

# THE FEDERAL DECLARATORY POWER UNDER THE BRITISH NORTH AMERICA ACT

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## I. *Introduction*

Section 92(10) of the British North America Act bestows legislative jurisdiction over “works and undertakings” on both the provincial legislatures and the federal Parliament. It gives the provinces jurisdiction over “local works and undertakings other than such as are of the following classes,” and then lists the following exceptions which, by virtue of s. 91(29), fall under federal jurisdiction:

“(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 provinces;

(b) Lines of steamships 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.”

This article concerns the third exception—the so-called “declaratory power” of the federal Parliament. By the declaratory power, which is found in s. 92(1)(c), Parliament is able to “clothe” itself with jurisdiction: i.e. although local works are normally within provincial jurisdiction by reason of s. 92(10), the federal Parliament may by a declaration properly framed remove a particular work, though located entirely within one province, from the jurisdiction of the provincial legislature, thereby the same jurisdiction onto itself.

In the area of water law this power could become extremely important since, generally speaking, the provinces are responsible for legislation in this field on the basis of their power over “property and civil right” or “local works and undertakings” in the province. This power, however, leaves it open for Parliament, to extend its jurisdiction in various aspects of water law as well as numerous other fields. For example, a hydro dam might normally be within provincial jurisdiction (local works and undertakings) but if the federal government declared the dam to be a work to the general advantage of Canada or two or more provinces the federal Parliament would become the responsible legislative body.

The power to declare works to be for the general advantage is a very broad power, the basic restriction being that the object of the declaration must in fact be a “work.” It has great potential as an expedient by which the federal government may extend its jurisdiction into all fields, not only that of water law. Further to this, the power is a discretionary power, exercised at the option of the federal Par-

liament,<sup>1</sup> and the courts have consistently held that they will not interfere with this discretion. It is worthy of note that the power provided for in s. 92(10)(c) is unique, in that it is the only case, (if the *Labor Convention Case*<sup>2</sup> respecting the treaty power is correctly decided) where Parliament can by its own act "create" jurisdiction for itself.

## II. *Historical Background*

Little is known of the history of the power. The first record of its appearance is contained in the documents of the Quebec Conference. On October 21, 1864<sup>3</sup> MacDonald introduced in rough draft a plan for the distribution of powers between the "general" and provincial governments. This rough draft contained the declaratory power, albeit different in form from the version eventually incorporated in the B.N.A. Act. During the course of debate that day, it appears that the section was deleted as it did not appear in the final resolutions adopted for the day. It did, however, reappear in the final resolutions adopted by the Quebec Conference.<sup>4</sup> It did not come to be in its final form until virtually the last draft of the B.N.A. Act. In the various drafts of the Act it appeared in different areas. At times it was placed under the federal head of jurisdiction. On one occasion it appeared under the head of concurrent jurisdiction with agriculture and immigration and public works.<sup>5</sup> However, in its final form it was included as an exception to s. 92(10).<sup>6</sup>

The only clue as to the *raison d'être* of the declaratory power seems to come from the Confederation Debates of 1865.<sup>7</sup> John A. MacDonald makes a brief reference to the power at p. 40.

"... all such works as shall, although lying within any province, be specially declared by the Acts authorizing them, to be for the general advantage, shall belong to the General government. For instance, the Welland Canal, though lying wholly within one section, and the St. Lawrence Canals in two only, may be properly considered natural works, and for the general benefit of the whole Federation."

Although it would seem that the purpose of 92(10)(c) was a concern on the part of drafters of the B.N.A. Act that works of national significance such as the Welland Canal should come within the legislative sphere of the federal government, in actual fact, its scope is

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1. *Luscar Collieries Ltd. v. MacDonald* [1925] 3 D.L.R. 225; *affd.* [1927].

2. [1937] A.C. 326.

3. Pope, Joseph, *Confederation Documents* pp. 23.

4. *Ibid.*, pp. 44.

5. *Ibid.*, pp. 238.

6. *Ibid.*, pp. 270.

7. *Parliamentary Debates on Confederation of British North American Provinces* (3rd Session).

far broader than that. The drafters have left in the hands of Parliament a broad discretion to determine which works are for the "general advantage."

### III. Comparison of s. 92(10)(c) with s. 11 of Quebec Resolutions

As has been stated—when the declaratory power first appeared it did so under different phrasing—

"All such works as shall, although lying wholly within any one province, be specially declared by the Acts authorizing them to be for the general advantage."

The present sections reads as follows:

"10. Local Works and Undertakings other than such as are of the following classes, — . . . .

(c) Such works, 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 provinces."

Laskin does not consider the change of wording to be of any great significance. He notes that "The power was included, under different phrasing, but with the same effect, in the catalogue of federal powers proposed by Sir John A. MacDonald at the Quebec Conference of 1864 . . . ." <sup>8</sup> At first blush this would appear to be true, but a careful examination reveals several important differences. The delegates to the Inter-provincial Conference held in Quebec in 1887 certainly thought the change in wording of s. 92(10)(c) was crucial to its interpretation. Resolution 6 of that Conference reads as follows:

"That the federal authorities construe the B.N.A. Act as giving to the federal Parliament the power of withdrawing from provincial jurisdiction local works situated in any province, and though built in part or otherwise with the money of the province or the municipalities thereof; and of so withdrawing such local works (without compensation) by merely declaring the same to be for the general advantage of Canada or for the advantage of two or more provinces, whether that is or is not the true character of such works within the meaning and intention of the Act; that it was not the intention that local works should so be withdrawn without the concurrence of the provincial legislature, or that the power of the federal Parliament should apply to any other except 'such works as shall although lying wholly within any province be specially declared by Acts authorizing them to be for the general advantage;' or expressly mentioned in s. 29, sub-section 11, of the Resolutions of the Quebec Conference of 1864, and that the Act should be amended accordingly."<sup>9</sup>

If we compare the two sections carefully at least four differences should be obvious:

(1) The original section might require provincial concurrence before there could be a declaration that a work was for the general advantage,

8. Laskin, *Canadian Constitutional Law* p. 504.

9. *Toronto Daily Mail* Nov. 10, 1887 pp. 1-2.

whereas it is clear that under s. 92(10)(c) a declaration by Parliament alone is sufficient. The drafters of s. 92(10)(c) left local works and undertakings to the provinces but subject to certain exceptions. S. 92(10)(a) and (b) specify certain works and undertakings which were to be excepted from s. 92(10). They also, it appears, contemplated certain other works which might be situated entirely within one province but which might be of such national significance that they ought to be subject to federal jurisdiction. At the same time they realized the task of specifically enumerating these works (many of which would come into existence only in the future) would be an impossible one. Therefore they left the "Parliament of Canada" a broad discretionary power to decide which local works ought to be subject to federal legislation. The corresponding section of the Quebec resolutions did not specifically leave this power to declare works to the general advantage of Parliament. The wording of the original section would probably have had the effect of requiring provincial concurrence at the least, and perhaps the provincial legislature would have been the *only* body competent to make the declaration that a work was to the "general advantage."

Why was the section altered? On this point one can only speculate, but possibly the drafters saw that by the original wording they might be defeating their purpose (i.e. to transfer legislative jurisdiction over works which, although located entirely within a particular province, had national or inter-provincial significance). That is, if provincial concurrence were required, sub-section 10(c) might have proven to be ineffective. The alteration might, as well, have been prompted by the need for clarification, as there was a certain amount of ambiguity on the face of the original section as to which legislature (federal or provincial) was capable of making the declaration.

(2) Under the present section a "work" may be declared "before or after its execution" but under the original section the works could only be declared by the ". . . Acts authorizing them . . ." The drafters probably realized that the original version would severely restrict the application of the declaratory power. The very purpose they intended by the declaratory power might be defeated: i.e. even if a work were to the "general advantage" once the statute authorizing it had been passed it would be out of the reach of the federal Parliament because the declaration had to be contained in the act *authorizing* the work.

(3) S. 92(10)(c) does not appear to be restricted to public works but could include any work. However, in *Re Grand Junction R.W. Co. et al.*<sup>10</sup> Cameron, J. said:

"It may be that sub-sec. 10 has relation solely to works of a public character to be undertaken at the public expense, and not to works of a quasi-private character, such as a railway to be constructed by a private company . . . ."

On the other hand, the section contained in the Quebec resolutions would appear to refer only to public works or works of a quasi-public nature. That is, it would appear to affect only such works as required statutory authorization. Any purely private work which did not require legislative authorization would not have fallen within the scope of the original section. Some support for this view might be found in John A. MacDonald's reference to the Welland Canal and the St. Lawrence Canals as examples of "works" during the course of the Confederation debates. (This debate was on the section as originally worded.) The present section, whether by design or inadvertence, appears to be much broader in its scope and the courts have certainly considered it to be so.

(4) It is sufficient today, if a work is for the "general advantage of Canada or two or more provinces." The original section less precisely required only that the work be for the "general advantage."

In general, then, the present section is probably of much greater scope than the original. Today there is no requirement of provincial concurrence, the time of the declaration is not critical, and the scope of the term "works" is probably much wider.

#### IV. *What is the effect of a declaration that a work is to the general advantage?*

The effect of the declaration would appear on the basis of s. 91(29) of the B.N.A. Act to be the withdrawal of the work from the jurisdiction of the provincial legislature and the placing of it within the exclusive legislative jurisdiction of the federal Parliament.

"It is admitted that by this declaration the railway to which it refers was withdrawn from the jurisdiction of the provincial legislature, that it passed under the exclusive jurisdiction and control of the Parliament of Canada, and, small and provincial though it was, stood to the latter in precisely the same relation, as far as the enactments upon the true construction of which this case turns, as do those great trunk lines, also federal railways, which traverse the Dominion from sea to sea . . . ."<sup>11</sup>

"The effect of sub-sec. 10 of sec. 92 of the B.N.A. Act is, their Lordships think, to transfer the excepted works mentioned in sub-heads (a), (b), and (c) of it to 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 specially enumerated in sec. 91, and local railways as distinct from federal railways were specifically enumerated in sec. 92."<sup>12</sup>

11. *Montreal Street Railway Case* 1 D.L.R. 681 at 683.

12. *Montreal Street Railway Case* 1 D.L.R. 681 at 685.

It is clear from the above case that a declaration has the effect of transferring a work from the provincial to federal jurisdiction as if the work had been expressly enumerated under s. 91.

The "work" declared becomes subject to federal legislation, but it does not become federal property. The work remains under the original ownership. That is, the declaration does not affect proprietary rights but merely legislative rights. Laskin, however, indicates that this may be subject to the right of the federal government to expropriate the "work" which forms the subject matter of the declaration.<sup>13</sup>

" . . . if the railway and navigation cases have any relevancy, it would seem to be open to Parliament to expropriate or authorize the expropriation of what it has brought within its jurisdiction."

