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Abstract

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Résumé

Cet article porte sur les notions divergentes d’autonomie gouvernementale dans le Canada d’après la confédération. Il s’intéresse notamment à la façon dont la question du droit d’auteur révèle un aspect controversé et mal compris de la théorie constitutionnelle dans les premières décennies de la confédération. Selon cette théorie, l’enjeu de l’Acte de l’Amérique du Nord britannique dépassait la simple répartition des compétences dans une colonie encore secondaire au sein de l’empire. Les tenants de la théorie ont plutôt fait valoir

I would like to thank Jim Phillips and Jeffers Lennox for their help with this paper, and the anonymous reviewers for their insightful suggestions. The R. Roy McMurtry Fellowship in Legal History and a SSHRC-CGS scholarship provided financial assistance.

que cette loi marque un moment charnière de l'histoire constitutionnelle, au sens où elle a transféré une part de souveraineté britannique au Canada et conféré de nouveaux pouvoirs au dominion, qui l'autorisaient même à contrevenir au droit impérial. De nombreux politiciens, juges, avocats et intellectuels en vue ont appuyé cette théorie. En 1872, armé de cette idée, le parlement fédéral a adopté un projet de loi proposant de passer outre à la loi impériale sur le droit d'auteur. Mais ni le projet de loi ni la théorie ne devaient connaître de lendemain, la Grande-Bretagne bloquant la proposition et un consensus se dégageant parmi les avocats, juges et têtes pensantes de la constitution pour rejeter ses fondements théoriques. Cet article, en analysant le débat sur les limites des pouvoirs du Canada, fait ressortir la diversité d'idées entourant même les préceptes fondamentaux de l'ordre constitutionnel d'après 1867.

Introduction

What was the foundation of Canadian self-government after 1867? Was it political only, in the sense of being allowed by British law and custom, but entirely subject to them as well? Or had the British North America Act (BNA Act) been a turning point, giving the new dominion an equal status with the mother country and a share of British sovereignty? Had it actually entrenched Canadian liberty? In the first two decades of confederation these questions sparked serious debate in Canada. Even among legal literates — those with a sophisticated knowledge of the law, trained lawyers or not — there was disagreement about this basic precept of the constitutional order.[1]

Few issues went so directly to the core of this debate as copyright. As the copyright controversy dragged on for decades, it continually evoked questions about the limits of Canadian self-government. Successive generations of Canadian policy-makers and businessmen campaigned for reform to the Canadian and imperial systems and their policy proposals often entailed disentangling Canada from British laws and, after 1886, from the multilateral Berne Convention. Not surprisingly, they usually found a critical audience in the imperial government. But the debate over copyright was even more heated because these proposals also embodied a provocative vision about the scope of Canadian power and about the meaning of the 1867 constitution. As a result, the debate over copyright was embroiled in a much larger discussion about Canada's legal stature in the empire.

Copyright reformers were not alone in offering an unconventional vision of the imperial connection. After 1867, this line of thinking was espoused by

1 The term "legal literates" is borrowed from Mary Sarah Bilder, "The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture," *Yale Journal of Law and the Humanities* 11 (1999): 47–117.

some major judges, lawyers, scholars, and government officials. They contended that the BNA Act was far more than an imperial statute laying out a federal constitution. For them, it was in fact a grant of sovereignty, a permanent abdication of British constitutional authority over the powers given to the federal parliament. This constitutional vision fuelled the 1872 copyright bill, and in adopting this theory and embodying it in this bill, the Canadian government embraced a vision of the imperial connection that went far beyond the idea of political autonomy and became one of constitutional liberty.

However, neither the bill nor the theory underpinning it succeeded. The bill was blocked by the imperial authorities and the constitutional theory was rejected both by the British government and by most constitutional thinkers in Canada. As a result, this paper is about legislative and ideological false-starts, examples of creative statecraft (however dubious) which were stifled in the early post-confederation period. By necessity it focuses on legal specifics, since the concepts of Canadian freedom explored here do not involve the usual hallmarks of independence. Canada was not dissolving the monarchy or declaring war. Rather, the concepts of liberty debated in the post-confederation period centre on the federal government's power to modify or repeal imperial law, and the arguments in favour of such power largely stemmed from a certain legal construction of a particular section of the BNA Act. As a result, understanding this climate of experimentation and appreciating how provocative the Canadian proposals were means wading to some extent into the technicalities of the law. But having done so we can more fully appreciate the diversity of ideas that surrounded the constitutional order after 1867, and see how these ideas affected the practice of Canadian politics.

That such disagreement existed should not in one sense be surprising, since Canadian historians have long focused on the heated federal-provincial debates over federalism.[2] This work has illustrated major cleavages in understanding the BNA Act between parties, ideologies, languages, and regions.[3] In fact, we have been pushed to ask if there could ever have been a coherent vision of the constitution emerging from the confederation conferences. But in another sense, that even legal experts disagreed on the nature of the imperial connection is surprising. After all, there simply was no straightforward answer for what should happen when the federal power over trade and commerce clashed with the provincial

2 Generally, see John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002); Paul Romney, *Getting It Wrong: How Canadians Forgot Their Past and Imperilled Confederation* (Toronto: University of Toronto Press, 1999); David Schneiderman, "A.V. Dicey, Lord Watson, and the Law of the Canadian Constitution in the Late Nineteenth Century," *Law and History Review* 16, no. 3 (1998): 495–526.

3 See A.I. Silver, *The French-Canadian Idea of Confederation* 2nd ed. (Toronto: University of Toronto Press, 1997); Robert C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution*. (Albany: S.U.N.Y. Press, 1991).

power on property and civil rights, to use a well-worn example. By contrast, Canada was simply and manifestly still a member of the British Empire, and that there was disagreement even on so foundational a point reinforces the argument made by the legal scholar R.C.B. Risk, that in the first few years of confederation even the core tenets of the constitution were up for grabs.[4]

In examining these issues, this paper proceeds in four main parts. First it outlines the nature of the copyright conflict. Almost immediately after confederation the issue became a top and pressing political matter, and Canadian officials and representatives of the book trade lobbied for changes to the imperial copyright system, but were rebuffed. Second, it discusses the influence of constitutional theory on the 1872 copyright bill. Third, it examines this theory of Canadian power in the jurisprudence and constitutional writing of the post-confederation period, in which this vision of the BNA Act had supporters among prominent members of the legal community. Finally, this paper examines responses to this theory, both by Canadian judges and scholars and by imperial officials, illustrating the formation of a consensus in which this idea was decisively rejected.

