

### AMENDING THE BRITISH NORTH AMERICA ACT.

Every Canadian should be inspired by the vision of the Fathers of Confederation in their conception of one vast nation of the British Provinces in North America, stretching from sea to sea, and by the ability and courage they displayed in putting their patriotic vision into practical effect. But the B.N.A. Act makes no special provision for its amendment and the suggestion is sometimes made that this point was overlooked. I believe the Fathers of Confederation assumed that any amendments to the Act would, as the occasion arose, be made by the Imperial Parliament. I can find no reference in pre-Confederation speeches to the amendment of the proposed Act, except that in the debates of the Canadian Parliament of 1865 the Hon. D'Arcy McGee said:—

“We go to the Imperial Government, the common arbiter of us all, in our true Federal metropolis—we go there to ask for our fundamental Charter. We hope, by having that Charter *that can only be amended by the authority that made it*, that we will lay the basis of permanency for our future government.”  
—“Canada Confederation Debates”, (1865) page 146.

There is a very substantial part of the Canadian Constitution outside the B.N.A. Act, which, following British precedent, grows and develops. The B.N.A. Act, however, can only be amended by statute and, defining as it does the legislative power of the Dominion and provinces respectively, the question as to how it should be amended has of late years become a matter of increasing importance. The recognition, since the Great War, of Canada's status as a nation has given rise to the proposal that it should no longer be necessary to apply to the Imperial Parliament to amend the B.N.A. Act but that the Dominion Parliament should be given the power to amend that Act. It has also been proposed that, to meet the unusual conditions of the present depression, the Dominion Parliament should be given more legislative jurisdiction in the interests of the nation as a whole. In reply to these proposals some of the provinces have put forward the contention that no amendment can be made to the B.N.A. Act without the unanimous consent of the provinces, bringing about an impasse that is viewed with concern by many thoughtful Canadians.

In 1867 Canada, of course, had not the degree of autonomy she acquired through her “Great War” efforts, participation in the Peace Treaty and membership in the League of Nations. By concurring

in resolutions passed at the Imperial Conference of 1926, the United Kingdom admitted that Canada was an autonomous nation within the British Commonwealth of Nations. In November, 1927, a Dominion-Provincial Conference was held in Ottawa at which were present Prime Minister King, the Dominion Cabinet and the Premiers of all the Provinces, with other provincial delegates. The Hon. Ernest Lapointe, Minister of Justice, introduced the question of "*Procedure in amending the British North America Act*" by submitting an opinion that

"Canada, in view of the quality of status which she now enjoys as declared at the last Imperial Conference and in view further of the cumbersome procedure now required, should have the power to amend her own constitution and that legislation should be asked for from the United Kingdom for that purpose."

—Sessional Paper No. 69, 1928.

According to the official report of this Conference, there was a great difference of opinion regarding the proposal, its opponents pointing out that on no occasion had the Imperial Government refused a demand for amendment, and its supporters declaring that the change must come sooner or later if Canada were to keep abreast of her status. At the conclusion of a lengthy discussion the Minister of Justice stated that the Government would carefully consider all the opinions on the subject, both pro and con.—Sessional Paper No. 69, 1928.

There appears to have been no action taken as a result of this Conference, but on September 10th, 1930, when the proposed Statute of Westminster was about to be submitted to the Imperial Parliament, Hon. G. H. Ferguson, then Premier of Ontario, wrote a memorandum to the Right Hon. R. B. Bennett, Prime Minister of Canada, contending that the proposed Statute would confer upon the Dominion Parliament an unqualified power of amending the B.N.A. Act unless it contained some clause protecting the rights of the provinces. This memorandum contends that the resolutions adopted by the Quebec Conference were in the nature of a compact or treaty, and says that

"No re-statement of the procedure for amending the constitution of Canada can be accepted by the Province of Ontario that does not fully and frankly acknowledge the right of all the provinces to be consulted and to become parties to the decision arrived at."—Toronto "Globe," Sept. 20th, 1930, p. 24.

