Fiat by Declaration-S.92(10)(c) of the British North America Act

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The British North America Act has never been praised for its logical symmetry, careful divisions, or precise delineations.1 Federalists and Centralists have both found sufficient material therein to give content to their strictures; those who have shunned both camps have been equally well supplied.2

A key and critical section in an evaluation and appreciation of the British North America Act is 92(10) which provides that the Province shall have legislative jurisdiction over:

Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
(b) Lines of Steam Ships between the Province and any British or Foreign Country;
(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

(10) (c), as a superficial reading of the section will readily reveal, allows parliament by unilateral declaration to except from the jur-

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1 John Deere Plow Co. v. Wharton (1915), 18 D.L.R. 353 (P.C.).
isdiction of the provincial legislatures such works as it declares to be “for the general advantage of Canada or for the advantage of two or more of the provinces”, and thus Parliament itself assumes jurisdiction. Logically speaking, this federal power obviates any rigid classification of federal and provincial areas of jurisdiction insofar as Parliament may at any time take unto itself jurisdiction over a great many matters which would otherwise fall within the provincial scope.\(^3\) Not only does this section cut down provincial jurisdiction at the instance of the Dominion Parliament, but it also belies any sincere assertion of equality between Dominion and Provinces; the Provinces are nowhere given an equivalent authority.\(^4\)

A section of the scope and magnitude of 10(c) obviously raises many difficult questions, particularly in the light of the long line of cases asserting provincial powers and rights and delimiting the federal authority in their favour. Unfortunately, insofar as decisions on (10)(c) are concerned, the courts have successfully followed their stated policy of not answering more than necessary;\(^5\) further, while the courts have been prepared to go to great lengths to avoid the ticklish problems inherent in the section, Parliament has made this task a simple one by claiming jurisdiction over a work under various heads so that there are often ample grounds for decision without a consideration of the declarations under 10(c).\(^6\)

Aside from problems of strict statutory construction, interpretation of 10(c) gives rise to the same problems inherent in the construction of 91 general, the political problems of division of authority, of centralism and federalism. In point of fact, there is in the literal reading of 91 general and 92(10) (c) a great similarity. Both sections appear to give jurisdiction to Parliament to make laws affecting the general welfare of Canada, and indeed 10(c) goes further and allows the Dominion to control works for the benefit of two or more of the provinces. While 91 general talks of law and 10(c) speaks of works, both have as their touchstone the well being of the body politic on the national scale.

Indeed, from an analytic point of view, we might even question the very need for s. 92(10) (c) in the light of 91 general. Its manifest purpose is obviously to allow Parliament to control works located within a province when it is in the best interest of Canada or two or more of the provinces so to do; yet it would appear that if this


\(^4\) Consider also the Dominion power of disallowance, of appointment of the lieutenant-governor, and the latter’s power of reservation over provincial legislation, etc.


\(^6\) e.g., Van Buren Bridge Co. v. Madawaska (1959), 15 D.L.R. (2d) 763, (N.B. Appeal Div.), where if the declaration had been considered, it would have been found faulty.
were the intent of the Fathers of Confederation, the section is superfluous inasmuch as 91 general *prima facie* gives Parliament this power. On this view, unless we are prepared to concede the draftsmen of the British North America Act an exceedingly large, if not prophetic, amount of prescience, in the light of how 91 general has been cut down, the section was designed as merely another repetitious safeguard for the authority of the central legislature. On the other hand, since 91 general gives as examples of the Dominion authority specifically enumerated classes of subjects, there is validity in incorporating by virtue of 91(29) works which would otherwise be under provincial jurisdiction, as a class explicitly under Parliament's authority. Why, however, the section was not directly included under s. 91 is somewhat of a mystery.

Against both sections equally the traditional warning of Lord Atkinson about the general power is applicable:

> If the Parliament of Canada had 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 upon which it might not legislate to the exclusion of provincial legislation.

Indeed, Landreville J. applies this theme to a construction of the scope of a declaration contained in the *Atomic Energy Control Act* and proceeds to narrowly construe that declaration.

The attempts to limit the scope and effect of 10(c) have focussed on the procedure necessary for the assertion of jurisdiction, the degree of precision required of the declaration, and, of course, the meaning and scope of the term 'work' as used in 10(c) itself. Inherent in this process is the articulation of a philosophy of dualism, whether the duality of nation and province, or of capacity and authority.

