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Sir Lyman Duff and the Constitution
SIR LYMAN DUFF AND THE CONSTITUTION

By GERALD LEDAIN, Q.C.*

1. *General*

Sir Lyman Poore Duff, who was on the Supreme Court of Canada for almost thirty-eight years, during the last ten of which he was Chief Justice, is generally considered to have been one of Canada’s greatest judges. There are many who would say that he was the greatest; there are others who would contend that his stature is rivalled, and even surpassed, in some respects, by that of the late Mr. Justice Ivan Cleveland Rand, who was a member of the Supreme Court for a shorter period, but whose thinking made a profound impression, particularly in the field of public law. Although there was almost twenty years’ difference in their ages, and Rand’s career on the Court began as Duff’s drew to a close, there was apparently a strong bond of attraction and mutual respect between them. Both had a thorough commitment to the life of the mind and a powerful and highly cultivated intellect enriched by reading and reflection on a wide range of subjects extending far beyond the law.

It is my purpose on this occasion to speak of Duff rather than Rand, but in any attempt to estimate the significance of Duff’s work in constitutional law one is inevitably drawn, in attempting to place it in a contemporary focus, to the commentary, express and implied, in the work of Rand. For despite the obvious respect which Rand had for the ability and judicial work of Duff, there can be no doubt that their emphasis in constitutional matters was essentially different. It is difficult and dangerous to try to express this difference in simple terms. There has been some tendency in recent years to somewhat over-simplified characterization of judicial results in terms of liberal and conservative, pro-government and pro-individual, active and passive, as well as a rather ingenuous attempt to show inconsistency by juxtaposing results which flow out of essentially different areas and considerations. And there has been an increasing tendency to count the results in one direction or another, rather than to evaluate the relative signifi-

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1 The late Mr. Justice Rand was born on April 27, 1884. He was appointed to the Court of British Columbia in 1904, and on September 27, 1906, to the Supreme Court of Canada. He was appointed Chief Justice of Canada on March 17, 1933, and he retired from the Court on January 7, 1944. He died on April 26, 1955, at the age of 90. For biographical detail and insights see the memoir in this issue by Mr. Kenneth Campbell (assisted by Professor Brian Bucknall), entitled The Right Honourable Sir Lyman Poore Duff, P.C., G.C.M.G.: The Man As I Knew Him. See also R. Gosse, Random Thoughts of a Wood-Be Judicial Biographer (1969), 19 U. of T.L.J. 597; and the memorial tributes of Rand, O’Leary and Wright in (1955), 33 Can. Bar Rev. 1113, 1118, and 1123.

2 The late Mr. Justice Rand was born on April 27, 1884. He was appointed to the Supreme Court of Canada on April 22, 1943, less than a year before Chief Justice Duff retired, and he retired from the Court on April 27, 1959.
cance of particular cases. This whole process, which depends on quantification of grossly over-simplified characterization, masks the essential complexity and subtlety of the judicial process. No doubt its purpose is to expose what appear to be the dominant trends, in terms of value preference, in the work of particular judges and courts; but the method does not do justice to the hard professional task of considering the implications for the shape of the law while attempting to do justice in the instant case.

In perhaps no other field are the implications of decisions for the general shape of the law as important as they are in constitutional law. For here the courts are concerned with the legal framework within which all other activity must be conducted, and with the organic, working relationship between the various branches of government. Any major adjustment in that framework, any essential shift in the distribution of power that determines that relationship at any given time, can have profound long-run implications for the welfare of the state and the individual. It is with this class of larger questions that judicial statesmanship must concern itself in constitutional law while attempting to arrive at sound conclusions in particular cases.

It is with this general perspective that one may venture a comparison of the essential concerns and tendencies behind the work of Duff and Rand. Basically, Duff was chiefly concerned with the necessary limits of federal power in the interests of the authority that must be conceded to the provincial governments if they were to be able to discharge their own constitutional responsibilities, and perhaps equally important, remain reconciled to the constitution. This was the chief concern of the Judicial Committee of the Privy Council in relation to which he played a unique role. Rand, on the other hand, while respectful of the lines which Duff and the Judicial Committee felt it necessary to draw, sought a more dynamic relationship between the two spheres of power that would take more realistic account of functional necessities. This of course, reflects only one aspect of the constitutional work of Rand, and in particular his commentary on the trade and commerce power. But it is this aspect of his work that affords some basis for contrasting his thinking with that of Duff. The major difference, of course, in the position and vantage point of the two men is that while Duff passed his entire judicial career under the shadow of the Judicial Committee of the Privy Council, which had the final word in constitutional matters, Rand was, for about ten years, a member of the Supreme Court of Canada after it had become a final court of appeal able to strike out in new directions. He worked within the general expectation that the Supreme Court, with power of final decision, would impart some of the vitality to federal power that had been denied by the general tendency of the Judicial Committee's decisions. That he welcomed this opportunity is reflected in the following passage from his judgment in the Ontario Farm Products Marketing reference:

with the same authority, wherever deemed necessary, be exercised in revising or restating those formulations that have come down to us. This is a function inseparable from constitutional decision. It involves no departure from the basic principles of jurisdictional distribution; it is rather a refinement of interpretation in application to the particularized and evolving features and aspects of matters which the intensive and extensive expansion of the life of the country inevitably presents.

Despite this declaration of purpose, however, and the broad sweep of some of Rand's statements, it was not given to him to make much fundamental impact on the general distribution of power that Duff had helped to shape. His judgments were more intimations of what might be. The constitutional realities which Duff recognized in attempting to strike the necessary, if not altogether satisfactory, balance between federal and provincial power are still very dominant. The judgments of Rand show that he himself was conscious of them, and that they make it difficult to move very far from the essential positions on which Duff settled.

Duff's judicial career spanned the crucial period of Canada's development. It included the two world wars and the great depression, and the period in which Canada evolved to independent status in the world community. It also covered the years in which the Canadian constitution was given its essential shape by judicial decision. The question of Duff's influence on this process resolves itself very substantially into the question of his influence on the Judicial Committee. This impact is difficult to estimate. It is partly to be inferred from explicit references to his work by the Judicial Committee and partly from a comparison of his judgments and theirs. But the full extent of his influence on the thinking of the various members who composed the Judicial Committee from time to time can not be estimated because of the Judicial Committee's tradition of the single judgment, which concealed the differences of opinion among its members and the part which Duff's thinking may have played in such differences. It is clear, however that Duff enjoyed great respect in the Judicial Committee and that he had, for a Canadian judge, a unique relationship to it.

Before Duff, Chief Justices of the Supreme Court had been invited to sit from time to time with the Judicial Committee. The tradition appears to have begun, at least in constitutional cases, with Sir Henry Strong around 1898, and it continued with Sir Henri Elzear Taschereau. But Duff appears to have been the first puisne judge of the Supreme Court to be invited to participate in the work of the Judicial Committee. Beginning in 1919 he regularly sat as a member of the Judicial Committee on Canadian appeals each summer during the 1920's. These were generally appeals from the decisions of provincial courts of appeal. This gave him an opportunity to have a voice in constitutional cases which had not come before him as a judge of the Supreme Court. From time to time he delivered the judgment of the Judicial Committee. The most important was probably the judgment in the Reciprocal Insurers case in which the Judicial Committee rejected the criminal law power as a basis for federal control of the insurance business. Since Duff could only sit on those cases which were heard in the summer, he was unable to participate in several important cases during the 1920's which came from provincial courts of appeal at other times of the year.

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Probably the most important of these were the *Fort Frances*\(^5\) and *Snider*\(^6\) cases in which the "emergency" concept of the general power was elaborated. Duff does not appear to have sat with the Judicial Committee in constitutional cases during the 1930's. It was impossible for him to make his trips to England during the Second World War, but after his retirement from the Supreme Court of Canada in January 1944 he sat on several constitutional appeals with the Judicial Committee, notably the *Japanese Canadians* case\(^7\) in the summer of 1947, in which the emergency doctrine of general power was re-affirmed after it had been seriously questioned a year earlier in the *Canada Temperance* case.\(^8\)

Thus Duff was associated with the Judicial Committee for over twenty-five years, a period during which its composition and dominating personalities changed many times. But his most important association was probably with Viscount Haldane, who was the dominant member of the Judicial Committee when Duff began to sit with it in 1919. Duff is believed to have enjoyed close intellectual relations with Haldane, and his own judgments give evidence that he was in broad sympathy with Haldane's general approach to the interpretation of the constitution. Haldane showed his confidence by inviting Duff to render the judgment of the Judicial Committee in several cases in the early 1920's.

It is tempting to see Duff's role in relation to the Judicial Committee as essentially one of summing up and giving forceful expression to the implications of the decisions of the higher tribunal. By common agreement he had a masterly capacity for summing up the law in a particular area, and many of his summations were adopted by the Judicial Committee, often with laudatory references. Certainly Duff's exposition from time to time of the effect of the Judicial Committee's decisions served to impart added authority to them and to reinforce their general tendency. But there is also reason to conclude that he made a positive contribution to the rationale of many of those decisions, and that his own thinking had an important influence on the result. Duff was much more than an echo of the Judicial Committee's voice on provincial rights. He made his own distinctive contribution to the development of the general position that resulted on this question.

Sir Lyman Duff must be ranked as one of the judicial architects of the Canadian constitution, and in particular, of the inclination towards provincial jurisdiction that was gradually imparted to it. Indeed, one cannot help but wonder what might have been the result in the Judicial Committee had Duff lent the weight of his intellectual authority to a different view in some of the important cases. Would it have made it more difficult for the Judicial Committee to follow the path it did? During the critical period there were two essentially different points of view in the Supreme Court of Canada concerning the balance of federal and provincial power. They were reflected in the approach of Mr. Justice (later Chief Justice) Anglin, who, on the whole, emphasized concern for the constitutional requirements of the federal government, and in the approach of Duff,

who, as we have said, tended to emphasize concern for provincial rights. Had Duff thrown his weight on the side of federal power would the result in the Judicial Committee have been different?

2. The Background of Judicial Decisions when Duff Came to the Supreme Court of Canada

When Duff came to the Supreme Court of Canada in 1906, after only two years as a member of the Supreme Court of British Columbia, the broad lines of interpretation of some of the important areas of jurisdiction under the constitution had already been laid down by decisions of the Judicial Committee. In the quarter of a century or so before he came to the Court there had been several leading decisions which were to exert a powerful influence on his thinking with respect to the general shape of the constitution. Before Viscount Haldane there had been a Sir Montague Smith era and a Lord Watson era. Both were relatively short but very influential. The two important decisions in the Montague Smith era were the *Russell* case\(^9\) and the *Parsons* case.\(^{10}\) One concerned the general power and the other the trade and commerce power of the federal Parliament. The important judgment in the Lord Watson era was the *Local Prohibition* case,\(^{11}\) in which a caution was expressed concerning the general power. In the *Parsons* case and the *Local Prohibition* case we see the foundation of Duff's general approach to the main heads of federal jurisdiction. He was also to lay great stress over the years on the unreported decision of the Judicial Committee in the *McCarthy Act* case,\(^{14}\) which, he contended, seriously qualified the significance of their decision in *Russell*.

In the *Russell* case the general power was affirmed as the basis for federal legislation that could have rested on the criminal law power: the prohibition with penal consequences of the sale of intoxicating liquor. In effect, it was the criminal law expression of the general power that the Judicial Committee affirmed. The case is not so significant, as some have suggested, as indicating the possible application of the general power to matters which ordinarily fall within provincial jurisdiction as it is in indicating the true relationship between the introduc-

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\(^{10}\) *Citizens Insurance Co. v. Parsons* (1881-82), 7 App. Cas. 96.

\(^{11}\) The general power of the Parliament of Canada, or the "Peace, Order and Good Government clause, as it is often referred to, is conferred by the introductory words of section 91 of the British North America Act, 1867, 30 & 31 Victoria, c. 3 (U.K.) as follows: "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated: that is to say . . . ."

\(^{12}\) Head 2 of Section 91 of the B.N.A. Act, which reads "The Regulation of Trade and Commerce."


\(^{14}\) For judicial references to the reasons for this decision, which declared the Dominion Liquor License Act, 1883, 46 Victoria, c. 30 (Can.) invalid, see Laskin's *Canadian Constitutional Law* ed. A. Abel, (4th ed. Toronto: Carswell Co., 1973) at 130.
tory grant of power and the specific heads of federal jurisdiction in section 91 of the B.N.A. Act. The implication of Sir Montague Smith’s judgment in the Russell case was that the specific heads of jurisdiction in section 91 were to be seen as merely examples of the general grant of power in the introductory clause. This was an insight that would have made an enormous difference to the possible shape of federal power had it been applied in later decisions. Instead, the Judicial Committee recoiled from the implications of this view and set about separating the general power from the specific heads of jurisdiction and imposing very strict limits on the application of the former. The view of the general power implied in the Russell case would have permitted the federal Parliament to determine the extent of its legislative jurisdiction, much as the American Congress has determined the extent of its reach under the commerce power. Its application would have involved a gradual transfer of power from the provinces to the federal government, as one matter after another inevitably assumed, in the complexity and interdependent relationships of modern life, a national as opposed to a local interest and importance.

It was Lord Watson in the Local Prohibition case who suggested the caution with which the general power should be allowed to be a basis for federal legislation. The particular language that he used, although much emphasized over the years, is relatively unimportant. What is important is that he perceived that provincial jurisdiction could gradually be swallowed up if it were relatively easy to invoke the general power. As he put it, such an application of the general power would “practically destroy the autonomy of the provinces”. The implications, as he expressed them, weighed heavily with later judges such as Duff and Haldane:

... If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

Of course, the issue is precisely whether a matter has ceased to be one of local concern and has become one of national concern. Lord Watson’s caution reflects the fact that there are many matters of local concern which are inevitably matters of national concern as well. When is the aspect of national concern to be treated as dominant? Said Lord Watson:

... Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interests of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.

In the Parsons case the Judicial Committee had to deal with the contention that the apparently unrestricted scope of federal jurisdiction to regulate trade

10. Id. at 360-61.
17. Id. at 361.
and commerce was an obstacle to provincial legislation which imposed statutory conditions on fire insurance policies issued by companies carrying on business in the province. The issue could have been avoided by holding, as the majority in the Supreme Court of Canada did, that the regulation of contracts of insurance was not regulation of trade or commerce, but the Judicial Committee chose to confront the issue directly. It was clear to them that some room had to be left, as a practical matter, for provincial regulation of local activity that would have to be characterized as trade and commerce. The choice was between recognition of overlapping or partially concurrent jurisdictions (with federal paramountcy in case of conflict) and mutually exclusive ones. The aspect doctrine, which was not fully appreciated until later, could have permitted the first solution, as it did in the case of liquor prohibition in reconciling the *Russell* and *Local Prohibition* cases. But where the constitution intended concurrent jurisdiction it had expressly provided for it, as in section 95 of the BNA Act. In sections 91 and 92 it had emphasized the mutually exclusive character of federal and provincial power, although the courts were often to observe that clear-cut lines of demarcation were impossible in practice. For example, in the *Montreal Street Railway* case, it was said: "It has, no doubt, been many times decided by this Board that the two sections 91 and 92 are not mutually exclusive, that the provisions may overlap, and that where the legislation of the Dominion Parliament comes into conflict with that of a provincial Legislature over a field of jurisdiction common to both the former must prevail"; and again in the *Parsons* case itself: "But it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the provincial legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in sect. 91 . . ." Nevertheless, the essential assumption on which the Judicial Committee proceeded in the *Parsons* case is reflected in the following passage:

"... It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them."

The Judicial Committee proceeded on the assumption that a provincial power to regulate the contracts of a company within the province would be incompatible with a general and unqualified federal power to regulate trade and commerce. It found justification for placing a limitation on the federal power in the fact that specific provision had been made in section 91 for the regulation of various aspects of trade and commerce which would have otherwise been comprehended in a plenary commerce power. Indeed, in assessing the full scope of federal power to deal effectively with trade and commerce under the Canadian constitution one must not lose sight of these specific heads of commercial significance, including extra-provincial transportation and communications, banking, and other matters which, under the American Constitution have been derived by

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19 (1881-82), 7 App. Cas. 96 at 107-108.
20 *Id.* at 109.
implication from the general commerce power. The Judicial Committee concluded that the intention in section 91(2) of the B.N.A. Act was to provide for regulation of trade and commerce of national and general, rather than local, concern, including "political arrangements in regard to trade requiring the sanction of parliament", "regulation of trade in matters of interprovincial concern", and possibly "general regulation of trade affecting the whole dominion", but not "power to regulate by legislation the contracts of a particular business or trade such as the business of fire insurance in a single province."21 This was the beginning of a substantial denial of scope to the federal trade and commerce power, eventually summed up by Duff in the Natural Products Marketing case22 as "the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense . . . ."

Duff was to return time after time over the years to the words and general reasoning of the Parsons case. He shared the conviction expressed by the Judicial Committee in that case that "the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the dominion parliament".23 The process of judicial qualification of the federal trade and commerce power was one that began before Duff came to the Supreme Court of Canada but it was one which he pursued and to which he gave final definition.

3. The Doctrine of Necessarily Incidental Power

The doctrine of ancillary or necessarily incidental power, with its corollary of the "unoccupied field", which was a prominent aspect of Duff's general conception of the relationship between the federal and provincial spheres of jurisdiction, had also emerged before he came to the Court. The distinction between exclusive federal jurisdiction and ancillary or necessarily incidental power in an area in which provincial legislation may validly operate in the absence of conflicting federal legislation appears to have been first suggested by the Judicial Committee in the Voluntary Assignments case24 in the following terms:

.. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly

21 Id. at 113.
23 (1881-82), 7 App. Cas. 96 at 108.
be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

Further reference was made in the *Local Prohibition* case to this power of "the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91." Later in the *Grand Trunk Railway* case the notion of "ancillary" power was applied to support federal legislation prohibiting railways under federal jurisdiction from contracting out of liability for damages caused by personal injury to their employees.

Thus began to emerge the distinction between the scope which should be assigned to the *exclusive* power of Parliament in a given field — a scope which precludes the application of any provincial legislation even in the absence of conflicting federal legislation — and those ancillary or necessarily incidental powers which may have to be conceded to Parliament in a given case to permit the effective exercise of its exclusive power. In the field covered by such ancillary power general provincial legislation may have application in the absence of conflicting federal legislation. It was this aspect of the doctrine of ancillary or necessarily incidental power that appealed particularly to Duff as a means of constitutional flexibility, and it was the one that he tended to emphasize in his statements of the doctrine. It must be observed, however, that the doctrine was rarely given actual application by him in favour of either federal or provincial legislation. His references to it may be assumed, however, to have had their influence on assumptions concerning the valid application of certain provincial legislation to enterprises or activities within federal jurisdiction.

The doctrine of necessarily incidental power, in its application to federal jurisdiction, was considered by Duff in 1910 in the *Montreal Street Railway* case, which was probably the most important of the constitutional decisions rendered by him in the first few years after his appointment to the Court. It is important for our purposes not so much for the issue involved, although that was important enough — federal power to regulate a provincial railway in respect of the conditions of through traffic to be carried with a federal line — but because it revealed the essential lines of Duff's constitutional philosophy. It is also of particular interest as showing the contrasting outlook of Anglin, which was to be a feature of several important decisions, including *Board of Commerce* and *Eastern Terminal*.

In the *Montreal Street Railway* case the issue was how much reach was to be given to necessarily incidental power to overcome the problems of divided

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29 *The Board of Commerce Act and the Combines and Fair Prices Act of 1919 (1920)*, 60 S.C.R. 456.
jurisdiction. The issue was one of fact in the particular case — the necessity of federal power to order a provincial railway to enter into a through traffic agreement with a railway under federal jurisdiction — but it was also one of the long-run implications for provincial jurisdiction of a broad and generous application of the concept of necessarily incidental power in favour of federal legislation. There was a good case for necessity on the facts of the particular case. If the federal Parliament was to have an effective jurisdiction with respect to through traffic over connecting federal and provincial lines it must have the power to regulate the provincial line. The case for necessity was persuasively asserted by Anglin. We see here, as later in the Eastern Terminal and Board of Commerce cases in which these two judges also came to different conclusions, Anglin’s keen and imaginative interest in the facts of the particular case and his ability to reconstruct the dynamic and inter-related nature of the activity for which a single, over-riding jurisdiction was claimed. While not indifferent to the facts of the particular case, nor to the inconvenience and possible frustration of policy arising from the division of jurisdiction, Duff appears to have been more concerned with the long-run implications for the distribution of power of conceding the federal claim. For at bottom the issue was the extent to which necessarily incidental power, based on a showing of “reasonable necessity”, was to be available to overcome the problems of divided jurisdiction and to convert divided jurisdiction into what would be effectively plenary or fully concurrent jurisdiction. Here was a device of constitutional flexibility of enormous potential. It was Duff’s conclusion that, useful as the notion of necessarily incidental power was in introducing a measure of flexibility into the relations of federal and provincial power, it could not be permitted to perform the radical office of converting mutually exclusive power into fully concurrent or overlapping power. In the Montreal Street Railway case the power claimed for the federal government would involve the assumption of a substantial regulatory jurisdiction with respect to the provincial railway. In Duff’s view, it went beyond what could reasonably be permitted if the distribution of jurisdiction with respect to extra-provincial and intra-provincial railway undertakings was to have any meaning.

In this case Duff revealed his essential attitude towards the problems created by divided jurisdiction. The solution lay not in constitutional distortion to accommodate one or other of the two orders of government but in cooperation between them. The courts must remain the final judges in each case of the necessity of ancillary power, and there was not a sufficient necessity to support a substantial extension of jurisdiction so long as such inter-governmental cooperation was possible. The fundamental consideration that led Duff to this conclusion is reflected in the following passage.31


In this case, as in others, such as Eastern Terminal, Board of Commerce,
Duff rejected the notion, of which Anglin was an exponent, that there must be effective power in one legislature or another, whether federal or provincial, to pursue a particular legislative purpose. Some legislative purposes could only be effectively pursued by inter-governmental cooperation. Duff stressed the need for the policy which came to be known as "cooperative federalism". In his reference to the possibility of a "joint board" he may be said to have anticipated the device of constitutional flexibility by which one legislature, in a field of divided jurisdiction, may confer administrative power on the agency of another in order that a uniform policy and regulation may be applied to a common problem without the waste of administrative duplication. The recognition by the courts of this device, virtually indistinguishable in its essence from a delegation of legislative jurisdiction, is a vindication of Duff’s insistence that the problem of divided jurisdiction could be effectively dealt with by governmental cooperation. It was Anglin’s view that the possibility of effective cooperation was too uncertain to justify the denial of necessarily incidental power as the solution to the problems of divided jurisdiction. In Duff’s view, where the power sought represented a substantial assumption of the other legislature’s jurisdiction the courts should not acknowledge necessity, at least until the possibilities of cooperation had been exhausted. It was this view that the Judicial Committee chose to adopt in language that closely reflected Duff’s reasoning.

A further consideration in Duff’s rejection of the concept of necessarily incidental power as a means of overcoming the difficulties of divided jurisdiction was the existence of the federal declaratory power to bring a necessary facility situated wholly within a province under plenary federal jurisdiction by declaring it to be a work for the general advantage of Canada. He saw this power not only as a means of acquiring a necessary jurisdiction to pursue an important legislative purpose that might otherwise be frustrated by the limitations of federal power, but as indicating the extent to which the Constitution contemplated a power in Parliament to enlarge its legislative jurisdiction by unilateral initiative. He suggested this as a possible solution, failing inter-governmental cooperation, in both the Montreal Street Railway and Eastern Terminal cases. Of course, this exceptional power would only be available where the necessary object of federal regulation could be considered to be a "work". It offered a solution to the problems in the Montreal Street Railway and Eastern Terminal cases, but it was not a solution to the problems of divided jurisdiction in such fields as restraint of trade and other forms of natural products marketing.

