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Pipeline Jurisdiction in Canada:
The Case of NOVA Gas Transmission Ltd.

Steven A. Kennett
Research Associate
Canadian Institute of Resources Law

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Faculty of Law, The University of Calgary, Calgary, Alberta, Canada T2N 1N4. Tel: (403) 220-3200 Fax: (403) 282-6182

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All enquiries should be addressed to:

The Executive Director
Canadian Institute of Resources Law
Room 3330 Professional Faculties Building,
Block “B” (PF-B 3330)
Faculty of Law
The University of Calgary
Calgary, Alberta, Canada
T2N 1N4

Telephone: (403) 220-3200
Facsimile: (403) 282-6182
Internet: cirl@acs.ucalgary.ca
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Directeur exécutif
Institut canadien du droit des ressources
Room 3330 Professional Faculties Building,
Block “B” (PF-B 3330)
Faculty of Law
The University of Calgary
Calgary, Alberta, Canada
T2N 1N4

Téléphone: (403) 220-3200
Facsimilé: (403) 282-6182
Internet: cirl@acs.ucalgary.ca
WWW Home Page: http://www.ucalgary.ca/~cirl

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Contents

1. Introduction

The "perennial question"[1] of which order of government has jurisdiction over the pipeline system owned and operated by NOVA Gas Transmission Ltd. (NGTL) in Alberta is increasingly significant from a regulatory perspective. Jurisdictional uncertainty has been fuelled by decisions of the National Energy Board[2] (NEB) and the Federal Court of Appeal[3] that appear to set the stage for a successful legal challenge to the *status quo* of provincial jurisdiction over NGTL.

The constitutional issue concerns the interpretation of s. 92(10)(a) of the *Constitution Act, 1867*. This section provides for federal jurisdiction over interprovincial and international (henceforth, extraprovincial) works and undertakings. The recent decisions are the latest in a long line of cases applying s. 92(10)(a). Despite the large volume of jurisprudence, the cases have yet to yield satisfactory guiding principles that can be applied in a consistent and predictable manner.

The NEB's *Altamont* decision dealt with a pipeline to be constructed by NOVA Corporation[4] between its facilities at Princess, Alberta and the applicant's "sausage-link" segment crossing the Alberta-Montana border.[5] The Board reversed its traditional practice of regulating only the sausage-link component in this type of project and held that its jurisdiction extended to both pipelines.

The Federal Court of Appeal decision concerned the pipelines and related facilities of Westcoast Energy Inc. in British Columbia.[6] The Court overturned an NEB decision and held that Westcoast's gathering network and processing facilities could not be severed from its mainline operations for constitutional purposes and that the entire system was within federal jurisdiction.

Added to these decisions are arguments, most clearly articulated by Ballem in a 1991 article,[7] that the courts would likely place NGTL as a whole within federal jurisdiction by virtue of the so-called "essential" test under s. 92(10)(a). The result, one might reasonably conclude, is that the regulatory regime for NGTL pipelines in Alberta is in a state of instability, with jurisdiction over this major component of the country's energy infrastructure poised to shift, with a stroke of the judicial pen, from provincial to federal hands.

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1 John Bishop Ballem, "Pipelines and the Federal Transportation Power" (1991) 29 Alta L. Rev. 617 at 627.

2 National Energy Board, *Reasons for Decision in the Matter of Altamont Gas Transmission Limited*, GHW-1-92, February 1993 [hereinafter *Altamont*].

3 *In the Matter of the National Energy Board Act* (9 February 1996) Nos. A-545-95 and A-606-95 (Federal Court of Appeal) [hereinafter *Westcoast*].

4 At the time of the application, what is now the NGTL gathering system was operated by the Alberta Gas Transmission Division of NOVA Corporation of Alberta. Descriptions of the *Altamont* facts therefore refer to the "NOVA pipeline".

5 *Altamont*, *supra* note 2 at 2-4.

6 *Westcoast*, *supra* note 3 at 2.

7 Ballem, *supra* note 1.

This paper takes the position that the s. 92(10)(a) case law does not, in fact, support federal jurisdiction over NGTL. In particular, it is argued that both the *Altamont* decision and Ballem's conclusion should be reexamined in light of a proposed new interpretation of s. 92(10)(a). Furthermore, the *Westcoast* decision) along with most of the other principal judicial decisions on pipelines and railways) is entirely consistent with a finding that the NGTL gathering system is an intraprovincial undertaking falling squarely within provincial jurisdiction under s. 92(10)(a).

The paper begins by briefly describing the NGTL gathering system. It then sets out the standard interpretation of s. 92(10)(a), summarizing both the *Altamont* decision and Ballem's argument regarding jurisdiction over NGTL as a whole. The sections that follow present a reformulated approach to s. 92(10)(a). Although this approach has not been articulated by the courts, they have been remarkably faithful to it in interpreting and applying this section. Stepping back to look at the broader constitutional picture, the paper then explains why provincial jurisdiction under s. 92(10)(a) does not preclude a federal regulatory role under certain circumstances. Finally, the resulting allocation of authority over NGTL is defended in terms of underlying constitutional values.

2. The NGTL Gathering System

The NGTL pipeline network is the primary system for transporting natural gas from processing facilities to delivery points within Alberta and to border stations for export.[8] NGTL has 21,400 kilometres of pipeline, 48 compressor stations, 927 receipt points and 163 delivery points. It employs 2,740 people in 90 communities in Alberta. NGTL is a wholly-owned subsidiary of NOVA Corporation.

NGTL delivered 4.3 trillion cubic feet of natural gas in 1995, approximately 80% of Canadian natural gas production and an amount equivalent to 15% of all natural gas produced in North America. Market deliveries of gas transported by NGTL in 1995 were divided between Alberta (15%), British Columbia (1%), Eastern Canada (26%) and the United States (58%).

3. Arguments for Federal Jurisdiction over NGTL

3.1 *The Issue as Defined by Section 92(10)(a) Jurisprudence*

Section 92(10)(a) of the *Constitution Act, 1867* applies to works and undertakings in the areas of transportation and communications, several of which

8 The factual information in this section was obtained from the NGTL “Fact Card” (December 31, 1995) and “NOVA at a Glance”, available through the NOVA Home Page on the Internet.

are specifically enumerated and others, notably pipelines, are included within its scope by inference.[9] This section provides as follows:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,)
>
> 10. Local Works and Undertakings other than such as are of the following Classes:)
>
> (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

Section 91(29) brings within federal jurisdiction matters that are expressly excepted from provincial authority under s. 92. The combined operation of these sections thus establishes federal legislative jurisdiction in relation to connecting or transboundary works and undertakings. This grant of federal authority is an exception to provincial jurisdiction over "local works and undertakings".

The distinction between works and undertakings is, in practice, frequently overlooked or obscured in the case law.[10] When it is addressed directly, however, the cases indicate that these terms are to be read disjunctively, with "work" referring to a "physical thing"[11] and an "undertaking" being "not a physical thing, but ... an arrangement under which ... physical things are used."[12] The implications of this distinction for the interpretation of s. 92(10)(a) are discussed below.

The most authoritative recent judicial statement on the interpretation of this section is the following passage from *Central Western*, a case concerning jurisdiction over a railway company operating within the province of Alberta. According to Dickson C.J.:

> There are two ways in which Central Western may be found to fall within federal jurisdiction.... First, it may be seen as an interprovincial railway and therefore come under s. 92(10)(a) of the *Constitution Act, 1867* as a federal work or undertaking. Second, if the appellant can be properly viewed as integral to an existing federal work or undertaking it would be subject to federal jurisdiction under s. 92(10)(a).[13]

This description of the courts' approach to s. 92(10)(a) indicates that the section establishes federal jurisdiction over two categories of works and undertakings: (1) those that are themselves extraprovincial; and (2) those that, while not extraprovincial themselves, are integral to an extraprovincial work or undertaking.

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9 Peter W. Hogg, *Constitutional Law of Canada*, 3rd Edition (Toronto: Carswell, 1992) at 569, 582.

10 Hogg, *ibid.* at 568. See also I.H. Fraser, "Some Comments on Subsection 92(10) of the *Constitution Act, 1867"* (1984) 29 McGill L.J. 557.

11 *Montreal* v. *Montreal St. Ry.*, [1912] A.C. 333 at 342 (J.C.P.C.).

12 *In re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304 at 315 (J.C.P.C.).

13 *United Transportation Union* v. *Central Western Railway Corp.*, [1990] 3 S.C.R. 1112 at 1124-1125 [hereinafter *Central Western*].

The first category is generally seen as unproblematic. For example, the pipeline systems of TransCanada PipeLines Limited (TCPL) and Interprovincial Pipe Line Inc. are within this category, as are sausage-link pipelines crossing provincial or international boundaries. The second category, however, raises more interesting issues. Dickson C.J.'s description of this category indicates that otherwise intraprovincial works and undertakings can be brought within federal jurisdiction by operation of s. 92(10)(a).[14] This explanation of the case law is supported by Ballem, who summarizes the pipeline context as follows:

> Certain facilities such as storage terminals, spur lines, injection facilities, and gathering lines may be situated entirely within the bounds of one province, yet connect in some fashion with a major transmission system. Such situations present the courts with the complex and often difficult question as to whether the connection or "nexus" is such as to cause the facilities to lose their local undertaking characterization and become a part of the federal undertaking and thus subject to the federal transportation power.[15]

The question of jurisdiction over NGTL has been framed in precisely this way. NGTL's operations, whether viewed individually as works (i.e., pipelines) or collectively as an undertaking, are generally regarded as being within the second category described in *Central Western*. The issue is whether NGTL's relationship with the extraprovincial pipeline systems, which are federal undertakings, is sufficiently integral to bring it within federal jurisdiction under s. 92(10)(a).

3.2 *The "Integral" and "Essential" Tests*

It is generally accepted in the case law that jurisdiction over facilities that are not themselves extraprovincial is determined on the basis of their relationship to core federal works and undertakings. Whether this relationship leads to a finding of federal jurisdiction is determined using the "integral" or "essential" tests.

The "integral" test is the broader of the two. It directs attention to a range of physical and operational characteristics including ownership, control, operational integration, physical connection, and purpose.[16] While no single factor is conclusive, the courts appear to group and weigh these characteristics to determine if the necessary "nexus" exists to bring the intraprovincial work or undertaking within federal jurisdiction.

The principal deficiency of this test, however, is that the required type or extent of "nexus" is never spelled out in a formal manner that can be readily generalized across cases. As Dickson C.J. said in the *Alberta Government Telephones* (*AGT*) case:

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14 See also, *Re National Energy Board Act*, [1988] 2 F.C. 196 at 216 (F.C.A.) [hereinafter *Cyanamid*].

15 Ballem, *supra* note 1 at 619-620.

16 A frequently cited enumeration of these indicia is *Re Westspur Pipe Line Co. Gathering System* (1957), 76 C.R.T.C. 158 at 177-178 (Board of Transport Commissioners); see also Ballem, *supra* note 1 at 620-621.

