MAY THE PROVINCES LEGISLATE IN VIOLATION OF INTERNATIONAL LAW?

G. V. LA FOREST*
Fredericton

I. *The Case for Provincial Competence.*

For many years it was generally believed that legislation of the provincial legislatures, in common with that of the Canadian Parliament, was valid even though it contravened the general principles of international law.[1] And it must be admitted that there were weighty grounds for this view. The Privy Council had on numerous occasions stated in very broad terms that the powers of the legislatures were as plenary and as ample within their spheres as the Imperial Parliament in the plenitude of its powers possessed and could bestow.[2] In addition, there was direct support for the proposition in the Ontario Divisional Court case of *R.* v. *Meikleham.*[3] There a master of an American steamer was convicted of unlawfully allowing liquors to be sold on the steamer contrary to an Ontario statute. The defendant argued, *inter alia*, that according to international law there was no jurisdiction to interfere with persons on board a foreign vessel navigating the Great Lakes, which it was argued were in the same position as the high seas. While it was not strictly necessary to decide the point, Meredith C.J.C.P., who gave the judgment of the court, said:

> Although that is, no doubt, a rule of international law, yet, where

*G. V. La Forest, of the Faculty of Law, University of New Brunswick, Fredericton.

[1] See Lefroy, The Law of Legislative Power in Canada (1897-8), pp. 334-5; Keith, The Constitutional Law of the British Dominions (1933), pp. 235-6. In a comment on the *Reference re Tax on Foreign Legations*, [1943] S.C.R. 208, [1943] 2 D.L.R. 481 in (1943), 21 Can. Bar Rev. 50, B.L. assumes the province of Ontario could amend the Assessment Act to levy rates on foreign legations. See, however, Vanek, Is International Law Part of the Law of Canada? (1949-50), 8 U. of T. L.J. 251, who believes that neither the federal Parliament nor the provincial legislatures may legislate in violation of customary international law or treaties.

[2] See, for example, *Hodge* v. *The Queen* (1883-4), L.R. 9 A.C. 117, at p. 132. *Cf.* Lord Haldane's remark during the argument in *Toronto Electric Comm.* v. *Snider*, [1925] A.C. 396 reported in the O'Connor Report (1939), Annex 1, pp. 15-16.

[3] (1905), 11 O.L.R. 366.

> it is plain that the Legislature has intended to disregard or interfere with that rule, the Courts are bound to give effect to its enactments.[4]

The view gains further support by analogy from the *Labour Conventions*[5] case where the Privy Council held that a treaty requiring a change in the law must be implemented by the provincial legislatures if it deals with matters ordinarily within the jurisdiction of the provinces.

II. *The Case Against Provincial Competence.*

Recently, however, Dean Rand has suggested that the provinces have no power to pass legislation in violation of international law, the whole field of external affairs being vested in the Dominion.[6] From a policy point of view, there can be no doubt of the desirability of this approach. It would be a most unsatisfactory situation if the provinces could legislate in violation of international law and thereby make the federal authorities liable to pay reparations to foreign states.[7] A similar difficulty, of course, exists in connection with the implementation of treaties and Dean Rand's view in its totality involves the assertion that the implementation of treaties, too, falls entirely within the Dominion's exclusive sphere of external relations, a proposition that would demand overruling the *Labour Conventions* case.[8] Whatever may be thought of that case, it must be admitted that the main consideration that impelled the Privy Council to decide it as it did was a serious one. Clothing the federal Parliament with power to implement treaties dealing with matters normally within provincial jurisdiction could undermine the constitutional position of the provinces. But no such consideration arises as regards obligations arising out of customary international law. Those obligations cannot be altered by a unilateral desire of the federal authorities to expand their jurisdiction; they are imposed on Canada by the customs of nations.[9]

In some respects, the difficulties that would arise from provincial competence to legislate in violation of international law

[4] *Ibid.*, at p. 373.

[5] *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] A.C. 326.

