising under the challenged provision differed in this respect. As it was Dominion jurisdiction had to be found, if at all, in an ancillary power over "through traffic" on local lines as an incident of the regulation of railways subject as such to Dominion jurisdiction. The Judicial Committee was not prepared to grant the necessity of such a power as it was not to be assumed that local railway companies would refuse to enter the necessary arrangements with those whose works or undertakings were under federal jurisdiction so as to enable the latter to discharge their Board-imposed obligations. Still less was it to be assumed that on default the Provincial Legislature would not coerce the local railway to comply. If the Judicial Committee was guilty of misplaced faith, it appears to leave open the possibility of a showing that the "through traffic" regulation was ancillary if both the Provinces and local railways proved to be recalcitrant.

In Luscar Collieries Ltd. v. McDonald the railway to which an interprovincial railway line had ultimate through connexion was part of one of the three major transcontinental systems. Two Alberta Acts had authorized successive extensions to a branch line of the Grand Trunk Railway, the latter having become, before the application in question, a part of the Canadian National Railways. In each case a coal company was to finance and construct the line but it was to be operated by the Grand Trunk and on the reimbursement of the coal companies by way of certain freight rebates the lines were to vest in the Branch Lines subsidiary of the Grand Trunk. The respondent applied to the Board of Railway Commissioners of Canada for an order giving him running rights over the second extension, the five and one half to five and three quarter mile long Luscar branch, or requiring the Canadian National Railway to construct a track to serve his coal lease. The appellant colliery, the Luscar company, objected insofar as the application related to its line which it claimed was intraprovincial and outside the Board's jurisdiction. At the time

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142 S.C., 1894, c. 84, ss 1 and 2. Re undertakings and the declaratory power, see supra.
143 This aspect of the declaration is considered supra.
144 Supra, footnote 100.
both of the Provincially authorized extensions were being operated by the Canadian National Railway.

In the circumstances, the Judicial Committee held that the Luscar line was, "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", and therefore fell within section 92(10)(a) of the British North America Act. The judgment expressly reserved on the question of whether the same conclusion would be reached should the Canadian National Railway Company cease to operate the Luscar branch.

The Supreme Court of Canada in British Columbia Electric Railway Co. Ltd. & C.P.R. v. C.N.R. took this reservation as an invitation to examine, as an open question, the effect of physical connexion where the local railway line was not operated by an interprovincial carrier. In that case the issue was the validity of a Board order to file joint rates to the extent that it applied to the Provincially-licenced British Columbia Electric Railway Co., whose works and undertaking were essentially intraprovincial, in respect of a mile of track owned and operated by it but connecting at either end with railway lines subject to Dominion jurisdiction. The connexion at one end was with the Canadian National Railway main line and at the other end with a local line, which ultimately connected with the Canadian Pacific Railway main line, and which was operated under agreement by the British Columbia Electric Railway Company but owned by a Canadian Pacific Railway controlled company and leased to the Canadian Pacific Railway. The latter line had previously been the subject of a declaration by Parliament under section 92(10)(c).

The Board order in question directed the British Columbia company and the Canadian National Railway to publish and file joint rates between points on the Canadian National Railway line and stations on the line subject to the declaration that were on the same basis as those then published between points on the latter line and stations on the Canadian Pacific Railway main line. The British Columbia Electric Railway Company objected on constitutional grounds to the rate order insofar as it affected the mile of its track linking the two lines referred to above.

The court refused to accept the argument that the mile of track was, or was part of, a section 92(10)(a) railway, rejecting

145 Ibid., at p. 932.
physical connexion with lines subject to Dominion jurisdiction as
determinative on the authority of the Montreal case. That physical
connexion was less compelling here than in the Luscar case might
be attributable to the fact that the connexion at the Canadian
National Railway end of the mile-long track had limited transfer
possibilities between the two systems as, one assumes, the Cana-
dian National system here operated under steam while the British
Columbia Electric Railway Company ran to it a local street rail-
way line operated electrically. While such a difference is unex-
pressed in the case, one commentator has suggested it has some
significance. On the other hand, at the other end of the one mile
portion the connexion was with a railway that was under Dominion
jurisdiction by declaration and, though ultimately connecting with
an interprovincial line, it was itself only under Dominion control
to the extent of the declaration which could hardly be said, due
to its terms, to take in a work of another company, even though
connecting with it. This, of course, was the underlying situation
in the Montreal case, though its significance was not articulated
in either case.