> It is impossible, in my view, to formulate in the abstract a single comprehensive test which will be useful in all of the cases involving s. 92(10)(a). The common theme in the cases is simply that the court must be guided by the particular facts in each situation ....[17]

The problem with this fact-based approach is that the absence of an underlying theoretical framework or set of general principles makes it difficult to organize or weigh "facts", particularly those pointing towards different conclusions. As a result, it is often difficult to predict in advance how any particular case will be decided.

The indeterminacy of the "integral" test is addressed to some extent by suggestions in certain cases, and in Ballem's article, that a more precise test has emerged. This conclusion is most clearly expressed by MacGuigan J.A. in *Re National Energy Board Act* (the *Cyanamid* reference), a case dealing with pipeline jurisdiction. After a selective review of the case law, MacGuigan J.A. stated that:

> Rather than trying to pick and choose among analogies, I believe a far sounder approach is to seek governing principles. In this context it is immediately apparent that in the vast majority of cases under paragraph 92(10)(a) the courts have explicitly required the parties alleging federal jurisdiction to meet what the NEB initially termed the "vital, essential or integral to the undertaking" test, and then shortened to the "essential test"....[18]

The "essential" test is interpreted to mean that a work or undertaking will be within federal jurisdiction under s. 92(10)(a) if it is essential to the operation of an extraprovincial work or undertaking. The dependence of the latter on the former establishes the "necessary nexus",[19] resulting in federal jurisdiction.

Although a number of authorities can be cited to support the "essential" test,[20] it has by no means supplanted the broader "integral" test. For example, in the *Central Western* case Dickson C.J. clearly applied the latter approach.[21] After reviewing a number of the "integral" test indicia, he concluded that: "Finally, and perhaps most importantly, it cannot be said that CN [Canadian National Railway] is in any way dependent on the services of the appellant."[22] The "essential" test, while a key component in the "integral" analysis, was not the only criterion considered to be relevant.

The two lines of argument for federal jurisdiction in relation to NGTL are based on the interpretation of s. 92(10)(a) jurisprudence just described. The first, relied on in the *Altamont* decision, focuses on particular components of the NGTL system. The second line of argument concerns NGTL as a whole. Both can be briefly summarized.

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17 *Alta. Govt. Tel.* v. *C.R.T.C.*, [1989] 5 W.W.R. 385 at 410 (S.C.C.) [hereinafter *AGT*].
18 *Cyanamid*, *supra* note 14 at 216.
19 *Ibid.* at 216.
20 *Ibid.* at 216.
21 *Central Western*, *supra* note 13 at 1136.
22 *Ibid.* at 1142.

3.3 *NGTL Pipelines as Works: The NEB's Altamont Decision*

As noted above, the *Altamont* decision concerned a proposal to link NOVA's (now NGTL's) gathering system with an American gas pipeline at the Alberta-Montana border. The project was to consist of two components: (1) a NOVA pipeline (the "Wild Horse Mainline") extending from Princess, Alberta to a point near the border; and (2) Altamont's "sausage-link" pipeline, to provide the border connection between the NOVA and American systems. This type of arrangement had been used elsewhere in Alberta and, until the *Altamont* decision, the NEB had consistently exercised jurisdiction only over the sausage-link segments. In this instance, the NEB raised the issue of whether its jurisdiction extended to both segments of pipeline, thereby bringing the NOVA line under the federal regulatory regime.

After convening a hearing on the jurisdictional issue, the NEB ruled in a split decision that its authority extended upstream to Princess. The majority opinion began by explicitly noting the distinction between works and undertakings and stating that, in this instance, it was viewing the pipeline segments as works.[23] It then relied on two alternative lines of reasoning.

First, it held that the two pipeline segments were in fact a single extraprovincial work, thereby coming within the first category set out by Dickson C.J. in *Central Western*.[24] In reaching this conclusion, the Board said that it was applying the "physical connection test". Its brief reasoning noted the coordinated construction of the two segments and "the manner in which the two lines will operate upon commencement of deliveries."[25]

The NEB's alternative reasoning relies on the second category in *Central Western*. The Board held that:

> an analysis of the facts before the Board shows that the Wild Horse Mainline is so closely connected with, or so essential to, the Altamont Canada line as to cause the proposed NOVA Wild Horse Mainline to lose its characteristics as a provincial work and become, together with the Altamont Canada line, one pipeline subject to federal jurisdiction.[26]

The explanation for this conclusion is uncomplicated: "without gas supply from and the operational support of NOVA, the Altamont Canada line would cease to function."[27]

If correct, this decision has important implications for NGTL. Since NGTL's pipelines connect with international and interprovincial pipeline systems at several

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23 *Altamont*, *supra* note 2 at 20.
24 *Ibid.* at 20-21.
25 *Ibid.* at 20-21.
26 *Ibid.* at 21.
27 *Ibid.* at 22.

border points, the *Altamont* reasoning leads to the conclusion that a component of the NGTL system consists of works under federal authority. It is difficult to determine, however, which elements of the NGTL system are federal, particularly since the NEB specifically stated that its finding in *Altamont* was made "notwithstanding the potential for use of the NOVA Wild Horse Mainline by an Alberta producer for purposes other than export and the separate ownership of, and separate transportation contracts for, the two lines."[28]

3.4 *NGTL as an Undertaking: Ballem's Application of the "Essential" Test*

The second argument for federal jurisdiction applies the "essential" test to NGTL as a whole. According to Ballem:

> In the final analysis, ... it is difficult to see how NOVA could avoid the consequences of the "essential" test. The three extraprovincial pipelines, all of which are federal undertakings, simply cannot function without the natural gas which is delivered to them by the NOVA system. Without that gas, Foothills and Alberta Natural Gas would have nothing to transport and TCPL would be left with a reduced throughput that would be completely uneconomic. Thus, the NOVA system, in relation to these federal undertakings, goes beyond being essential to being indispensable.[29]

The result under s. 92(10)(a), Ballem argues, is likely to be federal jurisdiction over the entire NGTL gathering system as a single undertaking.

4. Redefining the Issue: A New Approach to Section 92(10)(a)

The two arguments for federal jurisdiction over NGTL appear to be consistent with the generally accepted interpretation of s. 92(10)(a). On closer examination, however, this interpretation is itself a source of confusion. The approach proposed here is intended to provide a more satisfactory basis for explaining the case law and applying s. 92(10)(a). It also yields a diametrically different result in the case of NGTL. The distinction between works and undertakings is central to this alternative approach, and these two categories are therefore examined separately.

4.1 *Section 92(10)(a) and Works*

4.1.1 *Proposed Approach*

The approach proposed here is that s. 92(10)(a) be applied to works in the following relatively narrow and precise manner. The starting point is that there are

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28 *Ibid.* at 21.
29 Ballem, *supra* note 1 at 630.

only two types of works: intraprovincial and extraprovincial. Intraprovincial works are works) that is, physical things) located entirely within the boundaries of a province. Extraprovincial works cross provincial or international boundaries.

Intraprovincial works thus include segments of pipeline, like NOVA's Wild Horse Mainline, that begin and end within Alberta. Extraprovincial works are transboundary pipeline segments, like the Altamont sausage link, that provide the physical connection between intraprovincial works and works in another province or in the United States. Another example of an extraprovincial work of the sausage-link variety would be a connection between electric transmission lines at a provincial border. Of course, larger extraprovincial works, such as TCPL's pipeline that stretches from Empress in Alberta to delivery points in Ontario, would also fit within this category. However, since regulatory authority over the TCPL system follows from its characterization as an interprovincial undertaking, the identification of a specific extraprovincial work for jurisdictional purposes is largely unnecessary as a practical matter.

In determining whether works are intraprovincial or extraprovincial for purposes of s. 92(10)(a), courts and tribunals should not adopt an expansive characterization of extraprovincial works. Instead, they should restrict this category to “physical things” that are self-contained, constructed as a single entity, and transboundary in nature. Interpretive reach of the type used by the NEB to characterize the Wild Horse Mainline as part of a single extraprovincial work is not appropriate. As will be shown below, the operational integration that was central to the NEB's reasoning in this decision can be adequately addressed through the application of s. 92(10)(a) to undertakings.

This restrictive approach to characterization implies that courts and tribunals should take works as they find them when applying s. 92(10)(a). In other words, works should be accepted by the regulator as they are conceived by the proponent. The result is that an extraprovincial work could be anything from a very small sausage-link component to a single pipeline extending from Alberta to Ontario.

It may appear, initially at least, somewhat arbitrary to leave this much flexibility in the definition of works to the proponent. This decision will have jurisdictional implications, and proponents might structure the components of their pipelines to achieve desired jurisdictional outcomes. There are three reasons, however, why this situation should not cause concern.

First, the issue of what constitutes a work is unavoidable given that s. 92(10)(a) specifically identifies works as a matter for jurisdictional purposes. It is inevitable, therefore, that certain types of works will be federal, while others will be provincial. Since the physical characteristics of works as such do not embody constitutional values, and s. 92(10)(a) jurisprudence has proven insufficiently flexible and innovative to import these values into its reasoning, one has little choice but to accept a certain degree of arbitrariness in the definition of works and the attendant jurisdictional consequences.

Second, there appears to be no principled way for the courts to redefine the physical extent of extraprovincial works. The two most obvious criteria that could be applied to redraw divisions between works for s. 92(10)(a) purposes are inappropriate. These two approaches relate to physical and operational connection.

The problem with a physical connection test for works is that, in the case of transportation and communications facilities, it effectively reads out of existence provincial jurisdiction over local works. As noted by Dickson C.J. in the *Central Western* case:

> Railways, by their nature, form a network across provincial and national boundaries. As a consequence, purely local railways may very well "touch", either directly or indirectly, upon a federally regulated work or undertaking. That fact alone, however, cannot reasonably be sufficient to turn the local railway into an interprovincial work or undertaking within the meaning of s. 92(10)(a) of the *Constitution Act, 1867*. Furthermore, if the physical connection between rail lines were a sufficient basis for federal jurisdiction, it would be difficult to envision a rail line that could be provincial in nature: most rail lines located within a province do connect eventually with interprovincial lines.[30]

In the words of one commentator:

> physical connection cannot be the sole focus of analysis where paragraph [92(10)](a) works are concerned: few driveways in the nation would escape federal regulation on that basis.[31]

Mere physical connection cannot, therefore, provide a basis for concluding that pipeline segments, such as the NOVA line and the Altamont sausage link, are a single work. The courts have consistently rejected physical connection as determinative of jurisdiction.[32] It is not surprising, therefore, that the NEB's reasoning regarding the "physical connection test" in *Altamont* referred to the operational relationship between the two lines.