[6] Rand, Some Aspects of Canadian Constitutionalism (1960), 38 Can. Bar Rev. 135, at pp. 143-4. See also Vanek, *op. cit., supra*, footnote 1, at p. 266 *et seq.*

[7] The federal government could, of course, disallow such legislation, or have it reserved by the Lieutenant-Governor; see British North America Act, 1867, 30-31 Vict., c. 3, ss. 55-7, 90.

[8] *Supra*, footnote 6, at pp. 142-3.

[9] This point is made by Taschereau J. in *Reference re Tax on Foreign Legations, supra*, footnote 1, at pp. 249 (S.C.R.), 481 (D.L.R.). This is discussed below.

are more acute than those arising out of the necessity of provincial implementation of some treaties. Canada has a choice of entering or not entering into treaties; it is bound by the customary rules of international law whether or not it agrees with them.

Policy alone does not, of course, decide cases, but it is submitted that the view that the provinces cannot legislate in violation of international law is supported by considerable authority and is in accord with basic constitutional doctrine.

The strongest authority asserting provincial incompetence over matters of international law is the well known *Reference re Tax on Foreign Legations*.[10] There the Supreme Court of Canada was asked whether the City of Ottawa and the Village of Rockcliffe Park had power to levy taxes on certain foreign legations under an Ontario statute authorizing municipalities in general terms to assess property for taxes. By a majority of three to two, the Supreme Court held the municipalities had no such power. The case is usually dealt with as if all it decided was that the levying of municipal taxes against foreign legations was contrary to the principles of international law, and that general legislation should not be construed as intending to violate those principles.[11] That, of course, was clearly the position taken by Duff C.J., and Taschereau and possibly Rinfret JJ. agree. But the judgments of Rinfret and Taschereau JJ. are based on a much wider proposition. As I understand Rinfret J.'s judgment, he does not rely on the mere construction of a statute, but on the incompetence of a province as well as a municipality to tax a foreign legation, for this, he asserts, would require impleading the ambassador in the courts, a procedure that is clearly in violation of international law. An excerpt from Rinfret J.'s judgment demonstrates this. He says:

> The problem is not one which raises questions with regard to the respective competence of the Dominion Parliament and the Provincial Parliament. *It is limited to the legislative competence of a Provincial Parliament to levy rates or taxes on property of foreign governments owned and occupied as legations.*
>
> The solution, it seems to me, must, therefore, be found in the remedies which the municipal corporations are empowered to adopt in order to collect their taxes, *including, of course, the powers which the Provincial Legislature is competent to delegate, in that respect,* to the municipal corporations.[12]

Taschereau J. appears to be of a similar opinion. He is prin-

[10] *Supra*, footnote 1.

[11] See B.L., *op. cit.*, *supra*, footnote 1; an editorial note in [1943] 2 D.L.R. 482; and Vanek, *op. cit.*, *supra*, footnote 1, at p. 279.

[12] *Supra*, footnote 1, at pp. 233 (S.C.R.), 503 (D.L.R.) (italics mine).

cipally concerned with distinguishing this limitation on provincial power from Lord Atkin's statement in the *Labour Conventions* case[13] that the competence of the federal authorities cannot "become enlarged to keep pace with enlarged functions" brought about from Canada's accession to international stature. That case, he asserts, is distinguishable because there is here no federal legislation dealing with a provincial matter. All the court is concerned with is the validity of the assessment purporting to be made under a provincial statute. He continues:

> The question is whether under International Law, a property belonging to a foreign State may be assessed for municipal purposes. A negative answer would in no way clothe the Dominion with any "enlarged competence", and *the denial to the Provinces and the municipal authorities of the right to levy such rates, would not extend the field of federal legislative powers.*[14]

This statement indicates that Taschereau J. was concerned not solely with municipal, but also with provincial incompetence. Indeed there would have been little point to his reference to Lord Atkin's statement had he been solely concerned with the construction of a statute.

It may be argued that the case could have been decided on the narrower ground adopted by Duff C.J., but this in no way alters the fact that the broader ground was relied upon by two of the majority judges.

Neither Rinfret nor Taschereau JJ. give reasons for this limitation on provincial powers and one can only speculate as to the principles on which they acted. But several possibilities suggest themselves.