As a result of this and other protests, the Imperial Conference held in October and November, 1930, decided to give "an opportunity for the Canadian Government to take such action as might be appro-

priate to enable the provinces to present their views" regarding the proposed Statute of Westminster.

See Summary of Proceedings of the Imperial Conference of 1930, page 17.

The Prime Minister of Canada (Mr. Bennett) called a conference with the provinces, held in April, 1931, at which the provinces approved of the Statute of Westminster, subject to an amendment which was subsequently embodied in that Statute as follows:—

"7(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts 1867 to 1930, or any order, rule or regulation made thereunder."

Thus any implication that the Statute of Westminster conferred on the Dominion Parliament the power to amend the B.N.A. Act was expressly negated.

The Regina "Leader-Post" of April 8th, 1931, contained a Canadian Press despatch from Ottawa, which, after referring to the approval of the proposed Statute, reads:—

"The question of how the B.N.A. Act can be changed as the occasions for amendments develop is to be taken up at some further conference in which the Dominion and the provinces will take part. This was announced by Premier Bennett to-day. Many changes to the Act, which is Canada's Constitution, defining Provincial and Dominion rights, have been made from time to time, but the parties are for the most part in agreement that where a change of importance is to be made all the provinces must consent."

In the Winnipeg "Free Press" of July 2nd, 1931, in a Canadian Press despatch from Ottawa announcing approval by the Canadian Parliament of the Statute of Westminster, Mr. Bennett is quoted as saying during the discussion:—

"There will be a Dominion-Provincial Conference to deal with the question of power to amend the Canadian Constitution."

In January, 1933, Mr. Bennett called a Dominion-Provincial Conference to discuss such amendments to the B.N.A. Act as might be necessary to promote the enactment by the Dominion Parliament of a measure of unemployment insurance, which a Committee of the House of Commons some time ago decided was a matter within the jurisdiction of the provinces. I am not here dealing with the merits or demerits of unemployment insurance, but the point is that, according to Press reports of this Conference, it stumbled on the objection of some of the provinces, notably Quebec, to any constitutional

amendment by which the Dominion would acquire any of the rights over unemployment "now held exclusively by the provinces."—Toronto "Mail and Empire," January 23, 1933, p. 2.

On January 26th, 1933, the Canadian Press reported that Premier Taschereau of Quebec officially made the following statement in the Quebec Legislature regarding unemployment insurance:—

"The provinces, in unanimity, refused to countenance amendments to the British North America Act proposed by the Federal Government, which would have permitted the establishment of a federal scheme of unemployment insurance. In this respect let me say the Province of Quebec will continue to defend the privileges which it at present enjoys through Confederation, believing that it must protect them as a heritage for future generations."

However, some of the Press reports published while the Conference was in session indicated that while Quebec, Ontario and the Maritime Provinces were against the proposed amendment of the B.N.A. Act, the Prairie Provinces and British Columbia were on the side of the Dominion. Ontario may possibly not now be as inclined as in 1930 to favour the necessity for unanimous consent of the provinces to an amendment, but if that is the official view of any province, it raises an issue which is probably one of the most embarrassing since Confederation.

The contention that consent of all the provinces is required before amending the B.N.A. Act is based upon the theory that the Quebec resolutions were or the B.N.A. Act was a treaty or compact between the provinces and the Act cannot be altered without the consent of all. The question is, is this theory tenable?

Hon. G. H. Ferguson in his memorandum of 1930 (ante p. 2) quotes from speeches made in the Canadian Parliament of 1865 in which the Quebec resolutions were referred to as a treaty or compact. These addresses were made when the (old) Canadian Parliament was considering the motion of Hon. John A. Macdonald:—

"That an humble Address be presented to Her Majesty, praying that She may be graciously pleased to cause a measure to be submitted to the Imperial Parliament, for the purpose of uniting the Colonies of Canada, Nova Scotia, New Brunswick, Newfoundland, and Prince Edward Island, in one Government, *with provisions based on certain Resolutions, which were adopted at a Conference of Delegates from the said Colonies, held at the city of Quebec, on the 10th October, 1864.*"—Canada Conference Debates (1865), page 25.