The focus on operational connections as an alternative basis for determining the scope of works under s. 92(10)(a) is, however, inconsistent with the distinction between works and undertakings. To return to the *Altamont* example, the operational connection between the NOVA line and the Altamont sausage link relates to the way that these "physical things" are used. In other words, it is relevant to them as undertakings (or components of undertakings), not physical works.

The third reason not to be concerned about taking works as presented by the proponents for s. 92(10)(a) purposes is that this characterization is only one layer of the constitutional structure that determines jurisdiction over pipelines. A separate analysis is necessary to determine which order of government has authority over the

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30 *Central Western*, *supra* note 13 at 1129.
31 Fraser, *supra* note 10 at 606.
32 *Montreal* v. *Montreal St. Ry.*, *supra* note 11 at 345-346; *AGT*, *supra* note 17 at 412-13; *Central Western*, *supra* note 13 at 1128-1130.

relevant undertakings. Furthermore, jurisdiction over pipelines may be upheld under other heads of power through the application of general constitutional principles. This broader jurisdictional structure is discussed in more detail below. A relatively restrictive approach to works under s. 92(10)(a) does not, therefore, unduly short-circuit constitutional analysis. It simply provides a logical and practical means of distinguishing between extraprovincial and intraprovincial works, as required by s. 92(10)(a).

To summarize, the approach proposed here deals with the application of s. 92(10)(a) to works in two relatively straightforward steps. The first) identification of the work) is accomplished by taking the work as conceived by the proponent. The second step is to determine whether the "physical thing" at issue is located within a province or extends across a provincial or international boundary. Jurisdiction depends on the answer at the second step.

This approach is appropriate for four reasons. First, it is consistent with the distinction between works as physical things and undertakings as the arrangements by which physical things are used. This distinction implies that, for purposes of applying s. 92(10)(a), the focus of analysis should be the physical characteristics of the works themselves, not the way they are used. The operational characteristics of works are relevant to their use as components of undertakings, not to their characterization as works.

Second, the proposed reformulation of the s. 92(10)(a) approach to works corresponds well with the overall purpose and operation of the section. It reflects Hogg's observation that: "The essential scheme of s. 92(10) is to divide legislative authority over transportation and communication on a territorial basis."[33]

Third, it is consistent with a convincing constitutional rationale for federal authority over certain types of physical structures. Federal jurisdiction over extraprovincial works, such as sausage-link pipelines, fills a potential regulatory gap. As with the "gap" branch of the federal "peace, order, and good government" power,[34] the Constitution allocates power to Parliament over matters that cannot be regulated effectively by the provinces. Works that physically cross provincial boundaries, unlike those completely within a province, cannot be regulated in their entirety by a provincial legislature.

Finally, this approach yields results that are consistent with a number of important s. 92(10)(a) cases. It is also in line with the NEB's previous practice of regulating only sausage-link pipelines on fact situations similar to *Altamont*.

33 Hogg, *supra* note 9 at 566.
34 *Ibid.* at 439-441.

4.1.2 *The Case Law*

A prime example of the congruence of this approach with the outcomes of s. 92(10)(a) cases, if not with their explicit reasoning, is the decision in *Kootenay Railway*.[35] This case concerned a plan to construct a railway line in British Columbia to a point one-quarter of an inch from the international border. This line, obviously, was to connect with another line constructed by an American company, which stopped just on the other side of the border.

The Supreme Court of Canada, in a split decision, found in favour of provincial jurisdiction. Martland J. summarized the majority opinion as follows:

> a provincial Legislature can authorize the construction of a railway line wholly situate within its provincial boundaries. The fact that such a railway may subsequently, by reason of its interconnection with another railway and its operation, become subject to federal regulation does not affect the power of the provincial Legislature to create it.[36]

The key distinction implicit in this passage is between “railway line” and “railway”. The former is a work; the latter an undertaking. While the work is entirely intraprovincial, it may be used as part of an extraprovincial railway undertaking.

Ballem characterized this decision as “seemingly anomalous” and stated that it “rather unexpectedly upheld provincial jurisdiction, although on very narrow grounds”.[37] In describing the facts, he noted the operational arrangements that were planned for the transfer of railway traffic along the combined lines. He also quoted from the dissent of Hall J., who stated that:

> There never was the slightest intention on the part of those furthering the project that Kootenay would be a wholly contained provincial undertaking with an operation beginning and ending within British Columbia. It was conceived and intended as part and parcel of an international undertaking .... Throughout the argument the unreality of the whole situation became crystal clear that the Court was being called upon to deal with a wholly fictitious situation dressed up in legalistic terminology and argument involving corporate powers to obscure the realities of what was being proposed.[38]

The disagreement between majority and minority opinions thus seems to turn on confusion about whether the case concerned a work or an undertaking. The majority apparently treated the principal issue as jurisdiction over the construction of a physical work. The above-quoted passage from Hall J.'s dissent, however, clearly refers to the “undertaking” and its operations. Authority over works implies authority to regulate their construction, since that is how these “physical things” are brought into being. When they are operated, however, it is as part of undertakings) the arrangements by which physical things are used. As the majority noted, the

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35 *Kootenay and Elk Railway Co.* v. *Canadian Pacific Railway Co.* (1972), 28 D.L.R. (3d) 385 (S.C.C.) [hereinafter *Kootenay Railway*].

36 *Ibid.* at 405-406.

37 Ballem, *supra* note 1 at 629.

38 *Kootenay Railway*, *supra* note 35 at 416-417.

jurisdictional answer may change once a work is brought into operation as part of an undertaking.

The argument here is that the *Kootenay Railway* case should be understood as deciding jurisdiction over the work) the railway line stopping just short of the border. The operation of that work, in other words its eventual role as part of an undertaking, was therefore not relevant. On this basis, the majority opinion) including its explanation regarding the eventual emergence of an extraprovincial undertaking) is entirely consistent with the approach to works under s. 92(10)(a) that is proposed in this paper. The railway line at issue was a work located entirely within the province of British Columbia. Consequently, it was an intraprovincial work under s. 92(10)(a) and falls within provincial jurisdiction. Applying the analysis proposed here to the facts in *Kootenay Railway* thus makes the decision appear less anomalous and the reasoning less contrived.

Fulton v. *Energy Resources Conservation Board*[39] is another decision that may appear to be somewhat anomalous on the conventional interpretation of s. 92(10)(a).[40] It too can be explained, at least in part, using the proposed approach to works. In this case, the Supreme Court of Canada held that Alberta's Energy Resources Conservation Board, the predecessor of the Energy and Utilities Board, could authorize the construction and operation of an electrical transmission line that was to extend from Langdon, Alberta to a point just on the Alberta side of the Alberta-British Columbia border.

Laskin C.J.'s judgment did not deal with the distinction between works and undertakings in a clear and consistent manner. He also relied in part on the absence of federal legislation in upholding provincial jurisdiction to regulate the construction of the intraprovincial facilities and to authorize, but not regulate, the interprovincial connection.[41] These factors complicate a comprehensive analysis of his reasoning.

On the specific issue of the construction of the transmission line as a “work”, however, the decision in *Fulton* is clearly intelligible on the theory advanced here. As with the railway line in the *Kootenay Railway* case, the proposed transmission line was to be a physical thing constructed entirely within Alberta. Consequently, it is an intraprovincial work, coming within provincial jurisdiction.[42] The result in *Fulton* is also defensible on the very practical basis that, as Whyte observes, “the regulatory objective of the province (controlling the location of high voltage transmission lines) is patently desirable and is highly suitable for provincial regulation.”[43] Whether or not the interprovincial operation of that line is a federal

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39 [1981] 1 S.C.R. 153 [hereinafter *Fulton*].

40 Ballem, *supra* note 1 at 629-630.

41 *Fulton*, *supra* note 39 at 161-162.

42 In *Fulton*, *ibid.* at 166, Laskin C.J. states that: “the proposed works in Alberta may properly be regarded as local works for the purposes of the application that was before the Energy Resources Conservation Board.”

43 John D. Whyte, “Constitutional Aspects of Economic Development Policy” in Richard Simeon,

matter under s. 92(10)(a) should be decided according to principles applicable to undertakings, a subject addressed below.

Dicta in the *Cyanamid* case also provide judicial support for the proposed approach. At issue was a “bypass” pipeline that would directly link the TCPL mainline with an industrial customer. The entire bypass pipeline was to be within Ontario. MacGuigan J.A. stated that:

> As a work, the proposed pipeline exists solely within the province of Ontario and, as established by the *B.C. Electric Railway* case, ... mere physical connection to the admittedly interprovincial TCPL work is not sufficient to found federal jurisdiction. If it is to come under 92(10)(a), I believe it must therefore be as an undertaking rather than as a work alone.[44]

This reasoning supports the argument that a pipeline that does not itself cross a provincial or international boundary cannot be an extraprovincial work under s. 92(10)(a).

4.1.3 *Altamont Revisited*

The interpretation proposed here, if accepted, leads to the conclusion that the NEB's *Altamont* decision should be reconsidered. The principal problem with the NEB's reasoning is its attention to the operational relationship between the two pipeline segments. This relationship was a significant factor in its conclusion that the two pipelines constitute a single work, and in the Board's alternative approach that applied the “essential” test to bring the separate NOVA work within federal jurisdiction. While this type of analysis has a role) discussed below) in cases dealing with undertakings, the argument here is that operational relationships have no relevance to the application of s. 92(10)(a) to works. The proposed approach, on the *Altamont* facts, would take the two pipeline segments as self-contained entities, one intraprovincial and the other extraprovincial, and decide the jurisdictional issue accordingly.

This critique of *Altamont* is supported by the 1996 decision of the Federal Court of Appeal in the *Consumers' Gas* case. The issue was whether the Ottawa East Line, which is part of the Consumers' Gas delivery network, constitutes a federal work or undertaking by virtue of the fact that it supplies gas to) and is therefore essential to) the interprovincial Niagara Line. The Court explained its approach to this issue as follows:

> In the first place, and at the most basic level, there is simply no ground for the Board's finding, which is implicit and not even discussed in the reasons of the majority, that the Ottawa East Line constitutes a separate undertaking for constitutional purposes. There is no question, of course, that the line is a work, a physical thing, but as such it is wholly

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Research Coordinator, *Division of Powers and Public Policy* (Toronto: University of Toronto Press, 1985) 29 at 57.

44 *Cyanamid*, *supra* note 14 at 219.

> within the limits of Ontario and the simple fact of its physical connection to an interprovincial work, the Niagara Line, does not give it a federal character. As an undertaking, the Ottawa East Line simply has no separate existence.[45]

The NEB's reasoning in the *Altamont* case differed from that described above in that it specifically dealt with the lines as works, not undertakings. Both aspects of the *Consumers' Gas* analysis are nonetheless relevant to the Wild Horse Mainline at issue in *Altamont*. First, it is an intraprovincial work because it is entirely within Alberta; this intraprovincial character is not altered simply by virtue of its physical connection with the Altamont sausage-link segment. Second, the Wild Horse Mainline was to be built and operated by NOVA as a component of NOVA's gathering system and had “no separate existence” as an undertaking.