Nor, it was decided, was the granting of the challenged order
incidental to the Board’s power over “federal lines” for which the
Montreal case also provided ample authority.

It was also argued that the Board order was justified by the
fact that the Board had jurisdiction over the company by virtue
of its operation of the line subject to the declaration. In answer,
the court asserted that Dominion jurisdiction over the company
was only referrable to its operation of that particular line, a fact
which could not justify federal control of that company’s “purely
provincial railway”. This view is certainly consistent with that
of the later Empress Hotel case from which it is clear that a
company’s total enterprise may involve local activities as well as
a quite distinct work or undertaking within the exceptions of
section 92(10). This approach does not, correctly it has been sub-
mitted, elevate the fact that a work belongs to a company, the

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147 Ballem, Constitutional Validity of Provincial Oil and Gas Legisla-
148 Contained in S.C., 1901, c. 86.
149 However federal jurisdiction over the declared railway could per-
haps 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 limita-
tions, its ownership by a wholly owned subsidiary of the C.P.R., and its
999 year lease to the C.P.R.
150 Supra, footnote 146, at pp. 167 and 171.
151 Supra, footnote 20, at p. 171, consid’d in detail supra.
enterprise of which may include one of the excepted works or undertakings, to a controlling position.

The court also noted that the potential remedies referred to in the Montreal case were once again present here, namely declaration and Provincial coercion.

Most recently, in The Queen v. Board of Transport Commissioners\(^{65}\) the Supreme Court of Canada held that the control of rates charged by the Government of Ontario's commuter service, GO Transit, was within federal jurisdiction under section 92(10)(a), as read with section 91(29). The line of rail used by the Provincial service, by arrangement with the Canadian National Railway, did not simply connect with an interprovincial system but was indeed distinctly part of the Canadian National's interprovincial network of lines. On the other hand GO Transit was operated under Provincial management as an enterprise quite separate from the Canadian National Railway's interprovincial system and used its own rolling stock. The court focused on the physical coincidence of the lines of rail on which the two systems operated and found the jurisdiction over tolls to exist simply as an incident of federal legislative competence over the interprovincial work.\(^{153}\) Among the cases cited in support of the court's conclusion was the Luscar decision but, notably, no reference at all was made to the Montreal case or the B.C. Electric Ry. Co. case.

Generally speaking it may be said that the assertion of federal jurisdiction has not been successful in cases where the railway work or undertaking to which it is extended simply connects physically with a railway work or undertaking within the exceptions of section 92(10). Other features of integration must be apparent. But, while physical connexion between two systems, the rail lines of which are vested in different entities, may not be enough to compel their treatment as a single interprovincial work or undertaking yet if two systems, one operating locally and one interprovincially, use the same rail lines which are a part of the interprovincial system, then on this ground alone the local system will be regarded as part of an interprovincial work or under-


taking. Authority for the latter proposition is provided by the *GO Transit* case.

Physical connexion together with other features may be enough to justify treating a connecting unit as subject to federal control over it as a section 92(10) exception work or undertaking. One of such features is common operation. This is not to say either that the bare fact of common operation is significant. It would seem that a more sophisticated inquiry into the nature of the common operation is necessary to determine whether the "local" unit and the through unit are in their very nature interdependent and integrated to a substantial degree in practice. This is the approach suggested in the *Empress Hotel* case.

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. Alternatively, one must assume that the nature of the corporate entity carrying on the common operation is decisive. In *Luscar*, a national transcontinental railway company operated the branch line while in the *B.C. Electric Ry.* case a Provincially licensed (foreign incorporated) company whose operations were generally subject to Provincial regulation was involved. But, as has been mentioned, such a distinction should not be determinative for constitutional purposes.