If there were a canal entirely within one province and therefore subject to provincial jurisdiction, Parliament could by declaration that it is to the "general advantage" take legislative jurisdiction, but if the province originally owned the canal, it would still retain that ownership, although it would lose the right to legislate on the basis of the canal being a local work. If, for example, the province or some private individual collected a toll on the canal, it would still be entitled to the toll. The federal Parliament might however legislate with respect to the toll rates which could be charged.

#### V. *Effect of Provincial Legislation dealing with a work which had been declared*

Does a declaration have the effect of preventing any provincial legislation from applying to the declared work, or does the dual aspect doctrine still apply? It would appear clear that once the federal government has exercised the declaratory power 92(10)(c), the work is then exclusively within federal jurisdiction. The provincial legislature could no longer take jurisdiction on the basis of 92(10). One might say that 92(10) was "spent" so far as its being a source of provincial jurisdiction is concerned. Therefore within 92(10) *per se* the dual aspect doctrine would not apply. But if the province could find another head of jurisdiction under s. 92 other than 92(10) to justify its legislation, then the dual aspect doctrine would apply. For example, assume that a power dam which would otherwise be within provincial jurisdiction is the subject of a declaration under 92(10)(c) and therefore within federal jurisdiction; the provincial government could probably take jurisdiction on the basis of 92(13), property and civil rights in the province, or 92(16), generally all matters of a merely local or private nature in the province. The validity of the provincial legisla-

13. Laskin, *Canadian Constitutional Law* p. 506.

tion would depend on whether there was in existence federal legislation which had dealt with the matter with which the provincial legislation purported to deal. If the federal government had not occupied the field, then the provincial legislation would be valid. If the federal government had occupied the field, then the provincial legislation would be ineffective. Therefore, while in theory a declaration under 92(10)(c) passes the "local work" into the exclusive jurisdiction of the federal Parliament, in practice it seems hard to conceive of a situation in which there will not in fact be an overlapping jurisdiction. The province will almost certainly be able to take jurisdiction on the basis of 92(13) or 92(16) provided the federal Parliament has not occupied the field.

### VI. *The Meaning of "Works"*

It should be noted that while 92(10) as a whole refers to "works and undertakings" 92(10)(c) refers only to "works". While there are numerous confusing *dicta* on the point,<sup>14</sup> I think we can take it, on the basis of the cases, that there is a valid distinction between "works" and "undertakings" for the purpose of 92(10)(c). If this is so, the subject matter of the declaration must be a "work" and would not include an undertaking existing without a work. While the courts will not interfere with the discretion of Parliament to declare "work" for the "general advantage" the courts certainly have the power to interfere if the subject matter of the declaration is not in fact a work.

What is the difference between a work and an undertaking? In an inexact reference to 92(10), Lord Atkinson stated, "These works are physical things not services."<sup>15</sup> On the other hand, an undertaking has been defined as "an arrangement under which . . . physical things are used."

### VII. *The Extent of Federal Jurisdiction over Declared Works*

Once a "work has been brought within federal jurisdiction, how far does Parliament's jurisdiction over the work extend? Laskin has said that the result:

"must surely be to bring within federal authority not only the physical shell of the activity but also the integrated activity carried on therein; in other words, the declaration operates on the work in its functional character."<sup>16</sup>

The *R. V. Thumfert* case lends support to Laskin's point of view. In that case Parliament by its declaration became ". . . entitled to pre-

14. For an analysis of the case in depth see Schwartz, *Phineas Flat by Declaration* O.H.L.T. Vol. 2.

15. *Montreal Street Railway Case* 1 D.L.R. 681 at 685.

16. Laskin, *Canadian Constitutional Law* p. 506.

scribe what grain may go in and out of such a feed mill and the terms on which grain may be delivered thereto.<sup>17</sup> By means of a declaration Parliament not only acquired jurisdiction over the work *per se* but was able to exercise a certain amount of control over the undertaking of the grain trade. But how far can Parliament extend this jurisdiction? Could the courts apply the necessarily incidental doctrine? In his article Schwartz makes a good point:

"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."<sup>18</sup>

There must however be some test for remoteness. Perhaps all that can be said for the time being is that the declaration takes into the jurisdiction of Parliament more than the mere "physical shell" of the work, but the "integrated activity" as well. Exactly what constitutes an "integrated activity" is a question of fact for the courts to determine in any given case.

Several things, however, are fairly clear. Parliament could declare a canal or dam to be a work for the general advantage. By such a declaration it would require jurisdiction not only over the canal or dam *per se* but also over certain related activities. In the case of the canal it could, on the basis of the *Thumlert* case, regulate tolls, the number and types of ships passing through the canal, etc. In the case of the dam it could regulate water levels, etc. It is also clear that a river or lake existing in its natural state would not be considered a work and therefore could not be the subject of a declaration. The term work ". . . envisages something constructed or fabricated."<sup>19</sup> Just what would be sufficient to render a natural body of water a work is difficult to say. Would a river which has been dredged be a "work" subject to a federal declaration?

Can Parliament extend its jurisdiction in this area by definition? Can Parliament declare an undertaking to be a "work"? The suggestion that it can arises from *Beauport v. Que. R.L. and P. Co.*, where the judge quoted the incorporating statute:

"1. The undertaking of the Quebec, Montmorency and Charleroi Railway Co., 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."

without questioning the validity of a declaration in this form. (See also *Kerley v. London & Lake Erie Transportation Co.*, (1912) 6 D.L.R. 189. (Ont.).