It was Anglin’s view that the declaratory power, where it was available, was not a satisfactory solution to a particular problem of divided jurisdiction, since it was excessive, going far beyond the requirements of the case. For the solution of a specific problem Parliament was obliged to assume a plenary jurisdiction over a necessary work. It was apparently Duff’s view that if the necessity was such as to justify the assumption of a substantial area of what would ordinarily be provincial jurisdiction, then it should be achieved, as far as possible, by the declaratory power rather than by the application of the notion of necessarily

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incidental power. The inference is that he thought this assertion of federal jurisdiction over a particular work for particular reasons of necessity or national interest, where that necessity or interest, as well as the implications of the assumption of jurisdiction for federal-provincial relations, could be debated and judged in the political forum, was to be preferred to a judicial distortion of the distribution of jurisdiction, with serious implications beyond the particular case, in order to accommodate federal necessity.

Thus we see, as early as 1910, in the Montreal Street Railway case, the clear outline of Duff's general approach to the problem of divided jurisdiction, which has been the central problem of judicial interpretation under the Canadian constitution: divided jurisdiction in certain key areas of activity such as transportation and marketing is for better or for worse a fundamental feature of the Canadian constitution; while there may be some flexibility and over-lapping in the interpretation and application of the two spheres of jurisdiction through the doctrine of ancillary or necessarily incidental power, this doctrine must not be used to undermine the essential nature of the distribution of power and to convert divided jurisdiction by a gradual process of federal assertion into what is substantially plenary jurisdiction; that practical problems remaining after a reasonable or restrained application of this doctrine must be settled by inter-governmental cooperation; that failing such cooperation the federal government has its remedy, where something that can be considered a work is involved, in a declaration for the general advantage of Canada.

While Duff did not apply the doctrine of ancillary or necessarily incidental power in favour of federal legislation in the field of transportation (or, as we shall see, in the field of marketing), he referred to it on several occasions as permitting the application of provincial legislation to federal enterprises in the absence of conflicting federal legislation. He saw the doctrine as particularly applicable to matters of employer-employee relations in enterprises falling within exclusive federal jurisdiction, such as the extra-provincial transportation and communications undertakings contemplated by section 92(10) of the B.N.A. Act. He sat on the Judicial Committee in Workmen's Compensation Board v. C.P.R. when it held that a provincial Workmen's Compensation Act validly applied to a shipping enterprise within federal jurisdiction. This decision was in accordance with the view that federal enterprises were subject to provincial laws of general application when these did not relate to matters falling strictly within exclusive federal jurisdiction with respect to such enterprises. It was a recognition of the fact that federal enterprises have to operate within a general context of law, and that it is up to Parliament to determine the extent to which it finds it necessary to legislate with respect to that context insofar as it affects such enterprises. It is an approach that assigns reasonable limits to the scope of exclusive federal jurisdiction so as to avoid unnecessary preclusion or inhibition.

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33 Workmen's Compensation Board v. C.P.R., [1920] A.C. 184. See also McColl v. C.P.R., [1923] A.C. 126, in which Duff delivered the judgment of the Judicial Committee, and Sincennes-McNaughton Lines v. Bruneau, [1924] S.C.R. 168 at 173, in which he re-affirmed the basis on which provincial workmen's compensation legislation applied to extra-provincial transportation undertakings "so long as the Dominion does not in exercise of the authority mentioned enact legislation which conflicts with and overrides that of the province."
of provincial jurisdiction and the creation of a legal vacuum around such enterprises. In the workmen's compensation example, Parliament is free to enact workmen's compensation legislation with respect to federal enterprises as an exercise of ancillary or necessarily incidental power, but until it does so, provincial workmen's compensation legislation applies to them.

In the *Hours of Labour* reference Duff expressed the opinion that the same principle applied to legislation respecting hours of labour in extra-provincial undertakings within federal jurisdiction; general provincial legislation on this matter could validly apply to such undertakings in the absence of conflicting federal legislation. But this view has since been rejected by the Supreme Court of Canada. In *Commission du Salaire Minimum v. Bell Telephone Company of Canada* the issue was whether the Minimum Wage Act of Quebec which had been in force for some twenty-five years during which there had been no federal minimum wage legislation for extra-provincial undertakings validly applied to the Bell Telephone Company. The Supreme Court held that it did not. It held that the fixing of wages, like the fixing of rates was a "vital part of the operation of an interprovincial undertaking as a going concern", and as such, was within exclusive federal jurisdiction. But the Court went further and expressed the opinion that the whole field of "employer and employee relationships" (with the presumed exception of workmen's compensation which had been the subject of authoritative decision) was within exclusive federal jurisdiction, and it adopted the following statement by Abbott J. in the *Stevedoring* case:

... The right to strike and the right to bargain collectively are now generally recognized, and the determination of such matters as hours of work, rates of wages, working conditions and the like, is in my opinion a vital part of the management of any commercial or industrial undertaking. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament lies with Parliament and not with the Provincial Legislatures.

Thus the conclusion in the *Bell Telephone* case would apply to provincial legislation respecting hours of labour, child labour and other conditions of employment in such undertakings. The constitution has been interpreted to have the curious and inflexible result that while federal undertakings must be deemed to be immune from such provincial legislation in the absence of federal legislation other nation-wide enterprises of comparable economic importance are subject to it.

Apart from the merits of this view with respect to the field of labour relations, what is in issue here is a concept of the federal and provincial jurisdictions that permits a flexible, working relationship between the two. The function of the distinction between exclusive and necessarily incidental powers and the correlative concept of the "unoccupied field" is to introduce an element of working concurrency into an attribution of power according to mutually exclusive categories. Its function is to avoid extending the pre-emptive or preclusive aspect of

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federal jurisdiction beyond what is reasonably required for federal purposes. It leaves the initiative and responsibility with Parliament to determine the necessary reach of its jurisdiction.

The doctrine of necessarily incidental power has been the subject of critical comment as a "tortuous method of explaining the 'aspect doctrine'" and an "unnecessary embellishment" of it.\(^3\) But its significance lies not simply in its role as a basis or rationale of jurisdiction, but in its distinction between jurisdiction that is exclusive and that which is not. Similar results may well be achieved by application of the aspect doctrine, but so long as the scope of exclusive federal jurisdiction sets limits, regardless of federal legislative action, to the valid application of provincial legislation, the doctrine has its own distinctive and useful function. It permits the setting of reasonable limits to the scope of exclusive federal jurisdiction because of its preclusive effect, while at the same time permitting the extension of federal jurisdiction to what is reasonably necessary by actual legislative initiative. A comparable approach has permitted flexibility in the relationships between the American commerce power and state legislation.

The doctrine was never disavowed by the Judicial Committee, who indeed re-affirmed it, albeit with recognition of the difficulties attending its application in particular cases, as late as the *Debt Adjustment* case,\(^3\) in the following terms:

> ... Since 1894 it has been a settled proposition that, if a subject of legislation by the province is only incidental or ancillary to one of the classes of subjects enumerated in s. 91, and is properly within one of the subjects enumerated in s. 92, then legislation by the province is competent unless and until the Dominion Parliament chooses to occupy the field by legislation: *Attorney-General for Ontario v. Attorney-General for Canada* ... (1894) A.C. 189.

\(^3\) Laskin, *Peace, Order and Good Government Re-examined* (1947), 25 Can. Bar. Rev. 1054 at 1061. This critical passage on the doctrine of necessarily incidental power, which was quoted in the third edition of Laskin, *Canadian Constitutional Law* (3d ed. Toronto: Carswell Co., 1969) at 103, has been dropped in the fourth edition of this work, *supra*, note 14 at 19-23, edited by Professor Albert S. Abel. In its place at 20-21 there is a quotation from the judgment of Laskin J.A. (as he then was) in *Papp v. Papp* (1970), 1 O.R. 331 at 335-36 in which there is still a strong reservation concerning the language in which the doctrine is expressed but an acknowledgment of its convenience in indicating "situations in which the doctrine of exclusiveness of jurisdiction does not apply but that there is rather a legislative field with gates of entry for both Dominion and Province ... ." There is also acknowledgment that the concept of implied or incidental power received formal recognition as a valid and necessary constitutional doctrine in the American Constitution in the "Necessary-and-Proper Clause" of Article I, section 8, clause 18, and in the express provision for authorization to deal with "Matters incidental to the execution of any power" in s. 51 (XXXIX) of the Australian Constitution. These doctrines are obviously necessary, particularly under the American constitution, for giving sufficient scope to general grants of power. In addition to the express provision for incidental power there is a doctrine of "implied incidental powers" operative in Australian constitutional interpretation. See P. Lane, *The Australian Federal System* (Sydney: Law Book Co., 1972) at 225 et seq. Cf. Howard, *Australian Federal Constitutional Law* (2d ed. Melbourne: Law Book Co., 1972) at 17-18, quoting Dixon C. J. in *Grannall v. Marrickville Margarine Pty. Ltd.* (1955), 93 C.L.R. 55 at 77 and in *Wragg v. New South Wales*, (1953), 88 C.L.R. 353 at 386, concerning the general principle that every grant of power carries authority to deal with matters that are ancillary or incidental to the principal subject-matter.

It has been suggested that in the *Nykorak* case\(^{39}\) the doctrine was “punctured” or laid to rest by the Supreme Court of Canada.\(^{40}\) In that case, the issue was the validity of federal legislation providing, for purposes of determining liability, that a member of the armed forces is a servant of the Crown. The action was brought on behalf of the Crown for damages caused by the loss of services of a member of the R.C.A.F. The Court held that legislation to declare the nature of the relationship between the Crown and members of the armed forces related to a matter within exclusive federal jurisdiction with respect to “Militia, Military and Naval Service, and Defence” under section 91 (7) of the B.N.A. Act. Locke J., with whom one other member of the Court concurred, said, “This does not depend, in my view, upon any such ground as that to do this is necessarily incidental to the powers of Parliament under head 7; it is a direct dealing with the matter within such powers.” And Judson J., with whom three other members of the Court concurred, said: “It is meaningless to support this legislation, as was done in the *G.T.R. Co.* case, on the ground that it is ‘necessarily incidental’ to legislation in relation to an enumerated class of subject in s.91.” Is this a repudiation, at least impliedly, of the distinction between exclusive and necessarily incidental power, or merely an emphatic assertion that the matter in issue—the relationship, for purposes of liability, between the Crown and a member of the armed forces—is so central to the federal concern and responsibility under section 91(7) as to fall unquestionably within exclusive federal jurisdiction under that head? Is the reference by Judson J. to the *Grand Trunk Railway* case to be taken as a disapproval of the distinction between exclusive and necessarily incidental power generally or merely disagreement with the conclusion in that case that federal legislation governing the liability of a federal railway for injury suffered by its employees might be considered to rest on “ancillary” rather than exclusive federal power? Certainly, there is a strong suggestion of general disapproval of the distinction between exclusive and necessarily incidental power in Judson J.’s use of the word “meaningless”. But in a case involving the validity of federal legislation (rather than the possible application of provincial legislation), in which the distinction between the two kinds of power is not important, once there is a conclusion that Parliament must be conceded to have jurisdiction with respect to the matter, one would look for a more direct and elaborate discussion of the question as a basis from which to conclude that there has been a general repudiation or abandonment by the court of such a long-established doctrine of interpretation.

Thus in the *Stevedoring* case, where the issue was the validity of the federal labour relations statute and its application to the stevedoring operations of an extra-provincial shipping enterprise, there was reference to the distinction between exclusive and necessarily incidental power but the Court as a whole did not find it necessary to express its conclusion in favour of validity and valid

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\(^{40}\) In Laskin, *Canadian Constitutional Law*, 3d ed. revised, *supra*, note 37 at 104, it is said: “The ‘ancillary’ or ‘necessarily incidental’ doctrine was, at long last, effectively punctured by Judson J. in the Supreme Court of Canada in *A.-G. Can. v. Mykorak* . . . .” This statement is reproduced in Laskin's *Canadian Constitutional Law*, 4th ed. (Professor Albert S. Abel), *supra*, note 37 at 22.
On the other hand, in the Bell Telephone case, the issue of whether the provincial legislation had valid application turned on the question of whether federal jurisdiction with respect to minimum wage in extra-provincial undertakings was exclusive or not. No one denied that Parliament had such jurisdiction. The fact that the court was at pains to affirm and justify the exclusive character of such jurisdiction is indicative of implicit recognition rather than rejection of the distinction between exclusive and necessarily incidental power and the correlative doctrine of the "unoccupied field."

It is submitted that the doctrine is a useful one which gives a necessary flexibility to the constitution, and that it is an error to reject it or to fail to give it application in appropriate cases. Duff's emphasis on this doctrine reflected his own search for reasonably flexible constitutional relationships within the necessary and unavoidable limits imposed by the distribution of jurisdiction. His one qualification was that the doctrine must not be used to destroy the essential nature of that distribution. This would be the case where the doctrine is invoked, not to justify legislation with respect to a truly ancillary matter lying outside the main subject matter of the jurisdiction, but to assume substantially the other half of a divided jurisdiction. He emphasized this distinction in the Montreal Street Railway case by contrasting legislation of an ancillary nature in relation to property and civil rights in an area in which Parliament has plenary jurisdiction, such as banking, with legislation in an area of divided jurisdiction, such as transportation undertakings, in which neither half of the main subject-matter of the divided jurisdiction can be considered as ancillary or necessarily incidental to the other.

4. The General Power

In 1913, in the Insurance Reference case, Duff confronted the issue of the application of the general power of Parliament to matters, which, though having a local basis in the province, had attained a very marked degree of national importance. The issue was federal authority to regulate the insurance business by a system of licensing. The case was clearly one for consideration of the concept, referred to by Lord Watson in the Local Prohibition case, "that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interests of the Dominion." Was this not true of the insurance business? The specific federal concern was protection of the public by ensuring that insurance companies would remain solvent and able to meet their obligations. The Supreme Court of Canada ruled, four to two, against the federal legislation. The dissenting judges,

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41 In the Stevedoring case there was the distinction between exclusive and necessarily incidental power, as applied to the possible basis of the federal legislation, and the distinction between an integral and necessarily incidental part of an enterprise, as applied to the relationship between stevedoring and shipping. In neither case was the distinction important once there was a conclusion that Parliament must have jurisdiction with respect to labour relations in an extraprovincial shipping enterprise, and that stevedoring was a necessary part of shipping.

42 In the Matter of Sections Four and Seventy of the Canadian 'Insurance Act, 1910' (1913), 48 S.C.R. 260.
in contending that the insurance business justified the application of the general power, referred to its magnitude in such terms as "enormous" and "colossal", and stressed the public interest in adequate protection against financial failure. Once again, Duff was concerned about the long-run implications of such an application of the general power. He did not deny the relative importance of the insurance business nor the concern behind the federal legislation, but he perceived that there would inevitably be many other businesses and comparable concerns for which the argument in favour of the general power would have to be held to be valid if it were conceded in this case. The result, as Lord Watson hinted in the Local Prohibition case, would be that the federal Parliament could gradually take over provincial jurisdiction in one important area after another. One business, after another, as it assumed national significance, could on this basis be brought under the general power. This would be the inevitable result of business growth. Duff pointed out that there were many other cases in which financial reliability was of the utmost importance and could be invoked to justify federal jurisdiction. There were no foreseeable limits to the extent to which such a case for the general power could be pushed. If insurance companies, why not trust companies and later finance companies, and finally any category of company whose business is national in scope and relatively important. He concluded:

I do not think that the fact that the business of insurance has grown to great proportions affects the question in the least. The importance of some such provisions as this Act contains may be conceded. The question is: On what ground can it be contended that this is a matter which because of its importance has ceased to be substantially of local interest? The matter of the solvency and honesty of persons assuming fiduciary relations is at least as important as the matter of solvency of the insurance companies. It would be difficult to argue that the qualifications of trustees and executors and financial agents is a matter with which the Dominion could deal by a uniform law applicable to the whole Dominion. The Act before us illustrates the extremes to which people may be carried when acting upon the theory that because a given matter is large and of great public importance it is for that reason a matter which is not substantially local in each of the provinces.

In agreeing with the majority in the Supreme Court of Canada (which, in this case, included Anglin), the Judicial Committee adopted the essential reasoning of Duff.

... No doubt the business of insurance is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada which are to-day freely transacted under provincial authority. Where the British North America Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words which would have been unnecessary had the argument for the Dominion Government addressed to the Board from the Bar been well founded.

In many ways the Insurance Reference case was the turning point for the general power. It confronted the issue, apart from emergency, of a matter that might be said to have changed from one of local concern to one of national concern. It decided that mere growth and extent was not to be the criterion for application of the general power. Clearly some more concrete, specific and restrictive criterion had to be developed for the application of the general power

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43 (1913), 48 S.C.R. 260 at 304.
to matters which were originally or *prima facie* within provincial jurisdiction. The criterion was the emergency doctrine developed by the Judicial Committee in the *Board of Commerce*,45 *Fort Frances*46 and *Snider*47 cases. Duff did not anticipate the development of this doctrine. In the *Board of Commerce* case the issue was the validity of federal legislation which established machinery to prevent post-war exploitation of scarcity in necessaries of life by hoarding and unfair profits. (The legislation was also directed against combines in restraint of trade.) It established a board to deal with the problem on a case-by-case basis, determining what was unfair profit in the light of particular circumstances. The Supreme Court of Canada divided equally, three to three, with Duff opposed to the validity of the federal legislation and Anglin in favour of it. With respect to the general power, Duff shrank from the implications of a precedent that would permit such a far-reaching federal interference with the direction of business. Although he did not formulate the emergency test there is a hint in what he said that he would not like to see the application of the general power depend on a concept of national necessity. He said:48

> In truth if this legislation can be sustained under the residuary clause, it is not easy to put a limit to the extent to which Parliament through the instrumentality of commissions (having a large discretion in assigning the limits of their own jurisdiction . . . ), may from time to time in the viscissitudes of national trade, times of high prices, times of stagnation and low prices and so on, supersede the authority of the provincial legislatures. I am not convinced that it is a proper application of the reasoning to be found in the judgments on the subject of the drink legislation, to draw from it conclusions which would justify Parliament in any conceivable circumstances forcing upon a province a system of nationalization of industry.

This is one of the strongest hints in the judgments of Duff of a distrust and dislike of government interference with business. There is reason to believe that in economic and social matters he had a nineteenth century liberal outlook.49 This passage is suggestive evidence for those who contend that in these years the courts were concerned with provincial autonomy more as a means of denying the governmental power necessary for extensive and effective regulation of business than as a constitutional value essential to the preservation of Confederation.

Once again, the rationale which Duff offered for refusing to acknowledge a dimension of national concern justifying the application of federal power was to focus on and emphasize the essentially local aspect in each province of what was, taken as a whole, national in scope. According to him a matter which from a provincial point of view was one of property and civil rights did not acquire the dimension which qualified it for application of the general power merely because Parliament proposed to deal with it in a more or less uniform manner throughout the country. He did not really address himself to the general dimensions of the concern with profiteering in necessaries of life. He concentrated on

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45 *In Re The Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919* (1920), 60 S.C.R. 456 at 513.
49 Cf. Rand, *supra*, note 1 at 1116-1117; and O'Leary, *supra*, note 1 at 1120.
the immediate effects of the legislation in each province. On this point he said:50

Nor do I think it matters in the least that the legislation is enacted with the view of providing a remedy uniformly applicable to the whole of Canada in relation to a situation of general importance to the Dominion. The ultimate social, economic or political aims of the legislator cannot I think determine the category into which the matters dealt with fall in order to determine the question whether the jurisdiction to enact it is given by sec. 91 or sec. 92. The immediate operation and effect of the legislation, or the effect the legislation is calculated immediately to produce must alone, I think, be considered. I repeat that if, tested by reference to such operation and effect, the legislation does deal with matters which from a provincial point of view are within the first fifteen heads of section 92, it is incompetent to the Dominion unless it can be supported as ancillary to legislation under one of the enumerated heads of section 91.

Here there is a confusion between the dimensions of concern, flowing from the impact on the body politic as a whole — which is what is reflected in Lord Watson's dictum in the Local Prohibition case — and the locus of the legislation's effects. Legislation to deal with a matter of national concern is bound to have local effects. It is difficult to conceive of national legislation that does not express itself in local effects. Duff's repeated insistence on the local effects was an apparent evasion of the central issue for purposes of the general power — whether the matter was one of national concern. But this apparent evasion reflected Duff's essential insight that many matters of local concern, and suitable for provincial regulation, might also be reasonably considered — at least in their overall impact — matters of national importance or concern. In effect, as the foregoing passage suggests, Duff did not apparently consider the concept of national importance or concern a workable criterion for application of the general power.

In the Judicial Committee, Lord Haldane introduced the concept of emergency as the test of the application of the general power, where the matter would ordinarily be one which falls within provincial jurisdiction. The specific word "emergency" does not appear in the judgment, but it is implicit in such expressions as "special conditions in wartime", "temporary purpose", "special circumstances, such as those of a great war", "normal circumstances", "necessity in highly exceptional circumstances", "an altogether exceptional situation", "circumstances ... such as those of war and famine", "conditions so exceptional". The contention that there was a sufficient emergency was to be scrutinized with great care and the doctrine applied with great caution. Even the emergency application of the general power was conceded with great reluctance. It was to be a very special application of the aspect doctrine:51

... It has already been observed that circumstances are conceivable, such as those of war or famine, when the peace, order and good Government of the Dominion might be imperilled under conditions so exceptional that they require legislation of a character in reality beyond anything provided for by the enumerated heads in either s. 92 or s. 91 itself. Such a case, if it were to arise would have to be considered closely before the conclusion could properly be reached that it was one which could not be treated as falling under any of the heads enumerated. Still, it is a conceivable case, and although great caution is required in referring to it, even in general terms, it ought not, in the view their Lordships take of the British North America Act, read

50 (1920), 60 S.C.R. 456 at 509-510.
51, [1922] 1 A.C. 191 at 200-201.
as a whole, to be excluded from what is possible. For throughout the provisions of that Act there is apparent the recognition that subjects which would normally belong exclusively to a specifically assigned class of subject may, under different circumstances and in another aspect, assume a further significance. Such an aspect may conceivably become of paramount importance, and of dimensions that give rise to other aspects. This is a principle which, although recognized in earlier decisions, such as that of Russell v. The Queen, both here and in the Courts of Canada, has always been applied with reluctance, and its recognition as relevant can be justified only after scrutiny sufficient to render it clear that the circumstances are abnormal. In the case before them, however important it may seem to the Parliament of Canada that some such policy as that adopted in the two Acts in question should be made general throughout Canada, their Lordships do not find any evidence that the standard of necessity referred to has been reached, or that the attainment of the end sought is practicable, in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the Provincial Legislatures.

There is a suggestion here that the emergency or over-riding national necessity would not take the matter out of provincial jurisdiction but would give it an aspect of national dimension or concern that would permit it to be dealt with legislatively by the Parliament of Canada whose legislation in a case of conflict would prevail over that of a province. It was the application of the aspect doctrine to the federal and provincial general powers, illustrated in the Russell and Local Prohibition cases, that contained the enormous potential of giving the federal Parliament a substantial amount of concurrent and ultimately paramount power that would largely overcome the limitations and deficiencies of its specific heads of jurisdiction. It was this that Watson, Haldane and Duff saw and feared in its implications for the position of the provinces. But what Haldane perceived was that there would have to be something much more specific than the general expression of caution and reluctance expressed in the judgments of Watson and Duff if the courts were to avoid continuing embarrassment in attempting to restrict the application of the general power, where the matter involved was one which normally would fall within provincial jurisdiction. The emergency doctrine appears to have been suggested in the Board of Commerce case by counsel for the province of Quebec, who are reported to have said: "The Acts were not passed during the war and the suggested principle that under abnormal conditions the general power of the Dominion may override the specific powers under s. 92 can have no application". An emergency is a state of affairs of limited duration, and it became a criterion of a valid exercise of the general power in relation to matters normally within provincial jurisdiction whether the legislation was to be temporary or whether it was a general and indefinite assumption of jurisdiction.