With respect to other transportation facilities there have been varying degrees of emphasis on the operational and physical connexion features between a local and an interprovincial unit as elements in determining whether the whole should be treated as interprovincial. It has never been suggested that the facilities for interprovincial and foreign calls provided by various Provincial telephone systems are enough to bring these systems under federal control, though both a physical connexion of wires and co-operative arrangements with extraprovincial systems are necessary. It

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154 Once the proprietary interest was vested in the C.N.R. the situation would be much closer to that subsequently considered in the *GO Transit* case.

155 See remark of the federal Board of Transport Commissioners in *Re*
has been held that a highway is not an interprovincial work or undertaking where it runs to a Provincial border and there abuts on a highway of the adjacent Province. Yet in the recent B.C. Power case the court treated as extremely significant, in its conclusion that the British Columbia Electric Company's power system was within section 92(10)(a), the fact that the system had a connexion with an American grid through which power had in the past been exported but now had only a minimal "deviation" flow and was essentially for mutual emergency relief. The Board of Transport Commissioners considered the physical and operational connexion of a feeder pipeline with a trunk line as two of several relevant factors in a decision holding that the sale by an interprovincial pipeline company to a subsidiary of one of its gathering lines would not make the latter a local work or undertaking.

Westspur Pipe Line Co. Gathering System (1957), 76 C.R.T.C. 158, at p. 177. The question has never been directly mooted. A Provincial exercise of jurisdiction re an interconnexion is exemplified by the Ontario Telephone Act, R.S.O., 1960, c. 394, s. 99, which recognizes a co-ordinate jurisdiction in the federal Board. To date only the works and undertakings of the Bell Telephone Co. and the British Columbia Telephone Co. have been brought under the jurisdiction of the Canadian Transport Commission, formerly the Board of Transport Commissioners.


From time to time it has been suggested that the Dominion might enlarge its jurisdiction over highway transport by declaring highways to be works for the general advantage of Canada under s. 92(10)(c) (see Proceedings of the Standing Committee on Railways, Telegraphs and Harbours on Bill B, "An Act to establish a Board of Transport Commissioners for Canada", at p. 5 (per the Hon. Arthur Meighen) (Sess. 1937) and the Rowell-Sirois Report, 1940, supra, footnote 67, Bk. II, pp. 201, 217-218).

Supra, footnote 26. And see supra on the question of whether an electric system should properly be viewed as an interprovincial work or undertaking under s. 92(10)(a).

This type of arrangement is not peculiar to the British Columbia electrical system. The Hydro Electric Power Commission of Ontario has interconnexion agreements, providing for the export of power, with the New York Power Authority, the Detroit Edison Co. and the Niagara Mohawk Co. (see Deslisle, Treaty-Making Power in Canada in Background Papers and Reports, Ontario Advisory Committee on Confederation (1967), p. 143). But it has never been maintained that the works and undertakings of the H.E.P.C. are subject to federal jurisdiction, though the export of power is itself regulated federally (see the National Energy Board Act, S.C., 1959, c. 46, part VI). See also the Electric Power Exportation Act, R.S.Q., 1964, c. 85.

Re Westspur Pipe Line Co. Gathering System, supra, footnote 155. And see, on the subject of physical and operational connexion in relation to pipelines, Ballem, op. cit., footnote 147.
An interprovincial work or undertaking may be related in some way to a local work or undertaking of a quite different transport or communication variety, for example a national railway and a local trucking enterprise serving the railway. In determining whether the two should be treated constitutionally as part of a single interprovincial work or undertaking it would seem that the same considerations, as apply in the case of related works or undertakings of the same variety, should also apply in this class of case. However it is unlikely in this situation to find extensive physical connexion in that different forms of transport and communication works or undertakings do not lend themselves to this type of integration.

The national railway companies have become increasingly involved in diverse forms of transport and communication. Parliament has not as yet attempted to assert a general jurisdiction over trucking or bus undertakings, operating locally, which are run by the railway companies as an adjunct to their rail business. The strongest argument for federal jurisdiction here would seem to be in the case of piggy-back operations in respect of which the integration of the road and rail activities of the railway companies is most apparent. This itself is a growing field of endeavour and has led to plans for large scale containerization systems of transport, which again will raise similar constitutional considerations.