III. *The Doctrine of "Extra-territoriality".*

The first is the ill-defined,[15] but unquestionable,[16] doctrine that the law-making powers of a colonial or other subordinate legislature must be construed in accordance with the inherent conditions of the colony or other area over which it exercises jurisdiction.

[13] *Supra*, footnote 5, at p. 352.

[14] *Supra*, footnote 1, at pp. 249 (S.C.R.), 519 (D.L.R.)

[15] Lord Sankey described it as "a doctrine of somewhat obscure extent" in *British Coal Corporation* v. *The King*, [1935] A.C. 500, at p. 520.

[16] Lefroy, Canada's Federal System (1913), pp. 102-3; Clement, The Law of the Canadian Constitution (3rd ed., 1916), p. 91 *et seq.*; Salmond, The Limitations of Colonial Legislative Power (1917), 33 L.Q. Rev. 117; Smith, Extra-Territorial Legislation (1923), 1 Can. Bar Rev. 338 doubted the existence of the doctrine, but there have now been too many cases on the point to doubt it. For an excellent discussion of the doctrine, see Anglin, Extra-Territorial Criminal Legislation of Canada (1899), 19 Can. L.T. 1, 38.

This doctrine has come to be known as the concept of extra-territoriality, but the name is misleading. It implies that its chief purpose is to prevent a subordinate legislature from enacting laws operating beyond the territory of the colony or other dependency over which it exercises jurisdiction. Actually the doctrine was developed to prevent violations of international law by the colonies.[17] That this continued to be its underlying basis is evident from an examination of the cases. Thus the only statutes held void by the Privy Council on this ground were believed to violate international law[18] or to interfere with imperial institutions.[19] On the other hand several statutes clearly having extra-territorial operation were upheld when found not to violate international law. Thus under the law before the Statute of Westminster, 1931, the Privy Council had held valid a statute imposing a penalty for breaking customs seals on the high seas or elsewhere before entering an Australian port;[20] one authorizing the deportation of aliens even though this involved extra-territorial constraint;[21] and another authorizing the seizure of vessels hovering within twelve miles of the Canadian coast with dutiable goods on board.[22] Similarly the Supreme Court of Canada upheld legislation which, in effect, punished bigamy committed abroad by a British subject domiciled in Canada,[23] and it has also construed a statute authorizing the seizure of vessels violating Canadian fishery laws as including power to seize on the high seas following "hot pursuit".[24]

The language used in most of these cases also indicates that the so-called doctrine of "extra-territoriality" is not so much concerned with keeping colonial legislation within the bounds of a colony as to prevent it from interfering with international usage or imperial institutions because this type of legislation is inconsistent with colonial status. Thus, in the leading case of *MacLeod* v. *A.G.N.S.*,[25] where the Privy Council had to consider a colonial

[17] See O'Connell, The Doctrine of Colonial Extra-Territorial Incompetence (1959), 75 L.Q. Rev. 318, at pp. 320-1.

[18] *MacLeod* v. *Attorney-General for New South Wales*, [1891] A.C. 455.

[19] *Nadan* v. *The King*, [1926] A.C. 482.

[20] *Peninsular and Oriental Steam Navigation Company* v. *Kingston*, [1903] A.C. 471.

[21] *Attorney-General for Canada* v. *Cain and Gilhulla*, [1906] A.C. 542; in this case the Board hardly mentioned extra-territoriality, occupying itself almost solely with the question whether the statute violated international law.

[22] *Croft* v. *Dunphy*, [1933] A.C. 156. The case was decided after, but was dealt on the basis of the law existing before the Statute of Westminster, 1931.

[23] *Reference re Bigamy Sections* (1897), 27 S.C.R. 461.

[24] *The Ship "North"* v. *The King* (1906), 37 S.C.R. 385.