The emergency doctrine of the general power was further elaborated and affirmed by Lord Haldane in the Fort Frances and Snider cases in terms which made it plain that only an emergency presenting dangers to the national life comparable in seriousness to that created by war would be sufficient. In the Fort Frances case the post-war extension of federal war-time powers to regulate the supply and price of newsprint had to be conceded. In the Snider case, federal legislation providing machinery for the resolution of industrial conflict leading to strike or lock-out was held, like the legislation dealing with combines and hoarding and unfair profits in necessaries of life in the Board of Commerce case, 62 Id. at 193.
not to be concerned with a sufficient case of national emergency. Extravagant efforts were made to explain away the Russell case. There were strong hints that the Judicial Committee subsequently had serious misgivings concerning it, and that was the reason they chose not to give reasons for their decision in the McCarthy Act case. There was finally the embarrassing hypothesis that the decision of the Judicial Committee in the Russell case was based on a conclusion "that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster". Lord Haldane added: "An epidemic of pestilence might conceivably have been regarded as analogous\(^5\)

With respect to the federal legislation in the Snider case, designed to prevent or resolve paralysing industrial disputes, he concluded that the evidence "does not prove any emergency putting the national life of Canada in unanticipated peril such as the Board which decided Russell v. The Queen...may be considered to have had before their minds". This reasoning demonstrated that even the emergency doctrine, unless it was to be unequivocally confined to war or insurrection, was not to relieve the courts of embarrassment in their efforts to justify a very restrictive application of the general power to matters that would ordinarily fall within provincial jurisdiction. The effort to explain away the Russell case was wholly unconvincing; in effect it was being treated as having been wrongly decided, at least in so far as the general power was concerned. What the Judicial Committee had decided is that there was something sufficiently important at stake, in terms of provincial autonomy, for them not to be troubled by the embarrassment of unconvincing reasoning. What they had decided is that with matters normally within provincial jurisdiction there was no standard of national necessity short of that presented by war itself on which it was safe to rely for application of the general power if there was not to be an open door to increasing federal assumption of jurisdiction over large areas that would otherwise be within provincial competence.

As indicated earlier, Duff did not participate in the Fort Frances and Snider cases, but there is no reason to believe that he would have come to a different conclusion than the Judicial Committee in either of them. The considerations which commended themselves to him in the Board of Commerce case, and which received the approval of the Judicial Committee, would in all probability have appeared to him equally applicable to the federal legislation in the Snider case. In both cases it was assumed that the problem envisaged could be dealt with by the provinces within their respective territories, albeit not on a national scale with uniform legislative treatment. But this assumption reveals the fact that the extent of the division of legislative jurisdiction in the areas under consideration in the Board of Commerce and Snider cases was not fully considered and appreciated. It only became clear later that provincial labour law was of doubtful application to enterprises under federal jurisdiction, even in the absence of federal legislation. Gradually the courts were to move to the conclusion that

\(^{53}\) [1925] A.C. 396 at 412.  
\(^{54}\) Id.  
\(^{55}\) Id. at 415-416.
labour relations was of such vital concern to such enterprises that they must be deemed to fall within exclusive federal jurisdiction.\(^5\) Thus the ultimate extent of the federal jurisdiction that would have to be asserted and conceded in labour relations was not part of the perspective in the \textit{Snider} case. Nor was the national scope which the labour relations of many other large enterprises, not within federal jurisdiction, would eventually assume. Nor was it realistic to suggest in the \textit{Board of Commerce} case, in view of the division of jurisdiction that had already been recognized with respect to trade and commerce, that the provinces could deal effectively with the kind of problem contemplated by the legislation in that case.

After the \textit{Fort Frances} and \textit{Snider} cases it was left to Duff from time to time to sum up the effect of the Judicial Committee's decisions concerning the general power. He rejected the general power as a basis for federal jurisdiction over grain elevators in the \textit{Eastern Terminals} case, referring again to the "fallacy" that the federal Parliament should be held to have the jurisdiction "because no single province, nor, indeed, all the provinces acting together, could put into effect such a sweeping scheme".\(^5\) He said:\(^5\)

\ldots The authority arises, it is said, under the residuary clause because of the necessary limits of the provincial authority. This is precisely the view which was advanced in the \textit{Board of Commerce Case} and, indeed, is the view which was unsuccessfully put forward in the \textit{Montreal Street Railway Case}, where it was pointed out that in a system involving a division of powers such as that set up by the British North America Act, it may often be that subsidiary legislation by the provinces or by the Dominion is required to give full effect to some beneficial and necessary scheme of legislation not entirely within the powers of either.

In this he was opposed to Anglin, who asserted, as he had in the \textit{Montreal Street Railway} and \textit{Board of Commerce} cases, that because the provinces could not deal effectively with the matter under consideration it must necessarily fall as a whole under federal jurisdiction. In the \textit{Eastern Terminals} case, Anglin indicated that, unlike Duff, he could not acquiesce in the narrow construction which the Judicial Committee had placed on the general power, and, in particular, that he could not accept Lord Haldane's explanation of the \textit{Russell} case. He said:\(^5\)

In alluding to the Lemieux Act judgment I feel that I should respectfully take exception to the suggestion there made, that the Board which decided \textit{Russell v. The Queen} must be considered to have had before their minds an emergency putting the national life of Canada in unanticipated peril. . . . I cannot find anything in the judgment delivered by Sir Montague E. Smith in the \textit{Russell Case} suggestive of such a view having been entertained by the Judicial Committee. On the contrary, the whole tenor of the judgment seems to me inconsistent with its having proceeded on that basis. I should indeed be surprised if a body so well informed as their Lordships had countenanced such an aspersion on the fair name of Canada even though some hard driven advocate had ventured to insinuate it in argument.

\(^{58}\) Id. at 438.
In this he was to be vindicated by the Judicial Committee itself some twenty years later in the *Canada Temperance* case, where it was held that the *Russell* case did not rest on the notion of emergency.

In fairness to Duff it must be said that his view of the *Russell* case was based less on what was said by Haldane in the *Snider* case than on what he considered to be the implications of the liquor cases as a whole, and in particular the unreported *McCarthy Act* decision: in rejecting, soon after *Russell*, a federal scheme to regulate the liquor traffic by a system of licensing operating according to local option in the provinces the Judicial Committee indicated that the federal Parliament did not in its view have a true general power with respect to the liquor traffic; it could deal with it by prohibitions of a criminal law nature, but it could not do so by a licensing system that would make liquor available upon certain conditions. In Duff's view the liquor cases — *Russell, Hodge, McCarthy Act, Local Prohibition* and *Manitoba Licence Holders* — reflected a constitutional anomaly. The so-called general power affirmed in the *Russell* case (which he frequently observed was an unargued case in so far as the general power was concerned) had to be seen not only in the light of the *McCarthy Act* decision but also in the light of the *Hodge* case, which affirmed provincial power to regulate the liquor traffic by a system of licensing within the province, and the *Local Prohibition* and *Manitoba Licence Holders* cases, which affirmed provincial power to prohibit the liquor traffic as a "local evil" in the province. Duff asserted that no general principle could be drawn from the cases on the "'drink' legislation." In the result, it was his view that the liquor cases, taken as a whole, called for a cautious rather than a bold approach to the application of the general power.

After the *Board of Commerce, Snider and Eastern Terminal* cases, Duff persisted in his rejection of the argument in favour of the general power based on the convenience of a single, plenary power to deal effectively with problems and legislative purposes that lay across the divisions of jurisdiction that in his opinion were the inevitable consequence and characteristic mark of the federal character of the Constitution. The maintenance of that character was essential to provincial acceptance of the Constitution. The denial of a single national power to deal uniformly with certain complex problems that transcended provincial boundaries was one of the prices that had to be paid for the other values of a federal constitution. Moreover, none of the problems were beyond effective legislative treatment through inter-governmental co-operation. Let the Dominion approach the provinces as co-ordinate levels of government but let it not be placed in the position by judicial doctrine to be able to expand its legislative jurisdiction indefinitely on the basis of its own essentially unreviewable judgment as to what national importance, national interest and national convenience might require.

In the *Aeronautics* case Duff held, with Rinfret and Lamont JJ., that the primary jurisdiction with respect to aviation was provincial, and all members of the Court agreed that intra-provincial flying was *prima facie* within provincial

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jurisdiction. The Court was chiefly concerned, however, with the extent of Parliament's plenary powers to implement a treaty covered by section 132 of the B.N.A. Act, and in particular, whether they were exclusive or merely paramount. No one held that the federal Parliament had plenary jurisdiction with respect to aerial navigation by virtue of the general power. Once again, Duff rejected the argument based on convenience.61

The argument that because the Dominion has authority to legislate in relation to this subject, in several, it may be many, aspects, it therefore has authority to appropriate the whole subject to itself, is one which in various forms has been often advanced; and always rejected. It really amounts to this, that it would have been simpler and more convenient if the subject had in terms been committed to exclusive jurisdiction of the Dominion Parliament.

Certainly, a division of legislative jurisdiction (in the absence of a section 132 treaty) along extra-provincial and intra-provincial lines, as in the case of other transportation undertakings, was a possible one for aeronautics. The Judicial Committee concentrated on section 132 of the B.N.A. Act, and their conclusion was that it gave the federal Parliament an exclusive plenary jurisdiction with respect to the whole field of aerial navigation. They declined to express a definitive opinion as to where jurisdiction would lie in the absence of international agreement, although they did express the view that it did not fall under federal jurisdiction with respect to "Navigation and Shipping", nor under the sections dealing with other forms of transportation. They considered that there was some basis for federal jurisdiction under trade and commerce, postal services and defence. For the rest they appeared to hold, in a passage which later caused some difficulty, that it could be brought in under the general power. Lord Sankey said:62

... There may be a small portion of the field which is not by virtue of specific words in the British North America Act vested in the Dominion; but neither is it vested by specific words in the Provinces. As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further, their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s.132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

The difficulty with this statement concerning the general power is that it is not easily separated from what was said concerning section 132. Nor is it clear from other statements in the judgment that the Judicial Committee was taking a fresh view of the general power, uninhibited by the notion of emergency. After quoting Lord Tomlin's second proposition in the Fisheries case,63 which is

61 Id. at 685.
63 A.-G. Can. v. A.-G. B.C., [1930] A.C. 111 at 118: The general power of legislation conferred upon the Parliament of the Dominion by s. 91 at the Act in supplement of the power to legislative upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92, as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion . . . .
essentially in the same terms as Lord Watson’s reference to the general power in the *Local Prohibition* case, Lord Sankey referred to the caution expressed by Lord Watson in that case, and to the *Fort Frances* case, and observed:64

It is obvious, therefore, that there may be cases of emergency where the Dominion is empowered to act for the whole. There may also be cases where the Dominion is entitled to speak for the whole, and this not because of any judicial interpretation of ss. 91 and 92, but by reason of the plain terms of s. 132, where Canada as a whole, having undertaken an obligation, is given the power necessary and proper for performing that obligation.

It would appear, therefore, that there was no intention in the *Aeronautics* case to break new ground concerning the general power, and that the issue of federal jurisdiction was not considered seriously apart from the plenary power conferred by section 132. It must be admitted, however, that there was a strong hint that the Judicial Committee would have been prepared, if necessary, to find an exclusive federal jurisdiction on the basis of the general power.

The *Aeronautics* case was notable for Lord Sankey’s restatement of the expectations concerning federal and provincial power that lay behind Confederation. It was a reminder that there were important federal, as well as provincial, constitutional requirements. He said:65

Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.

But while the Courts should be jealous in upholding the charter of the Provinces as enacted in s. 92 it must no less be borne in mind that the real object of the Act was to give the central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the Provinces as members of a constituent whole.

It may be fairly said that Duff remained faithful to the first concern, and indeed, showed himself to be one of its most vigilant and vigorous judicial spokesmen. He was clearly less sympathetic to the second. It was his view that where the Constitution had intended federal power in the interests of legislative uniformity it had expressly conferred such power as witness the specific matters of commercial concern (many of which would otherwise have fallen within the concept of property and civil rights) that are grouped together in section 91. He felt reinforced in this conclusion by the terms of section 94 of the B.N.A. Act, which makes express provision for federal legislation, operating with provincial consent, to introduce uniformity in the law relating to property and civil rights in the common law provinces. Not only did section 94 show what the Constitution contemplated as the additional federal power to further the purpose of legislative uniformity, but in expressly excluding Quebec from its provisions it served as a reminder of the supreme importance of safeguarding provincial jurisdiction in respect of property and civil rights. As Duff put it in the *Natural*

64, [1932] A.C. 54 at 73.
65 Id. at 70.
"Language could not be more plain or, indeed, more explicit to declare that the subjects, Property and Civil Rights, are not subjects assigned to the Parliament of Canada under the initial words of section 91."

The express grant of federal authority with respect to specific subjects of commercial concern in section 91 had been used, it will be recalled, as an argument for refusing an exclusive federal jurisdiction with respect to the insurance business in the Insurance Reference case. The importance of the insurance business, including its relationship to commerce, was known and appreciated at the time of Confederation, and the argument was that if it had been intended to place insurance under exclusive federal jurisdiction express provision would logically have been made for it, as in the case of banking. While this argument applied to enterprises and activities that were well established and well-known at the time of Confederation, what about those that did not develop until later? Such were the cases of aeronautics and radio.

Duff did not sit in the Radio case. There, a majority of the Supreme Court, including Anglin, held that Parliament had jurisdiction under the general power to deal with the subject of radio communication, and in particular, with the regulation of radio frequencies. It was contended that only the federal government could provide an effective regulation that could prevent interference with an orderly use of radio frequencies. Taking a position similar to that which he had adopted with respect to the general power in other cases, Anglin said that his "reason for so concluding is largely that overwhelming convenience — under circumstances amounting to necessity — dictates that answer." The essential assumption of fact was that the effect of radio broadcasting could not be confined within a province, and no province could deal effectively with the problem of interference. The majority held that there was nothing "local or private" about radio communication. Federal jurisdiction with respect to telegraphs was also suggested as a basis for control. Curiously, none of the members of the Supreme Court suggested the federal power to implement international agreements although that was a basis of the decision in the Judicial Committee. Rinfret J., dissenting, rejected the argument based on convenience, adopting the passage which has been quoted above from Duff's judgment in the Eastern Terminal case: "The other fallacy is . . . that the Dominion has such power because no single province, nor, indeed, all the provinces acting together, could put into effect such a sweeping scheme." One wonders if Duff would have gone as far himself in a case in which, for technical reasons, it was difficult to find a plausible basis for provincial jurisdiction. His own grasp of scientific matters would have made him particularly able to appreciate these technical difficulties. Yet clearly there were, and still are, important provincial interests to assert. In the Judicial Committee counsel for the provinces conceded that the federal Parliament had substantial jurisdiction with respect to radio communication by

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68 Id. at 545-546.
69 Id. at 561.
vogue of specific heads in section 91; but were reported to have said:

"There are, however, parts of the subject which are wholly within the Provincial power as to property and civil rights, for instance, the control of broadcasting for educational purposes and as to programmes, especially as to the language used." These matters were not dealt with by the Judicial Committee, which concentrated on the technical aspects of radio communication as those which were emphasized in the questions put by the reference. The issue of control over content was not specifically raised. The Judicial Committee held that radio communication fell within exclusive federal jurisdiction as an extra-provincial undertaking, and more particularly as falling within the meaning of the word "telegraphs", but it also held that Parliament had plenary jurisdiction, by virtue of the general power, to implement the international convention concerning radio communication to which Canada was a party. The extent to which the Judicial Committee saw the general power as a basis for federal jurisdiction with respect to aeronautics and radio, apart from the power to implement international agreements, is not altogether clear. Certainly, it is fair to say that a reading of these decisions in the 1930s would not afford a basis for concluding that they warranted a new readiness to concede the application of the general power to matters which had traditionally been within provincial jurisdiction. They certainly afforded no basis for concluding that the Judicial Committee had rejected the emergency doctrine of the general power as applicable to such cases.

To the extent that the general power was considered to be a basis for federal jurisdiction in these cases, apart from the power of treaty implementation, both aeronautics and radio were new matters which could be said to be inherently of national concern. They were not matters whose character was said to have changed from one of local or provincial concern to one of national concern.

It was against this background of judicial decision that Duff approached the "Bennett New Deal" legislation with reference to the general power. This legislation consisted of some eight statutes enacted by the Conservative government of R. B. Bennett to try to cope with problems created by the great depression. Doubts were raised about their constitutionality, and soon after the Liberal Government of Mackenzie King came into office in 1935 it referred them to the Supreme Court of Canada for an opinion concerning their validity.

The legislation dealt with weekly rest, minimum wage, hours of labour, natural products marketing, unemployment insurance, compositions between farmers

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72 It is difficult to escape the conclusion that the new government was anxious to put this legislation to the test. In the debate on the Natural Products Marketing Act, the Liberal leader of the Opposition, Mr. MacKenzie King, had said: "I believe that when this measure is properly studied it will be found that some of its provisions are also contrary to the provisions of the British North America Act", Can. H. of C. Debates, (April 19, 1934) at 2348-9.
and creditors to avoid bankruptcy, and restraint of trade.\textsuperscript{73} The Federal Government invoked the general power as a basis of jurisdiction, among others, but economic depression was held not to meet the requirement of Lord Haldane's emergency doctrine. In fact, it was only in the \textit{Unemployment Insurance} reference\textsuperscript{74} that the case for national necessity appears to have been strongly argued and seriously considered, and even there, counsel for the Dominion are reported to have conceded that it was not "an emergency in the strict sense."\textsuperscript{75} In the Supreme Court, Rinfret J. (as he then was), who voted with the majority against the unemployment insurance legislation, spoke as follows concerning the issue of emergency:\textsuperscript{76}

In this particular matter, there is no evidence of an emergency amounting to national peril; but, moreover and still more important, the statute is not meant to provide for an emergency. It is not, on its face, intended to cope with a temporary national peril; it is a permanent statute dealing with normal conditions of employment. There was accordingly here no occasion, nor foundation, for the exercise of the residuary power.

The Judicial Committee seized on this characterization of the unemployment problem caused by the depression as reflecting the general opinion of the Court. It said: \textsuperscript{77}

\ldots A strong appeal, however, was made on the ground of the special importance of unemployment insurance in Canada at the time of, and for some time previous to, the passing of the Act. On this point it becomes unnecessary to do more than to refer to the judgment of this Board in the reference on the three labour Acts, and to the judgment of the Chief Justice in the National Products Marketing Act which, on this matter, the Board have approved and adopted. It is sufficient to say that the present Act does not purport to deal with any special emergency. It founds itself in the preamble on general world-wide conditions referred to in the Treaty of Peace: it is an Act whose operation is intended to be permanent: and there is agreement between all the members of the Supreme Court that it could not be supported upon the suggested existence of any special emergency. Their Lordships find themselves unable to differ from this view.

The responsibility for denying that the great depression was a sufficient national emergency to justify the general power was placed upon the shoulders of the Canadian tribunal. What this amounted to was that the emergency doctrine was given a further restrictive qualification: unless the legislation in question was avowedly temporary in nature it could not be said to be intended to meet an emergency. No legislation that related to matters ordinarily within provincial legislation and was to operate indefinitely could be supported on the general power.

The judgment of Duff to which reference was made was his summation of


\textsuperscript{75} [1937] A.C. 355 at 358.

the law concerning the general power, for purposes of all the statutes, in the *Natural Products Marketing* case. This part of his judgment received the highest accolade of the Judicial Committee, who said they hoped it would become the "locus classicus" on the subject and set further argument to rest. They hoped it would establish the emergency doctrine once and for all. This was not to be the case.

In his discussion of the general power, in the context of the natural products marketing legislation but purportedly with reference to all the challenged legislation, Duff did not confront the issue of emergency or national necessity on the facts. In fact, he seems to have taken little interest in this aspect of the case. (In the *Unemployment Insurance* case where the argument in favour of necessity was most obvious and compelling he decided in favour of the federal legislature on a basis other than the general power.) In this "locus classicus" there was simply a review, with commentary, of the decisions of the Judicial Committee: there was no attempt by Duff to formulate the criterion for application of the general power. He simply concluded, in the light of the passages he quoted from the decisions of the Judicial Committee, that the Natural Products Marketing Act (and by implication, the other pieces of the "Bennett New Deal" legislation to which the summary of the law was intended to apply) obviously did not meet the test of exceptional necessity that would permit a matter ordinarily or formerly within provincial jurisdiction to be dealt with under the general power. The clear implication of his judgment was that in his opinion nothing short of a wartime kind of emergency would meet the test. Any other conditions would have to be considered to be "normal" for purposes of the general power. This is clearly to be inferred from his interpretation of the *Board of Commerce* case.

... Nobody denied the existence of the evil. Nobody denied that it was general throughout Canada. Nobody denied the importance of suppressing it. Nobody denied that it prejudiced and seriously prejudiced the well-being of the people of Canada as a whole, or that in a loose, popular sense of words it "affected the body politic of Canada." Nevertheless, it was held that these facts did not constitute a sufficient basis for the exercise of jurisdiction by the Dominion Parliament under the introductory clause in the manner attempted. The Board said that in special circumstances, such as those of a great war, the interest of the Dominion in the matters might conceivably become of such paramount and overriding importance as to lie outside the heads of section 92 and not be covered by them. But it is, they held, quite another matter to say that under normal circumstances, general Canadian policy can justify interference, on the scale of the statutes then in controversy, with the property and civil rights of the inhabitants of the provinces.

Duff refused to see in the language of the Judicial Committee in the *Aeronautics* case, which has been quoted above, any departure from the emergency doctrine of the general power, in so far as matters normally within provincial jurisdiction were concerned. The passage of his judgment on this point shows how confident he was that he knew the mind of the Judicial Committee on this question and the importance which he attached to his restatements of Judicial Committee doctrine.

On behalf of the Dominion it is argued that the judgment in the *Aeronautics* case

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78 See, *supra*, note 71.
80 Id. at 425.
... constitutes a new point of departure. The effect of that judgment, it seems to be argued, is that if, in the broadest sense of the words, the matters dealt with are matters of "national concern" matters which "affect the body politic of the Dominion," jurisdiction arises under the introductory clause. One sentence is quoted from the judgment in the *Aeronautics* case... which we will not reproduce because we do not think their Lordships can have intended in that sentence to promulgate a canon of construction for sections 91 and 92. We see nothing in the judgment in the *Aeronautics* case... to indicate that their Lordships intended to detract from the judicial authority of the decisions in the *Combines* case... and Snider's case...

Their Lordships did not demur. In the *Labour Conventions* case they referred, in the context of a discussion of the power to implement treaties, to what had been said in the *Aeronautics* case concerning the general power as follows:81

... The *Aeronautics* case... concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries. Sec. 132, therefore, clearly applied, and but for a remark at the end of the judgment, which in view of the stated ground of the decision was clearly obiter, the case could not be said to be an authority on the matter now under discussion.

Clearly the matter under discussion was whether there was an exclusive federal power to implement treaties on the basis of the general power — an indication that the Judicial Committee considered that what was said concerning the general power in the *Aeronautics* case was with reference to treaty implementation. Then in the course of expressing their approval of Duff's summary of the law on the general power they re-emphasized the emergency doctrine:82

It is only necessary to call attention to the phrases in the various cases, "abnormal circumstances", "exceptional conditions", "standard of necessity" (*Board of Commerce* case...), "some extraordinary peril to the national life of Canada," "highly exceptional," "epidemic of pestilence" (*Snider's* case...), to show how far the present case is from the conditions which may override the normal distribution of powers in ss. 91 and 92.