The proposed approach to the “works” component of s. 92(10)(a) addresses two troubling issues that arise from the *Altamont* decision. The first issue concerns the implications for the NEB's reasoning and its jurisdictional conclusion of changes in pipeline configuration upstream of the sausage link. The second issue relates to the decision's implications for NGTL as an undertaking.

The configuration problem is as follows. The NEB's application of the “essential” test appears to be based on its finding that the Altamont sausage link could not operate without the NOVA line. Suppose, however, that NGTL proposed to construct, over a period of time, two additional lines that would converge with the Wild Horse Mainline at the sausage link. Would the NEB be able to assert jurisdiction over these new lines which are, in virtually every respect, identical to the Wild Horse Mainline except that they are clearly not “essential” to the sausage link? Furthermore, could the issue of jurisdiction over the Wild Horse Mainline be reopened on the grounds that it no longer satisfies the “essential” test?

There is also a broader issue. While no individual pipeline in the converging three-segment scenario is essential to the sausage link, an upstream pipeline configuration of some sort is indispensable. Should the concept of what constitutes a single work be expanded to encompass all three lines as well as the sausage link? Are all three lines sufficiently “integral” to the sausage link to attract federal jurisdiction, even if they are not all “essential”? Should federal jurisdiction extend upstream to include substantial portions of the NGTL system on the grounds that, although the Altamont sausage link does not depend directly on specific components of that system, the NGTL pipeline “work” as a whole is essential) or integral) to the extraprovincial link? If federal jurisdiction does extend upstream, where does one draw the line in determining which NGTL works it applies to?

The NEB's decision raises these important questions without indicating how they might be answered. Under the approach proposed here, these issues disappear. Only the sausage link is an extraprovincial work under federal jurisdiction

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45 *The Consumers' Gas Company Ltd.* v. *National Energy Board* (13 March 1996), No. A-777-95 at 3-4 [hereinafter *Consumers' Gas*].

because it is the only physical thing on these facts that crosses a border; all pipelines leading to it are works within Alberta and come under provincial authority.

The second problem arising from *Altamont* is that it appears, as a practical matter for NGTL, to be inconsistent with a basic principle of s. 92(10)(a) jurisprudence. The courts have consistently stated that this section confers undivided federal or provincial jurisdiction over transportation and communications undertakings.[46] As Dickson C.J. stated in the *AGT* case, jurisdiction under s. 92(10)(a) is an "all or nothing affair".[47] If NGTL were to construct the Wild Horse Mainline, the NEB's finding that this line is within federal jurisdiction leads inevitably to the result that the construction component NGTL's pipeline undertaking would be subject to divided jurisdiction. While the core of its gathering system operations would, presumably, remain under provincial jurisdiction, the Wild Horse Mainline) and other lines connecting with sausage links) would be federal. As an undertaking, therefore, NGTL would be in a position that is inconsistent with the principle of undivided jurisdiction under s. 92(10)(a).

This problem also disappears under the approach proposed here. Since the NGTL line is intraprovincial, it does not place NGTL as an undertaking under divided jurisdiction.

4.1.4 *Works and Extraprovincial Undertakings*

A final point of clarification regarding the jurisdictional implications of the distinction between works and undertakings is necessary. An intraprovincial segment of pipeline may, for practical purposes, be within federal jurisdiction under s. 92(10)(a) by virtue of being part of a federal undertaking. It will be recalled that undertakings are arrangements by which works are used. As a result, jurisdiction over an undertaking brings with it authority over the way that the undertaking constructs and operates its works. The approach to works proposed in this section does not, therefore, lead to the conclusion that the construction of a segment of the TCPL system in Saskatchewan would be a matter of exclusive provincial jurisdiction as an intraprovincial work under s. 92(10)(a). Federal authority over TCPL as an interprovincial undertaking provides ample room for the regulation of pipeline construction and operation throughout its system.

4.1.5 *Implications for NGTL*

As indicated by the discussion of the *Altamont* decision, the approach proposed here yields the result that NGTL pipelines are intraprovincial works and are therefore within provincial jurisdiction under s. 92(10)(a). The conclusion that the NEB was wrong in *Altamont* does not, however, address the second argument for

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46 Hogg, *supra* note 9 at 572-573.
47 *AGT*, *supra* note 17 at 409.

federal jurisdiction over NGTL. That argument raises the question whether s. 92(10)(a) operates to bring NGTL as an undertaking within federal jurisdiction. The following section provides an answer to that question.

4.2 ***Section 92(10)(a) and Undertakings***

4.2.1 *Proposed Approach*

The test from *Central Western* quoted above suggests that s. 92(10)(a) establishes federal jurisdiction over inherently extraprovincial undertakings and intraprovincial undertakings that meet the "integral" or "essential" test.[48] This section of the paper proposes an alternative explanation of the operation of s. 92(10)(a) which, it is argued, provides a clearer and more logical basis for applying this section to undertakings.

The proposed application of s. 92(10)(a) to undertakings involves a two step process that parallels the approach proposed above for works. The first step is to identify the undertaking. Second, the undertaking is characterized as either intraprovincial or extraprovincial. The jurisdictional issue is resolved on the basis of the answer at the second step.

The first step has its jurisprudential roots in the leading s. 92(10)(a) case of *Attorney-General for Ontario* v. *Winner*.[49] This case involved a bus line that transported passengers from Boston to Nova Scotia via New Brunswick. The jurisdictional issue was whether the New Brunswick highway board had authority to prohibit the bus line from picking up and putting down passengers at various points within the province. The Supreme Court of Canada held that the province could regulate journeys that began and ended within New Brunswick on the grounds that Winner was engaged in two enterprises, one intraprovincial and the other extraprovincial.[50] Since the intraprovincial undertaking was not essential to the extraprovincial one, it could be separated for constitutional purposes and regulated by the province.

This decision was overturned by the Judicial Committee of the Privy Council. The Privy Council rejected the dual enterprise analysis, stating that:

> this method of approach results from a misapprehension of the true construction of s. 92(10)(a).... The question is not what portions of the undertaking can be stripped from it without interfering with the activity altogether: it is rather *what is the undertaking which is in fact being carried on*. Is there one undertaking, and as part of that one undertaking does the respondent carry passengers between two points both within the Province, or are there two?[51]

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48 *Supra* note 13.
49 [1954] 4 D.L.R. 657 (J.C.P.C.) [hereinafter *Winner*].
50 *Ibid.* at 679.
51 *Ibid.* at 679 (emphasis added).

Although the service provided differed in the sense that some journeys began and ended within a single province and others crossed provincial or international boundaries, the Privy Council found that "it was the same undertaking which was engaged in both activities."[52] According to Lord Porter:

> The undertaking in question is in fact one and indivisible. It is true that it might have been carried on differently and might have been limited to activities within or without the Province, but it is not, and their Lordships do not agree that the fact that it might be carried on otherwise than it is makes it or any part of it any the less an interconnecting undertaking.[53]

Two key points should be noted. First, *Winner* supports the argument that the first question to be asked when applying s. 92(10)(a) to undertakings is the following: What is the undertaking which is in fact being carried on? Second, *Winner* indicates that undertakings should be taken as they exist, not as they might be configured under different arrangements.

The approach proposed here for answering the first question is that the courts should base their analysis on general principles regarding the nature of an "undertaking". These principles are in fact applied in the s. 92(10)(a) cases through the "integral" and "essential" tests, although the purpose of these tests is characterized differently by the courts.

As Hogg has noted, the courts use "undertaking" in a manner equivalent to "organization" or "enterprise".[54] The clearest analogy is arguably with a business. Consequently, it is not surprising that the criteria applied by the courts are characteristics that one associates with businesses. These characteristics include: common ownership, control and direction, operational coordination, and common purpose. Activities that share these characteristics are generally viewed as part of a single business. Where one or more of these characteristics is missing, a single business may not exist.

These are the key indicia that, along with physical connection, are used in the "integral" test under s. 92(10)(a). While none of these factors is, in itself, determinative, a strong argument can be made that the presence of most or all of them is necessary for the identification of a single undertaking. The "essential" test, which has sometimes been characterized as predominant among these indicia,[55] is in fact a measure of operational coordination or integration and is only one of the factors to be considered. The analysis of the cases which follows shows that it has not supplanted the other indicia, although it may seem central in certain instances.

Common ownership, direction and control is a frequently cited indicator of an

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52 *Ibid.* at 678.
53 *Ibid.* at 680.
54 Hogg, *supra* note 9 at 568.
55 *Cyanamid*, *supra* note 14 at 216; see also Ballem, *supra* note 1 at 627.

undertaking.[56] This criterion reflects the fact that these features are often among the defining characteristics of a single business enterprise or organization. For example, common ownership and control is a principal consideration in distinguishing the case of a business enterprise that manufactures and distributes a product from that where two separate enterprises, one engaged in manufacturing and the other in distribution, are linked contractually. In the latter situation, one would not normally speak of a single business enterprise.

The centrality of ownership and control is reflected in the fact that, in the pipeline and railway cases, the courts have rarely found that two separately-owned and controlled businesses, regardless of their commercial or operational interrelationships, form a single undertaking. As Hogg has stated:

> no case has ever decided that cooperative arrangements between two, separately managed, local undertakings could convert the local undertakings into a single interprovincial undertaking. Indeed, even when one of the enterprises is interprovincial, the railway cases hold that a physical connection, even combined with cooperation to facilitate through traffic, does not sweep a local undertaking into federal jurisdiction.[57]

Although this passage reflects the *Central Western* analysis that is rejected in this paper, the underlying point regarding the identification of undertakings is directly relevant. To adapt this quotation to the approach proposed here, it is simply necessary to replace the final clause with the words “does not lead to the characterization of the two enterprises as a single undertaking”.

Ownership and control are important factors in identifying undertakings, but the courts have clearly stated that they are not, by themselves, determinative.[58] This qualification is particularly important in situations where separate businesses may be owned in common, as may arise through holding companies and parent-subsidiary relationships. In this context, other indicia may assume greater importance in the identification of the relevant undertaking for purposes of s. 92(10)(a).

Although these situations complicate somewhat the analysis, the other indicia developed for the “integral” and “essential” tests provide a means of addressing them. The similarity of the approach proposed here with what is in fact occurring in the s. 92(10)(a) cases is borne out by Hogg's description of the treatment of related undertakings under common ownership:

> a company may engage in more than one undertaking, in which case that company's operations may become subject to dual legislative authority. The fact that various business operations are carried on by a single proprietor does not foreclose inquiry as to whether or not those operations consist of more than one undertaking for constitutional purposes. *It is the degree to which the operations are integrated in a*

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56 *Westcoast*, *supra* note 3 at 24-28.

57 Peter W. Hogg, “Jurisdiction over Telecommunications: *Alberta Government Telephones* v. *CRTC* ” (1990) 35 McGill L.J. 480 at 486.