17. *The Queen v. Thumlert* [1960] 20 D.L.R. 335 at 336 (head note).

18. Schwartz, P., *Fiat by Declaration* 1 O.H.L.T. Vol. p. 8.

19. Laskin, B., *Jurisdictional Framework for Water Management Resources for Tomorrow* Vol. 1 p. 219.



I think that this form of declaration is strictly improper. Parliament cannot extend its jurisdiction by definition. Such a power would enable Parliament unilaterally to alter the Constitution. In Canada, Parliament is not supreme but is subject to the Constitution. In a case such as this, Parliament must surely be bound by the intention of the drafters of the B.N.A. Act.

### VIII. *Ejusdem Generis Rule*

It appears well established that 92(10)(c) is not to be read in a *ejusdem generis* sense. That is, the class of works in 92(10)(c) is in no way restricted to the class of works set out in 92(10)(a) and (b). (See *The Queen v. Thumlert*, supra.)

In *Rex v. Red Line Ltd.* 66 O.L.R. 53, Orde, J. stated at p. 68:

"I do not think that the words 'such works' in exception (c) of para. 10 of s. 92 are to be restricted by any reference to exception (a) at all. There is no grammatical connection whatever. The exception is from the sweeping words 'local works and undertakings' in the body of para. 10, over which the provinces are given exclusive legislative jurisdiction. From these are excepted 'Such works as, although wholly situate within the province are . . . . declared by the Parliament of Canada to be for the general advantage of Canada.' 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)."

This rule that 92(10)(c) is not to be read *ejusdem generis* with exception (a) is vital in the area of water law. This means that "Such works" in 92(10)(c) does not refer only to works which involve some form of transportation or communication and, as a result, the subject matter of a declaration could be a work such as a dam for the purposes of hydro electric power or irrigation, neither of which have a transportation or communication aspect and which therefore would not be included within 92(10)(c) if it was restricted by 92(10)(a) and (b).

### IX. *Form of Declaration*

A. Must the declaration be express:<sup>21</sup> In 1918 Professor Lefroy was able to say, "On the whole the balance of authority at present seems in favour of the view that it need not be a declaration in express words."<sup>22</sup> While the position is not completely settled today, I think one can say that the attitude of the courts in cases subsequent to 1918 indicates there is a preponderance of opinion *now* in favour of the

20. *Rex v. Red Line Ltd.* 66 O.L.R. 53.

21. See: Le Froy, *Canada's Federal System* p. 366.

22. Le Froy, *Constitutional Law of Canada* p. 122.

view that the declaration must be express. This would seem to be consistent with the original intention of the drafters of the Quebec Resolutions where s. 29(11) referred to "... works ... *specially* declared ...". It cannot be doubted that what was contemplated by s. 29(11) must have been an express declaration. Unfortunately, however, the word "specially" was dropped in the final draft of the B.N.A. Act and, as a result, the courts have been somewhat confused as to what form of declaration was required. I believe that the phrasing was not dropped with the purpose of altering the construction of the section, for had that been the purpose it would seem logical that something further should have been done since the dropping of the phrase would not appear sufficient *per se* to alter the construction in this respect. It would appear, rather, that the drafters felt the present section would have the same effect as the original phrasing and therefore omitted the word "specially" as being superfluous rather than for the purpose of altering the legal construction.

In the earlier cases such as *Windsor and Annapolis Railway Co. v. Western Counties Railway Co.*, (1878), the court appeared to be of the opinion that an implied declaration would suffice.<sup>23</sup> In *Hewson v. Ontario Power Co.* Butler, J., in the Court of Appeal of Ontario<sup>24</sup> was of the opinion that the declaration could be contained in the preamble or implied. In the Supreme Court<sup>25</sup> Girourd and Idington, J. J., agreed. But Davies, J., (Sedgewick, J., concurring) said:

"As at present advised I do not think the general declaration in the preamble of this private Act such a declaration as that contemplated by sub-sec. 10(c) of section 92 of the B.N.A. Act, 1867. In my present view of that section I should be inclined to think that with respect to a work or undertaking of a purely provincial kind solely within the jurisdiction of the provincial legislature, and with respect to which Parliament was assuming jurisdiction on the sole ground that the undertaking was for the general advantage of Canada or of two or more provinces, the declaration intended was an enacting declaration to the effect required by the Imperial Act. 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."

In the *St. John and Que. Railway Co.* case<sup>26</sup> Davies, then C.J., said at p. 94:

"It has never yet been decided by any court that the declaration required by the B.N.A. Act to change a provincial road into a Dominion one can be implied by or from such legislation as is here relied on, legislation which is quite consistent with the work in question being and remaining, as in fact it was and is, a purely provincial one. Nor have I ever been able to hold that anything short of the statutory declaration the Confederation Act requires can accomplish such a transfer."

23. 12 N.S.R. 3 R & C 1877-79.

24. (1903) 60 L.R. 11 at 16.

25. [1905] S.C.R. 596—in particular pp. 609-10 and 605.

26. [1921] 625 C.R.C.

The court followed the Chief Justice, Idington and Duff, J.J. expressing no opinion.

It would seem therefore that this case has probably settled the issue, and that a declaration under s. 92(10)(c) “. . . must have statutory, enacting force, and neither a resolution nor a recital nor preamble to a statute will do.”<sup>27</sup>

The requirement that the declaration be express is but a procedural bar. In practice, Parliament can avoid any problem by using an express enacting declaration whenever it attempts to take jurisdiction over a local work.