[25] *Supra*, footnote 18.

statute providing that "whosoever being married marries another during the life of the former husband or wife, wheresoever such marriage takes place, shall be liable to penal servitude for seven years," the Board considered it impossible to construe the statute as applying to any person "anywhere in the habitable globe" because it "did not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony and indeed inconsistent with the most familiar principles of international law."[26] Other cases use similar expressions; they speak of colonial legislation as being subject to restrictions implied from "the inherent condition of dependency"[27] or as being "inconsistent with its relation to the Empire".[28]

It is true that in a later passage in the *MacLeod* case, Lord Halsbury states that the jurisdiction of colonies is confined within their own territories, but his subsequent remarks indicate that this passage did not refer to British subjects or other "persons who may be within the jurisdiction of the Colony by any means whatsoever", that is, persons over whom the state has jurisdiction under international law. This is the view taken of the case by two of the majority judges, King and Sedgwick JJ. in the *Reference re Bigamy Sections*.[29] There the Supreme Court of Canada was asked whether the sections of the Criminal Code under which a person who went through a form of marriage abroad under circumstances that would amount to bigamy if the form of marriage had taken place in Canada could be convicted of bigamy in Canada if he was a British subject domiciled in Canada and left Canada with intent to go through such a form of marriage. The other majority judges, Gwynne and Girouard JJ., held that no legislation of the Dominion Parliament can be held *ultra vires* unless repugnant to the British North America Act or some other Imperial statute. Strong C.J. dissented. He took the view that Canada had no power to enact criminal legislation operating beyond its territory, but it is interesting to note that he believed such legislation would also be in violation of international law. While both these views of Strong C.J. are demonstrably too narrow,[30] nonetheless his judgment

[26] *Ibid.*, at p. 457.
[27] *Reg.* v. *Taylor* (1876), 36 U.C.Q.B. 183, at p. 191.
[28] *International Bridge Co.* v. *Canada Southern Ry. Co.* (1880), 28 Grant's Ch. R. 114, at p. 134 affirmed on other grounds (1882), 7 O.A.R. 226 (1882-3), L.R. 8 A.C. 723.
[29] *Supra*, footnote 23.
[30] The majority rejected the first of these statements. As to the second, it is clear that under international law, states have wider jurisdiction than

clearly reveals the postulate on which the doctrine of extra-territoriality is based. In construing an English criminal statute, he asserted, it is always held to be confined within local jurisdiction in the absence of clear words. Similarly, he averred, a grant of power to legislate on criminal law to a dependent legislature should also be so construed. He then explains the underlying basis of his views:

> Indeed the argument in favour of the limitation is far stronger in the latter case than in the former, inasmuch as reasons of good policy, national safety and convenience all concur in favour of retaining all matters of legislation which may in any way tend to conflict with the rights or claims of foreign nations in the hands of the Imperial Government; and everything done within the jurisdiction of a foreign government must to some extent be a concern to that government which may give rise to international reclamations upon the Imperial Government.[31]

If, then, this was the underlying basis of the doctrine of extra-territoriality, is it to be supposed that the courts would refuse to hold colonial legislation void for violating international law simply because its operation was confined to the territory of the colony? There is, in fact, one case where the court did consider applying the doctrine to an Act that did not have extra-territorial operation. That was the case of *International Bridge Co.* v. *Canada Southern Ry. Co.*[32] before Proudfoot V.C. There a company was incorporated by legislation of the State of New York to construct a bridge across the Niagara River into Canada. A similar company was incorporated by an Act passed in Canada for the same purpose, and subsequently, under legislation of both Canada and New York, the two companies were empowered to amalgamate and later did so. Under the Canadian Act authorizing amalgamation it was provided that the amalgamated company should possess all the powers, rights and privileges, and be subject to all the disabilities of the American and Canadian companies. The American company had power to collect tolls, but an American statute passed after amalgamation limited the amounts that could be charged for these tolls. The question arose whether the amalgamated company could charge tolls under the Canadian Act in excess of the amounts in the subsequent American statute. Proudfoot V.C. held that the Canadian statute was not intended to incorporate the subsequent American statute. But he went on to say:

Strong C.J. believed; see *The Lotus Case*, [1927] P.C.I.J., series A, No. 10.

[31] *Supra*, footnote 23, at p. 475. (italics mine).