58 Hogg, *supra* note 9 at 575-579.

> *functional or business sense that will determine whether they constitute one undertaking or not*.[59]

The extent to which different operations and facilities function as an integrated business is thus of primary importance.

For example, where two companies with little or no operational or functional integration and with different purposes have a single owner, the courts would have no trouble determining that they are separate undertakings. The *Empress Hotel* case illustrates this point.[60] The Privy Council held that the hotel in question, which was owned by Canadian Pacific Railway, was not part of the company's extraprovincial railway but rather constituted a separate undertaking engaged in the general hotel business.

Conversely, the courts may be hesitant to view a number of highly integrated activities as distinct undertakings simply because they are owned by different subsidiaries of a single corporate conglomerate.[61] The courts are thus willing to look behind the formal corporate structure when determining what constitutes an undertakings. As Mahoney J.A. noted in the *Dome* case, "federal jurisdiction is not to be avoided simply by the vesting of a portion of a single undertaking in a subsidiary."[62]

There may, of course, be difficult cases, but at least the purpose of the indicia is clear. The courts look to the relationships between the business operations that are at issue to determine whether they constitute a single undertaking. For example, if an intraprovincial pipeline company operating in one province were to purchase another similar undertaking in another province, the courts would have to determine whether the two entities in fact take on a new operational identify as a single business, or whether they remain separate undertakings, operating independently as self-contained businesses despite having common elements of corporate ownership.

Once the undertaking is identified, the second step in the s. 92(10)(a) analysis is to determine whether it is intraprovincial or extraprovincial. In most instances, this determination will not be particularly complicated. If an undertaking has physical facilities or business operations that extend extraprovincially, or if its business involves the transportation of goods or people, or the transmission of communications signals, across provincial or international boundaries, then it is

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59 *Ibid.* at 575 (emphasis added).

60 *C.P.R.* v. *Attorney General for British Columbia and Attorney General for Canada*, [1950] 1 D.L.R. 721 (J.C.P.C.).

61 In *Northern Telecom* v. *Communication Workers*, [1983] 1 S.C.R. 733 at 771, Dickson J. stated that, while corporate relationships are not determinative, "the fact that Bell Canada controls Telecom makes it somewhat easier to conclude a segment of Telecom's operations is an integral part of Bell Canada's operations."

62 *Dome Petroleum Ltd.* v. *National Energy Board* (1987), 73 N.R. 135 at 139 (F.C.A.) [hereinafter *Dome*].

extraprovincial and within federal jurisdiction. However, if the undertaking's facilities, staff and business operations are contained within the boundaries of a single province, it is an intraprovincial undertaking coming under provincial jurisdiction.

A key implication of the proposed approach to undertakings under s. 92(10)(a) should be noted. The “integral” and “essential” tests would be applied by the courts only to define the scope of the undertaking. These tests are a useful method to determine whether business operations have a sufficiently close relationship to each other to constitute a single undertaking. The point to underline, however, is that the “integral” and “essential” tests do not determine directly the issue of federal or provincial jurisdiction. These tests have no constitutional dimension in the sense of reflecting underlying constitutional values. They simply provide a means of answering the plain-language question: Do the activities in question constitute a single business enterprise?

This analysis leads to the conclusion that the “integral” and “essential” tests, if correctly understood and applied, cannot bring an intraprovincial undertaking into federal jurisdiction. The argument presented here is that the judicial *dicta* suggesting this operation of s. 92(10)(a), notably Dickson C.J.'s formulation of the second category in the *Central Western* case, are the source of confusion regarding the purpose of the “integral” and “essential” tests and the manner in which they have been applied by the courts in the majority of cases, including *Central Western* itself. The *Central Western* explanation of s. 92(10)(a) mixes the identification of the undertaking with the separate question of which order of government has jurisdiction.

The argument here is that the two issues should be rigorously separated. Once a single undertaking has been identified (Step #1) and it has been found to be intraprovincial (Step #2), the inquiry under s. 92(10)(a) is finished. The only possible conclusion is that the undertaking is within provincial jurisdiction. Likewise, if the undertaking is extraprovincial, in that it has facilities and operations beyond the provincial border, it will be under federal jurisdiction.

4.2.2 *The Case Law*

The argument that the “integral” or “essential” tests should not be used in the way suggested by the second category in *Central Western* and by Ballem's article is consistent with the results reached in much of the case law, if not with the explicit reasoning. A review of the cases dealing with pipelines and railways under s. 92(10)(a) reveals little evidence that this section has ever been used to sweep intraprovincial undertakings into federal jurisdiction.

To support this proposition, two groups of cases will briefly be reviewed. The first group consists of cases that have found in favour of federal jurisdiction:

Westcoast, *Flamborough*,[63] and *Dome*. The second group includes cases where undertakings came within provincial jurisdiction: *Central Western*, *Cyanamid*, and *Consumers' Gas*. Finally, the consistency of the *AGT* case with the proposed approach will be assessed.

4.2.2.1 Cases Upholding Federal Jurisdiction

The recent Federal Court of Appeal decision in the *Westcoast* case is particularly significant for the argument advanced here. As noted above, the court held that Westcoast Energy Inc.'s gathering system was not a separate local undertaking for s. 92(10)(a) purposes but rather constituted an integral part of the Westcoast system. The consequence, in jurisdiction terms, was to overturn the NEB's conclusion that the Westcoast gathering system was a matter of provincial jurisdiction under s. 92(10)(a).

This decision appears, at first glance, to be directly relevant to NGTL on the grounds that the NGTL gathering system is itself integral or essential to interprovincial and international pipeline undertakings. Applying the second category in *Central Western*, it might be argued that this relationship is sufficient to bring NGTL within federal jurisdiction, just as the relationship identified by the court in *Westcoast* supported the finding of federal jurisdiction over the gathering system in British Columbia.

In fact, the Federal Court of Appeal's reasoning does not support this conclusion regarding NGTL. After reviewing in detail the facilities and operations at issue, Hugessen J.A. concluded as follows:

> In my view, the combination of ownership, direction and control in the hands of Westcoast, together with the other factors which I have enumerated above, lead ineluctably to the conclusion that Westcoast is a single undertaking engaged in the interprovincial and international transportation of natural gas. As such, it is subject to federal jurisdiction ....[64]

The analysis is clear: the gathering system is part of a single business enterprise, and that enterprise is engaged in an extraprovincial business.

If the intraprovincial gathering system and related facilities were not subject to the same “ownership, direction and control” as the mainline system, the answer to the first question would be different, as would the jurisdictional outcome of the case. This possibility is alluded to in *Westcoast*, where Hugessen J.A. states that:

> a finding that the gathering and processing facilities owned and operated by Westcoast are a part of its transportation undertaking does not necessarily establish that the gathering and processing operations carried on by others are vital or essential to the

63 *Flamborough (Township)* v. *National Energy Board* (1984), 55 N.R. 95 (F.C.A.) [hereinafter *Flamborough*]; leave to appeal to the Supreme Court of Canada refused (1984), 58 N.R. 79.

64 *Westcoast*, *supra* note 3 at 29.

> Westcoast undertaking so as to become themselves subject to federal jurisdiction.[65]

While Hugessen J.A. expresses no final opinion on how a case involving these other operations would be decided, the analysis proposed in this paper suggests that separately owned and operated facilities would not be characterized as part of the Westcoast undertaking.

The *Flamborough* case is another important pipeline decision where federal jurisdiction was found under s. 92(10)(a). This case began as an application by Interprovincial Pipe Line Inc. (IPL) to the NEB for approval of proposed modifications to its No. 8 pipeline in Ontario in order to make that line suitable for transporting specification propane.[66] The NEB approved the application, but the decision was challenged by the Township of Flamborough. Flamborough argued that, following the conversion, the character of the line would change and it should therefore be severed, for constitutional purposes, from the IPL system and viewed instead as an intraprovincial work or undertaking coming within provincial jurisdiction.

The Federal Court of Appeal rejected this argument on the grounds that the specification propane, which was obtained through the removal of certain substances from natural gas liquids, was essentially the same substance transported by the other IPL lines.[67] The court was also satisfied that the "modified line No. 8 is an integral part of the system operated by Interprovincial and that the system is one undertaking from which modified line No. 8 is not to be severed."[68] This result can easily be explained by the approach to undertakings proposed here. The No. 8 pipeline continued to be owned and operated by IPL after the modifications and thus remained a part of the IPL business enterprise. The undertaking in question is therefore IPL, which is an extraprovincial business. The finding of federal jurisdiction follows directly.

The *Dome* case is a third relevant example. The issue was whether the NEB had erred in asserting jurisdiction over underground storage caverns connected to the extraprovincial Cochlin pipeline system. Mahoney J.A. noted that the pipeline system and the caverns had common ownership, although he clearly stated that this fact was not determinative.[69] He concluded, however, that the caverns were in fact "essential" to the extraprovincial system and therefore were subject to federal jurisdiction. He also stated that:

> The terminalling facilities of a pipeline, whoever provides them and whatever the ultimate destination of shipments, are provided solely for the benefit of shippers on the line. In my opinion, when they are provided by the owner of the transportation undertaking, they are part and parcel of that undertaking. That is the case here. The joint venture's storage caverns are an integral and essential part of its Cochlin system.[70]

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65 *Ibid.* at 35.
66 *Flamborough*, *supra* note 63 at 97.
67 *Ibid.* at 103.
68 *Ibid.* at 103.
69 *Dome*, *supra* note 62 at 139.
70 *Ibid.* at 140.

As with *Flamborough*, this case can be characterized as one where the court found that the facilities in question were part of a single undertaking on the basis of common ownership and functional integration. Since that undertaking is extraprovincial, federal jurisdiction follows.

4.2.2.2 Cases Upholding Provincial Jurisdiction

A number of the pipeline and railway cases where the undertaking was found to be within provincial jurisdiction also lend support for the approach proposed here. A leading example of these cases is the Supreme Court of Canada's decision in *Central Western*. This case involved a railway line that had been sold by Canadian National Railway (CN) to Central Western Railway Corporation. The line was 165 kilometres long and was situated entirely within Alberta.

Dickson C.J. applied the test quoted at the beginning of this paper[71] and then examined the operational connection between the local railway and CN's extraprovincial undertaking to determine whether the former was within federal jurisdiction. He concluded that the necessary relationship did not exist, notably because CN was not dependent on the services of Central Western. This conclusion is consistent, however, with the analysis of undertakings proposed here. The Central Western line was separately owned and operated and thus constituted a distinct business enterprise, not a part of the CN undertaking. Since its facilities and operations were entirely intraprovincial, it was within provincial jurisdiction under s. 92(10)(a).