To make my point clear I will quote from several of these:—

Hon. John A. Macdonald—Confederation Debates (1865), page 31:—

“I trust the scheme will be assented to as a whole . . . .

If any important changes are made, every one of the colonies will feel itself absolved from the implied obligation to deal with it as a Treaty, each province will feel itself at liberty to amend it *ad libitum* so as to suit its own views and interests; in fact, the whole of our labours will have been for nought, and we will have to renew our negotiations with all the colonies for the purpose of establishing some new scheme.”

Hon. George Brown—*ibid.*, page 110:—

“We have but made a compact, subject to the approval of Parliament.”

Hon. D’Arcy McGee—*ibid.*, page 136:—

“The result of our proceedings is the document that has been submitted to the Imperial Government as well as to this House and which we speak of here as a treaty. . . . Question it you may, reject it you may or accept it you may, but alter it you may not.”

The Canadian Parliament passed the motion by a majority of 91 to 33 (*ibid.*, p. 962), thus addressing the Queen to pass an Act with provisions *based on the Quebec resolutions*. These resolutions, however, were not approved by the Legislatures of Nova Scotia, New Brunswick or Prince Edward Island.

However, some time after the “Address” (*ante*) based on the Quebec Resolutions, had passed the (old) Canadian Parliament, the Legislatures of both New Brunswick and Nova Scotia passed resolutions authorizing the appointment of delegates to arrange with the Imperial Government for the union of British North America but making no reference to the Quebec Resolutions. The delegates at the Quebec Conference had agreed (by res. 70) to submit the resolutions of that Conference to the Legislatures of the several provinces for approval. The Parliament of (old) Canada was the only one of these Legislatures that approved of the resolutions, and the remarks above quoted made in that Parliament, referring to the resolutions as a treaty or compact, were made prior to their rejection by the other Legislatures and on the assumption that they were going to be approved by the other Legislatures. It is elementary that one party or one province cannot make a treaty or compact, and it would therefore appear that the “Quebec resolutions”, as such, never became a compact or treaty between the four provinces originally comprising the Dominion of Canada.

It is, however, suggested by those advocating the "compact" theory of Confederation that although the Maritime Provinces had not accepted the Quebec resolutions, the delegates at the London Conference of December, 1866, accepted them as the *basis* for a federal union of the provinces. It is, therefore, necessary to consider what was said at the London Conference. After the point had been raised by Mr. McDougall, of Canada, as to whether matters settled at the Quebec Conference could be changed, and Mr. Mitchell, of New Brunswick, referred to certain specific objections New Brunswick had to that scheme, Mr. McCully, of Nova Scotia, said:—

"We have adopted the Quebec scheme as the backbone, but I think we are here to bring our judgment and maturer reflections to bear upon it. *We are tied down to nothing, but should not depart unnecessarily from the Quebec scheme. I will act with the majority of the Conference* although contrary to my own opinion."—"Confederation Documents" by Joseph Pope, p. 121.

Then Hon. John A. Macdonald, the Chairman, said (*ibid.*, p. 121):—

"*The Maritime Delegates are differently situated from us. Our Legislature passed an Address to the Queen, praying for an Act of Union on the basis of the Quebec Resolutions. We replied to inquiries in our last Session of Parliament that we did not feel at liberty ourselves to vary those Resolutions. It is quite understood in Canada, though never reduced to writing, that if any serious objection should be made by the Maritime Provinces we should be prepared to listen and consider.*"

Mr. Fisher, from New Brunswick:—

"I have heard forty objections in New Brunswick to the scheme (Quebec Resolutions), *but shall act on my own judgment.* But this matter will be settled on the basis of the Quebec scheme."