B. Parliament can bring within the scope of its declaration a work before or after its execution, but a further question remains.

How specific must the declaration be? Can it refer to a general class of works and thereby bring all works which fall within the general class within the jurisdiction of the federal Parliament, or must each work which is to be the subject of the declaration be expressly specified? If a general declaration is sufficient, is it possible to bring works not yet in contemplation of anyone within the scope of the declaration by including them in general class? For example, assume the Parliament of Canada has declared all hydro electric dams in existence and to come into existence to be works for the “general advantage” without further specifying exactly which works are to fall within the declaration. Would this be a valid declaration as far as a present existing dam which is not named but clearly falls within the generic definition of the declaration? Would this be a valid declaration as regards a dam built by the Saskatchewan government thirty years subsequent to the declaration, even though Parliament could not have possibly contemplated this work at the time of the declaration?

This very issue came before the court in *Luscar Collieries v. MacDonald*.<sup>28</sup> Anglin, C.J., Idington, Duff, Renfret, J.J. were of the opinion that a declaration in general terms was invalid. Newcombe, J. and Mignault, J. favoured the broad interpretation.

This case involved the general declaration with respect to railways contained in s. 6(c) of the Railway Act of 1919.

Idington at p. 466 stated:

“I certainly was surprised to find such a classification and declaration as in the s. 6(c) . . . , for I have never had occasion to consider same until this case was presented to us, unless the early legislation providing for the cases of local railways crossing Canadian through lines.

27. Laskin, B., *Canadian Constitutional Law* p. 504. See also *Montreal Street Railway [1912] 1 D.L.R. 581, Hamilton, Grimsby & Beamsville Railway Co. v. A.G. for Ont. [1916] 2 A.C. 583 (P.C.)* and *Luscar Collieries Ltd. v. MacDonald [1925] S.C.R. 460*.  
28. [1925] S.C.R. 460.

"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 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 advantage 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.s. (c) of item 10, of s. 92 of said *British North America Act*, and thereby to fulfil its requirements for a declaration as to any works 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., at p. 476 said (Anglin, C.J.C., concurring):

"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 *British North America 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; 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 consequences 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.

"In support of this view it may be said that the purport of the declaration authorized appears to be that the work which is the subject of it either is an existing work, beneficial to the country as a whole, or is such a work as ought to be executed, or, at all events, is to be executed, in the interests of the country as a whole. An affirmation in general terms, for example, an affirmation that all railways owned or operated hereafter by a Dominion company are works which ought to be or will be executed, as beneficial to the country as a whole, would be almost, if not quite, meaningless, and could hardly have been contemplated as the basis of jurisdiction.

"Of course, this provision of s. 92 must be construed reasonably, and reasonably applied. Parliament having assumed control of a work, such, for example, as a trunk line of railway within the limits of a province, may well, as included within the jurisdiction intended to be conferred by s. 92(10)(c), have ample authority with regard to subsidiary works existing and non-existing, even though such subsidiary works should not have been specifically in contemplation at the date of the declaration.

It is in light of this consideration, it would appear, that the observation of Lord Macnaghten, in *The City of Toronto v. The Bell Telephone Company*, ought to be construed and applied.

"There seems to be a preponderance of argument in support of the view that s. 6(c) is not an effective declaration under s. 92(10)(c) of the *British North America Act*."

Mignault, J., stated the argument for the broad interpretation in the following way (p. 481):

"The argument on behalf of the appellant is that the power which the *British North America Act* confers on Parliament to declare for the general advantage of Canada local works and undertaking is a power which can be exercised only in respect of a specified work, a work not necessarily named, but so identified by its description that it can be located on the plans or upon the ground. This, the appellant contends, cannot be said of the declaration made in s. 6, which comprises railways now or hereafter owned, controlled, leased or operated by a company wholly or partly within the legislative authority of the Parliament of Canada. It argues that the judgment of Parliament must be exercised as to the particular work which it declares to be a work for the general advantage of Canada, that the line must be drawn somewhere, and that a general declaration or a declaration applicable to a class of works, as distinguished from a specific work, is inoperative to remove the class of works from the provincial to the federal field of jurisdiction."

Also, at p. 483, he said:

"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. Certainly if the works declared to be for the general advantage of Canada are adequately described, it is no objection that the enactment has grouped them together or described them as a class of works, each member of which can be identified as having been contemplated by Parliament when it made the declaration. And such a declaration cannot be termed a general declaration, if that really is an objection, because it comprises all the works so described. However wide may be its application, it is specific in its description, and the judgment of Parliament is necessarily directed to each particular work which may now or hereafter come within this description.

"It must not be forgotten that the power conferred on Parliament applies to such works as are, before or after their execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more provinces. The work may not be in existence when in advance of its execution it is declared for the general advantage of Canada. It must therefore be described so that when it does come into existence it can be identified as being the work which Parliament had in mind when it made its declaration. If this condition be fulfilled, there can be, in my judgment, no possible complaint against a declaration that a class of works, and each member of the class, is for the general advantage of Canada. It matters not that new members of the described class may come into existence after the declaration is made, for the declaration can be made before or after the execution of the work. Parliament has considered in advance each new member coming within the described class, and has exercised its judgment as to each. And it would seem as inconvenient as it would be contrary to the wide terms of the grant of power to require that each member of the class should be the object of a new declaration by Parliament when it comes into existence or when plans have been prepared for its construction.