Explicit support for this analysis can be found in the *Central Western* decision. Dickson C.J. discussed ownership and control, noting that the ownership of an enterprise is not conclusive in determining jurisdiction.[72] He summarized this discussion, however, with the following revealing comment: “Basically, CN exercises no control over the running of the rail line, making it difficult to view Central Western as a federal work or undertaking.”[73] In other words, the separate ownership, control and direction of the Central Western and CN railway operations would make it odd to conclude that they are a single business enterprise.

The Federal Court of Appeal's decision in *Cyanamid* is a second important s. 92(10)(a) case which concluded in favour of provincial jurisdiction. The pipeline at issue was to be constructed and operated by a subsidiary of Cyanamid Canada Inc. to connect its plant directly to the TCPL mainline.[74] In this way, Cyanamid proposed to bypass the local distribution network.

MacGuigan J.A. concluded that the jurisdictional issue should be settled using

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71 *Supra* note 13.
72 *Central Western*, *supra* note 13 at 1130-1131.
73 *Ibid.* at 1132.
74 *Cyanamid*, *supra* note 14 at 202. Cyanamid Canada incorporated Cyanamid Canada Pipeline Inc. to construct and operate the bypass pipeline.

the “essential” test. Since the TCPL system was in no way dependent on the Cyanamid bypass, he concluded that the latter came under provincial jurisdiction.[75]

Applying the approach proposed here yields the same conclusion. The bypass was to be owned and operated by Cyanamid for the exclusive purpose of connecting its facilities to the TCPL mainline. Consequently, it is more naturally seen as a distinct business enterprise than as an element of TCPL. Since Cyanamid's pipeline operation is situated entirely within Ontario, it is an intraprovincial undertaking coming within provincial jurisdiction.

This analysis of *Cyanamid* is supported by a passage in the judgment dealing with the *Winner* case. After discussing how *Winner* might be reconciled with the “necessary nexus” or “essential” test, MacGuigan J.A. stated that: “In fact, the closest parallel to the *Winner* situation in the instant reference would be an application by TCPL to build and operate the bypass pipeline as its own.”[76] As noted by Hugessen J.A. in *Westcoast*, this passage “clearly implied that the result [in *Cyanamid*] would have been different if the bypass had been built and operated by the interprovincial undertaking.”[77] The reason is simply that it would then have been a part of IPL's extraprovincial business undertaking.

Finally, reference can be made to the *Consumers' Gas* case, the facts of which were outlined briefly above.[78] The court's finding in favour of provincial jurisdiction is consistent with the fact that the pipeline at issue was clearly part of the Consumers' Gas Co. business enterprise, which operated an intraprovincial gas distribution system. The fact that the interprovincial link depended on the Consumers' system, or some part of it, for its gas supply was insufficient to place some or all of that intraprovincial system under federal jurisdiction.

The court in *Consumers' Gas* made explicit reference to the second key point noted above in the discussion of *Winner*.[79] Hugessen J.A. stated that:

> It is well settled law that in constitutional inquiries of this sort the courts must take undertakings as they find them and not as they might be. It is clear to us ... that the Ottawa East Line is and has always been an integral part of Consumers' Ottawa distribution system; whether or not that system should itself be viewed as a separate undertaking (as opposed to being part of an even larger undertaking comprised of the various distribution systems operated by Consumers') it is constitutionally impermissible to break it into its constituent parts whose existence as independent undertakings is wholly notional.[80]

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75 *Ibid.* at 221.
76 *Ibid.* at 218.
77 *Westcoast*, *supra* note 3 at 28.
78 *Supra* note 45 and associated text.
79 *Supra* notes 49-53 and associated text.
80 *Consumers' Gas*, *supra* note 45 at 4 (footnote omitted). In the footnote following the first sentence of this passage, Hugessen J.A. cites the *Westcoast* decision, *supra* note 3 at 15. This section of *Westcoast*, in turn, includes the quotation from *Winner* that was reproduced above at note 53.

As in *Westcoast*, the enquiry focuses on the nature of the business enterprise as it in fact exists.

All of these leading s. 92(10)(a) cases can be explained on the theory that the courts first identify the undertaking and then determine if it is intraprovincial or extraprovincial. All of these cases are also consistent with the use of the "integral" or "essential" tests only to address the first issue. Most importantly, the cases that found in favour of federal jurisdiction do not, it is argued, apply s. 92(10)(a) to bring an "intraprovincial" undertaking into federal jurisdiction. *Westcoast*, *Flamborough* and *Dome* each involved one undertaking, and in each case it was an extraprovincial business enterprise. Likewise, even the relatively close physical and operational connections between intraprovincial and extraprovincial enterprises in *Central Western*, *Cyanamid*, and *Consumers' Gas* did not lead the courts to conclude that separate businesses constituted a single undertaking for purposes of s. 92(10)(a).

4.2.2.3 The *Alberta Government Telephones* (*AGT*) Case

Not all s. 92(10)(a) cases fit so comfortably with the proposed framework. For example, the Supreme Court of Canada's decision in the *AGT* case requires some discussion. In this case, the court found that AGT was a federal undertaking under the first category described in *Central Western*. All of AGT's facilities, operations and customers were in Alberta[81] and its relationship to extraprovincial telecommunications systems consisted only of providing connections for its subscribers at Alberta's boundaries. Nonetheless, the court found that AGT was engaged in an extraprovincial business.

This case can be reconciled with the approach proposed here on the basis of the distinction between telecommunications and pipeline undertakings. There is a strong argument that the connections between AGT and the extraprovincial telecommunications systems were so pervasive to its operations as to override the normal indicia of what constitutes an intraprovincial undertaking. In *Central Western*, Dickson C.J. characterized the *AGT* case, and distinguished the situation of Central Western Railways, as follows:

> The linchpin in the *A.G.T.* v. *C.R.T.C.* decision was this Court's finding that A.G.T., by virtue of its role in Telecom Canada and its bilateral contracts with other telephone companies, was able to provide its clients with an interprovincial and, indeed, international telecommunications service. In contrast, the appellant Central Western does not (through bilateral arrangements or otherwise) provide an interprovincial service to its clients: it simply moves grain within central Alberta. Clearly, the required degree of functional integration is absent.[82]

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81 A minor exception, the provision of service in the town of Lloydminster which straddles the Alberta-Saskatchewan boundary, was found by the court to be without constitutional significance. *AGT*, *supra* note 17 at 410.

82 *Central Western*, *supra* note 13 at 1135.

The nature of telecommunications businesses thus sets them apart from railway (and pipeline) undertakings, which may in other respects resemble them. In particular, two features of the telecommunications context are significant: the impact of technological and contractual connections on telecommunications undertakings and the role of Telecom Canada.

AGT is arguably able to engage in an extraprovincial business undertaking on the basis of an intraprovincial organization and infrastructure because of the technology of modern telecommunications and the complex contractual relationships with other enterprises and systems. NGTL is, of course, similar to AGT in that its intraprovincial facilities can serve both intraprovincial and extraprovincial purposes. For example, producers selling gas to customers in Calgary and those serving the California market may use many of the same elements of the NGTL system. However, NGTL itself does not have the same complex contractual relationships that proved to be critically important in *AGT*.[83] NGTL is therefore unlikely to be characterized as carrying on an extraprovincial business.

The argument that, as a general matter, broadcasting should be distinguished from other transportation and communications undertakings for s. 92(10)(a) purposes has been made by Hogg. Noting the importance of the bilateral and multilateral agreements, Hogg concludes that the scope and complexity of these agreements allowed AGT to provide interprovincial and international service to its customers. In his view:

> The result in *AGT* probably owes a good deal to the unique character of telecommunication, which permits instantaneous two-way communication between people in different provinces and different countries. In other contexts, cooperative arrangements between an independently-managed local undertaking and extraprovincial undertakings would not suffice to transform the local undertaking into an interprovincial undertaking. We have already noticed the railway and pipeline cases, which have held that cooperative arrangements with a connecting interprovincial undertaking were insufficient to transform an independently-managed local undertaking into an interprovincial undertaking.[84]

The distinction between broadcasting undertakings and those involving pipelines and railways is also supported by an important passage in the *Central Western* case. In explaining his finding that Central Western Railway was an intraprovincial undertaking, Dickson C.J. noted that "the nature of telecommunication systems is quite different from the railway business."[85] He then stated that:

> The pipeline analogy provides useful support for the disposition that I advocate in this appeal. Central Western is physically contained within the province of Alberta, much like the pipeline in *National Energy Board (Re)* [the *Cyanamid* case]. In both instances, spatial boundaries limit the range of the business' operations, something which can less easily be said with regard to broadcasting systems, where territorial boundaries are not

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83 This distinction is made in *Altamont*, *supra* note 2 at 23.

84 Hogg, *supra* note 9 at 570-571 (footnote omitted). Hogg cites the *Cyanamid* case, *supra* note 14, as authority for the last sentence in this passage.

85 *Central Western*, *supra* note 13 at 1144.

> extremely critical to the nature of the enterprise.[86]

The role of Telecom Canada was the second important feature of the telecommunications context in *AGT*. Telecom Canada was an unincorporated organization whose members included the principal telephone companies in Canada and Telesat Canada. Telecom Canada was the organization through which its members created a national telecommunications network.[87] It also acted as a fiscal clearing house for its members and as the central coordinating body for dealing with U.S. and overseas telecommunications carriers.[88] Finally, AGT was represented on Telecom Canada's board of directors and committees and it contributed employees to Telecom Canada's staff.[89]

In *AGT*, Dickson C.J. described this relationship as follows:

> One essential vehicle employed by AGT to interprovincialize and internationalize its services is the Telecom Canada organization. ... It is a form of a joint venture and is a necessary feature of AGT's overall undertaking. ... AGT could not separate itself from Telecom Canada without significantly altering the fundamental nature of AGT's enterprise.[90]

The term “joint venture” and the reference to the nature of “AGT's enterprise” indicate that Dickson C.J.'s analysis is directed, in the words of the *Winner* case, at determining “what is the undertaking which is in fact being carried on.”[91] The conclusion is that the extraprovincial joint venture) Telecom Canada) is a part of AGT's business enterprise.

This analysis highlights an important distinction between telecommunications and other types of s. 92(10)(a) undertakings. In the case of pipelines, for example, there is no equivalent to Telecom Canada. While NGTL is operationally linked with extraprovincial pipelines, there is nothing approaching an extraprovincial “joint venture” analogous to Telecom Canada. Consequently, the NGTL business enterprise retains the distinctive intraprovincial nature that AGT, on this analysis, had lost through its involvement in Telecom Canada.

The reasoning and result in *AGT* are thus consistent with the approach to undertakings proposed here. AGT is an undertaking engaged in extraprovincial operations by virtue of the distinctive characteristics of broadcasting, the complex contractual relations linking it with extraprovincial telecommunications systems, and the centrality to its business enterprise of the Telecom Canada joint venture. These factors explain how, in the telecommunications area, an undertaking can operate an extraprovincial business with intraprovincial facilities. NGTL can be distinguished as a non-telecommunications undertaking, the operations of which do not have the

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86 *Ibid.* at 1145-1146.
87 *AGT*, *supra* note 17 at 402.
88 *Ibid.* at 405-406.
89 *Ibid.* at 405.
90 *Ibid.* at 415.
91 *Winner*, *supra* note 49 at 679; quoted, *supra* at note 51.

same extraprovincial character.