Following these cases nothing significant was said about the general power for about a decade. Then in the *Canada Temperance*83 case in 1946, the Judicial Committee, when called upon to repudiate its decision in the *Russell* case, held that it had been correctly decided, and that the Canada Temperance Act had been held to be valid on the basis of the general power, quite apart from any question of emergency. Viscount Simon not only rejected the notion of national emergency as the ground for application of the general power in the *Russell* case, but he seemed to reject it generally as a limiting criterion for its application. He returned to a statement of the test in terms reminiscent of those used by Lord Watson in the *Local Prohibition* case:

... the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case... and the *Radio* case...), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.84

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82 Id. at 353.
84 Id. at 205.
Yet, having rejected the notion of emergency as the explanation of the Russell case, the Judicial Committee proceeded with examples that would meet the test of emergency or a valid criminal law concern:85

... War and pestilence, no doubt, are instances: so, too, may be the drink or drug traffic, or the carrying of arms. In Russell v. The Queen ..., Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease.

The Judicial Committee attempted to distinguish between emergency as the occasion of legislation and emergency as the constitutional justification of legislation in the following passage:86

... True it is that an emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not.

But surely, where emergency exists, it is the emergency which gives the matter its dimension of national concern or interest. That the notion of emergency was not to be rejected as one possible constitutional justification for the exercise of the general power, where the circumstances permitted, was clearly indicated by the Judicial Committee less than a year later in the Japanese Canadians case,87 when the validity of federal war-time legislation in relation to matters which would otherwise fall within provincial jurisdiction was once again affirmed on the basis of the emergency doctrine of the general power, in accordance with the decision in the Fort Frances case. Duff sat on the Judicial Committee in the Japanese Canadians case. It may reasonably be assumed that he exerted his influence to see that the references to the general power were couched in terms which were not in any way inconsistent with the line of cases prior to the decision in the Canada Temperance case. Lord Wright said:88

On certain general matters of principle there is not, since the decision in Fort Frances Pulp & Power Co. v. Manitoba Free Press Co., ... any room for dispute. Under the British North America Act property and civil rights in the several Provinces are committed to the Provincial legislatures, but the Parliament of the Dominion in a sufficiently great emergency, such as that arising out of war, has power to deal adequately with that emergency for the safety of the Dominion as a whole.

At the same time, the Judicial Committee indicated that there would be considerable judicial reluctance to challenge a declaration by Parliament that a national emergency of some kind existed.

The Judicial Committee reverted in the Empress Hotel case89 in 1949 to an expression of the caution with which the general power must be applied to matters which have at one time been under provincial jurisdiction. It quoted at length from what was said by Lord Watson in this respect in the Local Prohibition case. (This, it will be recalled, was the passage which Duff had taken as his point of departure in the Insurance Reference case.) Shortly thereafter, in the

85 Id. at 205-206.
86 Id. at 206.
88 Id. at 101.
The Margarine case,90 the Judicial Committee commented directly on what had been said with respect to the general power in the Canada Temperance case. “This passage must, however, be considered,” Lord Morton said, “with the words used by Lord Atkin when delivering the judgment of the Board in the Labour Conventions case,”91 and he thereupon quoted in full the passage in which the judgment of the Judicial Committee had adopted what was said by Duff concerning the general power in the Natural Products Marketing case. This appears to have been the Judicial Committee’s last pronouncement on the general power. In it they removed any doubt that in their view Duff’s summation in the Natural Products Marketing case still expressed the law concerning the application of the general power to matters ordinarily within provincial jurisdiction, unimpaired by what had been said in the Canada Temperance case.

Despite these indications by the Judicial Committee after the Canada Temperance case that it was not to be understood as having rejected the criterion of emergency or exceptional necessity as the test of whether the general power could be applied to matters which would ordinarily fall within provincial jurisdiction, the Supreme Court of Canada subsequently indicated in two cases that it intended to base further application of the general power on the test formulated by Viscount Simon in the Canada Temperance case. In the Johannesson case92 in 1952, when it was no longer possible to base federal jurisdiction with respect to aeronautics on the power to implement treaties within the meaning of section 132 of the B.N.A. Act, the Supreme Court held that Parliament had a plenary jurisdiction with respect to this subject by virtue of the general power. It based itself for the most part on what was said concerning the general power in the Aeronautics case and on Viscount Simon’s mention of aeronautics in the Canada Temperance case as a matter which “must from its inherent nature be the concern of the Dominion as a whole.”93 Emphasis must be placed on the word “inherent” in this formulation. The decision in respect of aeronautics did not involve the application of the general power to a matter assumed to have been originally under provincial jurisdiction but claimed to have changed in relative importance and concern so as to take it out of such jurisdiction and place it under the general power.

This was true as well of the Supreme Court’s decision in the Munro case,94 in which Viscount Simon’s statement on the general power was reaffirmed as the formulation of the law which the Court would follow. There the matter of the development of the National Capital Region to enhance the seat of the Government of Canada was held to be one which was inherently of national concern. There was no question in this conclusion of it ever having been otherwise. The case did not involve a pretended change in the character or dimensions of the matter.

91 Id. at 197.
94 Munro v. National Capital Commission, [1966] S.C.R. 663. In the Munro case, however, the Federal Government came to Court able to show that it had been unable to achieve its purpose by inter-governmental co-operation.
In the result, the formulation of the test for application of the general power in the *Canada Temperance* case is no more than what was said by Lord Watson in the *Local Prohibition* case, without the special emphasis on a cautious or restrained application of it in the interests of provincial autonomy. But the logic of that caution or restraint, which appealed to Duff and found expression in his judgments in the *Insurance Reference* and *Board of Commerce* cases, remains. What the Supreme Court has said, however, at least by implication, in adopting the *Canada Temperance* test is that the restraint is not to be necessarily guided by the criterion of emergency or exceptional necessity. But apart from the clear case of emergency or other overriding national necessity, of which Parliament will generally be allowed to be the judge, the Court is likely to continue to be influenced by the danger which Watson, Duff and Haldane, among others, perceived in the notion that as matters inevitably grow to become subjects of national importance and concern, they may pass from provincial to federal jurisdiction until the distribution of power under the constitution is fundamentally altered. Thus while Duff's summary of the law on the general power in *Natural Products Marketing* can hardly be called the "locus classicus" on the subject today, his general approach to the application of the general power to matters which have been assumed to fall within provincial jurisdiction may be expected to continue to exert influence because of the inherent soundness of its concern for the general balance of power under the Constitution.

As reflected in the *Munro* case, the issue with respect to the general power, where reliance cannot be placed on the notion of emergency, is to determine what are to be considered to be single, indivisible matters of national interest and concern lying outside the specific heads of jurisdiction in sections 91 and 92. It is possible to invent such matters by applying new names to old legislative purposes. There is an increasing tendency to sum up a wide variety of legislative purposes in single, comprehensive designations. Control of inflation, environmental protection, and preservation of the national identity or independence are examples.

Many matters within provincial jurisdiction can be transformed by being treated as part of a larger subject or concept for which no place can be found within that jurisdiction. This perspective has a close affinity to the notion that there must be a single, plenary power to deal effectively and completely with any problem. The future of the general power, in the absence of emergency, will depend very much on the approach that the courts adopt to this issue of characterization.

5. The Trade and Commerce Power

As we have seen, the basic approach to the distribution of the power to regulate trade and commerce had been laid down by the Judicial Committee in the *Parsons* case in 1881, about a quarter of a century before Duff came to the Supreme Court. He worked within the framework of this approach, but he added his own touches and emphasis to the definition of the distribution, and in the course of his career worked out the implications of its various aspects. In a way his personal contribution to thinking about the trade and commerce power was more evident than in the case of the general power. Again, it was the *Natural Products Marketing* case in which he summed up the distribution of
the trade and commerce power in terms that received the highest commendation from the Judicial Committee and have been repeatedly referred to since. A passage from Duff's judgment in the Natural Products Marketing case was adopted by the Judicial Committee as the ground of its own judgment with reference to the trade and commerce power in that case, with the statement: "Their Lordships agree with this, and find it unnecessary to add anything."95 In the Margarine case,96 the Judicial Committee, with reference to the regulation of trade and commerce, spoke of the "masterly judgment of Duff C.J., in the Natural Products Marketing case."

In the Montreal Street Railway case Duff did not refer to the trade and commerce power but concentrated rather on the issue of ancillary or necessarily incidental power in relation to federal jurisdiction with respect to railway undertakings. The Judicial Committee in that case, however, made a reference to the trade and commerce power to which Duff appeared to attach some importance in subsequent cases. In a general statement concerning the distribution of jurisdiction under sections 91 and 92 of the B.N.A. Act, Lord Atkinson summed up the considerations governing the general power laid down by Lord Watson in the Local Prohibition case, and observed that in the opinion of the Judicial Committee they applied equally to the federal trade and commerce power. In other words, this power was not to be treated like other specific heads of jurisdiction in section 91 but as a general power of its own, which was not to justify legislation "applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest." This was the perspective that Duff constantly kept in mind.

In the Insurance Reference case in 1913 Duff dismissed the federal trade and commerce power briefly as a possible basis for regulation of the insurance business. He did not even bother to cite the Parsons case. He held that the business of insurance was not trade or commerce but rather an "occupation". It must be admitted that this part of his judgment is rather obscure. The omission of any reference to the Parsons case, on which he laid great stress in subsequent decisions, is curious. Perhaps he was embarrased by the assumption, for purposes of argument in the Parsons case, of the validity of the existing federal legislation with respect to insurance.

In suggesting the outline of the federal trade and commerce power in the Parsons case the Judicial Committee had said that the words of section 91(2) "would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of interprovincial concern, and it may be that they would include general regulation of trade affecting the whole dominion."

97 (1881-82), 7 A.C. 96 at 113.
With the notion of "general regulation of trade affecting the whole Dominion" in Sir Montague Smith's dictum in the *Parsons* case Duff had considerable difficulty. The Judicial Committee had suggested in the *John Deere Plow* case the example of general trade regulations applicable to federally incorporated companies, but Duff himself never really found any application for the concept, except possibly in the case of the Alberta Social Credit legislation, where he held that the attempt to replace bank credit by another system of credit dealt with a matter within the regulation of trade and commerce under section 91(2) of the B.N.A. Act.

An opportunity for application of the concept of "general regulation of trade affecting the whole Dominion" was presented to the Supreme Court in the *Board of Commerce* case. Under the *Board of Commerce Act* and the *Combines and Fair Prices Act* of 1919 the Board of Commerce was empowered to take action against combines and against the hoarding and disposal at unfair prices of necessaries of life. It was this second aspect of the legislation that was brought in issue before the courts. It was brought forward on a fairly narrow basis in the form of a stated case involving the validity of an order of the Board specifying what would be fair profits for certain retail clothing dealers in the City of Ottawa. Thus, while the concern of the legislation was a general one with combines throughout Canada and the exploitation of post-war scarcity in necessities of life the case was brought on in a very local focus and this was much emphasized by those who held the legislation to be invalid. The issue had originally been put before the Supreme Court in the form of general questions concerning the validity of the Act but the Court held this to be an attempt to bring a reference under the guise of a stated case, and that a true stated case based on an actual factual situation should be presented. It was in this way that the issue was focused in a manner that tended to emphasize the local character of the regulation. The Supreme Court of Canada divided three to three, with Davies C.J., and Anglin and Mignault JJ. in favour of validity, and Idington, Duff and Brodeur JJ. against. The effect of this division, of course, was that the legislation was deemed to be valid.

In his opinion on behalf of those who favoured validity, Anglin based himself on both the general power and the trade and commerce power. He referred to profiteering as "an evil so prevalent and so insidious that in the opinion of many persons it threatens to-day the moral and social well-being of the Dominion," but he based the case for the general power, not so much on the existence of an emergency as on the inability of provincial legislation to deal effectively with the problem. It was again the notion that fully effective jurisdiction to deal with a particular problem must exist at one legislative level or another—a notion, as we have seen, that Duff repeatedly rejected. Anglin expressed some reservation, however, about resting validity entirely on the general power, having regard to the caution expressed by Lord Watson in the *Local Prohibition* case and perhaps also his own rejection of the general power as a basis for validity in the *Insurance Reference* case. He said he preferred

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100 (1920), 60 S.C.R. 456 at 467.
to rest the case for validity on the federal trade and commerce power. In this he invoked the concept of "general regulation of trade", suggested as one of the aspects of federal power in the *Parsons* case. The matter of unfair profits on necessaries of life was one of nation-wide concern but effective action in relation to it required decisions on a case-by-case basis at the local level. Anglin said that this administrative necessity did not detract from the general nature of the regulation. It was the only way in which effective regulation of this particular problem could be carried out.

This was the case that Duff had to meet. There can be no doubt that there was a problem of national concern and that it related to trade generally in a large number of commodities. Duff chose to turn the telescope around and to suggest, on the basis of the stated case, that the legislation had a very local focus. Indeed, he denied that there was any general regulation at all. On this point he observed: 101

> It is thus left to the Board to make orders affecting individual holders or traders, to fix the terms upon which they are required to dispose of articles withheld from disposition or held for disposition, and such terms the Board is not required to fix by any general regulation, but may, and in the normal course would, fix them with reference to the circumstances of a particular case. The fixing of the terms of disposition by reference to the prohibition against unfair profits might well result in great disparity between the prices charged for the same article by different traders. The creation of an authority endowed with such powers of fixing the terms of contracts in relation to specific articles appears to involve an interpretation of the words, "regulation of trade and commerce," much more comprehensive than anything contemplated by the decisions and judgments referred to above. . . .

Thus it was that Duff sought to take from this legislation of nation-wide concern any general character that would qualify it for inclusion in the expression "general regulation of trade affecting the whole Dominion". In effect, what he held was that regulation carried out at the local level according to the circumstances of particular cases does not, even when it is being carried out across the country, become "general regulation" within the meaning of the expression. It is still the regulation of particular trades within a province. In other words, the regulation of a local or provincial matter does not become "general regulation of trade affecting the whole Dominion" merely because it is carried out under federal legislation in every province.

Apart from the rather special case in which Duff appeared to apply the concept of general regulation of trade against the Alberta attempt to change the system of credit, it is impossible to discern what he would have considered to be an example of such regulation. He rejected the concept as a basis for the *Dominion Trade and Industry Act* which was concerned with undue competition and the establishment of a national trade mark, although in this he was reversed by the Judicial Committee. 102 His own uncertainty on the question is expressed in the following passage from his judgment in the *Board of Commerce* case: 103

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101 Id. at 502-503.
103 (1920), 60 S.C.R. 456 at 498-99.
It is not easy to ascribe a precise meaning to the words “general trade and commerce” but the passage seems to imply that the words “trade and commerce” are to be read conjunctively or at all events that the word “trade” takes on a special colour and significance from its association with the word “commerce”; and whatever be the precise significance of the word “general” we are at least able to affirm in consequence of the decisions already mentioned that it excludes regulations such as those which were in question in Hodge’s Case . . . , in the McCarthy Act reference, in Parson’s Case . . . , and in the Montreal Street Railway case . . . To borrow a phrase used arguendo on the Liquor License appeal, Attorney General of Ontario v. Attorney General for Canada, “general” in this passage means “general not as including all particulars but general as distinguished from some particulars.”

As was observed in connection with the discussion of the general power, all general regulation must necessarily have local impact, and may, indeed, be considered simply as an agglomeration or collection of such local impacts. The general cannot be separated from the local or particular. It is in fact carried out by a series of local applications. Here Anglin would appear to have had the better of the argument. What would seem to have been general in the Board of Commerce case is that the matter was one of concern to trade and commerce as a whole. It was a general issue as opposed to one affecting a particular trade or industry. It was concerned with trade in a great range of commodities. The combines aspect of the legislation was directed even more generally to trade. There was no concern with a particular trade as such, as in the Parson’s case, or in the McCarthy Act case. The legislation was concerned with a pervasive question of trade—the handling of necessaries of life in such a way as to obtain unfair or unreasonable profits. There was also concern for the deprivation that might be brought about by hoarding. Legislation directed at the prevention of combines and unfair profits on necessaries of life would appear to be a prime example of a general trade regulation concern. It is impossible to escape the conclusion that Duff did not consider it advisable to attempt to give real content to that aspect of the federal commerce power suggested by the words “general regulation of trade affecting the whole Dominion” in the Parson’s case. When he made his famous summation on the federal trade and commerce power in the Natural Products Marketing case he made reference to this expression almost as an afterthought. It was clearly not a central part of the definition. The illustration he gave was the rather special one suggested by Lord Haldane in the John Deere Plow case—general trade regulations applied to federally incorporated companies. In the Natural Products Marketing case he observed that the contemplated regulations were directed to the dealing “in particular commodities and classes of commodities” and that they were “not general regulations of trade as a whole or regulations of general trade and commerce within the sense of the judgment in Parson’s case”\(^\text{104}\). Having rejected the concept of “general regulation of trade affecting the whole Dominion” as a basis for validity in the Board of Commerce case Duff was not likely to find a more plausible or attractive example. Although he continued to pay lip service to the concept in his review of the law from time to time, he made it clear in the Board of Commerce case that he would not apply it to anything that could be viewed simply as local regulation carried on throughout the Dominion. Neither the fact that it was carried out in every province nor even that it might be uniform in its application would in his view justify it being characterized as

general so as to bring it within federal jurisdiction. Clearly, the expression "general regulation of trade affecting the whole Dominion" was not to be applied so as to destroy the effect of the express exclusion from federal power, in the Parsons case, of the regulation of particular trades in the province. In Duff's view, as the passage quoted above indicates, the two were very difficult to reconcile.

Apart from this virtual rejection of the concept of "general regulation of trade" as a basis for federal jurisdiction, Duff's main contribution to the shape of the commerce power was the scope which he was prepared to concede, or not concede, in the three main elements of jurisdiction, as he defined it in the Natural Products Marketing case: "the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers." In the Eastern Terminal and Natural Products Marketing cases he refused to concede that where trade in particular commodities was predominately extra-provincial it should be regarded as having an extra-provincial character as a whole. He insisted on maintaining the division of jurisdiction with respect to its extra-provincial and intra-provincial aspects. Nor, as we have seen, would he permit essentially the same result to be achieved by an extended and liberal application of the doctrine of ancillary or necessarily incidental power. He dealt with both of these closely related issues in the Eastern Terminal case, in which he held that federal power to regulate the grain trade did not include power to carry out a local regulation of grain elevators; 105

There are two lurking fallacies in the argument advanced on behalf of the Crown; first, that, because in large part the grain trade is an export trade, you can regulate it locally in order to give effect to your policy in relation to the regulation of that part of it which is export. Obviously that is not a principle the application of which can be ruled by percentages. If it is operative when the export trade is seventy per cent of the whole, it must be equally operative when the percentage is only thirty; and such a principle in truth must postulate authority in the Dominion to assume the regulation of almost any trade in the country, provided it does so by setting up a scheme embracing the local, as well as the external and interprovincial trade; and regulation of trade, according to the conception of it which governs this legislation, includes the regulation in the provinces of the occupations of those engaged in the trade, and of the local establishments in which it is carried on.

He went on, in the part of this passage which has been quoted earlier, to reject the argument "that the Dominion has such power because no single province, nor, indeed, all the provinces acting together, could put into effect such a sweeping scheme." 106

The above approach was made the basis for a similar conclusion in the Natural Products Marketing case, with reference to federal legislation that was directed on its face to natural products marketing generally without distinction as to extra-provincial and intra-provincial aspects. In that case he expressed his conclusion as follows: 107

The enactments in question, therefore, in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. Parlia-

106 Id. at 448.
Duff and the Constitution

ment cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of external and interprovincial and the regulation of trade which is exclusively local ... to the same authority. (*King v. Eastern Terminal Elevators...*)

It was this passage which the Judicial Committee adopted as its own, thereby affirming the authority of Duff's judgment in the *Eastern Terminal* case.

There was one particularly curious aspect of Duff's approach to the trade and commerce power, and that was his treatment of Lord Haldane's attempt in the *Snider* case to reduce this power to an ancillary or auxiliary status. Haldane had said:

... It is, in their Lordships' opinion, now clear that, excepting so far as the power can be invoked in aid of capacity conferred independently under other words in s. 91, the power to regulate trade and commerce cannot be relied on as enabling the Dominion Parliament to regulate civil rights in the Provinces.

This conception of the trade and commerce power was questioned by Anglin C.J., in the *Eastern Terminal* case, in another example of his candour and independence with respect to the judgments of the Judicial Committee: and it was disavowed by the Judicial Committee itself in the second combines case. Duff, however, continued to quote this passage as late as the *Natural Products Marketing* case. Finally, in 1938 in the *Alberta Statutes* case he acknowledged that this view had been set aside but he indicated that it had influenced the opinion of the Supreme Court to some extent in the *Natural Products Marketing* case. He said:

It is difficult, no doubt, to reconcile this view with the concluding paragraph of section 91 already discussed; nevertheless, in a judgment delivered in *Re the Natural Products Marketing Act* ... we unanimously expressed the opinion, and our judgment proceeded in part, at least, upon the hypothesis, that we were bound by this pronouncement in the judgment in *Snider's case* ... and by similar pronouncements in the *Board of Commerce case* ..., as expressing the *ratio decidendi* of those decisions. It is clear now, however, from the reasons for judgment in *A.-G. for Ontario v. A.-G. for Canada* ... that the Regulation of Trade and Commerce must be treated as having full independent status as one of the enumerated heads of section 91.

It is difficult to know what significance to attach to this admission in the context of the *Natural Products Marketing* case. It is impossible to conclude that the decision might have gone otherwise had Duff and the other members of the Court proceeded on a different assumption concerning the authority of this dictum in the *Snider* case. At most, it was a further consideration reinforcing the conclusion that the federal trade and commerce power could not be extended on any basis—whether characterization of the activity as a whole, general convenience of a single plenary jurisdiction, or the application of ancillary or necessarily incidental power—to encompass the whole of the intra-provincial trade and commerce in particular commodities.

The subsequent reference to this matter in the *Alberta Statutes* case is particularly curious because in 1930 in the *Lawson* case,* Reference re Alberta Statutes, [1938] S.C.R. 100 at 121.


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soon after the second combines case was argued in the Judicial Committee, Duff had clearly indicated that he did not think the auxiliary concept of the federal trade and commerce power applied in the case of international and interprovincial trade and commerce, which was tantamount to a repudiation of the concept for all practical purposes. He was quite explicit on this:

... It seems hardly necessary to observe that, here, there is nothing pointing to the conclusion that the regulative authority in respect of Trade and Commerce, in its application to matters which, in themselves, are involved in interprovincial or foreign trade, can only be invoked in aid of the execution of some power which the Dominion possesses independently of that head. Lord Haldane's proposition is strictly limited to matters which, in themselves, and independently of their connection with a Dominion trading company, would be of local concern only.

What Duff seemed to be saying then, was that the auxiliary notion of the trade and commerce power was not a limitation on the power with respect to international and interprovincial trade and commerce, but that it might permit Parliament to deal with matters of local trade and commerce in aid of some other head of jurisdiction.

It was Duff who included in the definition of the federal trade and commerce power a reference to the doctrine of ancillary or necessarily incidental power—a doctrine that could give the federal commerce power additional scope and reach—much as the Shreveport doctrine has done with respect to the commerce power in the United States; but, as we have already noted, Duff would not admit the application of this doctrine to permit the assumption of the other half of a divided jurisdiction. This view is clearly reflected in the following conclusion in the Natural Products Marketing case.

... Legislation necessarily incidental to the exercise of the undoubted powers of the Dominion in respect of the regulations of trade and commerce is competent although such legislation may trench upon subjects reserved to the provinces by section 92, but it cannot, we think, be seriously contended that sweeping regulation in respect of local trade, such as we find in this enactment, is, in the proper sense, necessarily incidental to the regulation of external trade or interprovincial trade or both combined.