[32] *Supra*, footnote 28.

> Were the Canadian Parliament to endeavour to do so—to say that Canadian subjects, and Canadian Corporations were to be subject to legislation that might be passed by Congress, it would, I apprehend, be unconstitutional; it would be authorizing a foreign power to legislate for its subjects; an abdication of sovereignty inconsistent with its relation to the Empire, of which it forms a part.[33]

We need not enquire into the correctness of this statement. The important thing is that the court did not think the limitation arising out of colonial status was limited to legislation having extra-territorial operation.

The fact that the statutes held void for exceeding the limitations imposed by colonial status also operated extra-territorially was simply a coincidence. It occurred because, under the conditions prevailing in the colonies, it was difficult to violate the principles of international law except by statutes having extra-territorial operation. That is why there appears to be only one case in which the limitation was considered in connection with a statute operating within a province. It should not, in any event, be forgotten that only rare and less obvious cases came before the courts. Most such statutes would be disallowed, or indeed, simply not be enacted because of the threat of disallowance. So it arose that the principle came to be called the doctrine of extra-territoriality, a confusion of the accidental for the substantial which was contributed to by the fact that the legislative competence of some of the colonies and the provinces are expressly limited to their territories.[34] The name of the doctrine, though misleading, is not entirely inapt. Many immunities under international law, for example those afforded ambassadors and public property of a foreign state within the realm, are sometimes explained by the fiction of extra-territoriality.[35]

That the foregoing represents the developed view of the Privy Council is evident from a close examination of *Croft* v. *Dunphy*.[36] There the Privy Council considered the validity of a statute of the Canadian Parliament providing that any vessel registered in Canada hovering within twelve miles of the Canadian coast could be seized and forfeited if it had dutiable goods on board. The case was decided after the passing of the Statute of Westminster, 1931, but was dealt with by the Board on the basis of the pre-existing

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[33] *Ibid.*, at p. 134 (italics mine).

[34] See O'Connell, *op. cit.*, *supra*, footnote 17, at pp. 322-3.

[35] See, for example, Oppenheim, International Law (8th ed., 1955), vol. 1 "Peace", pp. 792-3.

[36] *Supra*, footnote 22. See a comment on the case by D. A. MacRae in (1932), 10 Can. Bar Rev. 601.

law. It was argued that the Act was void because it was designed to operate beyond the boundaries and territorial waters of Canada. But the Board held that the Parliament of Canada was not under any such disability. If legislation was for the peace, order and good government of Canada or fell within one of the specific subjects enumerated in section 91 of the British North America Act, the Canadian Parliament was not restricted by any other consideration than is applicable to the legislation of a fully sovereign state. It was not necessary to consider whether the legislation could be impugned as being contrary to the principles of international law, because such legislation was recognized as legitimate under those principles, but Lord Macmillan, who gave the judgment of the Board, made the following observations on the matter:

> Legislation of the Imperial Parliament, even in contravention of generally acknowledged principles of international law, is binding upon and must be enforced by the Courts of this country, for in these Courts the legislation of the Imperial Parliament cannot be challenged as ultra vires .... It may be that legislation of the Dominion Parliament may be challenged as ultra vires on the ground that it is contrary to international law, but that must be because it must be assumed that the British North America Act has not conferred power on the Dominion Parliament to legislate contrary to these principles.[37]

If in 1932 so great a judge as Lord Macmillan could doubt Dominion competency to enact legislation in violation of international law, is it to be believed that the far more restricted legislatures of the provinces could do so?

The view also provides the most satisfactory distinction between *Croft* v. *Dunphy* and *Nadan* v. *The King*[38] where a statute of the federal Parliament abolishing appeals to the Privy Council in criminal matters was considered. One of the reasons given by the Privy Council for holding the statute *ultra vires* was that the power to legislate respecting criminal law was confined to action to be taken within the Dominion. Yet the later case of *Croft* v. *Dunphy* held that Canada was not subject to any other restriction to legis-

[37] *Ibid.*, at p. 164.