It is also arguable, however, that *AGT* might be decided differently under s. 92(10)(a) if the approach to undertakings proposed here were adopted by the courts. The fact that all of AGT's facilities and operations are within Alberta might lead to a finding that it is an intraprovincial undertaking. This decision would not, however, provide a complete answer to the jurisdictional issue. A federal role in regulating AGT could also be based on other constitutional provisions, notably the general trade and commerce power.

This power is discussed in more detail below. In principle, it could support a significant federal regulatory role with respect to AGT on the grounds that national and global telecommunications systems are of critical importance for Canada's economic interests and efficient regulation can only be achieved at the national level. While this argument will not be developed or evaluated here, federal regulatory authority justified on this basis might have a similar result in practice to the finding of exclusive federal jurisdiction under s. 92(10)(a) in the *AGT* decision.

There are, of course, other cases in the s. 92(10)(a) jurisprudence that may be, or at least appear to be, inconsistent with the approach described above.[92] Nonetheless, these arguably isolated examples do not refute the basic arguments that the process of reasoning outlined here is far more satisfactory than any other articulated to date. It is consistent with the identification of undertakings as a jurisdictionally relevant “matter” under s. 92(10)(a), it makes sense of the basic factors considered by the courts, it provides an intelligible theory for their application in individual cases, and it closely matches the outcomes in the principal decisions. In sum, it reveals an underlying structure in these cases which the courts, themselves, have failed to articulate clearly.

4.2.3 *Implications for NGTL*

The implications of this approach for NGTL can be briefly summarized. There is little doubt that NGTL is itself an undertaking. Ballem acknowledges this point, when considering (and ultimately rejecting) arguments that might lead to a finding of provincial jurisdiction. In his words:

> Paradoxically, the sheer size and importance of NOVA's pipeline operations may be its best defence against the imposition of federal jurisdiction. After looking at the whole picture, a court might conclude that an operation which employs more than 2,000 people and is capable of collecting and transporting more than 9 billion cubic feet of gas per day is a distinct and separate undertaking on its own. The fact that 20% of the gas is delivered to points within the province might also make a court hesitate before finding that the NOVA system formed part of a federal undertaking such as TCPL. Even more significant is the fact that NOVA delivers Alberta gas not just to TCPL, but to a number of extraprovincial lines that serve markets in the United States and other parts of Canada. This would tend to fortify the conclusion that collecting natural gas throughout

92 E.g., *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529.

> the Province and delivering it to a number of export points is an undertaking complete unto itself.[93]

Put simply, NGTL is a distinct business enterprise. Although it is clearly integrated in a functional manner with extraprovincial undertakings such as TCPL, it is unlikely that a court would conclude that NGTL and TCPL constitute, for s. 92(10)(a) purposes, a single business enterprise or undertaking.

The second question is then whether NGTL is an intraprovincial undertaking or an extraprovincial one. The location of its physical facilities and business operations indicates that NGTL is clearly intraprovincial. The NGTL gathering system is within Alberta, as are the NGTL operations, staff, and other facilities. The business of NGTL is not to transport gas across provincial or international boundaries; it moves gas to connection points within Alberta, from where some of that gas passes either directly or through sausage links into extraprovincial systems.

In fact, the “essential” and “integral” tests as applied to NGTL under the conventional s. 92(10)(a) analysis assume that NGTL is an intraprovincial undertaking. It will be recalled that the second category in *Central Western* is described in terms of bringing *intraprovincial* undertakings within federal jurisdiction by virtue of their relationship with core federal undertakings. The difference between the position argued here and that presented in Ballem's article does not, therefore, go to the issue of whether NGTL is an intraprovincial undertaking. Both approaches agree that it is. The difference is whether an intraprovincial undertaking can be swept into federal jurisdiction by virtue of being “essential” to an extraprovincial one. Ballem argues that it can. The argument here, for reasons set out above, is that the “essential” test should not be, and generally is not, used in that way.

If the reasoning and conclusion presented in this paper are accepted, one remaining issue may still cause some concern. Even if the “essential” test cannot bring NGTL as a whole within federal jurisdiction, should not the fact that NGTL is essential to Canada's interprovincial pipeline network and to a significant portion of its gas exports have some jurisdictional significance? Given this relationship, is there not some legitimate basis for a federal regulatory role in relation to NGTL in order to protect national economic interests and ensure the effectiveness of the federal regulatory system and the extraprovincial pipelines to which it applies? As the next section shows, both of these questions can be answered in the affirmative.

5. Federal Jurisdiction in Relation to NGTL

5.1 *Constitutional Principles*

The case law is clear that undertakings are within either federal or provincial

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93 Ballem, *supra* note 1 at 630 (the statistics quoted reflect the situation when Ballem wrote the article, which was published in 1991).

jurisdiction under s. 92(10)(a).[94] There is no divided jurisdiction under this section. However, the jurisdictional picture under the Constitution as a whole is somewhat more complicated. General principles of constitutional law, notably the double aspect doctrine, ensure a greater degree of flexibility than would be possible under a strict doctrine of exclusivity. In particular, it is well established that a matter may have both federal and provincial aspects, and thus be regulated by both orders of government.[95] Another way of stating the basic principle is that legislation on a matter of federal jurisdiction may incidentally affect areas of provincial authority.[96]

Dickson C.J. underlined this point in the *General Motors* case, noting that: "in a federal system it is inevitable that, in pursuing valid objectives, the legislation of each level of government will impact occasionally on the sphere of power of the other level of government."[97] He then quoted the following passage from his judgment in the *OPSEU* case:

> The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines: rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues.[98]

There is no reason in constitutional principle, therefore, why the federal Parliament could not regulate certain aspects of NGTL, so long as the legislation was constitutional under a federal head of power. The finding that NGTL is subject to provincial jurisdiction under s. 92(10)(a) does not preclude this federal role.

As noted above, the fact that NGTL is "essential" to the operation of extraprovincial gas pipeline systems, while not sufficient to bring the undertaking as a whole within federal jurisdiction under s. 92(10)(a), is not without significance. It means that NGTL's operations could have important implications for federal undertakings, the effectiveness of the federal regulatory regime governing these undertakings, the national economy (which depends in significant respects on interprovincial energy transportation), and Canada's international economic relations in the area of gas exports. In light of these facts, it would be surprising if NGTL were completely immune from federal regulation.

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94 *AGT*, *supra* note 17 at 409; Hogg, *supra* note 9 at 571-573.
95 Hogg, *ibid.* at 381-383.
96 *Ibid.* at 379.
97 *General Motors* v. *City National Leasing*, [1989] 1 S.C.R. 641 at 669 [hereinafter *General Motors*].
98 *OPSEU* v. *Ontario (Attorney General)*, [1987] 2 S.C.R. 2 at 18; quoted in *General Motors*, *ibid.* at 669.

5.2 *The Trade and Commerce Power*

A federal role to address precisely these issues is permitted by s. 91(2) of the *Constitution Act, 1867*. This section establishes federal jurisdiction over "the regulation of trade and commerce". The courts have distinguished two branches of this power, one of which gives the federal Parliament jurisdiction over "interprovincial and international" trade and commerce. For the same reasons that NGTL is not an extraprovincial undertaking, it could not easily be regulated under the interprovincial and international branch.

The second or "general" branch, however, provides another basis for federal economic regulation. This branch is closely analogous to the "national concern" branch of the peace, order and good government power.[99] It permits the federal Parliament to legislate on subjects of national economic concern that do not, strictly speaking, involve interprovincial or international trade and commerce. Such legislation could include regulatory schemes that require a national approach and, more broadly, measures directed at protecting the integrity and efficiency of the Canadian economic union. Parliament's authority to enact national competition law, for example, is based on the general trade and commerce power. Measures directed at the national energy transportation system could also be upheld under this power, even if they incidentally affected matters of provincial jurisdiction, in this case NGTL.

The Supreme Court of Canada set out a five-element test for the general trade and commerce power in a unanimous decision by Dickson C.J. in the *General Motors* case. These elements are as follows:[100]

(1) a "general regulatory scheme";

(2) the "oversight of a regulatory agency";

(3) a concern "with trade as a whole rather than with a particular industry";

(4) "the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting"; and

(5) "the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country."

If Parliament enacted legislation aimed at ensuring the unimpeded flow of gas through Canada's national pipeline system and to markets in the United States, this legislation could, using the constitutional terminology, "incidentally affect" certain aspects of NGTL's operations. How would such legislation fare under the test for the

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99 Whyte, *supra* note 43 at 45.
100 *General Motors*, *supra* note 97 at 661-662.

general trade and commerce power?

The precise analysis would, of course, depend on the details of the legislation. The basic approach, however, would be as follows. First, there is a general regulatory scheme which, as indicted, relates to gas transportation throughout Canada. Second, that scheme could be overseen or administered by a regulatory agency) in this case the National Energy Board would be the logical choice. Leaving aside the third element for the moment, the legislation in question clearly could not be enacted by the provinces; provincial authority could not extend to the national pipeline system as a whole, a significant part of which is federally regulated. Finally, the fifth element is satisfied because the successful operation of the scheme depends on its operation in all jurisdictions. Given the high level of integration between components of the pipeline system) as shown by the fact that NGTL is "essential" to extraprovincial pipeline undertakings) a blockage at one point could have system-wide effects.

Only the third element appears to be potentially problematic. This element requires that the legislation concern trade as a whole, rather than a particular industry. This test works well in the context of federal competition law, which applies across industries. The question is whether it would prevent federal legislation aimed at the gas transportation system, which is a particular industry.

There are several reasons to conclude that the third test set out in *General Motors* would not stand in the way of the federal legislation of this type. The most important of these reasons is that the test relates to the overall purpose of the legislation, not its particular application. Whyte elaborates on this point as follows, stating that the conditions for applying the general trade and commerce power

> should include, first, the requirement that actual federal regulation be general in conception) that it be directed toward economic goals that transcend the needs of specific economic or industrial sectors. This is not to say that the administration of policies that have been developed to satisfy the general goals cannot entail specific sectoral applications. It is, of course, a truism that even generally expressed standards or proscriptions must be applied in particular instances. The tolerance for sectoral application of general federal trade policies goes further. It would permit regulations and even primary legislation to be expressed in terms of specific industries, occupations or activities, so long as the legislation was clearly relatable to general economic goals or was clearly an application of a general economic strategy.[101]

The economic importance of energy transportation to Canada's domestic economy and international economic relations provides a basis for arguing that federal legislation directed at ensuring the smooth operation of the national gas transportation system is concerned with commerce, or the economy, as a whole. The fact that this legislation would be applied to a particular industry should not be, and on this argument is not, an impediment to its constitutionality under the general trade and commerce power.