Copyright and the Movement for Reform

The historical literature on Canadian copyright is growing rapidly. Scholars in Canada such as George Parker, Meera Nair, Sara Bannerman, and Myra Tawfik have illustrated very well how deep are the roots of the present global battles over copyright. Their work also makes plain that the political and legal questions at play, coupled with the amount of money involved in the publishing industry and the degree of pressure coming from Canadian business, consistently made copyright a top issue in Canada for decades.[5] Its importance also went well beyond the issue of books, posing crucial questions about Canada's place in the empire and wider world: how much could Britain intervene in

4 R.C.B. Risk, "Constitutional Scholarship in the Late Nineteenth Century: Making Federalism Work," in *A History of Canadian Legal Thought: Collected Essays of R.C.B. Risk*, eds. G. Blaine Baker and Jim Phillips (Toronto: University of Toronto Press, 2006), 50–1.

5 Meera Nair, "The Copyright Act of 1889: A Canadian Declaration of Independence," *Canadian Historical Review* 90, no. 1 (March 2009): 1–28; also Meera Nair, "From Fair Dealing to Fair Duty: The Necessary Margins of Canadian Copyright Law." (Ph.D. diss., Simon Fraser University, 2009); Sara Bannerman, "Canada and the Berne Convention, 1886–1971." (Ph.D. diss., Carleton University, 2009); Myra Tawfik, "For the Encouragement of Learning: The Origins of Canadian Copyright Law, 1824–1842," paper presented at the Toronto Legal History Group, February 2009; Myra Tawfik, "A Connecticut Yankee in Montreal: Mark Twain's Adventure with Canadian Copyright Law," paper presented at the Toronto Legal History Group, December 2006; George Parker, "English-Canadian Publishers and the Struggle for Copyright," in *History of the Book in Canada*, Vol. 2, eds., Yvan Lamonde, Patricia Lockhart Fleming, and Fiona A. Black (Toronto: University of Toronto Press, 2005), 148–58. For older work, see R.A. Shields, "Imperial Policy and the Canadian

Canadian affairs? How did the imperial government go about supervising the legislation of its established dominions? What role did international influences play in Canadian and imperial policy-making? On the question of imperial and international affairs, the work of British scholars such as Catherine Seville helps remind us that copyright was an international issue affected by British law, international trade policy, and the emerging international legal regime of copyright that developed in the nineteenth century, first through bilateral treaties and agreements and then through the multilateral Berne Convention.[6]

In order to understand the constitutional questions embedded in the copyright debate, it is necessary to understand the premises of that debate. Since this was (and is) an exceptionally complex area of law, what follows is a very simplified sketch of the aspects of copyright which caused the most controversy in Canada, namely foreign reprints of British copyrighted works and what we will call imperial copyright — that is, copyright that spanned the British Empire, giving a work protection not just in Canada but also in Britain, Australia, South Africa, and so on. First, the reprints issue: in 1842 Britain banned the importation of foreign reprints of British copyrighted works at home and in the empire.[7] This was an unpopular move in many colonies, and especially so in British North America where cheap American reprints of British books were a mainstay of the reading public.[8] Many claimed that British editions were too expensive for the colonial market, and since the United States offered no protection to non-American authors, American publishers marketed cheap editions north of the border. One Montréal newspaper said the new British policy would "girdle the tree of knowledge in Canada, by shutting out the people from the

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Copyright Act of 1889," *Dalhousie Review* 60, no. 4 (1980–1981): 634–58; Linda Hansen, "The Half-Circled 'C': Canadian Copyright Legislation," *Government Publications Review* 19, no. 2 (1992): 137–54; P.B. Waite, *The Man From Halifax: Sir John Thompson, Prime Minister* (Toronto: University of Toronto Press, 1985), passim; George Parker, *The Beginnings of the Book Trade in Canada* (Toronto: University of Toronto Press, 1985), *passim*; George Parker, "The Canadian Copyright Question in the 1890's," *Journal of Canadian Studies* 9, no. 2 (1976): 43–55.

6 Catherine Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (Cambridge: Cambridge University Press, 2006); Lionel Bentley and Brad Sherman, "Great Britain and the Signing of the Berne Copyright Convention in 1886," *Journal of the Copyright Society of the U.S.A.* 48 (2001): 311–40. On the pre-Berne treaty system, see Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works, 1886–1985* (London: Q.M.C./Kluwer, 1987), 25–38; Simon Nowell-Smith, *International Copyright Law and the Publisher in the Reign of Queen Victoria* (Oxford: Clarendon, 1968).

7 Copyright Act, 1842 [UK], 5 & 6 Vic., cap. 45.

8 Parker, *Beginnings of the Book Trade*, 93–138; Nowell-Smith, *International*, 35–6; Tawfik, "Connecticut," 6–7. On the price of books, see also Sir John Rose to T.H. Farrer, 9 April 1872, and Farrer to Rose, 31 May 1872, both in *Private Correspondence Between the Hon. Sir John* Rose and T.H. Farrer, Esq. on the Subject of Colonial Copyright (London: Eyre & Spottiswoode, 1872).

only available supplies of books."[9] Due to the mounting colonial pressure, Britain passed the Foreign Reprints Act in 1847, which suspended the ban on importing these reprints where a colony imposed and collected a duty on them and remitted that money to the imperial government for the copyright holders.[10] While imports were allowed, however, Canadian firms could not reprint those same books in the colony, which gave American publishers an almost uncontested dominance of the British North American market.[11] This system was still in place at the time of confederation.[12]

The other issue was the question of how Canadian copyright intersected with imperial copyright. In Canada, during this period, there were two copyrights — one could be obtained through printing, publishing, and registering under the Canadian copyright act. This was a territorially-defined copyright, and gave a work no protection outside of Canada. The other could be obtained under the imperial copyright act by publishing in the United Kingdom. This system was bolstered in 1868 when the House of Lords affirmed the rule that imperial copyright was only available under the imperial act, and that Canadian copyright meant nothing in England, or Australia, or South Africa, while British copyright applied everywhere in the empire.[13]

This copyright regime was very problematic for Canada. Obviously, the Canadian government would have preferred if more people took out Canadian copyright since it made work for typesetters, printers, paper manufacturers, and others. Not surprisingly, then, the fact that anyone could secure protection in Canada without printing or publishing in the country and without complying with Canadian law was increasingly irksome for policymakers. The other major problems centred on the reprints issue. First, the scheme to collect the import duty did not work, for various reasons; everyone seemed to agree on this. An 1878 British Royal Commission found that in the entire decade previous the nineteen colonies which participated in the reprint scheme remitted only about £1,100 in total.[14] The commission called it a "complete failure" and the Canadian Finance Minister in 1869 said the money collected was "a mere trifle."[15] On top of the collection system not working, which rankled the British government and certainly the British copyright holders, Canadians

9 Montreal Witness (December 1845), as quoted in J.L. Morison, British Supremacy & Canadian Self-Government, 1839–1854 (Glasgow: J. MacLehose, 1916), 39.