[38] *Supra*, footnote 19. The statement respecting extra-territoriality in the *Nadan* case was repeated in *British Coal Corporation* v. *The King*, *supra*, footnote 15, and in *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1947] A.C. 127 and found no longer applicable because of section 3 of the Statute of Westminster, 1931. Lord Jowitt L.C. in the latter case may possibly have had some doubt regarding the doctrine expressed in this form. He said at p. 146, it *might* have been a fetter on the Dominions and the provinces before the Statute of Westminster. The different formulation of the doctrine by Lord Macmillan in *Croft* v. *Dunphy* was not raised or considered by the court, since it had held the year before that no limitation of the kind now existed as regards the Dominion. This matter is discussed below.

late beyond its territory than is applicable to a sovereign state. But in the *Nadan* case the legislation not only operated beyond the bounds of Canada, it also interfered with an Imperial institution. In *Croft* v. *Dunphy* there was no such interference and no violation of international law.

IV. *Distinction from Federal Position.*

It might be suggested that the foregoing is as applicable to the federal Parliament as to the provincial legislatures, and the Privy Council has made it clear in two cases decided in 1946 that federal legislation, even in violation of international law, cannot be questioned by domestic courts. The first of these is *British Columbia Electric Ry. Co. Ltd.* v. *The King*[39] where it was held that within its sphere the federal Parliament now had legislative sovereignty and could impose taxes even in violation of international law. In *Reference re Japanese Canadians*[40] an order in council made under the Canadian War Measures Act authorizing the Minister of Labour to order the deportation of certain persons, including British subjects of the Japanese race, was under consideration. It was argued, *inter alia*, that the forcible removal to a foreign country of British subjects was contrary to international law, and that the Act should not be construed as conferring authority to make orders providing for such removal. The Privy Council held, however, that while this was ordinarily a valid rule of construction, it did not apply in this case. "The accepted rules of international law applicable in time of peace can hardly have been in contemplation, and the inference cannot be drawn that the Parliament of the Dominion impliedly imposed the limitation suggested."[41] If the federal Parliament could give power to a subordinate body to make orders in violation of international law, it follows, *a fortiori*, that it too has that power.

But on what basis can federal and provincial power be distinguished in this connection? There are several possibilities, but the answer probably lies in Canada's change of status since colonial days. After all, the limitation on colonial power to legislate in violation of international law was based on status—"the inherent condition of dependency". When Canada evolved to full nation-

[39] [1946] A.C. 527. [40] [1947] A.C. 87.

[41] *Ibid.*, at p. 104. Vanek, *op. cit.*, *supra*, footnote 1, at p. 276, footnote 77, says the order did not violate international law so that this statement is *obiter*. It is submitted, however, that the statement formed part of the *ratio decidendi*. In the view the court took, it was unnecessary to consider whether the order violated international law or not.

hood following the Imperial Conferences of 1926 and 1930 and the Statute of Westminster, 1931, any limitations flowing from its former status disappeared. When *Nadan* v. *The King* was decided in 1926, Canada could still be regarded as a colony, and when *Croft* v. *Dunphy* was decided in 1932, Canada's altered position was still sufficiently novel to warrant some doubt regarding its pre-existing limitations. But by 1946 all doubts regarding Canada's development as a fully sovereign state had vanished and with it any limitations on legislative power flowing from dependent status. This view receives support from the judgment of Adams J. in *Woolworth (N.Z.) Ltd.* v. *Wynn*[42] in the New Zealand Court of Appeal. It is also consistent with the language used in the Statute of Westminster, 1931. The section in that statute providing that the Dominion has power to make laws having extra-territorial operation is expressed in declaratory form,[43] leaving open the view that a Dominion might have possessed the power to make such laws even if the section had not been passed.[44]

It might be noted in passing that the section in the Statute of Westminster is directed at extra-territorial legislation rather than legislation inconsistent with colonial status because its authors did not understand the true nature of the doctrine. This is made plain by the Report of the Conference of 1929 on the "Operation of Dominion Legislation and Merchant Shipping Legislation" from which the section is taken. The authors of that report were confused by "a conflict of legal opinion as expressed in the Courts and in the writings of jurists, both as to the existence of the limitation itself and as to its extent" and found the doctrine "full of obscurity". It was left to Lord MacMillan in *Croft* v. *Dunphy* to clarify the doctrine.[45] But by that time the section had become law, so that the doctrine disappeared through the natural development of Canada to nationhood rather than statutory provision. But the provinces gained no greater status from the accession of Canada to international stature,[46] and so remained subject to the existing limitations as did the Australian states.