Procedurally, 10(c) simply requires Parliament to make a declaration, as a condition precedent to the assumption of jurisdiction. Whether this declaration need be explicit or may be implied is another question considered by some of the cases following. Britton J. took the view that a declaration might be implied from the preamble to a statute. However on appeal to the Supreme Court of Canada the court divided on this point. Davies and Sedgewick JJ. held without deciding that:

Such a declaration is not, I think, one which might be spelled out of the charter granted or inferred merely from its terms or deduced from recitals of the promoters in the preamble, but one substantially enacted by Parliament.

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7 Of course, it is accepted that their intent has no legal significance.
10 R.S.C. 1952, c. 11.
Eleven years later, Lord Buckmaster treated the issue as important but undecided. The last case dealing specifically with this topic is *St. John and Quebec Railway Co. v. Jones*. Here, the majority of the court followed the judgment of Davies J., as he then was, in the *Ontario Powers Co.* case, holding that Parliament must make a formal and explicit declaration to satisfy the requirements of 10(c). Practically speaking, Parliament has avoided this problem by explicit declarations in cases were it has sought to extend its authority.

A cognate problem is the degree of precision required of the declaration i.e. may a declaration be made in general terms, covering a broad class of works, or need a detailed list of works be expressly included in the declaration? This in turn involves the further problem of whether a declaration can cover works not yet in existence by including them in a general class. Again, if a general declaration is void, the question arises as to the validity of specific declarations covering works in contemplation but not in existence.

This issue came squarely before the Supreme Court in *Luscar Collieries Ltd. v. McDonald* where the majority of the court, Anglin C.J., Idington, Duff, Rinfret J.J. held a declaration in general terms to be invalid. On appeal, the Privy Council decided the case on grounds other than 92(10) (c), and held that the applicability and construction of 10(c) was left open. In not supporting the Supreme Court's holding on this point, a holding which is carefully expounded, the Privy Council more than leaves the issue open. However, as in the problem of implied declarations, Parliament may readily enumerate the works which compose the class over which it desires jurisdiction. However, it seems rather circuitous to require such enumeration when Parliament can in general terms readily make clear its intent.

If we consider closely some of the reasons in the *Luscar* case for a narrow approach to declarations and contrast therewith the reasoning of the minority, several significant matters become apparent. Idington J. pointed out:

The said assumption of authority if upheld, I respectfully submit, would leave it open to Parliament to assume control of all our highways, all our elevators, all our local hydro electric systems, now existent or hereafter

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16 *Supra*, footnote 11.
17 From the cases holding that a declaration must be specific, one may *a fortiori* argue that a declaration cannot be *implied* as opposed to *formal*.
20 *Supra*, footnote 19, per Lord Waddington.
22 *Supra*, footnote 18.
to come into existence; all our local public utilities, which have become so manifold, especially in some of our western Provinces, and which would include telephone systems and, if I mistake not, telegraph systems; and all the sidings and switches I have adverted to above, built by manufacturers for their own personal service and benefit, but operated by the railway to which they gave their transportation business, and perhaps preference in cases of competition, and in such cases possibly to a Dominion railway and alternating to a local railway, by simply passing a declaratory Act as to their being for the general advantages of Canada.

I cannot follow all the possible consequences of such a holding, or of its manifold implications.

I cannot assume that any such consequences, or anything like thereto, were ever expected to ensue upon or flow from any single enactment by the Parliament of Canada pretended to have been made within the meaning of the reservation of s. 92(10)(c) of said B.N.A. Act, and thereby to fulfil its requirements for a declaration as to any works for the general advantage of Canada.

Indeed I submit that it was in order to avoid any possibility of such like results that the said s-s. 10c was framed as it was, and so remains.

Subsections (a) and (b) of said s-s. 10 deal with works which can safely be classified and are dealt with accordingly, but beyond that the framers of the B.N.A. Act apparently felt they could not proceed by the classification process, and hence proceeded to deal with the residue of what could not be so properly dealt with by the classification process; by entrusting said residue by s-s. c to the Parliament of Canada, on which it cast the onus of deciding whether or not anything further could properly be declared to be a work for the general advantage of Canada.

In other words it seems to me quite clear that Parliament was entrusted with the quasi-judicial duty of determining, after hearing all those concerned, whether or not a specific work, either before or after its execution, could properly be declared to be for the general advantage of Canada, or of two or more of its Provinces.