10 Seville, *Internationalisation*, 78–90.

11 Foreign Reprints Act, 1847 [UK], 10 & 11 Vic., cap. 95.

12 See the Canadian Copyright Act, 1868, 31 Vic., cap. 54; also, the act imposing a duty on foreign reprints admitted to Canada, 31 Vic., cap. 56.

13 Routledge v. Low, *House of Lords Reports*, vol. 3, 120.

14 Report of the Royal Commission on Copyright, *Parliamentary Papers*, 1878 [UK], Vol. XXIV, C, 2036, xxxi.

15 "Copyright Commission," xxxi; Memorandum of Sir John Rose to Colonial Office, 30 June 1868, "Colonial Copyright," *Parliamentary Papers*, 1872, [UK], Vol. XLIII, 18.

increasingly found the system unfair. After all, in this system Canada could import foreign reprints of British works, but Canadian printers and publishers could not reprint those same works in Canada. And, coupled with the fact that anyone could obtain copyright in Canada under the imperial act without printing or publishing here, many in that industry felt they were decidedly disadvantaged by British policy. As a result, reform became an increasingly pressing political priority and a near-constant controversy in the wider sphere of imperial relations.

In the late 1860s, the publishing industry and the Parliament of Canada began pushing hard for Canadians to have the same right to reprint and sell British copyrighted works as was given to foreigners under the 1847 arrangement.[16] In 1868, the Senate resolved to impress on the imperial government "the justice and expediency" of extending reprint privileges to Canadians.[17] One Montréal publisher who was lobbying the government told the finance minister that "the people of the Dominion, and especially the printing and publishing interests, feel that they ought to possess at least equal privileges to those conceded to the foreigner."[18] This kind of language — that the issue was one of simple equality with foreigners — came up again and again in the debate over reprints. In pamphlets and petitions, official correspondence, newspaper editorials, and parliamentary debates, reform advocates continually stressed that they only wanted to be on an "equal footing" or "the same footing" with American firms. Given that right, they said, they could compete successfully in the market with American editions.

There was some support for this position in both the British government and the British literary world. There were authors and copyright holders who thought that if the Canadians could come up with a scheme to license reprints and extract a fee, and actually get them a royalty, it was worth deviating from the ideals of monopoly copyright and literary property, in which the copyright holder controlled when and where a book was reproduced.[19] Indeed, the Canadian finance minister and a representative of the British copyright lobby actually arrived at a joint proposal for such an arrangement in 1869.[20] There were also elements of the imperial government that were sympathetic to Canada on this issue, and most imperial officials readily admitted that the impe-

16 For example, see petitions presented in parliament: *Debates of the Senate of Canada*, 5 May 1869, 89–90; 11 May 1869, 103; *Journals of the Senate of Canada*, 26 April 1872, 51; *Journals of the House of Commons*, 26 April 1872, 50.

17 Resolution dated 15 May 1868, *Sessional Papers*, 1869, vol. 2, no. 11, 1.

18 John Lovell to Sir John Rose, 11 June 1868, *Sessional Papers*, 1868, vol. 2, no. 11, 5.

19 Sir Charles Trevelyan to Thomas Longman, 8 February 1872, *Copyright Commission Appendix*, no. 1, 328; Thomas Carlyle to Trevelyan, 1 April 1872, ibid., 329; J.A. Froude to Trevelyan, 12 May 1872, ibid.; A.W. Kinglake to Trevelyan, 22 April 1872, ibid.

20 "Copyright Commission Evidence," 2; "Colonial Copyright," 71–2.

rial copyright system (where copyright around the empire could be obtained by registering in Britain only) was unfair to the colonies.[21]

But the more powerful opinion in London, both in government and the literary world, was against any compromise on this front. In March 1870, the new British Copyright Association rejected the 1869 deal. The group included major figures in the British literary world such as authors Charles Dickens and Anthony Trollope and publishers John Murray and Thomas Longman. This group declared that authors and copyright holders should not have to surrender control over their work and they should not have to compromise with literary pirates. "Such a forced surrender would be a private wrong and a public injury," they contended.[22] Not only did they resist a new licensing scheme for Canada, but they began pushing for the repeal of the old Foreign Reprints Act of 1847, the act which allowed Canadians to buy American reprints of British books.[23]

The imperial government took a similar stand against reprints, and for much the same reason as the Copyright Association, namely the idea of literary property. One of the major officials in the board of trade said that the 1847 Reprint Act was an exception to imperial policy, a deviation to quell colonial unrest and not the basis for more legislation.[24] He wrote that the "public policy of the mother country enforces an absolute monopoly in works of literature."[25] Nor was Britain acting in isolation, and the Board of Trade expressed serious concerns about the impact of Canada's reprint proposals on Britain's bilateral copyright treaties. Another official there argued that colonial legislation based on the 1847 act might cause Britain's treaty partners, including France, Belgium, and Prussia, to simply pull out of the arrangements.[26] Yet another official cast the issue in a similarly international context, noting that "the principle of recognizing and protecting literary property has … become more and more firmly established, day by day, in all civilized nations."[27] While this principle had not yet crystallized into a multilateral convention, the movement for literary property was gaining ground rapidly across Europe. Framed in this context, Canada was not simply deviating from imperial policy, but going backwards on an issue of increasing international significance.

In the end, the empire proved incapable of resolving the conflict between these two viewpoints on reprinting. During this period, as long as British imperial law applied in Canada and as long as Britain was unwilling to relinquish all control over Canadian affairs in this respect, there was little chance of a reso-

21 G. Shaw Lefevre to the Colonial Office, 27 July 1869, "Colonial Copyright," 30.
22 "Colonial Copyright," 76–7.
23 Longman and Murray to W.E. Gladstone, March 1870, "Colonial Copyright," 46.
24 Louis Mallet to Colonial Office, 22 July 1868, "Colonial Copyright," 22.
25 Ibid.
26 Lefevre to the Colonial Office, 27 July 1869, "Colonial Copyright," 29.
27 Farrer to Rose, 26 March 1872, *Private Correspondence*.

lution. Given the pressures on the imperial government from both the colonies and the British publishers, given the increasingly influential ideas of monopoly copyright and the growing international treaty regime, there was no feasible way to balance the licensing position and the literary property position. As a result, the conflict dragged on, though as Parker has noted, Canadian support for reprinting diminished in the 1890s and the movement achieved little.[28]

Section 91 and the Copyright Question, 1872

As Britain proved unresponsive to Canadian protests, a radical constitutional theory became increasingly prominent in Canadian proposals for a reprint scheme. This was the idea that granting the reprint privilege was not simply the right thing to do, but that Canada actually had the constitutional freedom from Britain sufficient to do this itself, because copyright was one of the powers bestowed on Ottawa in the BNA Act. Most scholars of copyright, and historians of the imperial relationship such as David M.L. Farr, have noted this idea, but it remains little understood.[29] This section explores the influence of this theory on the 1872 copyright bill.