"If this interpretation of par. (c) of s. 10 of s. 92 of the *British North America Act* be sound, there is no room for the objection that the legisla-

tive jurisdiction of the province as to local works and undertakings is swept away by the declaration here in question. The argument before the court took a very wide range. It was urged that Parliament might conceivably declare all railways wholly situate within a province to be works for the general advantage of Canada, that a line must be drawn somewhere, and that the whole provincial jurisdiction as to local railways might be thus taken away.

"With these objections or these fears we need have no concern. It is unnecessary to discuss where the line should be drawn, for the present case is certainly well within the line of a reasonable construction of par. (c) of s.s. 10. That is the only point on which we have to pass judgment. 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. All that is necessary to say here, and that is the conclusion at which I have arrived, is that in enacting x. 6, s.s. (c) of the *Railway Act*, Parliament has not overstepped its legislative jurisdiction."

Newcombe, J., said, at p. 489-90:

"It will be perceived that by the express words of clause (c) declaration may take place before or after the execution of the work. It is mere conjecture that the Imperial Parliament contemplated that the power should not be exercised with regard to a future work until it had become a fixed and definite design, or until it could be identified as a work actually in contemplation. The declaration may be made at any time, although it operates only when the work shall have come into existence, because the subject matter is defined as works of a class declared by Parliament of Canada to be for the general advantage of Canada; therefore it would seem that until there is actually a work of the kind described in the declaration there would be nothing in the declaration except its potential authority, and therefore in the interval no disturbance of the pre-existing distribution of legislative power. Both in the introductory lines of s. 92 (10) and s. 91(29) works and undertaking belonging to classes are the subjects to which the exclusive legislative authority of Parliament attaches. Under s. 92(10)(c) it is Parliament which creates the class by its declaration. Why may not Parliament, as it has done in practice, call into existence a class *uno flatu*? Why is it necessary that it should create the class by the less convenient method of specifying each constituent unit? I am utterly at a loss to discover in s. 92(10)(c) any word or accent of Parliamentary intention that it is essential to the execution of the power to name a work to which the declaration is to apply, if the description be otherwise adequate to identify and include the work, or to define a class of works by describing the individual specimens rather than by apt words descriptive of the whole."

And at p. 491-2:

". . . . 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 . . . ."

In summary, then, the majority of the court held that the work must either be in existence or contemplation for there to be a valid declaration respecting it. The Privy Council, however, decided the case on other grounds and left this point open. Schwartz feels that the Privy Council's silence on this matter is significant:

"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."<sup>29</sup>

It is perhaps worthy of note, that following the Supreme Court decision, the Grain Act was drafted with a general declaration but followed "for greater certainty" by a schedule specifying 9,750 elevators and warehouses.

The issue remains open today. Much can be said for both points of view. By requiring that each work be specifically named the courts are able to ensure that each has been individually considered. While the courts are not able to interfere with Parliament's discretion, they can try to assure themselves Parliament has in fact exercised its discretion after considering the works individually. Also, the declaratory power is an unusually broad power for extending the jurisdiction of Parliament—and it is arguable that such powers ought to be narrowly interpreted. At the same time, there appears to be no real reason why in some circumstances Parliament ought not to be able to declare an entire class of works provided the description is sufficiently detailed. If, for example, Parliament considered all hydro electric developments to be works for the general advantage of Canada, it would seem unnecessarily circuitous to require that each be individually specified when a declaration in general terms could make clear exactly which works Parliament intended to include. From a practical point of view, this would appear to be the most logical approach.

#### X. *Can a Declaration Be Repealed?*

For a number of years there was some doubt if a declaration, once made, could subsequently be repealed by Parliament and jurisdiction, with respect to the work thereby be revested in the provincial legislature.<sup>30</sup>

However, *Hamilton, Grimsby and Beamsville Ry. Co. v. A.G. for Ontario*<sup>31</sup> appears to have finally settled the question:

"Their Lordships are clearly of opinion that s. 92, s.s. 10, never intended that a declaration once made by the Parliament of Canada should be incapable of modification or repeal. To come to such a conclusion would result in the impossibility of the Dominion ever being able to repair the oversights by which, even with the greatest care, mistakes frequently creep into the clauses of Acts of Parliament. The declaration under s. 92, sub-sec. 10(c), is a declaration which can be varied by the same authority as that by which it was made." (p. 587)

The headnote to the same case states:

"A declaration made by the Parliament of Canada under s. 92, sub-sec. 10(c), of the British North America Act, 1867, that a provincial work or undertaking is for the general advantage of Canada, whereby under s. 91, sub-sec. 29, of that Act the work or undertaking becomes subject to the exclusive legislative authority of the Dominion, can be

30. See Duff, J. (dissenting) *B.C. Electric Railway Co. v. Vancouver Railway Co.* (1913) 13 D.L.R. 308 at 319.

31. [1916] 2 A.C. 538.

repealed or varied by a subsequent Act of that Parliament, and thereupon the work or undertaking ceases to be under Dominion authority, or ceases to be so save to the extent then declared."<sup>32</sup>

### XI. *Restriction on Declaratory Power*

On the face of it, s. 92(1)(c) is a very broad power, as has already been stated. What, if any, restrictions does it have? The courts will not hesitate to nullify the legislation on the grounds that the subject matter of the declaration does not constitute a "work." This has been well established by decided cases. But does the phrase "for the general advantage of Canada or for the advantage of two or more provinces" place any further restriction on the federal declaratory power? In this regard, there are at least two possibilities. The courts might consider it within their jurisdiction to determine whether or not the declared "work" is in fact a work for the "general advantage." On the other hand, the courts might consider that as long as the object of the declaration is a work, the declaratory power of Parliament is completely unfettered: i.e. the courts cannot intervene once Parliament exercises its discretion to declare a work to be for the "general advantage" whether or not the court is of the same opinion.