Duff J. adds further objection:

The grounds on which it can be argued that s. 6(c) of the Railway Act does not constitute a valid declaration within s. 92(10)(c) of the B.N.A. Act, can be very concisely stated. The object of this provision, it is said, was not to enable the Dominion to take away jurisdiction from the Provinces in respect of a given class of potential works; that is to say, which are not in existence, which may never come into existence, and the execution of which is not in contemplation; the purpose of the provision is rather to enable the Dominion to assume control over specific existing works, or works the execution of which is in contemplation. The control intended to be vested in the Dominion is the control over the execution of the work, and over the executed work. If a declaration in respect of all works comprised within a generic description be competent, the necessary consequence would appear to be that, with regard to the class of works designated by the description, provincial jurisdiction would be excluded, although Dominion jurisdiction might never be exercised, and although no work answering the description should ever come into existence.

Mignault J. in favour of the wide declaration stated succinctly:

And it would seem as unreasonable as it would be impracticable to require that each time a provincial line is operated by a Dominion company a special declaration should be made by Parliament. The policy or the reason for the declaration is a matter for the consideration of Parliament alone.

This then appears to be the crux of the objection: has Parliament truly acted in the best interests of Canada in making a declaration?

24 Ibid. at p. 476.
25 Ibid. at pp. 484-5.
Idington J. in this particular case thought not. However, while the learned judge cannot control or overturn Parliament’s discretion once it has actually declared on this ground, he can and does demand that Parliament carry out the “quasi-judicial duty” of considering carefully whether a “specific” work should be the subject of a declaration. In other words, by demanding that Parliament specifically enumerate each desired work, each separately named work has the dignity of at least individual consideration, and new uncontemplated works as they arise will necessitate a fresh declaration. All this seeks to satisfy the standard and wish embodied in the words of Sir Mathise Tellier C.J.Q.:

No doubt, the Parliament of Canada has the power to declare, in an Act, that a certain enterprise, although entirely situate in the Province is for the general advantage of Canada; but it is presumed that in practice it uses this power with a wise discretion.

However, there seems to be no cogent reason why Parliament should not be free to consider an entire class of works, for example, railways, of advantage to the Dominion or two or more of the Provinces. Thus, in the words of Mignault J.:

Expressing now the opinion which I have formed after full consideration, it seems obvious that if Parliament can declare for the general advantage of Canada a specified work, it can also, in one declaration, comprise several works having the same distinguishing characteristics, or a class of works sufficiently described so as to leave no doubt as to the identity of each member of the class, as coming within the description of the enactment.

As long as the declaration is sufficiently detailed there is no reason why it should not as well cover works not in existence at the time the declaration is made. And, as Newcombe J. points out:

While of course care must be taken to see that the declaration is not uncertain, the general maxim certum est quod certum reddi potest would apply.

26 Ibid. p. 470, “Of course it is rather like reducing the phrase ‘A Work for the General Advantage of Canada’ to a point of ridicule, to bring thereunder the 5½ or 5% miles of spur lines ... where collieries seem to be numerous.”

27 cf. Lord Watson’s judgment in Union Colliery Co. v. Bryden, [1899] A.C. 581 at p. 585: “In assigning legislative power to one or the other of these parliaments it is not made a statutory condition that the exercise of such power shall be, in the opinion of a court of law, discreet. In so far as they possess legislative jurisdiction, the discretion committed to the parliaments, whether of Dominion or of the provinces, is unfettered ....” It is of course arguable that the learned judge here deals with a situation where the question of discretion arises after jurisdiction has been ascertained, while in the case of 10(c) the question of discretion is a condition precedent to the assumption of jurisdiction.

28 One might also argue that the court is free to determine whether or not a work over which Parliament asserts jurisdiction is of national importance without considering whether the declaration deals wisely with that work. However, perhaps this, as Professor Laskin would put it, is “a distinction without a difference.”

29 Quebec Railway, Light & Power Co. v. Quebec and Desnoyers (1940), 53 C.R.T.C. 115 at p. 132.

30 Lascar case, supra, footnote 18, at page 483.


32 Lascar case, supra, footnote 18, at pp. 491-2.
The key question in considering the scope of 10(c) is of course the meaning of the term “works” as used in the section, for while procedural controls, or roadblocks, may be useful, they are by their very nature inadequate and at best a temporary hurdle. Basically, the question has been whether “works” as found in 10(c) is used in the same sense and scope as in 10(a) so that in 10(c) it is cut down by any limitations placed on it in 10(a). That is to say, if in 10(a) the conjunction of “works” with “undertakings” narrows the applicability of “works”, then in 10(c) “works” will have an equally narrow characterization, without the compensatory conjunction with “undertakings”, and the broad field the two terms combined can cover. Further, the very same analysis may apply to the conjunction of “works” and “undertakings” in the very opening words of 92(10) itself.