IV. An Alternative Approach.

In the majority of cases that have been considered it is apparent that any affirmations of federal competence under the first two

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160 Compare Re Colonial Coach Lines Ltd. v. Ontario Highway Transport Bd., [1967] 2 O.R. 25 (H.C.) (appeal dismissed on other grounds at [1967] 2 O.R. 243 (C.A.)), holding that an air terminal limousine service did not come under federal jurisdiction simply because it served an airport and airlines, which fell under federal aeronautics authority (within the s. 91 general power) (per Donohue J., at p. 32: "There are things celestial and there are things terrestrial ").


162 But for a limited assertion of jurisdiction see s. 20 of the National Transportation Act, S.C., 1966-67, c. 69, discussed above. The severe competition to the railways which came from the relatively unregulated local trucking industry prompted the introduction of two Bills in Parliament which, however, never became law. "Bill B" in 1937 would have extended federal regulation to the intraprovincial transport of goods if forming part of a through movement of goods when the points of origin and ultimate destination were in different Provinces or in Canada and in a foreign country, see Proceedings of the Standing Committee on Railways, Telegraphs and Harbours on Bill B, op. cit., footnote 156.

In 1940, Bill No. 14 which would have imposed certain controls on truckers was withdrawn because of the war, see H. of C. Deb., Sess. 1940, p. 865.
exceptions of section 92(10) have depended predominantly upon a judicial assessment of the extent of an interprovincial work or undertaking. In other cases, however, the significant issue facing the court has been the effect of the subject matter of legislation upon a work or undertaking as properly characterized. However, where this has been the major issue and the finding has been in favour of federal jurisdiction the challenged provisions have usually imposed limitations or obligations upon an entity directly engaged in an interprovincial or declared undertaking or work, for example prohibiting railways from contracting out of liability for damages to servants or imposing minimum wage requirements on the Bell Telephone Co. The Stevedoring reference might appear to be an exception as one of the specific questions posed to the court was the applicability of the national labour relations Act to a stevedoring company and its employees, the company itself operating no "lines of steam ships" within the exceptions of section 92(10). However it will be remembered that the broadly framed and interpreted shipping power (section 91(10)) also played an important part in the decision, particularly on this issue. Moreover it appears that the majority of the court regarded the operation of stevedoring as part and parcel of either shipping or a section 92 (10) exception undertaking. Only Mr. Justice Rand, dissenting on the applicability question, laid special emphasis, in discussing both the validity and questioned application of the Act, upon the purpose and effect of the legislation, singling out for particular attention the attempt to obviate strikes and lockouts with their attendant national disruption. This is the very kind of effect that has justified "protective" federal legislation in the United States under the doctrine which takes its name from the Shreveport case.

In the United States, Congressional authority to legislate in relation to facilities of transport and communication has been found in the commerce power. Given the source of the power,

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165 Supra, footnote 8.
166 Ibid., at pp. 550-551, 554, 556.
168 Art. 1, s. 8, cl. 2: "Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes;" The line of authority invoking this article in respect of transport and communication facilities as agencies of commerce begins with Gibbons v. Ogden (1824), 9 Wheat. 1 (re vessels).
Congress is limited in its regulation of the facilities to those aspects relating to interstate commerce.\textsuperscript{169} However, in practice the courts have been diligent in their search to uncover effects upon interstate commerce of Congressional legislation so as to uphold it and in the result the scope of communication and transportation activities amenable to federal control is very far-reaching.