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[42] [1952] N.Z.L.R. 496, at p. 519. The case is discussed by O'Connell, *op. cit.*, *supra*, footnote 17 who also supports the view.

[43] 22 Geo. V., c. 4, s. 3 (Imp.).

[44] See the language of Adams J. in *Woolworth (N.Z.) Ltd.* v. *Wynn*, *supra*, footnote 42, at p. 518 cited *infra*. In *British Coal Corp.* v. *The King*, *supra*, footnote 15, however, Lord Sankey at p. 516 stated the doctrine of extra-territoriality "could only be overcome by an Imperial statute," but this was a bare *dictum*.

[45] See the comment on *Croft* v. *Dunphy* by D. A. MacRae, *supra*, footnote 36.

[46] See the language of Rinfret J. in the *Labour Conventions* case, [1936]

V. *Were the Dominions ever Subject to the Doctrine?*

It may even be that, unlike the colonies and the provinces, the federal Parliament was never subject to this limitation. The British North America Act was intended to create, not just another colonial possession or dependency, but a new entity far superior to ordinary colonies with a constitution similar in principle to that of the United Kingdom; a semi-sovereign nation called a "Dominion" with power to absorb other territories comprising half a continent. To the general Parliament of this nascent state were granted broad powers to govern for its "Peace, Order, and good Government," words "apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to".[47] And among these objects were wide heads of power ordinarily affecting international relations—"Militia, Military and Naval Service. and Defence", "Navigation and Shipping", "Sea Coast and Inland Fisheries", "Naturalization and Aliens". This is the view taken by Anglin and Girouard JJ. in *Reference re Bigamy Sections*.[48] British policy following Confederation strongly supports this view. As Girouard J. put it:

> The policy and conduct of the British authorities upon the Canadian legislation since the passing of the Confederation Act in different matters of international concern, and among others, extradition of criminals, Chinese emigration, trade tariff, reciprocity with the United States, and trade arrangements with foreign nations, patents and copyright, banking and currency, navigation and coasting trade, shipwrecks, seacoast fisheries, admiralty, the confirmation of the treaty of Washington by the Parliament of Canada, etc., demonstrate that Canada, in the eyes of British public law and international law, is no longer to be considered as a mere colonial possession or dependency, but as a component part of the British Empire. They mean that Canada is no longer submitted to the mere dictum of Downing Street, but only to the restrictions of the British Parliament. This clearly results from the language of the British North America Act.[49]

Provincial legislatures, on the other hand, were vested with restricted powers over "Matters of a merely local or private Nature" and there is no reason to believe they were not subject to

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S.C.R. 461, at p. 510. See Hendry, Memorandum on the Office of Lieutenant-Governor (1955), p. 35.

[47] *Riel* v. *The Queen* (1885), L.R. 10 A.C. 675, at p. 678.

[48] *Supra*, footnote 23. See also *Reg.* v. *Brierly* (1887), 14 O.R. 525, *per* Boyd J. O'Connell, *op. cit., supra*, footnote 17, p. 326, footnote 48, points out (citing C.O. Law Officers' Opinions, vol. 5, No. 243) that the Law Officers in their opinion of Dec. 21st, 1899, on the Commonwealth of Australia constitution were doubtful if the doctrine of extra-territoriality would apply to the Commonwealth.