Lord Atkinson in an imprecise reference to s. 92(10) stated,33 “These works are physical things, not services”. Clarifying the exact reference, Viscount Dunedin surmised that the use of “works” in 10(c) is other than in 10(a) and that the meaning of works in (c) is physical things in contradiction to “undertakings” which is “not a physical thing but is an arrangement under which of course physical things are used.”34 Referring to Cannon J.35 who assumed that Lord Atkinson’s equation of “works” and “physical things” applied to all of s. 92(10), Viscount Dunedin held this definition applied only to 92(10) (c). On the other hand, this definition of “undertakings” applies to the whole of head (10).36 It would appear then, from these cases that while “works” in 10(c) is limited to physical things, “works” in 10(a) is not so restricted. Logically, it would seem the converse would be more reasonable inasmuch as “works” in 10(a) is accompanied by “undertakings” which would by definition cover the usage of the “works”, while in 10(c) “works” stands alone without the crutch of “undertakings”, and one would think that by itself its meaning would be broader. When one further considers that “undertakings” has been defined not only as “an arrangement under which . . . physical things are used” but as interchangeable with “enterprise” and as equivalent to “organizations”,37 the scope of the emasculation of the concept “works” when one subtracts therefrom “undertakings” becomes apparent.38 A priori, there seems to be no intrinsically compelling reason why Parliament should be entrusted with the power of declaration over physical things but not over their usage, organization and the like, particularly when the criterion as stated by statute is “the general advantage of Canada

33 Supra, at p. 685.
38 For a more detailed account of the interaction of 92(10) (a) and 10(c), see the thorough analysis of Vincent C. MacDonald, [1934] 1 D.L.R. 1 pp. 9-15 and pp. 25-31.
or for the advantage of two or more of the provinces". Further, it requires a distinction of some nicety to differentiate between what ground is included in the control and regulation of the work per se, and what is included in the forbidden ground of the organization, or arrangements under which the work is employed. For example, when does control over grain elevators which are works and therefore within the jurisdiction of Parliament by declaration encroach on the undertaking of the grain business? If it be argued that the courts will here apply the doctrine of the necessarily incidental, the task will be indeed delightful; in point of fact, works are generally incidental to an undertaking rather than the undertaking to a work. Thus, any attempt to carve out of the regulation of an undertaking that which pertains of necessity to the regulation of the work (which in turn exists because of its importance to the undertaking) is bound to result in a highly artificial distinction, not necessarily "for the general advantage of Canada or for the advantage of two or more of the provinces".

Another line of cases also offers itself for consideration. In R. v. Red Line Ltd. Orde J.A. held that "works" in 10(c) had no relation to "works" in 10(a):

There is no grammatical connection whatsoever... If there is any restriction upon Parliament's power to make that declaration in any particular case, it must be sought for in exception (c) itself, and not by any reference to exception (a).

Thus, it would appear that in this view the scope of "works" as used in 10(c) is not cut down by inference from 10(a) and hence analytically at any rate may include "undertakings" as defined by Viscount Dunedin. This view is in harmony with the doctrine of Rand J.: Undertakings existing without works, do not appear within s. 92(10)(c) and cannot be the subject of such a declaration. In other words, undertakings existing with works can be the subject of such declaration. So too, Lord Porter in holding that 92(10)(c) embraces a wider subject matter than "works" which are also "undertakings" seems to imply that "works" in 10(c) includes "undertakings".