Mr. Ritchie, Nova Scotia:—

"I entirely concur in the views of Mr. Macdonald. But we of the Maritime Provinces may bring forward matters for discussion. *In the Legislature of Nova Scotia it was understood that all matters should be entirely open.*"

Mr. Johnson, New Brunswick:—

"The Quebec scheme should be the basis, but *we may agree upon some alterations, and these may necessitate other changes.*"

Mr. McDougall, Canada:—

"I have felt my hands tied and Mr. Howland also."

Mr. Macdonald (*ibid.*, p. 122):—

“The Conference can now quite understand our position, and we may now go on. *We are quite free to discuss points as if they were open, although we may be bound to adhere to the Quebec scheme.*”

The B.N.A. Act differs from the Quebec resolutions in several important respects, and the (old) Canadian Parliament, which had accepted the Quebec resolutions, was not consulted about these changes. As a matter of fact, the delegates at London actually acted in an advisory capacity in drafting and assisting the Imperial Government to draft the Bill.

It is true that in introducing the Bill in the House of Lords on February 12th, 1867, Lord Carnarvon said:—

“The Quebec Resolutions . . . with some slight changes, form the basis of the measure that I have now the honour to submit to Parliament. *To those Resolutions all the British Provinces in North America were, as I have said, consenting parties,* and the measure founded upon them must be accepted as a treaty of union.”—Parliamentary Debates (3rd series), vol. 185, p. 558.

When the Bill was in its second reading in the House of Commons Mr. Adderley, Under-Secretary of State, said:—

“As the arrangement is a matter of mutual concession on the part of the Provinces, there must be some external authority to give a sanction to the compact into which they have entered. . . . Such seems to me the office we have to perform in regard to this Bill.”—(*Ibid.*), p. 1169.

With deference I submit that these observations were not accurate. The Quebec Resolutions were not consented to (except by Canada) and neither they nor the negotiations at the London Conference were in fact or in law a treaty of union or compact. It is significant that there is no recital of either in the B.N.A. Act (with which compare the Address of the Canadian Parliament, *ante* p. 5, and the recital in the Commonwealth of Australia Act, 1900—63-64 Vic. cap. 12). The provinces, having agreed on the desire to unite, committed the drafting of the Bill to their delegates and the Imperial Government, and finally committed the whole matter to the Imperial Parliament in a Statute which they knew that Parliament could amend at any time. Mr. Adderley does not correctly state the function of the Imperial Parliament, for, once it enacted the B.N.A. Act, that constituted a wholly new point of departure. As a matter of law, regardless of what negotiations had taken place, the legislative powers of the

Dominion and provinces respectively were then settled by that Act alone, subject to amendment by the Imperial Parliament.

There is no suggestion in the B.N.A. Act that its provisions are final, except in section 118, which, dealing with the yearly grants paid to the provinces, says:—

“Such grants shall be in full settlement of all future demands on Canada.”

This finality clause appears in the Quebec resolutions as well, and yet we find in 1869, Nova Scotia was given a special subsidy for ten years and an increase in debt allowance by the Dominion Parliament. This procedure was objected to by the Hon. Edward Blake and the Hon. Alexander Mackenzie in supporting an amendment which read:—

“That in the opinion of this House any disturbance of the financial arrangements respecting the several Provinces provided for in the British North America Act, unless assented to by all the Provinces, would be subversive of the system of government under which the Dominion was constituted.”

This motion was defeated by a large majority.—Journals of the House of Commons (Canada) 1869, p. 260.

Sir John A. Macdonald, then Prime Minister, rested the Government's measure chiefly upon the need of pacifying Nova Scotia, which Province had sent a delegation to London headed by the Hon. Joseph Howe, asking for the repeal of the Act. Sir John also maintained that the Dominion Parliament had the right to spend its revenue as it saw fit, in which view he was afterwards supported by the Imperial law officers of the Crown. Thus this one clause in the B.N.A. Act which was described as final was altered without even an Imperial Act of Parliament. In fact Nova Scotia set the fashion, and there have been several revisions increasing these grants and in only one instance was there an Imperial Act—the amendment of 1907, to which I will refer later. On the question of the increase in provincial subsidies see “A Flexible Portion of the British North America Act”, 11 *Canadian Bar Review*, p. 149 (March, 1933) by J. A. Maxwell of Clark University, Massachusetts.