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101 Whyte, *supra* note 43 at 45-46.

This approach to the third element is supported at a more general level by the argument that a narrow and literal interpretation of this test is completely inconsistent with the functional approach of the other four criteria. As noted, the federal role under the general trade and commerce power is most simply described as authority to legislate on economic matters of national concern. It makes little sense to argue that matters of national concern which require regulation of a particular industry should be exempt from federal authority. As Monahan has argued, such an interpretation

> implies that the real test is not a functional one at all; instead, it is a purely formal question of whether the legislation singles out a particular industry. On this view, any federal attempt to regulate a particular industry is void, regardless of the functional utility of such regulation.[102]

Such formalism is inconsistent with the overall purpose and the other four elements of the *General Motors* test.

Finally, Dickson C.J. specifically stated in *General Motors* that the list of five indicia is not exhaustive, "nor is the presence or absence of any of these five criteria necessarily determinative."[103] Federal legislation that satisfied the other four tests could therefore be upheld, even in the unlikely event that it were found to be inconsistent with the third test.

5.3 ***The Case Law***

This explanation of the role of the general trade and commerce power in relation to pipelines is borne out by the *Saskatchewan Power* case.[104] This case involved a challenge to federal regulation of the price of gas. The Saskatchewan Court of Appeal discussed in detail the purpose and intended application of the legislation in question, the *Petroleum Administration Act*, and held that it was a valid exercise of the general trade and commerce power. In applying the five-element test for matters of general trade and commerce, the court focused particularly on the requirement that the legislation be directed at trade as a whole, as opposed to a particular industry. The court held that:

> Although the regulation is of a particular trade, and a narrow segment of that trade, the purpose of the legislation was to deal with a matter of not only national, but international scope. The economy was in a crisis situation because of international events: the actions of the OPEC countries. The cost of petroleum and natural gas affected not only the cost of fuel, but indirectly affected the cost of almost everything in our economy. Regional conflicts between producing and consuming provinces were involved. There can be no question that the matter at issue was legislation aimed at the economy as a single integrated national unit. Something of general interest and importance to the whole country was involved. ....

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102 Patrick Monahan, *Politics and the Constitution* (Toronto: Carswell/Methuen, 1987) at 218.
103 *General Motors*, *supra* note 97 at 662-663.
104 *Saskatchewan Power Corp.* v. *TransCanada Pipelines Ltd.* (1988), 56 D.L.R. (4th) 416.

> Furthermore, the *indicia* referred to by Dickson J. are all present. The fixing of price indicates the presence of a national regulatory scheme. The National Energy Board was a regulatory agency which oversaw the trade (although incapable of fixing the price). Furthermore, the provinces jointly or severally would be constitutionally incapable of passing such an enactment .... Finally, failure to include one or more provinces or localities would jeopardize successful operation in other parts of the country.[105]

Federal legislation could, on this basis, have incidental effects on NGTL. However, such legislation would have to be tailored to the specific federal jurisdictional interest at stake. That interest can be most succinctly summarized as the federal role in protecting the Canadian economic union and overseeing Canada's trade relations with other countries.

There appear to be no other cases that uphold federal regulatory authority in relation to pipelines on the basis of the trade and commerce power. The *Cyanamid* case, however, contains a tantalizing reference to this possibility. Near the end of his judgment, MacGuigan J.A. stated that:

> Any argument beyond one based on the interprovincial undertaking of TCPL, i.e. one resting, for example, on any perceived exigencies of national policy, would have to be cast in terms of the trade and commerce power, or the general power over peace, order and good government, arguments which the proponents of federal jurisdiction expressly refrained from making on the present reference.[106]

The argument here is that “exigencies” of national economic policy in relation to natural gas transportation could provide the constitutional basis for a federal regulatory role in relation to NGTL.

5.4 *Implications for Provincial Regulation of NGTL*

One other aspect of the trade and commerce analysis should be noted. Recognition of the federal interest in relation to NGTL may also constrain provincial regulation, even in the absence of a federal regulatory scheme. Provincial legislation that seriously disrupted the national energy transportation system or effectively neutralized federal regulatory authority in relation to interprovincial pipelines or gas exports would be vulnerable to constitutional challenge. If such legislation were found by the courts to regulate a subject matter coming within exclusive federal authority under the general trade and commerce power, it would be struck down as unconstitutional.

The trade and commerce analysis thus reflects the overall constitutional division of authority between federal and provincial orders of government in Canada. The final section of this paper argues that the proposed interpretation of s. 92(10)(a), combined with the general trade and commerce analysis, results in a

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105 *Ibid.* at 454.
106 *Cyanamid*, *supra* note 14 at 221-222.

division of powers over NGTL that is consistent with the basic structure of Canada's federal system.

6. Constitutional Values

The interpretation of s. 92(10)(a) outlined in this paper is based directly on a close reading of the section itself and an analysis of the case law that reveals a hidden structure. The resulting division of powers regarding NGTL can also, however, be assessed in light of more general constitutional values.

From the provincial perspective, regulation of the construction and operation of NGTL's gathering system is closely related to broader provincial authority over “local” matters, including legislative authority in the areas of land and resources. In particular, the regulation of NGTL raises issues connected to the following areas of provincial jurisdiction: land use (e.g., establishment of development and utility corridors, overall land-use planning, access to public and private land); the development of the province's resource base; the processing and marketing of energy resources; the location of pipelines in relation to other energy infrastructure (e.g., wells, production facilities, gas plants, etc.); and the regulation of health, safety and environmental matters associated with pipeline construction and operation. Much of the provincial regulatory role in relation to NGTL is therefore closely intertwined with other matters of provincial authority under the Constitution.

On the other hand, there is a clear federal interest in NGTL, given that it constitutes an “essential” component of Canada's energy infrastructure. In order to ensure the efficiency of the Canadian economic union, federal legislation may be enacted despite the fact that it may, in certain circumstances, have incidental effects on otherwise intraprovincial undertakings such as NGTL.

These underlying constitutional values are reflected in the approach proposed in this paper. The conclusion that NGTL is within provincial jurisdiction under s. 92(10)(a) provides the constitutional basis for provincial regulation of the many aspects of pipeline construction and operation that raise issues of exclusively local interest. There is, however, room for a federal role when required to address matters of national economic concern.

When measured against these constitutional values, the approach proposed here is much more consistent with the basic structure of Canada's federal division of powers than the application of s. 92(10)(a) to sweep NGTL entirely within federal jurisdiction. This application of the “essential” test results in significant jurisdictional overkill to the extent that federal regulatory authority, which may be necessary in relation to economic union and international trade objectives, would extend right down to the detailed regulation of every component of the NGTL system.

The fundamental problem is that applying the “essential” test to bring an intraprovincial undertaking such as NGTL into federal jurisdiction simply loads too

much constitutional freight on a test that lacks the sophistication and flexibility necessary to address the underlying constitutional values in a satisfactory manner. While perfectly adequate and intelligible as a factor in determining whether the relationship between activities is sufficient for them to be treated as a single business entity, the “essential” test is conceptually too shallow to serve as an all-encompassing jurisdictional test that may fundamentally alter the division of powers regarding intraprovincial undertakings like NGTL.

In contrast, reliance on the general trade and commerce power for federal regulation provides a conceptually sophisticated analysis that is carefully attuned to constitutional values. A federal regulatory presence would be permitted only where the five-element test for the general trade and commerce power is met. This test requires that Parliament's role be explicitly justified in terms of fundamental federalism values and it allows the courts to balance competing federal and provincial jurisdictional claims when determining the appropriate scope of federal legislation. Not surprisingly, the resulting allocation of authority over NGTL is much more consistent with the constitutional values underlying Canada's division of powers than a finding, based on the “essential” test, that the federal Parliament has exclusive jurisdiction over all aspects of the NGTL undertaking and its works.

7. **Conclusion**

This paper has presented a new approach to interpreting s. 92(10)(a) of the Constitution. The approach begins by distinguishing between works and undertakings. Works are physical things, whereas undertakings are the arrangements by which physical things are used.

The proposed application of s. 92(10)(a) to works draws a sharp distinction between physical things that cross provincial or international boundaries (extraprovincial works) and those that are entirely located within a province (intraprovincial works). The former are within federal jurisdiction, while the latter fall under provincial authority. In determining what constitutes a work for s. 92(10)(a) purposes, it is argued that the courts and tribunals should take projects as they are conceived and constructed by proponents. Arguments based on physical or operational connections are not relevant to the identification of works, and should not be used to redraw the dividing line between works or to bring intraprovincial works into federal jurisdiction.

In relation to undertakings, a two step approach is proposed. The first step is to identify the undertaking. This process involves reviewing a range of factors to determine if the activities in question are operated as a single business enterprise. The “integral” and “essential” tests that are currently used in s. 92(10)(a) cases provide a basis for identifying the undertaking. The second step is to determine whether the undertaking is intraprovincial or extraprovincial. Intraprovincial undertakings generally have their physical facilities and business operations contained within a single province. Extraprovincial undertakings generally have

transboundary facilities and engage in interprovincial or international business. Under the proposed approach, the second step answers the jurisdictional question. There is no scope for sweeping intraprovincial undertakings into federal jurisdiction on the basis of the "integral" or "essential" tests.

The result of this analysis is that NGTL is an intraprovincial undertaking and its individual pipelines are intraprovincial works. The jurisdictional issue under s. 92(10)(a) is therefore resolved in favour of the province. A federal regulatory role remains possible, however, on the basis of the general branch of the trade and commerce power.

The final issue to be addressed is the likelihood that the courts will accept this analysis of s. 92(10)(a). Judicial receptiveness will probably be influenced by two considerations: the internal consistency and persuasiveness of the proposed approach, and its relationship to the s. 92(10)(a) jurisprudence. A few comments on the second consideration are in order here.

In adopting the proposed approach, the courts would have to give up very little beyond the conventional explanation of what they are doing in s. 92(10)(a) cases. The *Central Western* formulation of the s. 92(10)(a) categories would, of course, be abandoned. Most of the case law, however, would not. As shown above, the principal pipeline and railway cases are consistent in their jurisdictional conclusions with the approach proposed here.

In addition, even the factors considered by the courts in the s. 92(10)(a) cases remain relevant under the new approach. The "integral" and "essential" tests and the indicia underlying them are still of value. Their use, however, is not to bring intraprovincial undertakings into federal jurisdiction but rather to identify the undertakings themselves.

The proposed approach would not, therefore, require a major judicial reversal on a matter of principle or the jettisoning of a significant body of jurisprudence. All that is called for is a reformulation of the issues and the articulation of a different explanation for the interpretation and application of s. 92(10)(a). This approach would significantly increase certainty regarding this section of the Constitution by rendering intelligible an otherwise confusing body of case law and providing a clear basis for predicting outcomes in new cases.

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