O'Halloran J.A. in a dissenting judgment seems to summarize the gist of argument in favour of a wide interpretation of "works"

39 cf. Duff J. in King v. Eastern Terminal Elevator Company, [1925] S.C.R. 434 at p. 447: "There is one way in which the Dominion may acquire authority to regulate a local work such as an elevator; and that is, by a declaration properly framed under s. 92(10) of the B.N.A. Act."
40 (1930), 66 O.L.R. 53.
41 cf. Lord Porter in A.-G. Ont. v. Winner, [1954] 4 D.L.R. 657 (P.C.) at p. 670: "Moreover in ss. (10) the word 'works' is found uncombined with the word 'undertakings', a circumstance which leads to the inference that the words are to be read disjunctively..." Here an inference is drawn from 10(c) to 10(a) rather than as customary from 10(a) to 10(c), either process being contrary to R. v. Red Line (supra).
42 Supra, footnote 41, at page 553.
43 A.-G. Ont. v. Winner, supra, footnote 41, at pp. 670-1.
in 10(c). He took the view that “works” as used in 10(c) denotes the “works and undertakings” “referred to in cl. (a) and cl. (b) of head (10)”.

Note that O’Halloran J.A. here utilizes cl. (a) and cl. (b) to enlarge cl. (c) rather than restrict it, a rather novel twist. Cf. Annotation, supra, footnote 38, at p. 29. “It is thus apparent that it is a crucial determinant of the meaning of ‘works’ in cl. (c) to hold that it is the same as in cl. (a) for so to do may be to restrict its meaning materially.”

45 [1929] S.C.R. 200 at p. 220. Note also the emphasis on a “solemn declaration”.

46 [1929] S.C.R. 200 at p. 220. Note also the emphasis on a “solemn declaration”.

47 Supra, footnote 40.

48 Supra, footnote 6, at p. 770.

49 Supra, footnote 9.


51 e.g., Industrial Relations and Disputes Investigation Act, R.S.C. 1952.
the case of the private act incorporating the London and Lake Erie Railway and Transportation Company\textsuperscript{52} neither Boyd C.\textsuperscript{53} nor Meredith C.J.O. questioned this feature of the declaration.\textsuperscript{54} So too, in Beauport \textit{v.} Que. R.L. and P. Co.,\textsuperscript{55} Rinfret J. echoed the words of the incorporating statute which stated:\textsuperscript{56}

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

and said,

The undertaking of the company was, therefore, "declared to be a \textit{work} for the general advantage of Canada"; \ldots (\textit{italics are mine}).

It is this approach that is the nightmare that confronts those who would uphold provincial autonomy in the face of what they consider the unwarranted unilateral expansion of the Federal Parliament's authority and jurisdiction. Thus writes R. H. McKercher:\textsuperscript{57}

The technique of legislative draftsmanship whereby Parliament's legislative jurisdiction is apparently sought to be unduly extended is obvious. The method is simply one of defining, within a particular statute, an "undertaking" to be a "\textit{work}". Once it becomes a "\textit{work}" then it is open to the Dominion to assume control over it. To allow this surreptitious technique to stand would amount to allowing Parliament to define not only its own legislative jurisdiction but also that of the provinces as well.

It is this basic concern that appears to lie behind the demands that 10(c) be strictly construed, that declarations be explicit and formal, and that "\textit{works}" in 10(c) be other than "undertakings". Something of this approach, may perhaps be found in the words of Rand J.:\textsuperscript{58}

There is towards them also (i.e., railways and telegraphs) a notion of fixity and determinateness that, although somewhat elusive, underlies the restriction of a declaration of Dominion advantage under head 10(c) to a "\textit{work}". But the building up of an aggregate of services into a unity of operation introduces considerations of a different nature.

We may, it would appear, infer that "\textit{works}" as used in 10(c) has a limiting determinate character, so that this concept would not include "undertakings" which appears to be closer to "an aggregate of services".

It is of course open for the courts to apply the doctrine of colourability so as to prevent Parliament's expansion by definition. The application of the doctrine would presuppose that "\textit{works}" does not include "undertakings" and would necessitate a detailed demarcation between the two concepts; the courts would have to decide whether the terms are mutually exclusive, disjunctive or conjunctive, that "undertakings" is provincial in aspect or in whole. In short,
the courts would have to consider carefully and minutely an area which, till now at any rate, has been generally glossed over.

Another question regarding declarations that has come before the courts is the question of their necessity. 10(c) speaks of works "wholly situate within the province", while 10(a) deals with works and undertakings "connecting the Province with any other or others of the Provinces or extending beyond the limits of the Provinces." Thus in *Toronto Corporation v. Bell Telephone Company of Canada,* Lord Macnaughton, speaking on behalf of the Privy Council, stated with regard to the Dominion-wide works of the Bell Telephone Company:

> It is not very easy to see what the part of the section declaring the Act of incorporation to be for the general advantage of Canada means. As regards the works therein referred to, if they had been "wholly situate within the province", the effect would have been to give exclusive jurisdiction over them to the Parliament of Canada; but, inasmuch as the works and undertaking of the company authorized by the Act of incorporation were not confined within the limits of the province, this part of the declaration seems to be unmeaning.