The idea that Canada could legislate in direct defiance of imperial law stemmed from the preamble to section 91 of the BNA Act, the main federal powers section. The preamble reads in part that "the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated."[30] While most readers have always assumed that the word "exclusive" was used to distinguish federal from provincial powers, many in this period argued that it actually signified the exclusion of the imperial parliament — that the British government had permanently bound its own hands, divided its sovereignty, and abdicated its authority over the issues listed in section 91. In this vision, then, Britain had not simply created a new colonial legislature through the BNA Act, but had instead crafted an equivalent institution to itself, another partner in British sovereignty. As a result, I will refer to this idea as "exclusivist theory," after the idea of exclusive powers under section 91.[31]

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28 Parker, *Beginnings of the Book Trade*, 224-225.

29 Nair, "Copyright Act," 20; Seville, *Internationalisation, passim*; David M.L. Farr, *The Colonial Office and Canada, 1867–1887* (Toronto: University of Toronto Press, 1955), 238–9. On this issue and the wider context of constitutional theory, see Peter C. Oliver *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 2005), esp. 111–59.

30 BNA Act [UK],30 & 31 Vic., cap. 3, sec. 91.

31 Peter C. Oliver has explored this idea in his superb book on constitutional thought in Canada, Australia, and New Zealand, calling it "independence theory." See Peter C. Oliver, *Constitution of Independence*, 118–23, 138–43. Given that most of its Canadian proponents recognized other aspects of British governance, I have chosen to describe the idea in narrower terms.

This theory ultimately fuelled the Canadian copyright bill of 1872. The bill would have allowed Canadian firms to purchase a license from the government to reprint British works without the copyright holder's permission if they were not reprinted and republished in Canada within a month of publication in Britain.[32] This was obviously in direct conflict with the 1842 and 1847 imperial laws, since it would end the protection given by British copyright in Canada, but the bill's preamble explained its justification. It reiterated the ideas that reprinting would more effectually remunerate British authors and that Canadians should have the same rights as foreigners to reprint books. However, it also alluded to this theory about what the BNA Act meant for Canadian power vis-á-vis the empire, declaring that "express power is given to the parliament of Canada to legislate upon the subject of copyright," by the BNA Act.[33] In this view, the section 91 power went far beyond separating federal from provincial responsibilities.

Exclusivist theory was clearly espoused in the Senate, where the bill was introduced. A few weeks previously, Senator J.S. Sanborn, a lawyer who very soon became a Québec superior court and then appeal court judge, argued as he and others had before, that "full liberty has been conceded to us by the Imperial Government" in the BNA Act and that the "spirit of our constitution gives us the power of acting" to implement a reprint arrangement.[34] A few weeks later when the government leader in the senate — lawyer and future Justice Minister Alexander Campbell — indeed introduced the reprints bill, he referenced Sanborn's opinion. Campbell said he had consulted with the justice minister (who was also the prime minister, Sir John A. Macdonald) and they had decided to bring a bill forward on that premise. Campbell also referred to the section 91 preamble, saying that while some might see it only as a division of powers with the provinces, he believed "the language was broad enough to embrace the power given in the present bill."[35]

There was disagreement about this idea from the start. Jacques-Olivier Bureau, for example, argued that Canada lacked the power to pass a statute which was, as he put it, "in the face" of imperial law.[36] He told the Senate that "we could not be too careful in dealing with matters of legislation, where we might come into conflict with Imperial authorities."[37] Certainly, the government knew the bill would be scrutinized heavily in London on these grounds. Campbell noted that it would only come into force with imperial permission,

32 Copyright Bill, 1872, "Colonial Copyright Correspondence [1875]," Parliamentary Papers, 1875, Vol. LI, no. 144, 5–6.

33 Ibid., 6.

34 *Senate Debates*, 8 May 1872, 427.

35 Ibid., 4 June 1872, 966.

36 Ibid., 5 June 1872, 993.

37 Ibid., 4 June 1872, 967.

but he hoped that the imperial law officers charged with reviewing colonial legislation would agree with the government's opinion on the constitutional question.[38] Nor was imperial review unusual in such circumstances. After confederation, the British government continued to examine Canadian legislation, and until 1878 the governor-general's royal instructions even specified a list of legislative topics on which royal assent should be reserved automatically.[39] In fact, the copyright bill met two of these criteria: it related to obligations under imperial treaties (as Britain then had at least four copyright treaties) and affected the rights of British subjects outside Canada.[40] As a result, while the bill embodied a theory which arguably re-shaped the nature of the imperial connection, it would be debated within a continuing matrix of British power.

Exclusivist Theory and Constitutional Thought

This expansive vision of the BNA Act was a feature of post-confederation politics. Besides the copyright issue, the government deployed exclusivist theory in an 1880 dispute with the British over tariff policy.[41] Likewise, scholars have explored its reappearance in the late 1880s and 1890s as the copyright debate dragged on.[42] (It is also worth noting that these examples all involve Conservative governments, which tended to be more sentimental about the imperial connection.) But the idea of exclusivity was not limited to politicians. This section shows that outside of politics this idea was not uncommon or marginal in the broader legal community in the first two decades of confederation. That such legal literates took up the exclusivist theory is in fact a very telling indicator of the degree to which opinions differed over the basic operation of the constitution and Canada's place in the empire.

At least three judges actually applied exclusivist theory in law during this period. The first and certainly the most important was the 1875 case R. v. Taylor, long noted as an early example of federalism jurisprudence.[43] Here, Chief Justice W.H. Draper of the Ontario Court of Appeal declared that in section 91 the word exclusive did not mean that the powers were exclusive of the provinces, but rather exclusive of the imperial government — that the imperial government had ended its own authority over those powers.[44] Draper had twice

38 Ibid.

39 Barbara Messamore, "'The line over which he must not pass': Defining the Office of Governor General, 1878," *Canadian Historical Review* 86, no. 3 (2005): 453–83.

40 Ibid., 464. For example, see the Royal Instructions of Lord Dufferin, 22 May 1872, *Sessional Papers*, 1875, No. 29, 4–5.