[49] *Ibid.*, at pp. 492-3.

ordinary colonial disabilities. Quite the contrary. Can it be supposed that in 1867 the Imperial Parliament would give legislatures with such relatively unimportant powers the capacity to pass laws that might embarrass the Imperial government in its dealings with foreign states and make it liable to pay reparations to those states for violations of international law? The doubt is increased by the fact that there was not even reserved to the Imperial government (as was done in the case of the Dominion Parliament and the colonies) direct control over provincial legislation by means of the powers of disallowance and reservation.[50] This control over provincial powers was vested instead in the federal government,[51] and it is significant that the Privy Council relied on this control when holding that provincial laws embarrassing the federal government were nonetheless valid.[52]

This view is also consistent with the declaratory form of words in the Statute of Westminster that the Dominions have power to make laws having extra-territorial effect; "apparently it was intended to leave open the view that a Dominion might already have possessed the power to make laws having extra-territorial effect even apart from the section."[53]

But this view is open to several objections. In the first place, it is inconsistent with the statement in the *Nadan* case that the federal statute there in question was void because its operation was not confined to action to be taken within Canada. Of course the case might well have been decided without reference to this point because the statute was void as being repugnant to an earlier British statute. Consistently with this, the court in *Woolworth (N.Z.)* v. *Wynn* rejected the portion of the *Nadan* case dealing with extra-territoriality as irrelevant. But the fact remains that the Board did rely on this ground. The view also demands that one reject the *dicta* of Lord MacMillan in *Croft* v. *Dunphy* in so far as it applies to Dominions. For these reasons, while this is a possible view, the earlier approach suggested in this article seems preferable.

VI. *Another Approach.*

Finally, if the view of the doctrine of extra-territoriality advanced

[50] They could exercise some indirect control over the provinces with the co-operation of the federal authorities, however, and at the instigation of Macdonald actually did so for a time; I have discussed this in Disallowance and Reservation of Provincial Legislation (1955), pp. 33-35.

[51] British North America Act, 1867, *supra*, footnote 7, ss. 55-7, 90.

[52] *Bank of Toronto* v. *Lambe* (1887), L.R. 12 A.C. 575, at pp. 586-7.

[53] per Adams J. in *Woolworth (N.Z.) Ltd.* v. *Wynn*, *supra*, footnote 42, at p. 518.

in this article is rejected, the matter may be approached in an entirely different way. I have already mentioned the rule of statutory interpretation exemplified by the *Reference re Tax on Foreign Legations*[54] that a legislature (including the Imperial Parliament)[55] does not intend to violate international law or to give a subordinate body the power to do so. There seems no reason why the rule should not apply to a grant of power to the provinces by the British North America Act.[56] Indeed, the nature of provincial powers, which have already been examined, point to the likelihood of such a limitation. This approach is consistent, too, with the cases on extra-territoriality already discussed, particularly the judgment of Strong C.J. in *Reference re Bigamy Sections*[57] and *Croft* v. *Dunphy*.[58]

But as we saw from the *Reference re Japanese Canadians*,[59] the rule that Parliament does not intend to give power to a subordinate body to legislate in violation of international law does not apply where the statute indicates a contrary intention. Such a contrary intention might well be implied from the nature of the powers given to the federal Parliament which have already been described. This view also receives support from the judgments of Gwynne and Girouard JJ. in *Reference re Bigamy Sections* and that of Boyd C. in *Reg.* v. *Brierly*.[60] If those judgments are accepted as wholly valid, however, the passage in the *Nadan* case[61] respecting extra-territoriality must be regarded as irrelevant, and it also demands rejecting the application of Lord MacMillan's *dicta* in *Croft* v. *Dunphy*[62] to the Dominions.

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[54] *Supra*, footnote 1. See also *Fraser-Brace Overseas Corp.* v. *Municipality of Saint John* (1958), 13 D.L.R. (2d) 177.

[55] See, for example, *Colquhoun* v. *Brooks* (1888), L.R. 21 Q.B.D. 52.

[56] This approach is taken by Vanek, *op. cit.*, *supra*, footnote 1, p. 275, but he also believes this applies to the federal Parliament and extends to legislation contrary to treaties.

[57] *Supra*, footnote 23.

[58] *Supra*, footnote 22.

[59] *Supra*, footnote 40.

[60] *Supra*, footnote 48.

[61] *Supra*, footnote 19.

[62] *Supra*, footnote 22.