So too, in *C.P.R. v. A.-G. B.C.* Rand J. said:

> Under head (10) (c) a work must be wholly confined within one province ... to be the subject of a declaration.

Accordingly, a railway cannot be the subject of a declaration for it is not wholly situate within the province. The Dominion, however, frequently persists in adding a superfluous declaration *ex abundanti cautela.* This was the case, for example, in *Van Buren Bridge Co. v. Madawaska* where a bridge connecting New Brunswick and Maine was the subject of a declaration. Ritchie J.A. referred to the bridge without commenting on the declaration, in the following words:

> I can see no interference with the operation of an inter-connecting undertaking extending beyond the limits of the Province and a work for the general advantage of Canada.

It is fairly obvious that the declaration by itself was unmeaning, unless we are prepared to argue that it applied only to the half of the bridge in the province.

Given a declaration over an appropriate subject matter, in proper language and precision, what exactly does a declaration do? Even on this apparently elementary question there is no unanimity

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59 [1905] A.C. 52 at p. 60.
61 Thus making the construction of 92(10)(c) an unnecessary task for the court. Of course, it would in principle be just as easy for the court to overlook the other issues and deal with the declaration.
62 *Supra,* footnote 6, at p. 70.
63 Cf. Rand J.'s qualification in *C.P.R. v. A.-G. B.C., supra,* footnote 60, where in referring to the inefficacy of a declaration upon a railway running cross-Canada he stated, "... so far as they purport to deal with railways as a whole."
of opinion. In *Montreal v. Montreal Street Railway Co.*** Lord Atkinson held that:

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

These two sections must then be read and construed as if these transferred subjects were especially enumerated in sec. 91, and local railways as distinct from federal railways were specifically enumerated in sec. 92.

A similar view was expressed by Viscount Dunedin in the *Radio case:*

These provisions as have been explained in several judgments of the Board have the effect of reading the excepted matters into the preferential place enjoyed by the enumerated subjects of s. 91.

With respect, it must be noted that these judgments gloss over and fail to take account of a very basic distinction between 10(a) and 10(b) on the one hand, and 10(c) on the other. The former two sections exclude from the jurisdiction of the provincial legislatures works and undertakings which by their nature as defined within the sections are, without more, subject to federal legislative authority. In the case of works covered by 10(c) the matter is otherwise, for the section merely gives Parliament the power to make a declaration. Until the declaration is made, however, the local works remain as much a part of the provincial domain as any other subject dealt with by s. 92. In other words, it is not the effect of 92(10) which transfers “works” in 10(c) into s. 91; it is Parliament’s declaration that effects this change. Duff J. in *Reference Re Water Powers* articulated this distinction by referring to the jurisdiction arising from 92(10) (c) as not a jurisdiction given directly by the British North America Act itself, but rather as given:

mediately through the instrumentality of declarations by the Parliament of Canada under s. 92(10) (c).

A subordinate, but related, question is the meaning of “exclusively” as used in reference to Parliament’s jurisdiction over interpolated 10(c) works. In *A.-G. Ont. v. Winner* Lord Porter, aside

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64 *Supra*, footnote 8, at p. 685.
65 *Supra*, footnote 34, at p. 85.
66 It is also open for Parliament to vary, cancel or modify any of its declarations: *Hamilton, Grimsby v. A.G. Ont.*, *supra*, footnote 14.
67 Lord Atkinson, in *Montreal v. Montreal Street Railway Co.*, *supra*, footnote 8, at p. 687 went on to say, “The only one of the heads enumerated in sec. 91 dealing expressly or impliedly with railways is that which is interpolated by the transfer into it of sub-heads (a), (b), and (c), of sub-sec. 10 of sec. 92.” The question arises: What is interpolated, the actual sub-sections or what they deal with? Previously, Lord Atkinson held, “the excepted works mentioned in sub-heads (a), (b), and (c)” to be the matters transferred. If the entire sub-sections are transferred, the problem of 10(c) arises. If only the works and undertakings dealt with are transferred, then they are given unique status in that every particular work taken to the Dominion by declaration becomes an independent sub-head of s. 91 of the British North America Act.
69 *Supra*, footnote 41, at p. 666.
from reaffirming Montreal v. Montreal Street R. Co.\textsuperscript{70} held the jurisdiction of the Dominion Parliament over 10(a), (b) and (c), the same as:

... they would have enjoyed if the exceptions were in terms inserted as one of the classes of subjects assigned to it under s. 91.