Duff adopted the same strict approach to provincial jurisdiction with respect to trade and commerce. In the Lawson case he held a provincial marketing scheme that was directed to extra-provincial as well as intra-provincial movement to be invalid on the ground that “the regulation of the trade with other provinces is no mere incident of a scheme for controlling local trade; it is of the essence of the statute and of the object and character of the Committee's activities.” Although this passage could be said to reflect the distinction between matters to which the legislation relates and matters which are merely incidentally affected by it, it may also be seen as a rejection in this

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111 Id. at 370.
112 See B. Schwartz, A Commentary on the Constitution of the United States (New York: MacMillan Co., 1963) Part 1 at 192: “Under the Shreveport doctrine, the reach of the commerce power includes the regulation of any intrastate transactions that have become so interwoven with interstate commerce that their regulation may be deemed necessary or proper for the effective control of interstate commerce.”
case of ancillary or necessarily incidental power as a basis for extending provincial jurisdiction to the extra-provincial aspects of trade and commerce.

What has been the fate of Duff's definition of the trade and commerce power? On the whole, it has stood up better than his summation on the general power. It has continued to be treated with respect, and has turned out to be much more of a "locus classicus" than his statement of the law concerning the general power. There have, however, been suggestions of new departures.

In the Ontario Farm Products Marketing case,\textsuperscript{115} which concerned the validity of provincial marketing legislation, the Court was required by the reference to assume that the statute was directed to intra-provincial transactions only. It was necessary, however, for the Court to indicate what this assumption implied concerning the nature of the transactions covered by the Act. The question was whether a transaction that took place wholly within a province was always and necessarily one within provincial jurisdiction to regulate intra-provincial trade and commerce. Four of the seven judges who addressed themselves to this question appeared to proceed on the assumption that to fall within provincial jurisdiction the transaction must involve products to be consumed in the province. There were varying expressions of when a product, although the subject of a transaction that takes place wholly within the province, may nevertheless be considered to be part of extra-provincial trade and commerce. They appeared to conclude that the place of ultimate consumption of the product, whether in original or processed form, determined whether it fell within intra-provincial or extra-provincial trade. Kerwin C.J. spoke of a product entering the "flow" of extra-provincial trade and commerce in the following terms:

\begin{quote}
... Once an article enters into the flow of interprovincial or external trade, the subject-matter and all its attendant circumstances cease to be a mere matter of local concern.\textsuperscript{116}
\end{quote}

Rand J., after acknowledging the authority of Duff's definition of the distribution of the trade and commerce power in the Natural Products Marketing case and the Judicial Committee's approval of his judgment in the Eastern Terminal case to the "effect that Dominion regulation cannot embrace local trade merely because in undifferentiated subject-matter the external interest is dominant", expressed the following opinion, also suggestive of the "flow" of trade concept:\textsuperscript{117}

\begin{quote}
... if in a trade activity, including manufacture or production, there is involved a matter of extra-provincial interest or concern its regulation thereafter in the aspect of trade is by that fact put beyond Provincial power.
\end{quote}

Locke J., with whom Nolan J. concurred, indicated that it was a necessary assumption of his conclusion in favour of validity that the Act did not extend to "sales of produce where the producer himself ships his product to other Provinces or countries for sale by any means of transport, or sells his product

\begin{footnotes}
\footnotemark\footnotetext{115}{Reference re The Farm Products Marketing Act, R.S.O. 1950, c. 131, as amended, [1957] S.C.R. 198.}
\footnotemark\footnotetext{116}{Id. at 205.}
\footnotemark\footnotetext{117}{Id. at 210.}
\end{footnotes}
to a person who purchases the same for export." He would also exclude products which were processed before export from the province. He assumed for purposes of validity that intra-provincial transactions consisted of "purchases and sales of the controlled product, whether hogs, fruit or vegetables in their natural form, for consumption in the Province, and sales to processors, manufacturers or dealers proposing to sell such products, either in their natural form or after they have been processed by canning, preserving or otherwise treating them, for consumption within the Province."

The other three members of the Court who discussed this question, Taschereau, Fauteux and Abbott J.J., rejected the notion that the ultimate destination of a product for purposes of consumption, whether in original or processed form, should determine whether it falls within intra-provincial or extra-provincial trade and commerce.

Fauteux J. expressed himself on this point as follows:

... The suggestion that to be intra-provincial a transaction must be completed within the Province, in the sense that the product, object of the transaction, must be ultimately and exclusively consumed or sold for delivery therein for such consumption, is one which would, if carried to its logical conclusion, strip from a Province its recognized power to provide for the regulation of marketing within such Province....

And Abbott J. said:

The power to regulate the sale within a Province of specific products, is not, in my opinion, affected by reason of the fact that some, or all, of such products may subsequently, in the same or in an altered form, be exported from that Province, unless it be shown, of course, that such regulation is merely a colourable device for assuming control of extraprovincial trade.

Neither Kerwin C.J., nor Rand J., were very precise as to when they thought a product should be deemed to be in the flow or current of extra-provincial trade. While the language used by them suggested a more flexible or dynamic approach to the distinction between intra-provincial and extra-provincial trade and commerce it has never been made the basis of an actual determination by the Supreme Court of Canada. There is much to suggest they were merely concerned to emphasize that a transaction within the province might involve an object of extra-provincial trade. The reference by Rand J. to the Lawson case, as exemplifying the principle he was affirming, suggests that what he chiefly had in mind were transactions within the province which contemplated export. But both Kerwin C.J. and Rand J. emphasized the difficulties of determining where jurisdiction should lie to regulate operations affecting products of which some are destined for intra-provincial and some for extra-provincial trade. The difficulties were summed up by Rand J. as follows:

It follows that trade regulation by a Province or the Dominion, acting alone, related to local or external trade respectively, before the segregation of products or manufactures of each class is reached, is impracticable, with the only effective means

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118 Id. at 231.
119 Id.
120 Id. at 256.
121 Id. at 264.
122 Id. at 214.
open, apart from conditional regulation, being that of co-operative action; this, as in
some situations already in effect, may take the form of a single board to administer
regulations of both on agreed measures.

In effect, this was the conclusion to which Duff had come.

The test of ultimate destination for use appeared to receive a check in the Carnation case, in which it was held that a provincial marketing scheme which fixed the price of milk to a condensed milk producer who sent most of it out of the province for processing was not a regulation of extra-provincial trade and commerce. The court based itself on the distinction which Duff had emphasized in the Gold Seal case between legislation in relation to a matter and legislation affecting a matter. The legislation was directed to fixing the price of the sale of milk for delivery within the province. The effect of such price-fixing on the extra-provincial trade in the processed product of such milk was merely an incidental effect. The ultimate destination or "flow" concept could conceivably have been applied to this case to invalidate the provincial legislation, since the milk was known to be purchased with the intention of export, but it would have prevented the realization of a highly desirable provincial legislative purpose — the protection of farmers from exploitation by a large customer.

The Carnation case must be held to be an affirmation that the test is the extent of the movement contemplated by the transaction of sale, and not the ultimate destination of the product. This becomes the basis for provincial jurisdiction. That jurisdiction is not affected by the incidental or consequential effects which the provincial regulation may have on the flow or current of extra-provincial trade and commerce into which that product, or some by-product thereof, may ultimately pass as a result of subsequent transactions or operations. Leaving the character of a particular transaction operation or movement in goods to be determined by ultimate destination or the significance of ultimate effects on the extra-provincial market in such goods would leave provincial jurisdiction with a wholly uncertain basis. Consideration of the effects on extra-provincial trade and commerce is relevant in attempting to determine whether the provincial legislation intends or is aimed at such effects, but such effects cannot by themselves, regardless of legislative purpose, be allowed to give the legislation its essential character for purposes of jurisdiction. It may be argued that legislative purpose or object should be of little consequence, that it is effects that matter, and that the constitution should be regarded as permitting certain results to be achieved by provincial legislation and certain results by federal legislation. But the constitution is not really concerned with specific legislative results except insofar as they reflect general legislative concerns or purposes. It is concerned with the distribution of jurisdiction to pursue a variety of legislative purposes in broad areas of constitutional responsibility. Except insofar as effect may throw light on the area of legislative concern that is truly in contemplation it only becomes material in the case of operational conflict with valid federal legislation. No matter how great the effect, if it be incidental or consequential, it cannot give the legislation its character for purposes of jurisdiction. If it be the immediate, direct and intended

effect of the legislation, then it is certainly an important, and often the most important, factor in determining that character. The concept of ultimate destination, of ultimate relationship to the flow or current of extra-provincial trade as the criterion of distinction, would make provincial jurisdiction in the field of trade and commerce a wholly precarious and vulnerable one. The concept of the movement contemplated by the transaction or operation which is the object of the regulation, although not free from practical difficulties in some cases, gives provincial jurisdiction some reasonable basis on which to fasten.

This view, which is affirmed in the Carnation case, is not inconsistent with the later decisions of the Supreme Court of Canada in the Manitoba Egg and Poultry\(^{125}\) and Burns Food\(^{126}\) cases, in which provincial marketing legislation was held to be invalid on the ground that it was aimed at interference with the transactions by which products were to be imported into a province. Neither of these decisions suggested that provincial regulation could not validly deal with subsequent transactions in such products on the ground that once in the extra-provincial flow or current of trade they could not be dealt with thereafter as articles of intra-provincial trade. But it is a clear implication of the decisions that they could not be dealt with in respect of subsequent transactions within the province in such a manner as to have an intended effect, adverse or otherwise, on extra-provincial trade and commerce.

Much significance seems to have been attached by commentators to the decision of the Supreme Court of Canada in the Murphy\(^{127}\) case, as suggesting a more favourable judicial attitude to the federal trade and commerce power. I confess to being unable to perceive its special significance in this regard. The legislation in question—the Canadian Wheat Board Act\(^{128}\)—was expressly directed to the regulation of the extra-provincial trade in grain, and this was sufficient to support its validity. The decision in favour of its valid application to a particular transaction—a shipment by an individual in the poultry business of grain from one province to another for use in his business—did not depend on the application of the doctrine of ancillary or necessarily incidental power or on the view that the grain trade as a whole must be considered to be extra-provincial. The most that might be said is that it suggested the Court was prepared to take a fairly broad view of what would constitute an inter-provincial shipment coming under the regulation of the Act. The decision held that the regulation imposed by the Act was not in violation of section 121 of the B.N.A. Act requiring that trade between the provinces be free of impediments in the nature of inter-provincial tariff barriers. There were also dicta implying the general validity of the legislative scheme as a whole, including regulation of the delivery to elevators and mills of grain, some of which might be for intra-provincial consumption. The regulation of the elevators and mills, although not in issue in the case was presumed to rest, insofar as my inference is to be drawn on this aspect from the dicta, on their having been brought under exclusive


\(^{128}\) R.S.C. 1952, c. 44.
federal jurisdiction by a declaration that they were works for the general advantage of Canada, in accordance with the suggestion that Duff had made in the Eastern Terminal case.

Perhaps the general significance of the decision in the Murphy case for those who have looked for an enlargement of the federal trade and commerce power is in its apparent contrast with the decision in the Eastern Terminal case. Whereas the Eastern Terminal case raised serious questions about Parliament's power to deal effectively with the grain trade, the Murphy case suggested that all such doubts had been removed. The difference lay not in a change of doctrine in the ensuing years concerning the scope of the federal trade and commerce power but in the consequences that flowed, in effective power to regulate transactions that might otherwise have been considered within provincial jurisdiction, from the declaration that all elevators and mills involved in the grain trade were works for the general advantage of Canada. The Murphy case did not hold or imply, contrary to Eastern Terminal, that the intra-provincial aspects of trade in which there was a substantial or dominant extra-provincial interest might on that ground alone be brought under federal jurisdiction. In fact there was no reference to the Eastern Terminal case.

On the other hand, the Klassen case, a decision of the Manitoba Court of Appeal shortly after Murphy, did represent an important departure, if not in the formulation of doctrine, at least in its application to the federal trade and commerce power. The issue in the Klassen case was whether the regulations under the Canadian Wheat Board Act respecting delivery of grain to a feedmill validly applied to the delivery of grain to be used entirely for intra-provincial consumption. The Court held that they did, not on the basis of the declaration that the feed mill was a work for the general advantage of Canada (the validity of which the Court declined to pronounce on), but on the basis of ancillary or necessarily incidental power. This doctrine was applied with a considerable touch of irony, since the Court invoked the words "and such ancillary legislation as may be necessarily incidental to the exercise of such powers" included by Duff in his definition of the federal trade and commerce power in the Natural Products Marketing case, but without reference to the Eastern Terminal decision.

Although in the Klassen case the Court need not have relied on the doctrine of ancillary or necessarily incidental power, in view of the declaration that feed mills were works for the general advantage of Canada, its application to the facts of that case appears to have been an eminently logical and reasonable one, and in retrospect the decision of Duff in the Eastern Terminal case appears to have been misguided. The queuing system, which, as Rand J. pointed out in the Murphy case, is an essential element of the regulation of the grain trade, cannot work effectively unless all producers who are using the facilities for storage and movement of grain are required to submit to it. This necessarily involves regulation of the movement of intra-provincial trade in grain so long as it uses facilities that are necessary to the movement of the extra-provincial trade. Such regulation is truly ancillary; it is not directed to the regulation of intra-provincial

trade in and for itself, but solely to the extent necessary to make federal regulation of the extra-provincial trade effective. But as Duff perceived in the *Eastern Terminal* case, what is necessarily involved is the assumption of a substantial jurisdiction to regulate intra-provincial trade. This is precisely because of the difficulty, in the marketing of natural products, of segregating products in intra-provincial trade from those in extra-provincial trade. The logic of the facts, as expressed in the doctrine of ancillary or necessarily incidental power, is to attempt to extend the jurisdiction over the whole field. On the basis of necessity, a claim can be made for plenary jurisdiction. It was Duff's perception of these implications that led him to decline to allow the doctrine of ancillary or necessarily incidental power as the solution to the problems of divided jurisdiction.

This view seems to be reflected in the decision of the Supreme Court of Canada in the *Burns Food* case. There the issue was whether a province, as part of a marketing scheme designed to maximize the returns to hog producers from sales to meat packers for processing, could validly require that shipments of hogs into the province should submit to the scheme. The legislation provided that hogs could not be slaughtered for processing unless they had been purchased through the provincial marketing board, and the issue was whether this provision could be validly applied in respect of hogs that had been imported from another province. The Manitoba trial court and Court of Appeal held that the legislation could validly have such application on the ground that the effect on the extra-provincial trade in hogs was purely an incidental one, and that the legislation was not aimed at a regulation of such trade. The Manitoba Courts did not attempt to rest validity on the notion of ancillary or necessarily incidental power, but rather on the distinction between a matter in relation to which the legislation is enacted and a matter which is merely incidentally affected by it.

There is a distinction between the concept of necessarily incidental power and incidental effect, although the two are sometimes confused in practice. In the case of an exercise of necessarily incidental power the legislation is aimed at the matter or result which is the object of the exercise of such power. Incidental is used here as synonymous with ancillary to express the relationship of a subsidiary or auxiliary basis of jurisdiction to the main power. It is not used, as in the distinction between a matter to which legislation relates and a matter which is incidentally affected by it, to indicate something which is not an intended object of the legislation but merely an unavoidable result of the exercise of power. In one case we are speaking of incidental *power*; in the other of incidental *effect*. In one case we are asking whether there is jurisdiction to pursue a particular legislative purpose on the ground that it is necessary to the effective exercise of the main jurisdiction. In the other case, we are asking whether a particular effect reflects the true legislative purpose, or whether it is merely an extraneous but unavoidable consequence of the pursuit of that purpose.

In the *Burns Food* case the Supreme Court concluded, with Ritchie J. dissenting, that the provincial regulation was aimed at requiring all sales by which hogs were brought into the province for processing to pass through the

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130 The Trial Court judgment is reported at 33 D.L.R. (3d) 207 and that of the Manitoba Court of Appeal at 35 D.L.R. (3d) 581.
Board, that this was the necessary effect of the provision requiring that hogs could not be slaughtered for processing unless they had been purchased through the Board, and that this effect was not an incidental one, but was rather a direct object of the regulation. It had been contended that the provincial scheme could not work effectively to protect producers in the province if shipments from outside the province could circumvent it. But what this contention amounted to is that, if necessary, the province would have to extend its regulation to all extra-provincial trade in hogs for processing in order to make the provincial scheme work. This was the argument which Duff had rejected since its ultimate result would be to transform divided jurisdiction into plenary jurisdiction, and in the Burns Food case the Supreme Court of Canada followed Duff's view, quoting the passage of his judgment (which was adopted by the Judicial Committee) in the Natural Products Marketing case.

The problems with which provincial policy was concerned in the Manitoba Egg & Poultry and the Burns Food cases are to be solved not by judicial extension of provincial jurisdiction but by federal-provincial co-operation, and where necessary or appropriate, by the kind of federal delegation of administrative power to provincial marketing agencies permitted under the formula approved in the Potato Board and Coughlin cases.

In the field of trade and commerce, the Duff adherence to the essential lines and necessary consequences of divided jurisdiction appears to have prevailed. Today the problems have been placed in a new context of urgency by the energy crisis. The issue is how development and marketing policy is to be determined with respect to natural resources on which the whole nation depends. The difficulties are only partially reflected in constitutional issues, and it remains to be seen how far the federal and provincial governments will choose to test the limits of their respective jurisdictions as part of the process of negotiation and adjustment. But to the extent they do, the courts may be called on to consider the relationship between the power inherent in the public ownership of natural resources and the federal responsibility for the regulation of extra-provincial trade and commerce. The issue is whether there are any limitations on the conditions which a province can impose on the use of its natural resources in the exercise of its rights as owner, or whether certain results achieved in this manner may be held to be an invalid interference with extra-provincial trade and commerce such as, for example, conditions in provincial leases determining quantities, destinations and prices of exports.

A more convenient constitutional arrangement than the present one with respect to trade and commerce would undoubtedly be a plenary federal power that would be concurrent or overlapping with a provincial power to regulate intra-provincial trade and commerce. The Federal Government could then intervene in the regulation of intra-provincial trade and commerce with paramountcy in the case of conflict, to the extent necessary to make its regulation of extra-provincial trade and commerce effective. This construction of the distribution of the trade and commerce power was open to the courts at the time of the Parsons case; but it was not one for which they felt they had constitutional warrant, given their historical perception of the importance to be attached to provincial jurisdiction. Duff remained faithful to this perception.
As suggested by his reference to the declaratory power as a solution to specific problems, he would presumably have said that it was for the people to indicate that they desired a change.

6. The Criminal Law Power

Because of the limitations placed by judicial decision on the general power and the trade and commerce power, the federal government has attempted from time to time to find a constitutional basis for essentially regulatory purposes in the criminal law power. In some cases it has been successful, in others not. It has been a question of what the courts have been prepared to recognize as a valid criminal law purpose and a bona fide exercise of the criminal law power. The only limitation on the federal criminal law power is what may be referred to as the doctrine of colourability. The form of the criminal law must not be used as a disguised or colourable attempt to usurp an area of provincial jurisdiction. Whether or not the exercise of the criminal law power is to be deemed a bona fide one is to be judged by reference to whether the purpose or object of the legislation discloses a genuine criminal law concern. Duff applied a firm check to the colourable use of the criminal law power to supply the deficiencies of federal jurisdiction in the Reciprocal Insurers case, in which he delivered the judgment of the Judicial Committee holding that an amendment to the Criminal Code making it an offence to carry on the business of insurance without a federal licence was an invalid attempt by means of the criminal law power to effect a regulatory purpose lying outside federal jurisdiction. Where Parliament has jurisdiction with respect to a particular regulatory purpose it has ancillary power to enforce its legislation by penal provisions. It does not have to rely on the criminal law power for such purpose. But it had been held in the Insurance Reference case that the regulatory purpose—the regulation of the business of insurance within a province—lay beyond federal jurisdiction. In effect, what Duff held in the Reciprocal Insurers case was that the amendment to the Criminal Code was not a bona fide attempt to create the crime of carrying on the business of insurance without a federal licence. Inferentially, this could be taken as a holding that such conduct could not be validly made a crime. It was excluding such conduct from the category of valid criminal law concerns. Duff did not suggest the criterion or hallmark of a valid criminal law concern. In the Board of Commerce case Viscount Haldane had found it necessary, in rejecting the criminal law power as a basis for legislation directed against combines and the hoarding and sale at unfair profits of necessaries of life, to put forward the astonishing proposition that the categories of crime were closed and that, for an exercise of the criminal law power to be valid, it had to relate to conduct which was inherently criminal, or in his words, "which by its very nature belongs to the domain of criminal jurisprudence". (The example of inherently criminal conduct which he gave was incest.) This view, which was later repudiated by the Judicial Committee in the Proprietary Articles case, did not apparently appeal to Duff. He did not, at least, avail himself of it in the Reciprocal Insurers case.

case. Much later, in the Egan case, he was to affirm that the criminal law is “necessarily an expanding field”\textsuperscript{133}

On the whole, he seems to have taken a broad view of the power of Parliament to create new crimes, subject to the reservation against a clearly colourable exercise of such power. The opinion of the Judicial Committee had been too unqualified in the Proprietary Articles case in suggesting that the only test of a valid exercise of the criminal law power was whether there was a prohibition of conduct with penal consequences. In the Reference re Section 498A of the Criminal Code,\textsuperscript{134} Duff had apparently been influenced by this dictum to speak in similarly unqualified terms of the federal power. At one point he said: “The jurisdiction in relation to the criminal law is plenary; and enactments passed within the scope of that jurisdiction are not subject to review by the courts.”\textsuperscript{135} This statement was apparently a slip, and it was seized on in the dissenting judgment of Crocket J. In fact, Duff appears to have merely been observing that there were no limits in theory to the kinds of conduct Parliament could declare to be criminal in a \emph{bona fide} exercise of its criminal law power. That he was not overlooking the doctrine of colourability is indicated by a later passage in his judgment:\textsuperscript{136}

\ldots It is also well settled that the Parliament of Canada cannot acquire jurisdiction over a subject which belongs exclusively to the provinces by attaching penal sanctions to legislation which in its pith and substance is legislation in relation to that subject in its provincial aspects alone. \textit{(In re Insurance Act of Canada)}. \ldots

In the Judicial Committee the dictum in the Proprietary Articles case was given its necessary qualification with reference to the rule against a colourable use of the criminal law power.

Because of his failure to suggest the relationship between the search for true legislative purpose and the nature of the prohibited conduct, Duff’s judgment in the Reciprocal Insurers case, although it is generally cited as a leading authority, is not as helpful on the doctrine of colourability as Rand’s judgment in the Margarine case.\textsuperscript{137} There it was held by the Supreme Court of Canada and the Judicial Committee that a prohibition with penal consequences of the manufacture and sale of margarine within a province was an attempt to interfere with intraprovincial trade and commerce (the protection of dairy farmers from the competition of butter substitutes) rather than a \emph{bona fide} exercise of the criminal law power. While referring to the common criminal law concerns in terms which were not intended to be limitative — “Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law \ldots”\textsuperscript{138} — Rand emphasized that in determining whether legislation that is in criminal law form has a \emph{bona fide} criminal law purpose one must look at the supposed “evil” to which it is directed. The conclusion against validity in the Margarine


\textsuperscript{135} \textit{Id.} at 366.

\textsuperscript{136} \textit{Id.} at 367.


\textsuperscript{138} \textit{Id.} at 50.
case was based on a combination of two factors: margarine was admitted not to constitute a hazard to health, and the legislation was clearly concerned with the protection of dairy farmers from competition. Thus, in the final analysis, as Duff perceived in the Reciprocal Insurers case, the issue is not whether particular conduct is appropriate for criminal law prohibition, but whether the criminal law form is being used to pursue an ultra vires legislative purpose. At the same time, as Rand emphasized in the Margarine case, the nature of the prohibited conduct is necessarily an important consideration in reaching a conclusion on this issue.