The phrasing of s. 92(10)(c) appears to suggest that a declaration by Parliament that a certain "work" is for the "general advantage" of Canada is not subject to review by the courts. The courts have generally tended to support the view that the power set out in s. 92(10)(c) is a discretionary power vested in the federal Parliament and as such the courts are not entitled to substitute their discretion for that of Parliament.

Duff, J., in the *Companies Reference* case:<sup>33</sup>

"Again everyone knows that the assumption by the Dominion of jurisdiction over works obviously of only local interest by declaring them to be for the 'general advantage of Canada' became a few years ago a grave scandal. Is it suggested that there is any power in any court in the Empire to nullify . . . such an Act of the Dominion Parliament on the ground that there had been an abuse of the Dominion power? In the case of enactments of the Dominion Parliament (which are subject to no power of disallowance such as that which exists in respect of provincial legislation) there might be some possible reason for investing the courts with such a power. The constitution, however, has not done so."

Mignault, J., in the *Luscar Collieries Case* said:

"Parliament is the sole judge of the advisability of making this declaration as a matter of policy which it alone can decide."<sup>34</sup>

Clinton, J. Ford C.J.A., at p. 337 of the *Thumlert Case*, said:

". . . Parliament has the power to make such a declaration, and also, that having done so no court can override its decision."

32. See also Newcombe, J., *Luscar Collieries Ltd. v. N.S. MacDonald* pp. 484-492.

33. [1913] 48 S.C.R. 331.

34. *Luscar Collieries Ltd., v. N.S. MacDonald* p. 480.



The court, it appears, will not substitute its judgment for that of Parliament, as to what is or is no to the "general advantage" of Canada or of two or more provinces.

But further to this point, the *Thumlert Case* raises an interesting possibility—could the federal legislation declaring a work to be to the general advantage to be held to be *ultra vires* as being "colourable" legislation by which the federal government is attempting to usurp provincial jurisdiction? It has long been a principle associated with Canadian constitutional interpretation that constitutional restrictions on the legislative capacity of a legislature cannot be avoided by the means of colourable devices or procedural subterfuges. However, because of the very nature of the declaratory power, it is doubtful whether the doctrine of colourability would apply to it. The very purpose of s. 92 (10)(c) is to extend federal jurisdiction into what otherwise would be the provincial field. Therefore the mere fact that by the declaration the federal Parliament intends to vest in itself jurisdiction over works which otherwise would be within provincial jurisdiction cannot itself be cause for complaint, for otherwise s. 92(10)(c) would be of no effect.

Can, then, the concept of colourability apply to the declaratory power at all? I think it can, but in a somewhat restricted sense.

In the *Thumlert Case* McBride, J., hinted that such might be the case:<sup>35</sup>

"Nothing in the stated case, which contains all the evidence of fact before us, nor in the legislation itself, in any way furnishes grounds for the suggestion that Parliament enacted s. 45 of the Act as a colourable device to enable it to control local contracts and transactions. As was said by Lord Atkin . . . . a court must have cogent grounds before it, arising from the nature of the impugned legislation, before it can impute to a Legislature some object other than what is to be seen on the face of the enactment itself. On a critical examination of the Wheat Board Act and of the scheme of orderly marketing envisaged by it, I find nothing which would justify such a conclusion . . . . [The] appellant cites in support of his proposition . . . . *A.-G. Alta. v. A.-G. Canada* . . . . but there it was held . . . . that there was no escape from the conclusion that the bill under consideration was part of a legislative plan to prevent the operation in Alberta of banking institutions called into existence and given their power by Parliament, an objective obviously *ultra vires*."

McBride, in rejecting the appellants' allegation that the legislation was colourable in the manner in which he did, impliedly suggested that in other circumstances the doctrine might apply so as to restrict the declaratory power.<sup>36</sup>

When could the doctrine apply? In light of the *Thumlert Case*<sup>37</sup> it would seem the doctrine might be applied where Parliament exer-

35. *The Queen v. Thumlert* [1960] 20 D.L.R. 335 at 337.

36. *The Queen v. Thumlert* at p. 353.

37. See *The Queen v. Thumlert* and *A-G Canada v. Hallet & Carey Ltd.*, [1952] A.C. 427.

cised the declaratory power in bad faith: e.g. where Parliament declares a work to be for the general advantage of Canada while not believing it to be so but instead using the declaratory power with the intent of usurping provincial jurisdiction. In the final analysis, it would appear necessary to make a distinction (subtle though it may be) between the situation where Parliament exercises the declaratory power in good faith declaring a work to be for the "general advantage" though the court may have a different opinion, and the situation where Parliament acts in bad faith as outlined above.

In the former case, the declaratory legislation is valid because it is a valid exercise of the discretion vested in Parliament by virtue of s. 92(10)(c) to declare a work for the "general advantage" (this is so even though the court would not have exercised this discretion in the same way).<sup>38</sup> In the latter case, where Parliament acts in bad faith the legislation will be invalid because it is in fact not an exercise of the declaratory power 92(10)(c) but in pith and substance legislation falling under some other head of s. 92. S. 92(1)(c) is merely being used as a guise to usurp provincial jurisdiction.