It appears then, that the Dominion's "exclusive jurisdiction and control" over these interpolated heads is no more or less than over the other heads of s. 91.\textsuperscript{71} In other words, the same principles of interpretation as apply to all the other heads of s. 91 here too apply.

But in the case of subjects of declarations, there is a logical difficulty. Until the declaration, the specific work would be by s. 92(10) under provincial jurisdiction and therefore subject to provincial laws. By the declaration, the said work becomes subject to Parliament's laws. It would appear, therefore, that in the case of 10(c) there is a built-in conflict between Dominion and Provincial legislation inasmuch as, aside from the all-important declaration, the work involved is a local work. In such a case, how far does federal legislation override provincial legislation? Does the doctrine of the "unoccupied field" apply or is the province completely cut out once a declaration is made? If the latter is the true position then 92(10) (c) as read into s. 91 will have a position favoured over the rest of s. 91 which is cut down by the heads of jurisdiction found in s. 92.

An examination of the cases in this area is very revealing. In C.P.R. v. Parish of Notre Dame de Bonsecours,\textsuperscript{72} Lord Watson discussed the effect of a declaration upon a railway in the following words:

The British North America Act, whilst it gives the legislative control of the appellants' railway qua railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, \textit{inter alia}, reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes.

In this case, municipal legislation prescribing the cleaning of a ditch was held to be \textit{intra vires}. In Madden v. Nelson and Fort Sheppard Railway,\textsuperscript{73} the above principle was reaffirmed, but it was held that provincial legislation prescribing the erection of proper fences on a railway on penalty of responsibility for cattle injured or killed was \textit{ultra vires} of the provincial legislature. The distinction drawn by the Lord Chancellor between the cases appears to be the fact that in the

\textsuperscript{70} i.e., the aspect of it discussed above.
\textsuperscript{71} See the argument of Mr. Arnup in Re Perini Ltd. v. Can.-Met. Explorations, supra, footnote 49.
\textsuperscript{72} [1899] A.C. 367 at p. 372.
\textsuperscript{73} [1899] A.C. 626.
C.P.R. case, the legislation was of a general nature aimed at all landowners, while in the Madden case, the legislation was aimed specifically at the railway. Both judgments recognize the fact that “exclusively” means no more exclusively than the jurisdiction of Parliament over the other sections of head 91.

In Beauport v. Que. R.L.P. Co. the view was held that when a railway carries on activities in an area not covered by federal law, provincial law applies. So long as Parliament does not utilize the jurisdiction which it has taken to itself, valid provincial legislation remains in force, in an unoccupied field. On the other hand, Kellock J. in Reference Re Industrial Relations found it unnecessary:

To consider whether, so far as s. 92(10) is concerned, such legislation as the present would fall within the exclusive jurisdiction of Parliament or whether . . . provincial legislation covering the same ground would be operative in the absence of Dominion legislation.

In the light of the Beauport case, and in the light of In Re Treaty of Versailles, Kellock J. appears to cast some doubt on the unoccupied field approach in this area. Relying on C.P.R. v. Notre Dame de Bonsecours where Lord Watson stated:

The Parliament of Canada has in the opinion of their Lordships exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company.

Kellock J. went on to say:

If the matter dealt with by the legislation in question on this Reference can therefore be said to fall within the scope of management of the undertakings excepted by s. 92(10), there would be no room for provincial legislation on the same subject matter with relation to such an undertaking, whether the field had or had not been occupied. (Italics are mine).

Thus, even if the issue is left open, it appears that in the view of Kellock J. there are areas where the “unoccupied field” theory has no application.

Locke J. avoids the question of an unoccupied field by pointing out that in this particular case Parliament had legislated. He does, however, point out the opposition between the statement of Duff J.