41 Farr, *The Colonial Office and Canada*, 238–9.

42 P.B. Waite, "Sir John Thompson and Copyright, 1889–1894: Struggling to Break Free of Imperial Law," *Bulletin of Canadian Studies* 6, no. 27 and no. 1, 1983, 38; Nair, "Copyright Act," 20.

43 Saywell, *Lawmakers*, 26–7, 29–30, 40, 41.

44 R. v. Taylor, *Upper Canada Reports*, vol. 36, 220.

been co-premier of the province of Canada, and had also served as solicitor general and attorney general of Upper Canada, and as attorney general after the union.[45] In looking at the federal powers section he concluded that the grant of exclusivity was "intended as a more definite or extended renunciation on the part of the Parliament of Great Britain of its powers over the internal affairs of the New Dominion," than any previous imperial declaration.[46] (Interestingly, another judge on that panel was Samuel Henry Strong, later chief justice of the Supreme Court of Canada, who added briefly that he entirely concurred with Draper, though he did not write at any length and did not deal with the issue of exclusivity.[47])

Two other known decisions applied this theory, and both came from Québec courts. The first was an 1881 ruling in Holmes v. Temple by sessions judge Alexandre Chauveau, a prominent lawyer and Queen's Counsel who had been a Québec assemblyman and solicitor general of the province and would later be a professor of law at Laval.[48] In this case, Chauveau decided that a Canadian act passed under the federal power over the military had actually ended the effect of an imperial army act — that the colonial law had superseded the imperial.[49] The other decision came in the 1883 Vice Admiralty case The Royal. The judge here was George Okill Stuart, also a Queen's Counsel, who had, in addition to being a long-time prominent lawyer, been a solicitor of the city of Québec, mayor of Québec, and president of the Lower Canada bar.[50] This case also involved a kind of competition between provisions of an imperial and a Canadian law. It was a more complex case than Holmes, but in the end Stuart took a position similar to Chauveau, declaring that Canada's "exclusive" power over the subjects listed in section 91 included the power to repeal or modify imperial laws.[51]

The argument was also used by lawyers in several other cases, though unsuccessfully. In the 1876–1877 Ontario copyright case Smiles v. Belford, defence lawyers, including future Toronto mayor and MP James Beaty, argued

45 George Metcalf, "William Henry Draper," *Dictionary of Canadian Biography* (hereafter DCB), vol. X.

46 R v. Taylor, 220. The previous imperial laws he was referring to were the famous Taxation of Colonies Act of 1778 (18 Geo. III, cap. 12) by which Britain attempted to end the Revolutionary War by removing one of the Americans' key grievances, and the Colonial Laws Validity Act of 1865 (28 & 29 Vic., cap. 63) by which the imperial government announced that only colonial legislation directly repugnant to imperial law was void.

47 Ibid., 224.

48 "Hon. Charles Alexandre Chauveau," in *Canadian Men and Women of the Time* (hereafter CMWT), ed. Henry J. Morgan, 1st ed, (Toronto: William Briggs, 1898), 182.

49 Holmes v. Temple, *Quebec Law Reports,* vol. 8, 351–3. The case was still being debate decades later: W.E. Hodgins, "Is the English Army Act Applicable to Civilians in Canada?" *Canada Law Journal*, 39 (October 1903): 604–10.

50 Kenneth S. Mackenzie, "George Okill Stuart, Jr.," *DCB*, vol. XI.

51 The Royal, *Quebec Law Reports*, vol. 9, 148–55.

at trial that an 1875 Canadian copyright act had overridden the imperial law and that as a result copyright was only available in Canada under the Canadian law — that imperial copyright had been ended.[52] In this, the lawyers argued for the idea of "exclusive" jurisdiction excluding even imperial power, and cited Draper's decision.[53] Likewise, in 1879 the lawyer for the College of Physicians and Surgeons of Ontario made a similar argument. The lawyer here was Adam Crooks, a former Ontario attorney general and provincial treasurer, who was then sitting as the province's first minister of education.[54]

Crooks' argument was rooted in an idea of colonial liberty. His position was more complex than the other cases above — he admitted, for example, that the British parliament *could*, in theory, amend the BNA Act without Canadian permission.[55] But he took a similar approach to the idea that the act had been a turning point in the imperial relationship. "No enactment has been passed in modern times of such gravity as the Constitutional act of 1867," he contended, "and it is well known that all its provisions were as carefully discussed and considered as if it had been a compact between independent nationalities." He argued that while it was necessary to package the constitution in an imperial statute, "it was intended to be lasting and permanent, and therefore only subject to alteration after the like consideration by the contracting parties." Imperial laws that infringed on the constitution without such colonial consultation, he said, "would be an infringement of that liberty of governing ourselves and of managing our own affairs which was granted to us by the BNA Act."[56] For Crooks, Canada's freedom had evolved beyond the imperial system and this evolution had been ratified by the BNA Act. While theoretical sovereignty still lingered in Westminster, practical power resided in Canada.

Outside of the courts, the exclusivist theory was also endorsed in the first major post-confederation treatise on Canadian constitutional law. *A Manual of Government in Canada* was published in 1879 by Toronto lawyer Dennis O'Sullivan, who took a similar approach to Draper and Crooks. He argued that self-government had gone beyond a political arrangement allowed by imperial custom, and had become an irrevocable and constitutional principle cemented by the BNA Act. In so doing, he laid out a very provocative take on the concept of Canadian sovereignty. He argued that when the empire set up colonial legislatures it did more than delegate power, it actually divided sovereignty. In Canada, he wrote, there was a "three-fold division of sovereignty" between the imperial, federal, and provincial governments. He called these "separate and

52 Smiles v. Belford, *Grant's Chancery Reports*, vol. 23, 597; for Beaty, see "James Beaty, Q.C.," in *CMWT*, 57–8; also, "James Cleland Hamilton," ibid., 431.

53 Ibid., 600.

54 Robert M. Stamp, "Adam Crooks," *DCB*, vol. XI.

55 R. v. College of Physicians and Surgeons of Ontario, *Upper Canada Reports*, vol. 44, 567.

56 Ibid., 569.

distinct sovereignties acting separately and independently of each other within their respective spheres."[57] (Certainly this has implications for federalism generally, but that is beyond the scope of this paper.) In doing so, he cited and endorsed Draper's opinion in Taylor.