Duff also had something significant to say with respect to provincial power to prohibit conduct with penal consequences. There is much to suggest that he regarded the criminal law power in Canada as essentially a concurrent one. While provincial jurisdiction under section 92(15) of the B.N.A. Act to impose punishment in the form of imprisonment, fine and other penalty for the enforcement of otherwise valid legislation is an ancillary one, the scope of the regulatory jurisdiction under the other heads in section 92 — particularly head 13 with respect to property and civil rights — is such as to give the provinces a very large sphere for the prohibition of conduct with penal consequences. The prohibition itself must rest on some head of jurisdiction other than 92(15), which merely provides for the imposition of penalties, but the human activity covered by the other heads of jurisdiction in section 92 encompasses a very substantial amount of what can also be brought within the scope of the federal criminal law. Duff emphasized this reality of concurrent or overlapping criminal law powers in Reference re Section 498A of the Criminal Code in the following passage:139

... When it is said that "criminal law" in section 91(27) is criminal law in its widest sense, it is not meant that by force of section 92, including subdivision 15 of that section, the provinces have no power to pass enactments which would fall within the scope of the "criminal law", as that phrase would ordinarily be understood as applied to the enactments of a legislature possessing a general competence in relation to criminal law. People in Canada are familiar with a network of prohibitions and regulations, the violation of which is punishable by fine, and sometimes by imprisonment, under municipal bylaws passed under the authority of provincial legislative measures. It has been held in many cases that prohibitions enforceable by fine and imprisonment enacted by the provincial legislatures may be valid enactments under section 92. Notable instances are the prohibitions enacted under the local option law of Ontario which was in question in A.G. for Ont. v. A.G. for Dominion... and the conditional and qualified prohibitions enforceable in the same way which were upheld in Hodge v. The Queen... Then there are the groups of provincial statutes passed under the authority of section 92(1) dealing with the disqualification of voters; the disqualification of persons elected to sit and vote as members of the provincial legislatures; in which offences are created punishable by fine and imprisonment. These enactments which, in part at least, have the purpose of securing public order, and protecting the integrity of the representative system in the provinces, would, as I have said, fall within almost any definition of criminal law.

The question is what, if any, are the important limitations on provincial penal jurisdiction resulting from the existence of the federal criminal law power. The most important areas that have been placed by judicial decision beyond provincial reach have been prohibitions in the interests of public morality and prohibitions restricting fundamental freedoms, notably freedom of speech.

Because of the important differences in local or regional attitudes on the

various matters that make up the field of public morality, these matters might well have been recognized as appropriate for determination by provincial law on the basis of "local option". Indeed, the principle of "local option" is reflected in federal legislation with respect to liquor prohibition and Sunday observance. There is, however, no general basis in section 92 of the B.N.A. Act for provincial legislation with respect to public morality. "Civil rights", interpreted in a large enough sense to encompass freedom generally, would extend too far and give the provinces power to determine the scope of political freedoms, on which national and not local attitudes and values must prevail.

In the case of Bedard v. Dawson, in which it was held that a province could validly provide for the closing of a disorderly house following conviction under the Criminal Code, Duff suggested a broad basis for provincial penal jurisdiction in this area in the notion of power to suppress conditions conducive to crime. His entire opinion in this case was as follows:

The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the provinces seem to be free to legislate. I think the legislation is not invalid.

This notion appears to have some affinity to the concept of "police regulations", which was suggested as a basis for the provincial liquor legislation in the Hodge case and which was invoked by Cartwright J. (as he then was) in the Saumur case. The weight of opinion has not rallied to these ideas as a basis for provincial penal jurisdiction. The notion of a provincial power to suppress conditions conducive to crime has encountered the observation that the federal criminal law power also has a preventive as well as a remedial aspect. The idea of a provincial police power has never been clearly defined in relation to the criminal law power.

Attempts, invoking Bedard v. Dawson, to support provincial legislation relating to gambling and obscenity on the basis of a regulation of property have failed. The rationale of Bedard v. Dawson which has emerged from subsequent judicial commentary is that it was a true exercise of provincial jurisdiction to protect the property interests of neighbouring owners. This bona fide provincial legislative concern was none the less valid because the legislation also served an interest of public morality. What has survived from Bedard v. Dawson is the idea of suppression of nuisance for the protection of the enjoyment of property.

It was in its encounter with the value of free speech that the case was reduced to these proportions by the Supreme Court of Canada. Bedard v. Dawson was unsuccessfully invoked in the Switzman case to support the validity of the Quebec "Padlock Act", which provided for the closing of property used

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341 Id. at 684.
342 Hodge v. The Queen (1883-84), 9 A.C. 117 at 131 and 133.
for communist propaganda. Taschereau J. (as he then was), dissenting, relied on Duff's idea of a provincial power to suppress conditions conducive to crime, but the majority of the court allowed it to drop into limbo. In quoting from the judgments in Bedard v. Dawson to support the conclusion that the Court was there concerned with a public nuisance in "its repugnant or prejudicial effect upon the neighbouring inhabitants and properties", Rand J. made no reference to or commentary upon Duff's notion of the suppression of conditions conducive to crime, although in the earlier Johnson case, concerning provincial legislation to suppress slot-machines he had made a brief allusion to it in the following terms: "... that it [the province] may deal with conditions that conduce to the development of crime where what is proposed is in fact legislation of that character and infringes no legislative field beyond its jurisdiction though undoubted is not in question here." It is fair to say that this notion, as an independent basis for provincial penal legislation, has gradually been laid to rest.

In any event, whatever scope Duff may have been prepared to concede to provincial penal jurisdiction in the field of public morality, it is clear that he would have drawn the line at interference with the political freedoms necessary to the operation of the federal electoral and parliamentary system. This is the necessary conclusion from his famous judgment in the Alberta Press case, which is the subject of commentary in the next section.

One of the most important developments in Canadian constitutional law in the last twenty-five years or so has been the increasing recognition of the valid co-existence and concurrent operation of provincial penal provisions which have a solid basis in regulatory jurisdiction with similar or overlapping criminal law prohibitions. This development has been most marked in the field of highway traffic offences, although it has not been confined to this field. What has been involved is the extent to which the existence and exercise of the federal criminal law power may inhibit provincial regulatory jurisdiction by rendering invalid or inoperative provincial prohibitions with penal consequences or other restrictive measures, such as licence suspension, deemed necessary for the enforcement of provincial laws. The question was considered by Duff in the Egan case, where the issue was the relationship between a provision of the Criminal Code empowering a court of justice to prohibit a person from driving a motor vehicle anywhere in Canada for a period up to three years upon a conviction for driving while intoxicated and a provision in a provincial Highway Traffic Act for automatic cancellation of a person's driving licence upon such a conviction for a period of twelve months in the case of a first offence. The court held that there was no question that the province had authority to enact such a provision in the exercise of its jurisdiction to regulate highway traffic, and that such automatic suspension of a driver's licence upon conviction under the Criminal Code was not an additional criminal law penalty but a valid condition of the right to enjoy a provincial licence. It was characterized (with allusion to Bedard v. Dawson) as a "civil disability arising out of a conviction for a criminal offence".


\(^{142}\) Id. at 414.
The difficult question was whether the federal Parliament, in enacting its own provision for prohibition of the right to drive following conviction, must be deemed to have dealt completely with this consequence, to the exclusion of provincial legislation. For example, a court or justice might decide that a prohibition to drive anywhere in Canada for a period of three months was a sufficient additional penalty. Should that prevent the application of a provincial provision for automatic suspension of the driver’s licence for a longer period in the exercise of its jurisdiction to regulate the use of the highways in the province? The aspect doctrine takes care of the validity of the provincial and federal provisions, but the real question is whether there is such conflict or repugnancy that the rule of paramountcy must be applied in favour of the federal legislation to render the provincial provision inoperative. The Supreme Court of Canada held in the *Egan* case that there was not repugnancy and the provincial provision was not suspended. On the difficult question of what is to constitute repugnancy in such situations Chief Justice Duff said:\(^{149}\)  

> We are here on rather delicate ground. We have to consider the effect of legislation by the Dominion creating a crime and imposing punishment for it in effecting the suspension of provincial legislative authority in relation to matters prima facie within the provincial jurisdiction. I say we are on delicate ground because the subject of criminal law entrusted to the Parliament of Canada is necessarily an expanding field by reason of the authority of the Parliament to create crimes, impose punishment for such crimes, and to deal with criminal procedure. If there is a conflict between Dominion legislation and Provincial legislation, then nobody doubts that the Dominion legislation prevails. But even where there is no actual conflict, the question often arises as to the effect of Dominion legislation in excluding matters from provincial jurisdiction which would otherwise fall within it. I doubt if any test can be stated with accuracy in general terms for the resolution of such questions. It is important to remember that matters which, from one point of view and for one purpose, fall exclusively within the Dominion authority, may, nevertheless, be proper subjects for legislation by the Province from a different point of view, although this is a principle that must be “applied only with great caution.” (*Attorney-General for Canada v. Attorney-General for Alberta...*).  

And again:\(^{150}\)  

In every case where a dispute arises, the precise question must be whether or not the matter of the provincial legislation that is challenged is so related to the substance of the Dominion criminal legislation as to be brought within the scope of criminal law in the sense of section 91. If there is repugnancy between the provincial enactment and the Dominion enactment, the provincial enactment is, of course, inoperative. It would be most unwise, I think, to attempt to lay down any rules for determining repugnancy in this sense. The task of applying the general principles is not made less difficult by reason of the jurisdiction of the provincial legislatures under the fifteenth paragraph of section 92 to create penal offences which may be truly criminal in their essential character. (*The King v. Nat. Ball Liquors Ltd. . . .* and *Nadan v. The King. . . .*)

What is suggested here is a theory of the pre-emptive effect of an exercise of the criminal law power in relation to provincial penal provisions that would otherwise be valid. This was the theory advanced by Cartwright J. (as he then was) in his dissent in *O'Grady v. Sparling*\(^{151}\) as follows:

> In my opinion when Parliament has expressed in an Act its decision that a certain

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\(^{149}\) Id. at 401.  
\(^{150}\) Id. at 402.  
kind or degree of negligence in the operation of a motor vehicle shall be punishable as a crime against the state it follows that it has decided that no less culpable kind or degree of negligence in such operation shall be so punishable. By necessary implication the Act says not only what kinds or degrees of negligence shall be punishable but also what kinds or degrees shall not.

The majority of the Court held that the provincial offence of careless driving could validly co-exist with the federal offence of criminal negligence in the operation of a motor vehicle for not only were they enacted from different aspects but they were not co-extensive in effect. As Judson J., who delivered the judgment of the majority, put it:152 "... the two pieces of legislation differed both in legislative purpose and legal and practical effect, the provincial Act imposing a duty to serve bona fide provincial ends not otherwise secured and in no way conflicting with s. 221 (2) of the Criminal Code."

This approach to conflict or repugnancy was applied again in the somewhat similar case of Mann v. The Queen,153 in which it was held that the provincial careless driving provision could validly co-exist with the federal offence of dangerous driving. In this case, Cartwright J. (as he then was) abandoned the pre-emptive approach and ruled in favour of the valid operation of the provincial provision. He found an important difference between the two provisions in the requirement of criminal intent for the federal offence. What this case suggested is that in the interests of a full and uninhibited penal power in the exercise of provincial regulatory jurisdiction with respect to highway traffic the Court would be prepared, if necessary, to recognize the valid co-existence of virtually identical provisions. The problem of double jeopardy was to be left to the good sense of the provincial administration of justice which is responsible for enforcement of the Criminal Code as well as provincial highway traffic legislation.

Perhaps in anticipation of the ultimate development of operational concurrency in the relationship between provincial regulatory jurisdiction and the federal criminal law power, Martland J., in the earlier Smith case,154 had formulated a narrower test of repugnancy that would permit the valid co-existence of identical penal provisions. It was a test derived from what had been said by Duff in the Egan case, as the following passage indicates:155

The test to be applied in cases of this kind is that which was stated by Duff C.J., in The Provincial Secretary of the Province of Prince Edward Island v. Egan . . . :

In every case where a dispute arises, the precise question must be whether or not the matter of the provincial legislation that is challenged is so related to the substance of the Dominion criminal legislation as to be brought within the scope of criminal law in the sense of section 91. If there is repugnancy between the provincial enactment and the Dominion enactment, the provincial enactment is, of course, inoperative.

For the reasons already given, I do not think that the matter of the provincial legislation in question here is so related in substance to s. 343 of the Criminal Code as to be brought within the scope of criminal law in the sense of s. 91 of the British North America Act. I do not think there is repugnancy between s. 63 (1) (d) and (e) of The Securities Act and s. 343 of the Criminal Code. The fact that both provisions prohibit

152 Id. at 812.
155 Id. at 800.
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Certain acts with penal consequences does not constitute a conflict. It may happen that some acts might be punishable under both provisions and in this sense that these provisions overlap. However, even in such cases, there is no conflict in the sense that compliance with one law involves breach of the other. It would appear, therefore, that they can operate concurrently.

Thus Martland J. derived from Duff's test for repugnancy in the Egan case — "so related to the substance of the Dominion criminal legislation as to be brought within the scope of the criminal law in the sense section 91" — the idea of nullification rather than pre-emption. This narrower test of repugnancy has not yet been adopted by a majority of the Court, although the Mann case would suggest that the Court has been moving inevitably towards it.

The issue of nullification came squarely before the Court in the Ross and Bell cases,156 and the decisions suggest that operational concurrency in the highway traffic field has been conceded to the extent of a virtual suspension of the rule of paramountcy. In these cases the issue was the relationship between provincial legislation providing for the automatic suspension for a continuous period of a driver's licence in the event of conviction for a driving offence under the Criminal Code and a provision of the Criminal Code empowering a court or justice in a case of such conviction to prohibit the offender from driving a motor vehicle "at all times or at such times and places as may be specified in the order"157 — or in other words permitting the suspension of the right to drive for an intermittent period. The purpose of giving a court or justice this discretion is to permit the suspension of the right to drive without preventing the offender from earning his livelihood. The issue in the cases was whether this purpose of the federal legislation was frustrated or nullified by the automatic suspension for a continuous period under provincial law. The majority of the Court held that there was no repugnancy between the federal and provincial provisions. Pigeon J., who delivered the judgment of the majority, relied on the Egan case, which he referred to as having dealt with "a substantially similar question."158 It is true that in that case the automatic suspension under provincial law could have been for a longer period than the prohibition to drive imposed in a sentence under the Criminal Code; but the provincial suspension would not have nullified the operation of the latter. The difficulty in assimilating the situation in the Ross and Bell cases to that in the Egan case is reflected in the following passage from the judgment of Pigeon J. in the Ross case:159

... in terms, the Criminal Code merely provides for the making of prohibitory orders limited as to time and place. If such an order is made in respect of a period of time during which a provincial licence suspension is in effect, there is, strictly speaking, no repugnancy. Both legislations can fully operate simultaneously. It is true that this means that as long as the provincial licence suspension is in effect, the person concerned gets no benefit from the indulgence granted under the federal legislation. But, is the situation any different in law from that which was considered in the Egan case, namely, that due to the provincial legislation, the right to drive was lost by

reason of the conviction, although the convicting magistrate had made no prohibitory order whatsoever?

The answer of the majority opinion was, of course, no, but it did not deal directly and explicitly with the issue of whether provincial law should be permitted to frustrate the realization of the federal purpose, namely, that the consequences of a criminal conviction for a driving offence should not, where the convicting court or justice thinks fit, so remove the right to drive as to prevent the offender from earning his livelihood. What the court held in effect is that the right to drive, in relation to the right to earn a livelihood, is an overriding provincial concern: in other words, that this is a legislative purpose to which the rule of paramountcy in favour of federal legislation does not apply. The majority decision suggests that not only has the application of the aspect doctrine in the field of highway traffic offences converted mutual exclusivity into operating concurrency, but it has attenuated, if not suspended, the rule of paramountcy itself.

The minority, consisting of Judson and Spence JJ., held that there was repugnancy rendering the provincial provision inoperative in the Ross case but not in Bell. In the Ross case there had been a prohibitory order under the Criminal Code permitting intermittent driving. In the opinion of the minority, the automatic suspension of the driving licence for a continuous period under provincial law had to give way. In the Bell case there had been no order at all under the Criminal Code prohibiting the offender from driving. Such a case, the minority held, was governed by the Egan decision; there was no repugnancy. In other words, the provincial provision is only suspended in its operation to the extent that it actually comes into conflict with the exercise of the discretion given by the Criminal Code to permit intermittent driving. It is operational conflict or repugnancy and not possible conflict on the face of the statute book that is the test. There are other exercises of the discretion to make an order prohibiting an offender from driving a motor vehicle in Canada “at all times or at such times and places as may be specified in the order” with which the provincial provision would not be in conflict. Thus, even the minority opinion reflects how far the courts are prepared to go to sustain the concurrent operation of provincial penal provisions which are closely related to matters that are dealt with by the criminal law.

Compliance with the provincial provision did not involve violation of the federal provision, or of a prohibitory order permitting intermittent driving under it, within the meaning of the test suggested by Martland J. in the Smith case. The question, however, was whether the provincial provision nullified a purpose of the federal provision — namely, to permit intermittent driving in a case in which some prohibition was considered desirable. Such a notion of nullification is closely related to, if not indistinguishable, from the idea of a pre-emptive exercise of the Criminal law power: that Parliament may not only indicate what conduct is to be prohibited with penal consequences, but what conduct is to be permitted and thus may not be prohibited. This is the notion which the Court as a whole appeared to put aside in the O'Grady and Mann cases, with Cartwright J., its chief exponent eventually abandoning it himself. It is a view that ignores the difference in aspect between federal criminal law and provincial penal provisions, and regards the field of criminal law as essentially a concurrent field, subject to federal paramountcy. The dissenting opinion in the Ross case must
be regarded as a revival of the pre-emptive notion at the level of operational conflict. It appealed, in the opinion of Spence J., to the larger concept of nullification expressed by Rand J. in the Johnson case, which involved conflict between federal and provincial provisions concerning slot-machines:

From this it is seen that the Code has dealt comprehensively with the subject matter of the provincial statute. An additional process of forfeiture by the province would both duplicate the sanctions of the Code and introduce an interference with the administration of its provisions. Criminality is primarily personal and sanctions are intended not only to serve as deterrents but to mark a personal delinquency. The enforcement of criminal law is vital to the peace and order of the community. The obvious conflict of administrative action in prosecutions under the Code and proceedings under the statute, considering the more direct and less complicated action of the latter, could lend itself to a virtual nullification of enforcement under the Code and in effect displace the Code so far by the statute. But the criminal law has been enacted to be carried into effect against violations, and any local legislation of a supplementary nature that would tend to weaken or confuse that enforcement would be an interference with the exclusive power of Parliament.

This broad notion of nullification — including possible administrative embarrassment arising out of the choice between overlapping provisions involving different degrees of penalty — would also appear to have been set aside in the O'Grady and Mann cases. (It must be observed that in the Johnson case three members of the Court rested their case against the provincial provision on the ground it was invalid as an invasion of criminal law and not merely rendered inoperative by conflict with the federal provision, and Rand J., while content to rest his opinion on the basis of repugnancy, clearly indicated that he would also have found the provision ultra vires, if necessary).

It is surprising that in neither the majority nor the minority opinions in the Ross and Bell cases is there any reference to the decision of the Supreme Court of Canada in the Breathalyzer case, where the issue of nullification was in certain respects a closer analogy than the one in the Egan case. In the Breathalyzer case the issue was whether provincial legislation providing for the suspension of a driver's licence when, being suspected of driving while under the influence of intoxicating liquor, he refused to give a sample of his breath, was repugnant to a provision of the Criminal Code that a person was not required to give a sample of his breath "for the purposes of this act", and these words were emphasized by the majority of the Court (for whom Fauteux J., as he then was, delivered the principal opinion) in holding that there was a clear intention not to limit the operation of provincial law.

The majority contended further that the provincial provision did not create an obligation to give a sample of breath, in direct conflict with the federal pro-

vision, but merely attached the consequences of suspension of a driver’s licence to the failure to do so. The minority, consisting of Locke, Cartwright and Martland J.J., held that the direct effect of the provincial provision was to nullify throughout the province of Saskatchewan the federal provision that a person was not required to give a sample of his breath when requested to do so in the course of enforcement of the Criminal Code. The consequence of suspension of a driver’s licence under the provincial provision was regarded as a statutory compulsion amounting to a requirement to give a sample of breath. As Cartwright J., (as he then was) put it: “I am of opinion that a statute declaring that a person who refuses to do an act shall be liable to suffer a serious and permanent economic disadvantage does ‘require’ the doing of the act. With deference to those who hold a contrary view, it appears to me to be playing with words to say that a person who is made liable to a penalty (whether economic, pecuniary, corporal or, I suppose, capital) if he fails to do an act is not required to do the act because he is free to choose to suffer the penalty instead!” Martland J., who agreed with Cartwright J., emphasized, like him, that the federal and provincial provisions contemplated the same circumstances: a person suspected of driving while intoxicated or driving while impaired, contrary to the Criminal Code, is requested to give a sample of his breath but refuses to do so. The federal provision says that he is not required or obliged to do so, and his refusal to do so cannot be used in evidence against him. The provincial provision says that if he refuses to do so his driver’s licence may be suspended. It was Martland J.’s conclusion that “The two legislations therefore meet and the provisions of the Criminal Code must prevail.” This was not a case, to use the words of Martland J. in the Smith case, of compliance with the provincial law involving violation of the federal provision. It was, if anything, the reverse. Conduct that complied with the federal law could involve violation of what amounted to a provincial prohibition of refusal to give a sample of breath, upon pain of losing one’s driver’s licence. Martland J., distinguished the Egan case on the ground that “the statutory provision in question in the Egan case only became applicable after there had been a conviction under the Criminal Code.” The implication is that it did not conflict with the application and operation of the Criminal Code provision. There was not in the federal provision which applied in the Egan case any suggestion that Parliament had some purpose that might be defeated by an automatic suspension of the driver’s licence for a continuous period under the provincial law. At most there might be an overlapping of periods covered by a prohibition to drive under the Criminal Code and an automatic suspension of a driver’s licence within the province. It would require an application of the pure pre-emptive theory — that Parliament must be deemed to have intended that the right to drive should not be prohibited as a consequence of criminal conviction beyond the limits set by a sentence under the Criminal Code — in order to find conflict or repugnancy. While the language used by Duff in the Egan case — “But even where there is no actual conflict, the question often arises as to the effect of Dominion legislation in excluding matters from provincial jurisdiction which would otherwise fall within it” and “whether

102 Id. at 622.
103 Id. at 624.
104 Id.
Duff and the Constitution

or not the matter of the provincial legislation that is challenged is so related to the substance of the Dominion criminal legislation as to be brought within the scope of the criminal law in the sense of section 91" — left room for application of the pre-emptive theory, he allowed the issue to be ruled by the aspect doctrine. The extent of the operational concurrency that has been permitted in the relationship between federal criminal law and provincial penal provisions reflects what is probably the fullest application of this doctrine in constitutional interpretation.

There can be little doubt that Duff, with characteristic vision, foresaw the necessity of this development if the exercise of the criminal law power was not to render provincial regulatory jurisdiction uncertain and capable of stultification. It is implied in his words, "I say we are on delicate ground because the subject of criminal law entrusted to the Parliament of Canada is necessarily an expanding field . . . ." The result of this development, now brought to its farthest point by the majority decision in the Ross and Bell cases, is that only operational nullification in a very narrow sense — as, for example, where the requirements of provincial law compel an act that constitutes a violation of a federal provision — is likely to be found to be a repugnancy. An exercise of the criminal law power will not be construed as limiting the extent to which a provincial legislature may attach regulatory consequences to a criminal law conviction, since this would be to confuse federal and provincial aspects. The Egan case, like so many others, reflects Duff's concern with viable working relationships between the two spheres of jurisdiction.