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74 This objection could readily be overcome by a more generalized statute dealing with fencing, omitting the pointed preamble. Both cases appear to be dealing with the regulation of railway property so as to preserve valid provincial interests, but not with the railway qua railway.
75 Supra, footnote 31.
76 Supra, footnote 37, at p. 557.
77 [1925] S.C.R. 505 at p. 511, where Duff J. held that, “The effect of such legislation by the Dominion to execution of this power is that provincial authority in relation to the subject matter of such legislation is superseded, and remains inoperative so long as the Dominion legislation continues in force.” On this case because the Dominion had not legislated beyond a specific enactment, Duff J. held, “... the primary authority of the Province in relation to the subject matter remains, subject to the qualification mentioned, unimpaired and unrestricted.”
78 Supra, footnote 23, at p. 372.
79 Supra, footnote 37 at p. 557.
80 Ibid. at p. 577.
81 Quoted in footnote 77.
and that of Lord Watson in Union Colliery Ltd. v. Bryden where Lord Watson stated:

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

Considering that the legislative power involved is power that the Dominion gave itself by declaration, this statement would allow the Dominion to place an area of control in limbo, in a forbidden category, by making a declaration over a particular work and not legislating on that work. The clash of the two quotations highlights the unique position of jurisdiction shifted by utilization of 10(c) inasmuch as, if we accept the unoccupied field approach because of the essential difference between this interpolated part of s. 91 and the rest of s. 91, there will always be provincial legislation ready for application if the Dominion does not utilize its jurisdiction. On the other hand, if we treated interpolated 10(c) as any other part of s. 91, there is the danger that valid provincial interests will be overlooked.

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

Other cases have taken a quite pragmatic view of the problem and applied the "aspect doctrine" and the "doctrine of the necessarily incidental". Thus in Beauport v. Que. R.L.P. Co. Kerwin J. held that:

... the "works" being considered an enumerated head of s. 91, Parliament may enact such further legislation as is necessarily incidental to the exercise of its jurisdiction over them... .

Thus Kerwin J. treats the new heads of s. 91 as any other section, applying thereto the doctrine of the "necessarily incidental" so as to allow the Dominion to reach s. 92 matters. However, in applying this doctrine, Kerwin J. by implication overrules not only any blanket supremacy of Parliament over 92(10) (c) works, but also any vestiges of survival of pre-declaration provincial laws per se.

A recent judgment of Landreville J. is also worth considering on this topic. In Re Perini Ltd. v. Can.-Met. Explorations the
learned judge held with regard to the application of Mechanics' Liens to the subjects of a declaration, that the declaration does not derogate from provincial legislative jurisdiction except to the extent of enabling the Dominion to reach matters "necessarily incidental". 92(10)(c), he held, did not declare such works should cease to be part of the province or exempt from valid provincial legislation.

Thus Landreville J. held that provincial works under a declaration do not simply because of the declaration become immune to provincial legislation.86

... It imposes itself that if the Dominion legislates on works or undertakings which are for the general advantage of Canada, it must express itself in clearly discernible manner as to its main purpose and object. When such is unequivocally defined it may then be a matter of interpretation to what extent other fields of legislation are ancillary or incidentally affected but necessary for the effective existence of the Dominion Act. ...

His reason for this construction is pithily stated:

In the case of works which are strictly and wholly within the confines of a Province, to construe otherwise would be to render inoperative many, if not all, laws enacted by the Province which have even remotely some effect on the works.

Whether this last point is a valid constitutional argument or not, it finds echo in many an earlier case.87

This, then, is our present situation. It is fairly obvious that except for a few elementary matters, the broad sweep of 10(c) is as much open to interpretation and clarification in our day as it was in 1934, when Vincent C. MacDonald wrote:88

... The proper construction of s. 92(10)—and particularly of cl. (c) thereof, upon which the power of Parliament to declare works to be for the general advantage depends—is a task requiring the exercise of the highest gifts of judicial statesmanship. It is to be hoped that the Court which is confronted by such a task will approach it with not too much regard to the mechanistic application of canons appropriate to ordinary statutes but rather with regard to the fact—ever-present to the mind of the great Marshall—that it is a Constitution they are expounding.

With the growth of Canada, and the accompanying enlargement of her political and economic problems, these theoretical doctrinal dissertations will become pressing, practical considerations. In this process, the Dominion will no doubt be more and more tempted to utilize 10(c) in cases where, till now, political considerations may have restrained. It will be interesting to see what will be the future development of this section.

86 Supra, footnote 9 at p. 380.
88 Supra, footnote 38, at p. 31.