On the other hand there is a broad area for state regulation of transport and communication agencies in the absence of an assertion of federal control. This results from the Cooley doctrine which limits the exclusive powers of Congress in relation to interstate commerce to subjects by their nature national and admitting of only one uniform system of regulation.\textsuperscript{170} In Canada, by comparison, there have been comparatively few situations in which concurrency of powers, with Dominion paramountcy in the case of a conflict, have been recognized.\textsuperscript{171}

The \textit{Shreveport} decision itself involved federal railway rate jurisdiction exercisable through the Interstate Commerce Commission. On complaints of unjust discrimination that Commission ordered two interstate railway carriers to equalize (on a commodity-distance basis) their rates on intrastate hauls eastward out of Dallas and Houston with those on interstate carriage westward out of Shreveport, Louisiana into the same Texas market area as served from the Dallas and Houston originating routes. The rates that the railways charged on the Louisiana-Texas route had been previously filed and found reasonable by the Commission. In the circumstances the commerce court had held that the railways were at liberty to increase the intrastate Texas rates to remove the forbidden discrimination. The latter however were in substantial conformity with the class rates fixed by the Railroad Commission of Texas. The Supreme Court affirmed the power of Congress to exercise the measure of control asserted here over intrastate rates. Mr. Justice Hughes, for the court, said that while Congress had no authority to regulate a state’s internal commerce as such yet:

\[\ldots\] it does possess the power to foster and protect interstate commerce, and to take all measures necessary and appropriate to that end, al-

\textsuperscript{169} See \textit{National Labour Relations Board v. Jones and Laughlin Steel Corp.} (1937), 301 U.S. 1, at p. 38.

\textsuperscript{170} See \textit{Cooley v. Board of Wardens of the Port of Philadelphia} (1851), 12 How. 299.

\textsuperscript{171} Only ss 94a and 95 of the B.N.A. Act as amended provide expressly for concurrent Dominion and Provincial powers, specifically in respect of old age pensions, supplementary benefits, agriculture and immigration.
though intrastate transactions of interstate carriers may thereby be controlled.\textsuperscript{172}

Congress, the court asserted, had exclusive jurisdiction to deal with the relation between the two kinds of rates.\textsuperscript{173}

The result of the case would be reached with ease if a similar fact situation had been before a Canadian court since the control over an interprovincial railway comprises even the purely intraprovincial activities of the work or undertaking. However it is the reasoning that is particularly significant, representing a recognition that evils may exist so as to justify a certain amount of federal control over a matter normally within state power where necessary or appropriate to fostering and protecting activities within the competence of the federal legislative body. This reasoning was later held equally to apply to justify protective regulation of intrastate transactions of those not also engaged in interstate commerce,\textsuperscript{174} a position which in the area of transportation and communication would probably not be so readily accepted by a Canadian court.

The British North America Act, unlike the United States Constitution, contains an enumeration of the legislative powers of the constituent units of the federation (the Provinces in Canada) as well as of the central legislative body. In the United States the States have simply a general residual authority.\textsuperscript{175} And in the British North America Act there is no express necessary and proper clause, similar to that in the United States Constitution,\textsuperscript{176} available to support the legislation of Parliament. But even though the federal and Provincial heads of legislative jurisdiction in the British North America Act are generally framed as mutually exclusive, the courts have sometimes acknowledged the futility of attempting to allocate a subject matter definitively between section 91 and section 92 and have introduced the gloss that the federal Parliament may legislate upon matters "ancillary" or "necessarily incidental" to enumerated federal classes of subjects, which matters, in the absence of the federal exercise, would fall to be legislated upon by the Provinces under the heads of section 92.\textsuperscript{177} Or, additionally, the courts have recognized that particular

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\item\textsuperscript{172} Supra, footnote 167, at p. 353.
\item\textsuperscript{173} Ibid., at pp. 354, 358.
\item\textsuperscript{174} U.S. v. Wrightwood Dairy Co. (1942), 315 U.S. 110, at p. 121.
\item\textsuperscript{175} Am. X.
\item\textsuperscript{176} Art. 1, s. 8, cl. 17: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."
\item\textsuperscript{177} See A.G. of Ont. v. A.G. for Can., supra, footnote 39. This bifur-
subjects may "in one aspect and for one purpose fall within s.92, and may in another aspect and for another purpose fall within s.91".\(^{178}\) When both Provincial and Dominion legislative bodies have acted one is faced with the additional inquiry as to whether the statutes can stand together. If not paramountcy is accorded to the enactment of Parliament.