7. The Protection of Fundamental Freedoms

Probably Duff's most celebrated judicial statement was his elaboration, in Re Alberta Statutes\(^{165}\) of what has come to be known as the "implied bill of rights". It is the concept that the federal parliamentary system depends for its effective operation on the existence and expression of certain political freedoms, such as freedom of the press and freedom of public discussion, and that provincial legislatures cannot validly interfere with these freedoms in such a manner as to impair the operation of the federal parliamentary system. It is an idea derived from the assumption implicit in the preamble and various provisions of the B.N.A. Act that the basis of the Canadian political system is to be a democratically elected parliamentary government operating in a climate of free public discussion. The provincial legislation in issue in Re Alberta Statutes provided for a control and management of the press in the interests of a favourable treatment of social credit policy. Duff held that the bill was \emph{ultra vires} because it fell as an ancillary part of the main social credit legislation; but he also suggested that it might be held to be invalid as an interference with the political freedoms essential to the federal parliamentary system. (He did not actually hold it to be \emph{ultra vires} on this ground.) It should be observed that Duff was not the only member of the Court to give expression to this idea; there is an equally quotable passage to similar effect in the judgment of Cannon J. The concept, however, has generally been attributed to Duff, and it is his opinion, as a general rule, that has been quoted in subsequent cases. The passage in which he finds an implied bill of

rights in the Constitution, operating as a limitation on provincial legislative power, is as follows:\textsuperscript{166}

Under the constitution established by \textit{The British North America Act}, legislative power for Canada is vested in one Parliament consisting of the Sovereign, an upper house styled the Senate, and the House of Commons. Without entering in detail upon an examination of the enactments of the Act relating to the House of Commons, it can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body; constituted, that is to say, by members elected by such of the population of the united provinces as may be qualified to vote. The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals.

The validity of a provincial interference with freedom of public discussion, operating within an admitted sphere of provincial regulatory jurisdiction, is to be measured by its effect on the federal parliamentary system. It is not any restriction that is to be invalid but that which "effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of \textit{The British North America Act} and the statutes of the Dominion of Canada."

Although this concept has been invoked from time to time by particular judges against the validity of provincial legislation, it has never been the ground of a majority opinion in the Supreme Court of Canada. The reason probably lies not in misgivings about the concept but in the fact that the federal criminal law power has been a sufficient limitation upon provincial authority to interfere effectively with fundamental freedoms. Such interference will usually take the form of a prohibition of conduct with penal consequences, and where that prohibition cannot be reasonably related to provincial regulatory jurisdiction in some field, it will be held to be invalid as an attempt to enact criminal law.

The implied bill of rights was invoked by Rand and Kellock JJ., in the \textit{Saumur} case,\textsuperscript{168} where the issue was whether a by-law of the City of Quebec could validly prevent the Jehovah Witnesses from distributing their literature in the streets of the city. There were other grounds for holding that the by-law could not validly have this effect, in particular, conflict with a pre-Confederation provincial statute affirming freedom of religion. But the implied bill of rights concept was also applied by these judges to the by-law in so far as it interfered with freedom of speech. (The implied bill of rights is necessarily limited to those political freedoms which are essential to the effective operation of the parliamentary system, and would presumably not cover freedom of religion, as such, except to the extent that freedom of speech is necessary for its expression and enjoyment.)

While recognizing that the doctrine, as formulated by Duff, contemplated that

\begin{thebibliography}{99}
\bibitem{Id. at 132-133.} Id. at 132-133.
\bibitem{Id. at 134-135.} Id. at 134-135.
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these political freedoms might necessarily be affected to some extent in the valid exercise of a provincial regulatory jurisdiction, and that the test in such case was the degree of actual interference with them and its consequences for the parliamentary system, Rand J. held that where the provincial interest or concern was not sufficiently identified in the terms of the legislation (or by-law) the provision as a whole must fall. Thus, in Rand's opinion, a by-law conferring a general and unqualified discretion to prohibit the circulation of literature did not sufficiently disclose the relationship between such power and the bona fide provincial regulatory concern with the use of streets to give it any basis of validity whatever. As he put it: 169

Conceding, as in The Alberta Reference, that aspects of the activities of religion and free speech may be affected by provincial legislation, such legislation, as in all other fields, must be sufficiently definite and precise to indicate its subject matter. In our political organization, as in federal structures generally, that is the condition of legislation by any authority within it: the courts must be able from its language and its relevant circumstances, to attribute an enactment to a matter in relation to which the legislature acting has been empowered to make laws. That principle inheres in the nature of federalism; otherwise, authority, in broad and general terms, could be conferred which would end the division of powers. Where the language is sufficiently specific and can fairly be interpreted as applying only to matter within the enacting jurisdiction, that attribution will be made; and where the requisite elements are present, there is the rule of severability. But to authorize action which may be related indifferently to a variety of incompatible matters by means of the device of a discretionary licence cannot be brought within either of these mechanisms; and the Court is powerless, under general language that overlaps exclusive jurisdictions, to delineate and preserve valid power in a segregated form. If the purpose is street regulation, taxation, registration or other local object, the language must, with sufficient precision, define the matter and mode of administration; and by no expedient which ignores that requirement can constitutional limitations be circumvented.

In the Saumur case, four of the judges held the by-law to be valid; four of them expressed the opinion that it was ultra vires; but the judgment of the court, based on the opinion of the ninth member, Kerwin J. (as he then was) took the form of a declaration that the by-law could not validly apply to prevent Jehovah's Witnesses from distributing their literature in the streets of Quebec, and an injunction was issued to restrain the City from interfering with such distribution. Thus, in the view of Kerwin J., contrary to the opinion expressed by Rand J. above, the by-law could be given an intra vires construction and application. Kerwin J. expressed disagreement, moreover, with the concept of an implied bill of rights. Thus the majority judgment in the Saumur case did not turn on this concept but rather on conflict with the pre-Confederation provincial Freedom of Worship Act which, if not within provincial legislative jurisdiction, remained in force by virtue of section 129 of the B.N.A. Act.

The implied bill of rights was again invoked by Rand and Kellock JJ. in the Switzman case, 170 which set aside the Quebec "Padlock Act". They were joined by Abbott J. The concept was re-stated by Rand J. in unqualified terms that placed freedom of speech, because of its relationship to the Canadian demo-

169 Id. at 333.
ocratic system, as a single, indivisible matter lying outside provincial jurisdiction and consequently falling as a whole within federal competence. He said:171

Indicated by the opening words of the preamble in the Act of 1867, reciting the desire of the four Provinces to be united in a federal union with a constitution "similar in principle to that of the United Kingdom", the political theory which the Act embodies is that of parliamentary government, with all its social implications, and the provisions of the statute elaborate that principle in the institutional apparatus which they create or contemplate. Whatever the deficiencies in its workings, Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted.

But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that government, the freedom of discussion in Canada as a subject-matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is ipso facto excluded from head 16 as a local matter.

This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence. As such an inheritance in the individual it is embodied in his status of citizenship. . . .

Prohibition of any part of this activity as an evil would be within the scope of the criminal law, as ss. 60, 61 and 62 of the Criminal Code dealing with sedition exemplify. Bearing in mind that the endowment of parliamentary institutions is one and entire for the Dominion, that Legislatures and Parliament are permanent features of our constitutional structure, and that the body of discussion is indivisible, apart from the incidence of criminal law and civil rights, and incidental effects of legislation in relation to other matters, the degree and nature of its regulation must await future consideration; for the purpose here it is sufficient to say that it is not a matter within the regulation of a Province.

It was in the Winner case,172 concerning the distribution of jurisdiction with respect to highway transport undertakings, that Rand J. had suggested the concept of rights inhering in the status of Canadian citizenship (such as the right of free movement between the provinces), with which provincial legislation could not validly interfere. This concept, however, does not appear to have received subsequent judicial application, perhaps because of its potential scope and the fact that its limitations are not easily perceived. In Switzman, Abbott J. extended the concept of the implied bill of rights even further indicating that, in his opinion, it was a limitation on federal, as well as provincial, legislative competence. He said:173

Although it is not necessary, of course, to determine this question for the purposes of the present appeal, the Canadian constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercised under its exclusive legislative jurisdiction with respect to criminal law and to make laws for the peace, order and good government of the nation.

171 Id. at 306-307.
This would place freedom of public discussion on a higher constitutional plane than it enjoys under the Canadian Bill of Rights,\textsuperscript{174} which merely protects it as a matter of statutory interpretation, subject to the right of Parliament to declare in particular cases that the protection of the Bill shall not apply. (Of course, the political reality is that the government might often find it difficult to obtain approval for an express exclusion of the Bill of Rights, so that to the extent a court is prepared to find conflict with the Bill of Rights rendering a federal legislative provision inoperative, the political embarrassment or difficulty of obtaining an express declaration excluding the operation of the Bill may give it the same force and effect from a practical point of view as if it were entrenched.)

The implied bill of rights concept was given further consideration by members of the Supreme Court of Canada in the \textit{Oil, Chemical and Atomic Workers} case\textsuperscript{175} and the \textit{McKay} case\textsuperscript{176}. In the first of these cases the issue was whether a provision in a provincial Labour Relations Act prohibiting a union from making any contribution from union dues for the support of a political party or candidate was invalid as an interference with the federal political process within the notion of the implied bill of rights. The Court held, in a four to three judgment, that the provision was \textit{bona fide} labour relations legislation, not directed to interference with the federal electoral system as such, but rather to the kinds of disposition or application that a union could make of funds collected from its members as union dues. It was characterized by the majority as legislation for the protection of certain civil rights in the province — that is, the right of a union member not to have his union dues which he can be compelled to pay under the collective bargaining system applied to the support of a political party or candidate whom he does not personally favour. But that did not end the inquiry, given the test formulated by Duff in \textit{Re Alberta Statutes}. Assuming \textit{prima facie} validity, the issue, as acknowledged by Martland J., who spoke for the majority, was "whether the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada." He concluded that the provincial provision did not effect such a curtailment:\textsuperscript{177}

The legislation, however, does not affect the right of any individual to engage in any form of political activity which he may desire. It does not prevent a trade union from engaging in political activities. It does not prevent it from soliciting funds from its members for political purposes, or limit, in any way, the expenditure of funds so raised. It does prevent the use of funds, which are obtained in particular ways, from being used for political purposes.

The minority, consisting of Cartwright, Abbott and Judson JJ., held that the provision was not \textit{bona fide} labour relations legislation but was directed to the political activity of unions, including participation in federal elections. The minority did not, therefore, deal with the question whether, on an assumption of \textit{prima facie} validity, the interference with the federal electoral process would

\textsuperscript{174} S.C. 1960, c. 44.
be a substantial one within the meaning of the Duff test. The clear implication of their observations, however, was that even if the legislation could be considered to have a valid provincial aspect, the curtailment of the freedom to engage in the political activity necessary to effective operation of the federal parliamentary system would in this case be considered to be a substantial one.

In the McKay case, the issue was whether a municipal by-law which prohibited the maintenance on residential property of all signs other than a limited number of specified kinds should be interpreted as prohibiting a sign urging persons to vote for a particular candidate in a federal election. The appellants McKay were convicted of violating the by-law by posting a sign on their property which read “Vote for David Middleton, New Democratic Party”. The appellants did not challenge the constitutional validity of the by-law but contended that it should not be interpreted so as to prohibit a sign posted for federal election purposes. The majority of the Supreme Court of Canada, for whom Cartwright J. (as he then was) delivered judgment, agreed with this contention. They held that if the by-law were interpreted so as to prohibit such a sign it would be a law in relation to federal elections, a matter within the exclusive jurisdiction of the federal Parliament. As such it would be ultra vires, regardless of the presence of federal legislation in the field and regardless of the relative seriousness of its impact on the federal electoral process. The majority then disposed of the matter in a manner similar to that of the decisive vote of Kerwin C. J. in the Saumur case. Since the by-law related to a matter within provincial legislative jurisdiction (which, in fact, had been conceded) and was not directed expressly to signs for the support of candidates in federal elections, it could be given an intra vires interpretation and application, and it was sufficient to hold that it could not validly apply to such signs.

The approach of the majority was based on legislative jurisdiction with respect to federal elections rather than on the notion of an implied bill of rights which may render otherwise valid provincial legislation invalid or inoperative because of its effect on a fundamental freedom on which the federal parliamentary system depends. The latter is the true bill of rights approach. There is prima facie legislative jurisdiction but the legislation is rendered invalid or inoperative because of its effect on a fundamental right. It was this approach that was implicit in Duff’s acknowledgment in Reference re Alberta Statutes that there was some provincial jurisdiction to regulate the press but that the permissible limits of such jurisdiction would be exceeded where it was exercised in a manner to effect a substantial interference with the operation of the federal parliamentary system.

Martland J., who delivered the judgment of the minority, adopted much the same approach as he had when speaking for the majority in the Oil, Chemical and Atomic Workers case. If the by-law were interpreted so as to apply to federal election signs such as the one in question, it would not be a law which related to federal election signs but merely one which had an incidental effect on them. In other words, in such an application the by-law would still have a valid provincial aspect as directed to the regulation of the use of property from a point of view of provincial concern, and only an incidental effect on a matter within federal jurisdiction. Then turning to the Duff test in Reference re Alberta Statutes, which he did not expressly concede, but assumed for purposes of
analysis, to be “a sound proposition of constitutional law”, Martland J. said that he was not prepared to hold “that, because a by-law of general application incidentally prevented a particular form of political propaganda from being used in a particular area, this constituted a substantial interference with the working of the parliamentary institutions of Canada”.

If any curtailment of freedom of speech or the other political freedoms necessary to the effective operation of the federal parliamentary system is not to be invalid or inoperative, but only that which effects a substantial interference with the system, the courts are left with considerable discretion and the application of the implied bill of rights becomes rather uncertain. It is perhaps for this reason that where the federal criminal law power has not been available as an obstacle to provincial legislation, some judges have preferred to seek a basis for limitation of provincial power in the notion that, at least insofar as the federal parliamentary and electoral processes are concerned, these freedoms constitute a separate constitutional value that lies wholly within federal jurisdiction, and in characterizing offensive provincial legislation as directed to interference with such freedoms rather than as merely incidentally affecting them. It is submitted, however, that Duff’s approach in Reference re Alberta Statutes reflects a truer recognition of the extent to which such rights must necessarily be affected from time to time by the exercise of provincial regulatory jurisdiction and of the necessary application of the aspect doctrine, if provincial jurisdiction is to have adequate scope. It is an approach that attaches final importance to the degree of effect, thereby permitting a more flexible accommodation between provincial power and fundamental values of the federal system.

8. The Power of Judicial Appointment

Another example of Duff’s emphasis on the necessity of flexible relations between federal and provincial powers was his opinion in Reference re Adoption concerning the distribution of the power of judicial appointment. The general issue in this area of the constitution is the extent to which the exclusive federal power under section 96 of the B.N.A. Act to appoint the judges of the superior, district and county courts in the provinces is to inhibit the provincial power to re-distribute judicial business among the provincial courts in the interests of a more efficient administration of justice (for which the provinces have the primary responsibility under the constitution) or to assign it to specialized tribunals for particular regulatory purposes. In Reference re Adoption, the specific issue was whether certain judges had the authority, having


179 Reference re Authority to Perform Functions Vested by the Adoption Act, the Children’s Protection Act, the Children of Unmarried Parents Act, the Deserted Wives’ and Children’s Maintenance Act, of Ontario, [1938] S.C.R. 398.

180 Section 96 reads: “The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.”

181 By virtue of section 92(14) of the BNA Act, which confers on the provinces exclusive jurisdiction to make laws in relation to matters falling within the class of subjects described as “The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts”.
regard to the requirements of section 96, to perform the functions vested in them by certain pieces of provincial legislation dealing with the adoption, child protection and the maintenance of illegitimate children and deserted wives and children. The issue was whether the jurisdiction conferred on them was of the kind exercised by courts within the contemplation of section 96. Duff, in delivering the unanimous opinion of the Supreme Court of Canada, held that it was not; that it was jurisdiction of a summary nature that had traditionally been exercised by courts or judges — more specifically, magistrates and justices of the peace — outside the scope of section 96. In coming to this conclusion Duff made a thorough review of earlier and conflicting governmental and judicial assertions as to the scope of section 96 and the existence, if any, of a provincial power of judicial appointment. It was a judgment that clarified the whole question and placed the federal appointment power in some reasonable perspective in relation to the primary provincial responsibility for the administration of justice.

Acknowledging that the federal power of appointment to the more important courts had traditionally been regarded as an important aspect of the group of constitutional provisions designed to assure and safeguard the independence of the judiciary, Duff, at the same time, stressed the importance, from the practical point of view, of the jurisdiction exercised by inferior courts in the provinces, and observed that the provinces must be credited with the will and capacity to take necessary measures for maintaining the integrity of the judiciary appointed by them. It was a commentary that tended to deflate some of the more extravagant rhetoric that had been applied in the past to the provisions in sections 96 and following of the B.N.A. Act, such as the characterization of them in *Toronto Corporation v. York Corporation* as the “principal pillars in the temple of justice”.

The important emphasis in *Reference re Adoption*, however, and the one that has influenced judicial consideration of the implications of section 96, is that the section must be so interpreted and applied as to give reasonable scope to the necessary provincial power to re-distribute or re-assign judicial business. In particular, the jurisdiction of section 96 and non-section 96 courts is not to be considered as “fixed forever as it stood at the date of Confederation”; the provinces must be able to make reasonable changes in the jurisdiction of both kinds of courts, including changes in monetary limits which would have the effect of decreasing the jurisdiction of section 96 courts and increasing that of non-section 96 courts, without being in conflict with section 96; but the effect of such changes must not be such as to so change the fundamental character of a court as to create a court of the class contemplated by section 96. At the same time, in considering the significance of a particular change or transfer of jurisdiction, the court is not to be influenced by the possibility that by a succession of such changes the provincial legislature may eventually create a court of the kind contemplated by section 96. Each change is to be considered on its own merits. The test suggested by Duff was whether challenged elements of jurisdiction “broadly conform” to those exercised by section 96 courts.

Duff’s judgment in *Reference re Adoption* received very high praise from

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the Judicial Committee of the Privy Council in the *John East Iron* case, where it was referred to as a judgment "so exhaustive and penetrating, both in historical retrospect and in analysis of this topic, that their Lordships would respectfully adopt it as their own, so far as it is relevant to the present appeal". In the *John East Iron* case the issue was whether a provincial labour relations board was, in the exercise of the jurisdiction conferred on it by its governing statute, analogous to a section 96 court. The particular aspect of the Board's jurisdiction that gave rise to the challenge was the power to grant relief to an employee illegally dismissed for union activity. What we see emerge in this case is a question that was left somewhat unclear by *Reference re Adoption*: the extent to which particular elements of jurisdiction are to be measured against section 96 and the extent to which the character and powers of a tribunal are to be looked at as a whole. The issue, where there are several elements or aspects of jurisdiction, is whether we are to talk about section 96 type tribunals or section 96 type jurisdiction. A possible inference from Duff's analysis is that it is the effect of particular changes on the character and jurisdiction of a tribunal as a whole that is to be the test. This might appear to be suggested by the following statements in his judgment:

... a province is not empowered to usurp the authority vested exclusively in the Dominion in respect of the appointment of judges who, by the true intendment of the section, fall within the ambit of s. 96, or to enact legislation repugnant to that section; and it is too plain for discussion that a province is not competent to do that indirectly by altering the character of existing courts outside that section in such a manner as to bring them within the intendment of it while retaining control of the appointment of the judges presiding over such courts. That, in effect, would not be distinguishable from constituting a new court as, for example, a Superior Court, within the scope of section 96 and assuming power to appoint the judge of it. In principle, I do not think it is possible to support any stricter limitation upon the authority of the provinces ...  

One further point made against this feature of the statute is that there is no pecuniary limit. This again I regard as of small importance. The jurisdiction is not without limit: it is necessarily limited by the purpose for which the order is made. In *Clubine v. Clubine* the Court of Appeal for Ontario, following the judgment of the Court of Appeal for Alberta in *Kazakewich v. Kazakewich*, held that section 1 (1) of the *Deserted Wives and Children's Maintenance Act* is ultra vires on the ground that it is beyond the powers of a provincial legislature to invest a court of summary jurisdiction, such as a magistrate's court, with a jurisdiction theretofore exclusively exercised by a Superior Court of the province. I have given my reasons for thinking that the proposition in that sweeping form cannot be sustained ...  

Yet the legislation in question in *Reference re Adoption* conferred single elements of jurisdiction for specific legislative purposes, and the test applied by Duff, as most favourable to the case against the legislation, referred to a type of jurisdiction rather than a type of tribunal:

... does the jurisdiction conferred upon magistrates under these statutes broadly conform to a type of jurisdiction generally exercisable by courts of summary jurisdiction rather than the jurisdiction exercised by courts within the purview of s. 96?

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285 Id. at 421.
Section 96 is obviously concerned with courts of a certain over-all relative importance. Yet, the importance of these courts for the individual lies in the particular element or aspect of jurisdiction that they exercise at any given time. The issue, therefore, in the final analysis must be whether a particular element of jurisdiction should be exercised by judges appointed by the federal government and enjoying the constitutionally guaranteed conditions of judicial independence. Where a single element of jurisdiction has been conferred on a provincially appointed official, section 96 could have no application if the test was whether the provincial authority constituted a tribunal of an over-all relative importance comparable to that of a section 96 court. This would be the case with provincial administrative tribunals. Such a test could only have meaning if applied to a provincial court having a comprehensive jurisdiction of several strands or elements. But even here, section 96 could have little meaning if it were only to apply when successive accretions of jurisdiction had given a court not merely the entire jurisdiction in one or more specific areas of a section 96 court but the over-all character of such a court.

In the *John East Iron* case the Judicial Committee re-formulated the test, suggested by Duff, expressing it as follows: “Does the jurisdiction conferred by the Act on the appellant board broadly conform to the type of jurisdiction exercised by the superior district or county courts?” It said that there were two issues involved: whether the Board was exercising power of a judicial nature, and if so, whether in the exercise of such power it was a tribunal analogous to a section 96 court. The Judicial Committee did not answer the first question, although its observations upon the characteristics of judicial power suggest that it had in mind a rather more narrow and strict concept of such power than that which might serve to justify the application of certiorari or prohibition and the rules of natural justice in administrative law. On a review of the whole legislative scheme administered by the Board, including the particular power which gave rise to the challenge, the Judicial Committee concluded that whether or not that particular power might be considered to be judicial, the scheme as a whole was unlike anything ever applied by a section 96 court. The particular power that had provoked the challenge was a necessary part of the over-all scheme and drew validity from it, but the Judicial Committee also emphasized certain characteristics of it that distinguished it from relief in the regular courts, such as the right of persons other than the party aggrieved to invoke it. Thus, even assuming that the power could be characterized as judicial for some purposes, it was not a power that broadly conformed to any that had been exercised by a section 96 court. At the same time, the Committee observed that it should not be assumed that any judicial power that might be conferred upon an administrative tribunal would necessarily derive validity from being ancillary to an administrative scheme that in its over-all features was unlike section 96 court jurisdiction. Some kinds of power

might be held to be *ultra vires* and severable from the scheme as a whole. On this point the Judicial Committee said:

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\[\ldots\] It is relevant, too, to consider the alleged judicial function of the board under sec. 5(e) of the Act in relation to its other duties. It is not impossible, as Toronto Corporation v. York Corporation illustrates, for a body to be validly established for administrative purposes and yet to be unconstitutionally clothed with a judicial power. It is not, therefore, conclusive of the constitutionality of the board that in the main it is an administrative instrument and that its judicial function is designed to implement administrative policy. But, once more seeking an analogy with the courts mentioned in s. 96, their Lordships must observe that the feature of the board's constitution, which is conspicuously shown in the power vested in it by s. 10, sub - s. 3, of the Act to appeal in its own name from any judgment of any court affecting any of its orders or decisions, emphasizes the dissimilarity of those courts.