If this distinction be valid, it raises further difficulties—particularly in the field of evidence. How do you determine if Parliament acted in bad faith? The courts would have to impute a certain intent (in this case bad faith) from the facts placed before it. This might have some interesting ramifications. The mere fact that the work declared by Parliament is not, in the opinion of the court, for the "general advantage" is not in itself sufficient for the court to upset the legislation, but it may be evidence of bad faith on the part of Parliament. What are the implications of this? Perhaps this may have the effect of making it possible for the courts to do indirectly what they cannot do directly—namely, substitute their discretion for that of Parliament. However, as long as the court is convinced that Parliament thought that it was in fact a work for the general advantage, it cannot set the legislation aside whatever its own opinion might be.

To date, there has been little discussion of this aspect of the declaratory power by the courts. One of the reasons for this is undoubtedly the fact that the federal Parliament has used the power relatively

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38. Lord Watson has stated the position of the courts under such circumstances in the *Union Colliery Co. of B.C. Ltd. v. Bryden* [1899] A.C. 580 at p. 584—  
"In assigning legislative power to the 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 the Dominion or of the provinces, is unfettered. It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them; but when that point has been settled, courts of law have no right whatever to enquire whether their jurisdiction has been exercised wisely or not."

wisely. If, however, the federal Parliament should commence to abuse the power, the courts would probably intervene.

## XII. *The Future of the Declaratory Power in the Field of Water Management.*

From a purely legal point of view, it is clear that the declaratory power has great potential in the field of water management. Hydro electric installations, dams, canals and other works of this nature, even if located entirely within one province, could become subject to federal legislation if they were declared to be works to the "General Advantage . . ." In fact, as early as 1870 an act was passed declaring certain works on the Ottawa River to be works to the general advantage of Canada.<sup>39</sup>

But to consider the future of the declaratory power solely from a legal viewpoint would be unrealistic in a federal state such as ours. Political realities demand a consideration of more than the mere legal aspects of the Constitution. Whether the federal government will take the initiative in certain fields does not depend solely upon whether they have constitutional jurisdiction in the strict sense of the word. With the present pressure toward decentralization, not only from Quebec but from the provinces in general, the federal government cannot ignore provincial attitudes and aspirations. There is reason to anticipate an unfavourable reaction from the provinces if the federal government began to make extreme use of the declaratory power in order to exercise jurisdiction in a field which would otherwise be largely within provincial jurisdiction.

As early as the Inter-provincial Conference of 1887, the provincial premiers objected to the fact that Parliament by a unilateral act could acquire jurisdiction over works situated in any province by declaring it to be a work for the general advantage of Canada. (See supra.) Also, prior to 1913, there had been a "grave scandal" over the federal Parliament declaring works of a purely local nature to be for the general advantage of Canada. (see supra.) Whether this latter criticism was a factor or not, the frequency of use of the power appears to have declined substantially after World War I. (See Appendix.) This may, however, have resulted from the decline in the number of provincial railways being incorporated, for it was in early railway legislation that the declaratory power was used most frequently.

The declaratory power, while existing in theory over the last twenty years, has for the most part lain dormant. Though from a legal stand-

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39. An Act respecting certain works on the Ottawa River 1870 ch. 24 p. 77.

point there is no reason why it should not play a vital role in the development of our water resources, much depends on whether the federal politicians will, in light of present political considerations, make use of the power.

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APPENDIX †  
STATUTES CONTAINING AN EXERCISE OF THE FEDERAL  
DECLARATORY POWER UNDER SECTION 92(10)(c)  
OF THE BRITISH NORTH AMERICA ACT

1856 - 1966

\* Indicates declaration in language similar to Section 92(10)(c) of the B.N.A. Act.

\*\*Indicates that an "undertaking" is included in declaration.

† The Appendix was prepared in co-operation with Mr. Harvin Pitch, Graduate, Faculty of Law, University of Manitoba, 1967.

YEAR	STATUTE	DECLARATION	SUBJECT MATTER
1867-8	St. Lawrence & Ottawa Ry., c. 20, s. 1.	°	Railway
1869	None		
1870	Works on the Ottawa River, c. 24, s. 1	. . . shall be held to be works for the general advantage of Canada . . .	Canals, dams, etc.
	Montreal and Champlain Junction Ry. Co., c. 55, s. 1	°	Railway
1871	Ontario & Quebec Ry. Co., c. 48, preamble	. . . the construction . . . is a work for the general advantage of Canada.	Railway
	Sault Ste. Marie Ry. and Bridge Co., c. 50, preamble	. . . the construction . . . would be a work for the general advantage of Canada . . .	Railway and railway bridge
	Fredericton & St. Mary's Bridge Co., c. 51, preamble	°	Bridge
1872	Great Western Ry. Co., c. 65, s. 5	°	Railway
	Manitoba Junction Ry. Co., c. 75, s. 1	°	Railway
	Central Ry. Co. of Manitoba, c. 77, s. 1	°	Railway
	North-Western Ry. Co. of Manitoba, c. 78, s. 1	°	Railway
	Thunder Bay Silver Mines Ry. Co., c. 80, s. 1	°	Railway
	Quebec Frontier Ry. Co., c. 81, s. 1	°	Railway

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