O'Sullivan did not deny British authority. That is, he did not think Canada was altogether independent, and at points it is difficult to piece together how he squared the idea of divided sovereignties with his admission that the federal government was "subject to imperial authority."[58] He revisited this issue eight years later when he published a second edition. In this version, he reversed some of his arguments about the division of powers made in the first edition — he went from favouring the federal government to supporting the provinces, for example.[59] But he retained his idea of divided sovereignty, and spelled out more clearly what London's lingering power meant, calling it "not much more than the nominal subjection of a colony to the Mother Country."[60] Moreover, he went further on the subject of the section 91 powers, writing that on those issues the imperial parliament had "deprived itself of the right of ever interfering."(emphasis added)[61] That idea, not just of autonomy but of permanent abdication of power, speaks to a vision of the BNA Act as much more than an ordinary imperial statute. For O'Sullivan it was, as he put it, "a contract with the people."[62] In the first edition he had taken a similar stance, saying that the federal powers were "introduced by the permission of the people of Canada, and exist by their own authority, ratified by the Mother Country."[63]

O'Sullivan's ideas on sovereignty are thus similar to those of Crooks. Both men distinguished between what they regarded as the nominal sovereignty of Britain and the real power of Canada, which O'Sullivan went so far as to explicitly call sovereign. Theirs was a definition of sovereignty grounded in the simple question of which government had the final word. In doing so, they both distinguished between what Britain could and would do — Westminster could alter the constitution, but it would not, which left Canada in control of domestic issues. Certainly, this was not an orthodox vision, but unorthodox constitutional ideas flourished in the nineteenth-century empire. As Peter C. Oliver has shown, the empire was a kind of constitutional laboratory in which,

57 D.A. O'Sullivan, *A Manual of Government in Canada; or, the Principles and Institutions of Our Federal and Provincial Constitutions* (Toronto: J.C. Stuart & Co. Publishers, 1879), 29.

58 Ibid., 57.

59 Risk, "Constitutional Scholarship," 41–2.

60 D.A. O'Sullivan, *Government in Canada: The Principles and Institutions of Our Federal and Provincial Constitutions; the B.N.A. Act, 1867, Compared with the United States Constitution with a Sketch of the Constitutional History of Canada* (Toronto: Carswell, 1887), 98.

61 Ibid.

62 Ibid., 17.

63 O'Sullivan, *Manual*, 57.

for example, New Zealand gained the power to amend its own constitution as early as 1852, and proposals for federal governance in Australia and South Africa, however abortive, circulated for decades.[64] Likewise, Lauren Benton's work highlights how much of Britain's practice of imperialism in India was actually premised on divided sovereignty.[65] The influential jurist and colonial administrator Sir Henry Sumner Maine, for example, noted that the Indian princes exercised some sovereign rights while the imperial government exercised others. "Sovereignty," he argued in 1864, "has always been regarded as divisible."[66]

In Canada, the argument over constitutional liberty resurfaced in the copyright debate in the late 1880s and early 1890s. As scholars have long noted, Justice Minister (and soon to be Prime Minister) Sir John Thompson argued stridently that Canada's section 91 power on copyright was absolute and that the federal parliament could in effect repeal imperial law on the subject so far as it operated in Canada.[67] Thompson was arguing for a copyright policy which would have pulled Canada out of the 1886 Berne Convention, and which contained a reprints scheme very similar to that in the 1872 bill. In doing so he leaned heavily on the theory of exclusivity. "If it were a mere matter of business profits I should be inclined to give it up," he wrote, "but as it is a question of principle involving the rights of Canada it seems to be a matter of duty to continue."[68]

This is not the place to argue whether Thompson or the other proponents of this theory were right on the law. However, several historians of copyright have accepted such claims too readily. The by-product of this is to cast Thompson and the Canadians as both legally and morally correct and the imperial authorities who resisted his ideas as reactionary throwbacks pining for a pre-responsible government empire. Certainly, his rhetoric about Canada's rights of self-government was compelling, and the copyright policy for which he argued might well have been the best for Canada. But these are separate issues from the constitutional question, and as the following section will show, Thompson was increasingly outside the Canadian legal mainstream in arguing as he did.

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64 Oliver, *Constitution of Independence*, 185–88, 202-209. On South Africa, see R.L. Cope, "Local Imperatives and Imperial Policy: The Sources of Lord Carnarvon's South African Confederation Policy," *The International Journal of African Historical Studies* 20, no. 4 (1987): 601–26.

65 Lauren Benton, "From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870–1900," *Law and History Review* 26, no. 3 (2008): 595–619.

66 Quoted in ibid.," 605.

67 See Shields, "Imperial Policy"; Waite, "Sir John Thompson and Copyright"; Nair, "The Copyright Act of 1889."

68 Thompson to Robertson, 24 January 1894, as quoted in Waite, "Sir John Thompson and Copyright," 46.

The Rejection of the Exclusivist Idea

This strain of constitutional thought did not win out. Despite Draper's decision and O'Sullivan's treatise, most subsequent judges and constitutional thinkers rejected the idea that the BNA Act had granted new and sweeping powers. Likewise, although the federal government embodied the theory in the 1872 copyright bill, and continued on occasion to argue for it into the 1890s and early 1900s, it was decisively rejected by the emerging legal orthodoxy, as noted by Oliver.[69] However, Oliver attributes much of the hardening of ideas on sovereignty to the growing influence of the late Victorian British scholar A.V. Dicey. In fact, there was already considerable intellectual support in Canada and Britain for what became the orthodox imperial position before Dicey's ideas permeated the empire in the late 1880s and 1890s. This section explores the developing consensus against the theory of exclusivity among imperial officials, and among Canadian judges and scholars.

To understand how this legal consensus formed it is necessary to appreciate several aspects of the British parliamentary system and of the imperial relationship, which challenged the idea that Britain either could renounce or had renounced its power. At this time, in the British system, simply put, parliament was supreme and parliament could not bind future parliaments and so could not renounce permanently their own authority, as advocates of the exclusivist theory seemed to contend Britain had done. Moreover, imperial sovereignty was actually embedded in the BNA Act, where section 129 kept pre-confederation laws in force until they were repealed by the federal parliament or provincial legislatures, while specifically exempting imperial laws from repeal.[70] Also, pre-1867 imperial law continued to apply in Canada: collections in 1874 and 1899 show dozens of imperial laws still operating in the dominion.[71] Imperial sovereignty was also evident in the powers of disallowance and reservation still wielded by Britain, which gave the Westminster government the executive power to block colonial legislation.[72] Nor were these dead powers at the time of confederation, either. In fact, in the decade after 1867, at least 12 substantive bills were reserved and reviewed by London, and at least six of these were blocked by the imperial government.[73] Moreover, after

69 Oliver, *Constitution of Independence*.

70 BNA Act, sec. 129.

71 R.J. Wicksteed, *Table of the Statutes of the Dominion of Canada* (Ottawa: MacLean, Roger & Co., 1874), 99–108. G.H. Watson and G.L.B. Fraser, eds. *Imperial Statutes affecting the Province of Ontario* (Toronto: John Notman, 1975). Appendix, *Revised Statutes of Ontario, 1897*, vol. III (Toronto: L.K. Cameron, 1902), xliii–xlv.