In 1871 the first amendment to the B.N.A. Act was passed by the Imperial Parliament (34-35 Victoria, c. 28). This Act dealt with establishment of provinces in the territories and confirmed the Acts passed by the Parliament of Canada for the government of Rupert's Land and the North-West Territories and for the establishment of the Province of Manitoba. When the motion in the Canadian House of Commons requesting the passing of this Act was under discussion,

the Hon. David Mills presented a series of resolutions, the last of which reads:—

“That the representative legislatures of the Provinces now embraced by the Union have agreed to the same on a Federal basis, which has been sanctioned by the Imperial Parliament. This House is of opinion that *any alteration* by Imperial Legislation of the principle of representation in the House of Commons, recognized and fixed by the 51st and 52nd sections of the British North America Act, *without the consent of the several provinces that were parties to the compact, would be a violation* of the Federal principle in our constitution, and destructive of the independence and security of the Provincial Governments and Legislatures.”

This resolution was voted down at a time when many of the Fathers of Confederation were in the House of Commons, and supported the motion asking for the amendment.—*Journals of the House of Commons (Can.) 1871, p. 254.*

This amendment was passed without the Provinces even being consulted.

In 1886 the B.N.A. Act was again amended (49-50 Vic., ch. 35) on the joint addresses of the Senate and the House of Commons to provide for representation of the North-West Territories. This amendment affected all of the Provinces, for such representation would affect the balance of representation in the Dominion, but the Provinces were not consulted and did not give their consent to the amendment.

In 1907 the B.N.A. Act was again amended (7 Ed. VII, cap. 11) by increasing the payments made by Canada to the Provinces. On this occasion Sir Wilfrid Laurier, who was then Prime Minister, consulted the Provinces and they all consented to the proposed changes except British Columbia. British Columbia not only refused to consent, but sent its Premier, Sir Richard McBride, to London, protesting against the proposed Act, particularly the proportion British Columbia was receiving and the finality clause that was to be inserted. Notwithstanding Premier McBride's objection, the Act was passed. The “finality clause” was, however, taken out of the Act although it is in the schedule thereto, being the Address of the Canadian Parliament.

In discussing the procedure leading up to the B.N.A. Act of 1907, Professor Arthur B. Keith in “Responsible Government and the Dominions”, page 586, says:—

“It was most expressly recognized in 1907 by the Imperial Government that the Federal Constitution is a compact which

cannot be altered save with the assent both of the Dominion and the Provinces."

The late Sir George Ross in "The Senate of Canada", pages 115-116, says:—

"It was not until 1907 that the Parliament of Canada formally admitted the doctrine of consent. The Subsidy Act of 1907 . . . was based upon the assent of all the Provinces by their Legislatures or representatives, and thus Parliament recognized for the first time that the Union Act was a treaty, to be amended only with the consent of the parties that were bound by it."

See also Prof. W. P. M. Kennedy of the University of Toronto, in "The Constitution of Canada", page 450:—

"The formation of the federation has been treated as a covenanted occasion, and explicit recognition was given to this treatment in 1907 by the cabinets of the United Kingdom and of Canada, when admission was made that the general assent of the provinces was necessary to any constitutional changes."

Are the conclusions of these three eminent writers warranted by the facts? I find that Sir Wilfrid Laurier in moving an address to His Majesty to repeal section 118 of the B.N.A. Act, 1867, and substitute therefor the scale of payments set forth in the motion, refers to the various changes made by the Canadian Parliament in the subsidies, and says:—

"When the Provinces came to us and asked for better terms *we might have done as our predecessors did and have them voted by this Parliament*, but we thought we should insist upon having the sanction of the British Parliament. We desired that they should be embodied in an Imperial Act. That is the policy we now propose to this Parliament and it is, I believe, calculated to promote the harmony which is absolutely essential if we are to work out, as we expect to work out, our destiny as a united people."—Debates, House of Commons, (Canada) Session 1906-7, Vol. III, page 5309.