The general approach of *Reference re Adoption* to the reasonable adjustments required for the more efficient distribution of judicial business among provincial courts was reaffirmed by the Supreme Court of Canada in the *Magistrate's Court* case.\[188\] The issue in that case was whether the provincially appointed judges of the Quebec Magistrate's Court (now the Provincial Court) were competent to exercise the jurisdiction which the provincial legislature had transferred from the Superior Court by increasing the monetary limits of the jurisdiction of the Magistrate's Court from $200 to $500. It was obviously the kind of adjustment that Duff had affirmed in *Reference re Adoption* as necessarily permitted by section 96. This approach clearly contemplates the validity of successive increases from time to time in the monetary limits of the jurisdiction of inferior provincial courts without any sense of the necessity, as yet, to attempt to define the point, unlikely to arise, at which the accumulative transfer of jurisdiction from section 96 courts might be so substantial as to call for the application of that section. In the *Magistrate's Court* case reference was made to the decrease in the real value of the dollar as justifying the proposed increase in the monetary limits of jurisdiction, but it would not appear that there was an intention to suggest this as a criterion for the validity of future increases. Even in the current state of inflation such a criterion could be a serious qualification of the necessary flexibility contemplated in *Reference re Adoption* and might well not justify the increases in monetary limits that might be required from time to time to relieve pressure on section 96 courts and to provide for a more expeditious and less costly disposition of cases of a certain relative importance.

The decision in the *Magistrate's Court* case was noteworthy for more than a fairly obvious application of the principles affirmed in *Reference re Adoption*. It rejected the notion that by conferring on a court presided over by provincially

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\[187\] Id. at 151.

appointed judges elements of jurisdiction which such judges are not competent to exercise by virtue of section 96 a provincial legislature thereby changes the character of the court in such a manner as to disqualify its judges from exercising any of its jurisdiction at all. This notion of a kind of section 96 virus had in fact been applied by the provincial Court of Appeal, to which the reference had been made in the first instance. Although they had been asked to consider the specific piece of legislation increasing the monetary limits of the jurisdiction of the Magistrate's Court in certain areas, they had reviewed all the jurisdiction that had been conferred on the Court since it was established, including elements of supervisory jurisdiction, and had come to the conclusion that the Court as a whole had become a court within the contemplation of section 96. Their conclusion was that the judges of the court were not competent to exercise any of its jurisdiction, including the additional jurisdiction that had been conferred by the specific piece of legislation referred to them. Apart from the fact that the Court had gone beyond the terms of the reference, this obviously could not be a workable approach to the application of section 96. It was sufficient for the Supreme Court of Canada to hold that the Court must confine itself to the restricted terms of the reference but it also observed that where a non-section 96 court is involved the issue concerning accretions of jurisdiction is not whether a particular aspect or element of jurisdiction has changed the character of the court as a whole but whether that aspect or element of jurisdiction can be validly exercised by provincially appointed judges. In other words, the issue is not whether the court as a whole has become a section 96 type court but whether the particular aspect or element of jurisdiction that is challenged is a section 96 court type of jurisdiction. That is the meaning of the question as to whether in the exercise of particular jurisdiction a tribunal is analogous to one within the scope of section 96. Each aspect or element of jurisdiction must be considered on its own merits in the light of section 96.

The obverse of this, in the administrative tribunal cases, is that the over-all administrative character of such tribunals will not necessarily impart validity to any kind of judicial power that may be conferred upon them. In the Tremblay case, the Supreme Court of Canada held, following the approach in John East Iron, that the power given to a Labour Relations Board to dissolve a company-dominated union was not jurisdiction that could only be exercised by a section 96 court. It was held to be “purely incidental to the accomplishment of one of the primary purposes for which the association was granted corporate status, namely the maintenance of industrial peace” and not to be part of the general power of the Superior Court to dissolve corporations on such grounds as “usurpation of corporate rights, or fraud and mistake in obtaining letters patent.” Here then was an entirely new power to dissolve an incorporated body, fashioned for labour relations purposes and never exercised by the superior courts.

180 Tremblay v. Quebec Labour Relations Board (1967), 64 D.L.R. (2d) 484.
100 Id. at 487.
The case would appear to be different where, as under the new British Columbia Labour Code,\textsuperscript{191} superior court jurisdiction with respect to labour injunctions is conferred upon the Labour Relations Board. Labour injunctions are obviously closely related to the successful operation of labour relations legislation, and a persuasive case on grounds of policy can no doubt be made for vesting the power to grant them in a labour relations board on the assumption that it is better able than the courts to weigh the interests involved and to assess the implications of such injunctions for relations between the parties. On the other hand, unlike the jurisdiction considered in the \textit{John East Iron} and \textit{Tremblay} cases, labour injunction has incontestably been superior court jurisdiction and labour relations boards have operated for many years without it. Nor would it appear that the nature of the jurisdiction has been so transformed under the new legislation as to make it essentially different from that which has been exercised by section 96 courts. Thus the British Columbia Labour Code presents a distinctly new type of section 96 challenge in the administrative law field. The issue is not whether it may be appropriate for a number of reasons to confer jurisdiction that has hitherto been exercised by a section 96 court


See particularly sections 28, 31 and 32. Section 28 confers power on the Labour Relations Board to hear a complaint that there has been a contravention of the Act or regulations and “to order an employer, trade-union, and their officers, officials or agents, or any other person, to do anything for the purpose of complying with this Act or the regulations, or refrain from doing anything in contravention of this Act or the regulations”. Sections 31 and 32 read as follows:

“31. (1) Except as otherwise provided in this Act, the board has and shall exercise jurisdiction to hear and determine a complaint under section 28 and to make any order required to be made under that section, and, without limiting the generality of the foregoing, it has and shall exercise exclusive jurisdiction in respect of

(a) any matter in respect of which the board has jurisdiction under this Act or the regulations; or

(b) any application for the restraint or prohibition of any person or group of persons from

(i) ceasing, or refusing, to perform work, or to remain in a relationship of employment; or

(ii) picketing, striking, or locking out; or

(iii) communicating information or opinion in a labour dispute by speech, writing, or any other means of communication.

(2) Except as provided in subsection (3), no court has or shall exercise any jurisdiction in respect of a matter that is, or may be, the subject of a complaint under section 28 or a matter referred to in subsection (1), and, without restricting the generality of the foregoing, no court shall make an order enjoining or prohibiting any act or thing in respect thereof, and, make an order enjoining or prohibiting any such act or thing in support of a claim for damages.

(3) Nothing in this section shall be construed to restrict or limit the jurisdiction of a court, or deprive a court of jurisdiction, to make any form of order the court may make in the proper exercise of its jurisdiction where the court is of opinion that, unless the court makes an order, an immediate and serious danger to life or health is likely to occur or is continuing to occur.

32. Notwithstanding anything in this or any other Act, no court shall order an injunction to restrain a person from striking, locking out, or picketing, or from doing any act or thing in respect of a strike, lockout, dispute, or a difference arising out of or relating to a collective agreement, upon an ex part application.”
on a provincially appointed administrative tribunal. The issue is whether it is in fact jurisdiction that broadly conforms to that of a section 96 court.

Section 96 may be given a reasonable application in relation to the provincial need to be able to create new regulatory and social welfare jurisdictions but it cannot be read out of the constitution. For example, it cannot be seriously contended that, however appropriate it might appear to be, a province could establish a specialized court staffed by provincial appointees to exercise the supervisory jurisdiction over administrative authorities that has traditionally been exercised by section 96 courts. There have already been decisions indicating that portions of that jurisdiction may not be validly transferred to provincially appointed judges or officials.\footnote{192 Seminary of Chicoutimi v. A.-G. and Minister of Justice of Quebec (1972), 27 D.L.R. (3d) 356 (S.C.C.). Cf. also Re Howard Investments and South of St. James Town Tenants Association (1973), 30 D.L.R. (3d) 148.}

It would not appear to be an argument in favour of the British Columbia Labour Code that the legislation only purports to confer a portion of the jurisdiction in respect of injunction upon the Labour Relations Board. There would not appear to be an analogy here between such a case and an adjustment in the monetary limits of jurisdiction. What has been conferred is the whole of the jurisdiction in respect of injunction for certain limited purposes. The issue, as suggested in the Display Service case,\footnote{193 A.-G. and Display Service Co. Ltd. v. Victoria Bldg. Ltd., [1960] S.C.R. 32.} is whether the whole of a section 96 court’s jurisdiction in a certain area, however limited, has been transferred to provincially appointed officials. A change in monetary limits does not confer the jurisdiction of a superior court on a provincially appointed tribunal since such jurisdiction is not characterized by its lower limits but rather by the fact that it has no upper limits.

On the whole, section 96 has not up to now created many serious problems for provincial regulatory jurisdiction. This is mainly attributable to the general approach adopted by the Judicial Committee in the John East Iron case and to the influence which the general perspective on section 96 expressed by Duff in Reference re Adoption may be presumed to have had upon their thinking. This general perspective is that section 96 may be conceded to be an important provision of the constitution but it must not be permitted to stultify provincial power to redistribute judicial business and to create new judicial functions. Workmen’s compensation, labour relations, and other forms of provincial administrative jurisdiction have all survived challenge on the basis of section 96.\footnote{194 See, supra, note 14, at 789-90.} The major exception has been in the area of municipal assessment, in which a line of cases flowing out of the emphasis in Toronto v. York have held that a province cannot validly confer power on its own assessment tribunals to determine the question of liability to assessment because this is a question that has been traditionally determined by section 96 courts.\footnote{195 Quince v. Thomas A. Ivey and Sons Ltd., [1950] 3 D.L.R. 656, (1950) O.R. 397; City of Toronto v. Olympia Edward Recreation Club Ltd., [1955] S.C.R. 454. For a trenchant analysis of these cases see Laskin, Municipal Tax Assessment and Section 96 of the British North American Act: The Olympia Bowling Alleys Case (1955), 33 Can. Bar Rev. 993, and also Laskin, Id. at 784-788.} In these cases it was
not too clear whether what was objectionable was the attempt to confer final and exclusive power to determine this question, or whether the courts objected to the conferring of this power on provincial administrative tribunals to any extent and for any purposes at all. One possible inference is that concern for the section 96 issue was confused to some extent with concern for the power of superior courts to review the question of liability to assessment in the exercise of their supervisory jurisdiction. The traditional judicial approach to privative clauses would be sufficient to preserve the power to review such a question since it can so plausibly be characterized as a jurisdictional one. To safeguard this right it is not necessary to deny jurisdiction to provincial assessment tribunals to determine the question of liability to assessment in first instance or on administrative appeal as a necessary incident of their administration of the legislation. The assumption on which the provincial legislature proceeded in attempting to remove the uncertainty left in the wake of these decisions was based on the minority opinion of Rand J. in the Olympia Bowling case that section 96 of the B.N.A. Act does not prevent the province from conferring power on its assessment tribunals to determine liability to assessment as a necessary incident of the administration of the assessment legislation so long as it does not purport to make their determination final and exclusive of superior court jurisdiction. This view reflects the emphasis in John East Iron on functional necessity in relation to the over-all character of a tribunal, rather than the emphasis in Toronto v. York on the characterization of specific powers or elements of jurisdiction on their own merits in the light of the doctrine of severability.

Both emphases have their place and must be reconciled in some measure. Traditional superior court questions of right and liability may be transformed in their essential nature and basis and validly removed from the superior courts and transferred to provincially appointed administrative tribunals under new regulatory schemes. Such was the case when compensation without fault replaced the former liability of employers for injury to workmen, and when labour relations legislation recognizing collective bargaining supplanted to a considerable extent the common law of employer-employee relations. Such would presumably be the case if the liability for damage caused by automobile accidents was placed on an essentially different legal basis and assigned to administrative tribunals. But once such tribunals have been validly constituted and endowed with all the power deemed to be reasonably required for the satisfactory administration of the legislation, there may be a temptation to add further powers from time to time in an attempt to insulate the area of regulation as much as possible from the impact of the regular judicial process—in other

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196 This was certainly the case in R. v. Ontario Labour Relations Board, ex p. Ontario Food Terminal, [1963] 38 D.L.R. (2d) 540, where it was suggested that because of section 96 a provincial administrative tribunal cannot even consider (as part of its administrative functions and subject to judicial review) a collateral question of law of a kind traditionally determined by a section 96 court. Cf. Laskin's comment on this case in (1963), 41 Can. Bar Rev. 446. This notion appears to have been rejected: R. v. Ontario Labour Relations Board, ex p. Taylor (1964), 41 D.L.R. (2d) 456; [1964] 1 O.R. 173; Re Armstrong Transport and Ontario Relations Board (1964), 42 D.L.R. (2d) 217; [1964] O.R. 338.

197 The Assessment Act, R.S.O. 1970, c. 32, s. 65(3).
words, to create a legal system touching the essential interests in the area of regulation that is as self-contained and self-sufficient as possible. This appears to be the tendency discernible in the new British Columbia Labour Code. It is reinforced by the attempt to formulate a fool-proof privative clause that the courts will be unable to dispose of on the traditional approaches of statutory interpretation, namely, that the legislature cannot have intended to exclude review for jurisdictional error, or that an administrative authority cannot claim the protection of the privative clause when it places itself outside the ambit of its governing statute. The intention to exclude judicial review where there has been an absence or excess of jurisdiction has been made unmistakably explicit and clear.

This raises the question again as to whether the courts may be obliged finally to fall back on the contention that there is a constitutional guarantee of judicial review. It has generally been assumed that section 96 of the B.N.A. Act does not prevent a provincial legislature from removing jurisdiction from section 96 courts but merely prevents it from conferring such jurisdiction on provincially appointed judges or administrative authorities. In the John East Iron case the Judicial Committee held that the privative clause did not make the Labour Relations Board a tribunal within the meaning of section 96, but in rejecting the argument that the privative clause had a bearing on the section 96 issue the Judicial Committee was proceeding on the assumption that such a clause "would not avail the tribunal if it purported to exercise a jurisdiction wider than that specifically entrusted to it by the Act". From time to time judges have suggested that judicial review would, if necessary, be held to be guaranteed by the constitution, but in the Farrell case Judson J., delivering the judgment of the Supreme Court of Canada, expressed the opinion that there could be no constitutional objection to privative clauses on the basis of section 96 or otherwise. An argument against the jurisdiction of the Workmen's Compensation Board based on section 96 had been abandoned by counsel in the

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Section 33 provides: "The board, in respect of matters under sections 16, 28, 31, 34, 38, and 90, has and shall exercise exclusive jurisdiction to determine the extent of its jurisdiction under those sections, or to determine any fact or question of law that is necessary to establish its jurisdiction." Section 34 provides in part as follows:

"34. (1) Except as otherwise provided in this Act, the board has exclusive jurisdiction to decide for all purposes of this Act any question, including, without restricting the generality of the foregoing, any question as to whether [and then there follows a long list of specific questions many of which in the light of the existing judicial approach might be characterized as going to jurisdiction] . . . .

(2) A decision, order or ruling of the board made under this Act in respect of any matter in which jurisdiction is conferred by this Act, or is determined under section 33 to be conferred by this Act, is final and conclusive, and is not open to question or review in any court, and no proceedings by or before the board shall be restrained by injunction, prohibition, or any other process or proceeding in any court, or be removable by certiorari or otherwise into any court."

200 See, for example, Rinfret C.J. in L'Alliance des professeurs catholiques de Montréal v. Labour Relations Board of Quebec and The Montreal Catholic School Commission, [1953] 2 S.C.R. 140 at 155.

Supreme Court, but the general constitutional challenge to the privative clause formulated in the following terms—"That the Legislature has no jurisdiction to prevent a review by the Courts of a decision of the Board upon questions of law since that deprives the subject of his right of access to the Courts"—apparently remained before the Court. It was disposed of by Judson J. in the following terms:202

If an argument based upon s. 96 of the *British North America Act* is untenable, the other argument based upon right of access to the courts falls with it. Its rejection as far as this Board is concerned is implicit in the judgments in the *Dominion Canneries* case and in the *Alcyon* case. The restriction on the legislative power of the province to confer jurisdiction on boards must be derived by implication from the provisions of s. 96 of the *British North America Act*. Short of an infringement of this section, if the legislation is otherwise within the provincial power, there is no constitutional rule against the enactment of s. 76(1).

Once again, however, this conclusion was drawn against a background of judicial decisions refusing to give any effect to privative clauses other than the exclusion of review for non-jurisdictional error of law on the face of the record.203 The question is whether this consideration of the issue exhausts the possibility of section 96 as the basis of a constitutional objection to a provincial legislative provision which expressly confers on an administrative tribunal a final and exclusive power to determine the limits of its own jurisdiction in terms which the courts are unable to avoid by the traditional approach of statutory interpretation. While this is not the power of judicial review it is a characteristic of the superior courts which might be reasonably presumed to be one of the aspects of their over-all power and relative importance, justifying the special provision for them in the constitution. Looked at from another perspective, it would indeed be ironic if the much-vaunted section 96 proved in the end powerless to prevent the effective suppression by provincial legislatures, to the extent they see fit within the scope of their regulatory jurisdiction, of the power of judicial review, which is the power that characterizes superior courts above all others. It may be safely assumed, of course, that the courts would never permit a privative clause to exclude judicial review of a question of constitutional validity.204 Judicial review to this extent is considered to be an essential aspect of a federal constitution. But beyond that, as part of our constitutional system in a more general sense, is the protection traditionally afforded by the superior courts against abuses of administrative power. However views may differ as to the vigour or self-restraint with which this power should be exercised in the general run of cases, it seems to be incontestable that it must be maintained at the very least for the clear and blatant abuse of power which no one would pretend to justify as a necessary price of administrative autonomy. If in the face of stronger and more explicit privative clauses the courts are unable to find a constitutional basis for this power of judicial review then responsibility will have to pass back to the legislatures to find a clearer mandate for such a result. If the tendency discernible in a certain judicial outlook on privative

202 Id. at 52.
clauses gains ascendency,\(^\text{205}\) as it may well do, it is likely that legislatures would have to consider their withdrawal or at least their modification in a way that would effect some compromise between objectionable judicial interference with the administrative process on what often approximates to an appellate review and no judicial control at all.

It is interesting to speculate as to what Duff's response might have been to this new form of legislative challenge to the power of judicial control. It is tempting to surmise that notwithstanding his concern for the implications of section 96 for provincial jurisdiction he would be led on this issue to follow the kind of reasoning that he applied in Reference re Alberta Statutes and to find that, just as the constitution necessarily contemplates a system of parliamentary democracy, so it necessarily contemplates the existence of superior courts with an effective and operative power of judicial control.\(^\text{206}\)

9. \textit{In Conclusion}

It has not been possible to comment on all the important facets of the constitutional work of Duff. I have tried to concentrate on a number of areas in which his thought appears to have had a significant influence on the shape which judicial decision has imparted to the relationships between federal and provincial power. In this process of selection I have necessarily omitted reference to many cases. Duff participated in some 115 constitutional decisions\(^\text{207}\) during his career of almost thirty-eight years on the Supreme Court of Canada. For virtually the whole of this period he played a dominant role, expressing for the most part the view of the whole court or a majority thereof. He delivered the judgment of the Court in about 13\% of these cases, a majority opinion in about 62\%, a concurrence in a majority opinion in about 18\%,\(^\text{208}\) and a dissent in about 7\%. There were only about a dozen constitutional cases in the Court during this period in which he did not participate. These cases, taken as a whole, touch almost every aspect of the constitution and exhibit the wide range of Duff's profound understanding of the principles not only of federalism, but also of what may be called the unitary aspects of the constitution which we have inherited from Great Britain. A considerable proportion of the constitutional decisions in which Duff participated involved questions of public property and the provincial power of taxation, including succession duty. I have not referred to these because, important as they were for the particular interests involved, they do not appear to be particularly significant for an assessment of


\(^{206}\) Indeed, an approach of this kind was suggested by Professor Lederman in \textit{The Independence of the Judiciary} (1956), 34 Can. Bar Rev. 1139 at 1158 et seq. See also LeDain \textit{The Supervisory Jurisdiction in Quebec}, (1957) 35 Can. Bar Rev. 788 at 825 et seq.

\(^{207}\) I am indebted to my colleague Professor Sidney Peck for providing me with a computer print-out of the list of the constitutional cases in which Duff participated in the Supreme Court of Canada, which is the basis for the statistical information I have provided in the text.

\(^{208}\) The words "majority opinion" do not necessarily imply that there were dissenting judgments in these cases. They are used to distinguish the cases in which Duff did not render the judgment of the court nor dissent.
his influence on the general shape of the constitution. They do, however, reflect in a very vivid manner his quite remarkable powers of legal analysis and exposition. Indeed, many of them probably exhibit to a greater degree than some of the passages of general discussion on which I have focused his capacity for close and subtle reasoning based on a consummate mastery of underlying institutions and rules.

Perhaps a further observation should be made on Duff's opinion in two cases which place in a more balanced perspective the general tendency of his decisions to tilt the balance of the constitution in favour of provincial power. Duff ruled in favour of federal jurisdiction in two of the most important of the "Bennett New Deal" cases—the Unemployment Insurance and the Labour Conventions references. As we have seen, he rejected the general power as a basis of federal jurisdiction in these cases, but in the Unemployment Insurance reference he based validity on the federal power to tax and to spend, and in the Labour Conventions case on a plenary federal power of treaty implementation. A federal power to tax and to spend for purposes which do not fall within federal regulatory jurisdiction is now firmly established and conceded (despite complaint from time to time) by constitutional practice. In fact, it is largely this power that has made the constitution workable by making it possible to compensate for many of the difficulties created by the division of powers and by geography. There may be some question concerning the merits of Duff's characterization of the obligation of employers and employees to contribute to the unemployment insurance fund as taxation that did not involve an attempt to regulate employer-employee relations within the province, but his opinion contains what is probably the strongest and most elaborate judicial statement of the essentially unlimited scope of the federal power to tax and to spend for public purposes.

In the Labour Conventions case, Duff interpreted the judgment of the Judicial Committee in the Radio case as affirming a plenary federal jurisdiction based on the general power to implement international agreements falling outside the scope of section 132 of the B.N.A. Act. Although the Judicial Committee disagreed with him, it is submitted that Duff did not misread the judgment in the Radio case on this point. What seems to have happened is that the Judicial Committee reconsidered what it had suggested concerning treaty implementation power, in the context of legislation for which there was clearly another basis of federal jurisdiction, when it was confronted with the implications of a plenary federal power of treaty implementation in relation to matters within provincial jurisdiction. Certainly, a plenary federal power of treaty implementation would have gone far to supply the deficiencies of federal legislative jurisdiction, as judicially determined. It would have significantly enlarged the power of the federal government to increase its jurisdiction by its own initiative in the international sphere. This was essentially the reason that the Judicial Committee denied the power.

The Unemployment Insurance and Labour Conventions references also place in a more balanced perspective the question of Duff's influence on the Judicial Committee. They were perhaps the two most important cases in which the Committee disagreed with him. They illustrate how strong was the persis-
tence of the Judicial Committee in its concern for provincial jurisdiction, despite the great respect for his opinions. They suggest an answer to the highly speculative question that was posed earlier as to whether the tendency of the Judicial Committee's decisions might have been significantly different had Duff thrown the weight of his intellectual authority on the side of federal power in some of the important cases. Duff was of great assistance to the Judicial Committee in the elaboration of the general perspective which they brought to the interpretation of the constitution, but, great as he was, it is doubtful if he could have changed the result by an essentially different emphasis in his own work.