Yet, either in applying these doctrines or simply in attempting to find the "constitutional value" of legislation, Canadian courts have not taken the same pragmatic approach as manifested in the American decisions on the commerce power as augmented by the necessary and proper clause. Indeed, the ancillary doctrine has sometimes been used to expand areas of Provincial competence, as a finding that a subject matter is merely ancillary to rather than an integral part of a federal class of subject is to admit Provincial jurisdiction if the field is unoccupied.

It will be remembered that the Privy Council in the *Montreal Street Ry.* case\(^{179}\) did not absolutely foreclose the argument that control of the rates of a local carrier is ancillary to the regulation of rates of a work or undertaking referred to in the exceptions to section 92(10). It would seem therefore to be theoretically open to the Supreme Court of Canada to uphold federal regulation of rates of certain intraprovincial carriers as appropriate to preserve the competitive position of interprovincial carriers on a showing of exigencies justifying such control and adopting a line of reasoning similar to that in *Shreveport*.\(^{180}\) Presumably a court would take judicial notice of the fact that the declaratory power cannot now be practically exploited by the Dominion to any great extent. In the *Montreal Street Ry.* case the availability of such a method to achieve the same object as sought to be justified under an ancillary power was expressly remarked on.

It does, however, present a rather special case if the federal authority attempted to be justified under the exception clauses of section 92(10) bears directly upon local works and undertakings of the principal clause of section 92(10). This was indeed the situation in the *Montreal Street Ry.* case. The problem lies in the circumstance that this situation falls within the classic case of mutually exclusive powers as the Provincial and federal heads are

\(^{178}\) *Hodge v. the Queen*, supra, footnote 39, at p. 130.

\(^{179}\) *Supra*, footnote 6.

\(^{180}\) Compare also *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R.R. Co.* (1922), 257 U.S. 563.
drafted respectively in terms of a principal category and exceptions thereto. It might be questioned whether there is room for any Dominion power the exercise of which would impose a considerable degree of control over local works and undertakings, the subject of the principal clause, out of which the federal power relied on only operates by way of exception.

It has been indicated that the principal clause of section 92(10) is rarely invoked by itself as a justification for provincial jurisdiction. But if the clause, as has been suggested, is not limited to works and undertakings of a transportation and communication nature, just about any federal legislation relating to local activities outside the heretofore established limits of section 92(10) exceptions embodies a conceivable conflict with the principal clause. The conflict is, of course, visibly more acute and direct if the local activity is merely the intraprovincial variety of an interprovincial transport or communication work or undertaking which is the basis of the assertion of an ancillary power over the local activity.

It should be noted that in the marketing cases, in which the division between the federal trade and commerce power and the potentially competing Provincial powers is less explicit there is a manifest judicial reluctance to permit of any significant federal regulation of intraprovincial activity even where the latter is so admixed with activity bearing the stamp of interprovincial trade so as not to admit of practical differentiation. However, different factors were at play here and no similar judicial tradition is as clearly entrenched with respect to section 92(10).

While it is certainly open, then, to the Canadian courts to focus more sharply in future on the protective effect of federal transportation and communication legislation so as to bring it within the exceptions to section 92(10) there are reasons, as indicated, to be cautious about predicting the adoption of this type of approach.

**Conclusion**

There are, as has been seen, several constitutional provisions which have lent support to Dominion regulation of transportation

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161 See *supra*.
162 *Ibid*.
163 S. 92(13): "Property and Civil Rights in the Province", and s. 92(10): "Generally all Matters of a merely local or private Nature in the Province".
and communication. Of these perhaps the most important are the exceptions to section 92(10) of the British North America Act, 1867. This article has been concerned to a large extent with the scope of the interprovincial works and undertakings entrusted to exclusive federal jurisdiction by these exceptions.

Whether the scope of federal transportation and communication authority, as presently delimited, is adequate is a matter which, in the very near future, may well have to be resolved by those now engaged in the process of constitutional review. That judgment, of course, if it is to be an informed one, must be based on an appreciation of the present constitutional position. It is hoped that this article has gone some way to elaborate that position and pinpoint some of the areas of existing deficiencies and uncertainties.