72 BNA Act, secs. 55–57.

73 W.E. Hodgins, *Correspondence, Reports of the Ministers of Justice, and Orders in Council upon the Subject of Dominion and Provincial Legislation, 1867–1895* (Ottawa: Government Printing Bureau, 1896), 6–58d. This number does not include ten further bills for divorce which were also reserved. See 5–60.

1867 the imperial parliament continued to legislate for Canada — it continued to exercise its role as the supreme parliament of the empire. One 1889 book provides what it says is a partial list of new imperial laws since 1867 and there are 27 of them. More importantly, around 20 of these new imperial laws were on subjects given to the federal government in section 91.[74] Imperial sovereignty, then, continued.

The first systematic response to exclusivist theory came from the British government after the 1872 copyright bill was passed. After passing through the Canadian parliament, the bill was reserved by the Governor-General and sent on to London for review. Because reserved bills expired if they did not get approval within two years, parliament petitioned the Queen in 1874 to grant the royal assent.[75] This pressure did not succeed in swaying the imperial government, and in June 1874 Colonial Secretary Lord Carnarvon announced he was withholding assent and that the bill would be left to expire. Carnarvon was very much aware of the wider theory about constitutional power underpinning the copyright bill, and in his reasons, he noted the assertion in the bill's preamble about the Canadian parliament having "express authority" over copyright under the BNA Act. Carnarvon did not accept that interpretation and brushed it aside, declaring that section 91 was clearly nothing more than a division of powers between Ottawa and the provinces. It bestowed power in Canada but could not be interpreted as limiting Westminster's authority to legislate for the dominion as well.[76] Interestingly, on this point he cited and reproduced an 1871 opinion written by two eminent British lawyers prepared for the British Copyright Association, which opposed the Canadian proposals.[77]

Canadian judges took a similar approach to the constitutional question and Draper's decision in Taylor quickly fell out of favour. In the Ontario, copyright case Smiles v. Belford, noted above, both the trial judge and the appeal panel rejected his interpretation of the BNA Act. This case dealt specifically with Canada's copyright power but laid down a doctrine about the dominion's power more broadly. At trial in 1876, the judge declared that the BNA Act simply conferred no new authority on copyright.[78] In the 1877 appeal court decision, Justice G.W. Burton was even more strident on this point. Burton began his decision by declaring that "an erroneous impression would appear to prevail" about the effect of the BNA Act on copyright, which he blamed on Draper's

74 J.E.C. Munro, *The Constitution of Canada* (Cambridge: Cambridge University Press, 1889), 268.

75 *Journals of the Senate*, 28 April 1874, 86–7; *Commons Debates*, 13 May 1874.

76 Hodgins, *Correspondence*, 12.

77 Memo of Sir Roundell Palmer (later Lord Chancellor and Earl of Selborne) and Farrer Herschell (later Lord Chancellor and Lord Herschell), 7 November 1871, ibid., 37. For its use by the British Copyright Association, see "Colonial Copyright," 73–5.

78 Smiles v. Belford, *Grant's Chancery Reports*, vol. 23, 601–4.

decision.[79] Burton roundly rejected the idea that the BNA Act enlarged Canada's power and declared that section 91 only conferred powers exclusive of the provinces, a point on which the other judges agreed.[80] This decision was followed in 1879 by the College of Physicians case where Adam Crooks urged a variant of this theory. Here again, the court dismissed exclusivist theory.[81] These precedents, and not the Draper decision or the two Québec judgments, became the foundation for later jurisprudence on this point of law.[82]

However, given the two Québec cases it may be tempting to suppose that Québec judges were more creative or open to innovations in constitutional theory. While little is known about this aspect of legal thought in Québec, historians should avoid such generalizations. First, because, as shown below, at least two prominent Québec legal scholars took a different approach to the constitution. And second, because the former Québec *Rouge* and anti-Confederate Antoine-Aimé Dorion joined with most English Canadian judges in rejecting the idea that the BNA Act had changed the imperial connection. In 1876, while chief justice of Québec, Dorion heard a case in which lawyers argued that a post-confederation imperial statute could not apply to Canada because it would infringe on the dominion's rights under the BNA Act. Dorion brushed off the idea, deciding that even if the law were inconsistent with the BNA Act, the outcome was simple: a newer imperial law trumped an older one.[83] In Dorion's view, the BNA Act had no special status among imperial laws. His decision on this point was long used as a precedent alongside Smiles v. Belford and the College of Physicians case.[84]

A similar consensus formed outside the courts. It is difficult to gauge how Dennis O'Sullivan's ideas were received by the legal profession at the time of publication. During the 1880s, for example, his treatise remained a standard text for the intermediate examinations at the Law Society of Upper Canada that law students had to pass before their admission to the bar, so his ideas were, at least, reaching young lawyers.[85] But other evidence suggests his ideas on con-

79 Ibid., *Ontario Appeal Reports*, vol., 1, 442.

80 Ibid., 442–51.

81 R. v. College of Physicians and Surgeons of Ontario, *Upper Canada Reports*, vol. 44, 576.

82 For a summary of the case law on this in Canada and the empire, see W.H.P. Clement, *The Law of the Canadian Constitution*, 2nd ed (Toronto: Carswell, 1904), 25–37; see especially Tai Sing v. Maguire, *British Columbia Reports*, vol. I, 101. Early in the twentieth century the supreme court seemed open-minded on this point, however, see Imperial Book Co. v. Black, *Supreme Court Reports*, vol. 35, 488.

83 Re Worms, 21 February 1876, *Lower Canada Jurist*, XXII, 111.

84 For example, see A.B. Keith, *Responsible Government in the Dominions* 2nd ed., vol. I (Oxford: Clarendon, 1928), 343–45.

85 *Canada Law Journal* XVI (December 1880,): 341; XVII (June 1881): 252; XVII (May 1882): 188; IXX (January 1883): 40; XX (January 1884): 19; XXI (September 1885): 323; XXII (February 1886): 51.

stitutional theory met with a critical reception. The *Canada Law Journal* said his take on the exclusion of imperial authority in particular was "surprising" and, generally, that "whether, indeed, the author's constitutional doctrine is always sound is questionable."[86] Likewise, in a review of the book's second edition, the *Canadian Law Times* attacked vehemently his argument about divided sovereignty and in reply stressed Canada's constitutional subordination to Westminster. The reviewer wrote that "with respect to the sovereign power the simplest and most truthful doctrine is that none exists in Canada." Canada's autonomy, he wrote, was simply political and not constitutional in nature.[87]

Most constitutional scholars after O'Sullivan echoed this idea. While his book may have been the first major post-confederation constitutional treatise, within a few years several others had been published and none agreed with him. The first two were published the year after O'Sullivan's, in 1880, and were by librarians: Alpheus Todd of the parliamentary library in Ottawa and Samuel James Watson of the legislative library in Toronto. Todd, long a respected constitutional thinker and an adviser to several governors-general, was especially strident on the issue of sovereignty.[88] He wrote that the idea of "exclusive" powers in section 91 must be understood as a division only between Ottawa and the provinces.[89] He called Chief Justice Draper's opinion in Taylor "untenable and inconsistent with fact," and he argued that the division of powers section "has in no respect altered the relation of Canadian subjects to the Imperial Crown or Parliament, or interposed any additional obstacle to prevent imperial legislation in reference to Canada."[90] This was impossible in the British system of parliamentary sovereignty, he wrote, "for no parliament is competent, by its own act or declaration, to bind or restrain the freedom of action of a succeeding parliament."[91]

Todd's book, like many that followed, was premised on an orderly constitutional system: Westminster remained the supreme parliament of the empire, and the British government remained the supreme executive and diplomatic authority. Power flowed from it, to be exercised by the colonies, but that exercise did not make them equivalent institutions. Watson, for example, declared:

> Political imagination, in its most fervid and patriotic flights, would shrink from picturing the Imperial and the Federal Legislatures as the possessors of co-equal powers. Still, there may be a few who fancy that the British North America Act, while giving pre-eminence to the Ottawa House of Commons as

86 Ibid., XVI (December 1880): 321; XVI (September 1880): 234.
87 *Canadian Law Times* VII (1887): 281.
88 Bruce W. Hodgins, "Alpheus Todd," *DCB*, vol. XI.
89 Alpheus Todd, *Parliamentary Government in the British Colonies* (Boston: Little, Brown, 1880), 189.
90 Ibid.
91 Ibid.

> respects the Provincial Parliaments, constitutes it, in a mysterious and an indefinite manner, the compeer of the Imperial Legislature. For better or for worse, they will never be compeers."[92]

Most of the other nineteenth century books on the constitution took a similar view, though with varying degrees of interest in the issue. Montréal lawyer Joseph Doutre's 1880 book, for example, did not discuss the issue of imperial sovereignty at any length, although it did note the copyright controversy and endorsed Justice Burton's opinion in Smiles.[93] Québec judge T.J.J. Loranger's 1884 *Letters Upon the Interpretation of the Federal Constitution* did not deal with copyright at all, or with Draper's opinion; but a central plank of his reasoning was that sovereignty was indivisible and thus vested in Britain.[94]

Later scholars of the 1890s and early 1900s, such as A.H.F. Lefroy and W.H.P. Clement, were more vigorous in arguing for what Peter C. Oliver calls the "imperial orthodoxy" of undivided British sovereignty, heavily influenced by Dicey and other British thinkers.[95] For Lefroy, any vision of the BNA Act as anything more than an imperial statute allocating powers to still-subordinate colonial legislatures was fanciful. In fact, one of the central theses of his important *Law of Legislative Power in Canada* was that federal and provincial legislative power was "conferred subject to the sovereign authority of the Imperial Parliament," a point to which he devoted an entire chapter.[96]

Conclusion

In the first few decades of confederation, Canada tested the limits of its power. Alongside the developing federal-provincial rivalries that would boil over into decades of controversy and litigation, the federal government also pushed the bounds of its autonomy within the British Empire. The issue of copyright offers a unique vantage point into this process of legal experimentation. On copyright, Ottawa took a provocative stance, passing an 1872 bill which was starkly at odds with the policy of the imperial government. This bill would have overrid-

92 S.J. Watson, *The Powers of Canadian Parliaments* (Toronto: C.B. Robinson, 1880), 89.

93 Joseph Doutre, *Constitution of Canada: The British North America Act, 1867; Its Interpretation, Gathered From Decisions of Courts, the Dicta of Judges, and the Opinions of Statesmen and Others; To Which it is added the Quebec Resolutions of 1864, and the Constitution of the United States* (Montréal: John Lovell & Sons, 1880), 183.

94 Thomas Jean Jacques Loranger, *Letters Upon the Interpretation of the Federal Constitution, known as the British North America Act (1867): First Letter* (Québec: Morning Chronicle, 1884), 11, 21, 27.

95 A.H.F. Lefroy, *The Law of Legislative Power in Canada* (Toronto: Toronto Law Book Company, 1897–1898), 208–31. Clement, *The Law of the Canadian Constitution*, 25–37; A.H.F. Lefroy, *A Short Treatise on Constitutional Law* (Toronto: Carswell, 1918), 47–50. An exception is attorney John G. O'Donoghue's essay in the *Canadian Law Times* 37 (1901): 370–95.

96 Lefroy, *Law of Legislative Power*, 12, 208–31.

den imperial law in Canada, ending the system by which British monopoly copyright applied everywhere in the empire. In so doing, it challenged imperial law, Britain's foreign policy, and the powerful London publishing industry. Not surprisingly, then, the bill was blocked by the imperial authorities.

But this was not simply a debate about copyright. It was also about the larger question of how the government defined its own power. The 1872 bill, and others like it in the 1880s and 1890s, was based on an idea of the BNA Act which would have re-shaped the imperial connection. In this vision of the constitution, the new dominion had gone beyond political autonomy and had instead obtained sovereignty over the powers given to the federal government in section 91. This line of thinking gave Canada power even to contravene imperial law. For proponents of this theory, by allowing Ottawa "exclusive" control over its list of responsibilities, Westminster had ended its own authority on these issues in Canada. And since copyright was one of those enumerated powers, it followed that Canada could defy and even override imperial edicts on the subject. But neither the bill nor the exclusivist theory got very far. Instead, even as Canada's autonomy within the empire was growing in practice, a more provocative legal view of Canada's freedom was decisively beaten back.

Examined together, these issues illustrate the diversity of opinions surrounding the constitutional order after 1867. Certainly constitutional disputes were to be expected given the division of powers arrangement where few clear-cut solutions could be found. However, the debates over Canada's place in the empire speak to deeply divergent views of core legal ideas. And that such debate existed even among those who knew how law worked and understood constitutional principles, helps us understand the climate of political experimentation and legal self-definition occurring in the post-confederation period. The new dominion was testing its powers not simply internally, but also in relation to the very imperial government by which it had been created.

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