I submit that in passing this motion neither the Canadian Government nor the Canadian Parliament admitted that consent of all the Provinces is necessary before any amendment can be made to the B.N.A. Act or adopted the doctrine of "compact," for the following reasons:—

1. The "Address" asking for the amendment, then under consideration, stated that the new provision therein made for provincial

subsidies was to be a "*final and unalterable settlement* of the amounts paid yearly to the several provinces."

2. Sir Wilfrid Laurier in introducing the motion made it clear that his Government might have done as his predecessors did and had the increases voted by Parliament, but thought it better to have the changes embodied in an Imperial Act.

3. The Act itself recites that an address has been presented by the Senate and Commons of Canada, and no mention is made in the Act of consent of any Province.

4. The Province of British Columbia, as a matter of fact, did not consent to the amendment.

For the same reasons the passing of this Act (B.N.A. Act of 1907), in the face of the opposition of British Columbia, is, in my opinion, not a recognition by the Imperial Government or Parliament that "the Federal Constitution is a compact which cannot be altered save with the consent both of the Dominion and the Provinces," as Prof. Keith says (*ante* p. 217). I observe that in his new book, "The Constitutional Law of the British Dominions" (1933), p. 109, Prof. Keith treats in a different way the 1907 amendment procedure but still contends it established an important precedent which "it is useless to ignore" . . . "whether it was wise to create it or not."

The next amendment of the B.N.A. Act was in 1915, when the Imperial Parliament on addresses from the Canadian Houses of Parliament, altered the constitution of the Senate, increasing the number of Senators from 72 to 96 and proportionating the members among the different Provinces (5-6 George V, chapter 45). In 1916 the B.N.A. Act was again amended at the request of the Canadian Houses of Parliament by providing that notwithstanding anything in the British North America Act or any Act amending same "the term of the twelfth Parliament of Canada is hereby extended until the 7th day of October, 1917."

The constitutional practice is, therefore, entirely against the consent of the Provinces being necessary for amendment, and ever since Confederation, even including the Act of 1907, is uniform in establishing that the Act may be amended by the Imperial Parliament upon the addresses of the Senate and the House of Commons of Canada.

This is confirmed by the statement of the Hon. Mr. Lapointe, former Minister of Justice, at the Dominion-provincial Conference of 1927, as follows:—

"The Minister of Justice pointed out that while there had been five amendments to the British North America Act, on only one occasion had the Provinces been consulted. This was

in 1907 when the subsidy question was up. On that occasion there was only one dissenting Province, namely British Columbia."—Sessional Paper No. 69, 1928.

[The B.N.A. Act, 1930 (20-21 George V, cap. 26) is merely a confirmation by the Imperial Parliament of agreements between Canada and certain Provinces regarding the transfer of natural resources, etc.]

Prof. Norman McL. Rogers of Queen's University, in "The Compact Theory of Confederation," 9 *Can. Bar Rev.* 395 (June, 1931), reviews the arguments in favour of and against the theory that Confederation is in the nature of a compact or treaty, and for a number of reasons, to some of which I have referred, he is definitely against the theory on the grounds of history, constitutional practice, federal theory and practical convenience. He contends that the principle of unanimous consent has never been conceded by the Dominion, and where the Provinces have been consulted in certain cases, this has only been as a measure of convenience and not as a matter of right, and that the Provinces themselves have adopted a position wholly inconsistent with the compact theory. Prof. Rogers wrote a later article "Our Incredible Constitution," in "The Canadian Forum" of March, 1933, in which he refers to "the untenable doctrine of unanimous consent" and says that if this doctrine prevails, "Canada would have the most rigid federal constitution on the face of the earth"—p. 212.

Professor Norman A. M. Mackenzie of the University of Toronto, in an article in the *Toronto Saturday Night* of November 5th, 1933, "The Federal Problem and the B.N.A.," said:—

"As a lawyer and a student of history, I have no hesitation in saying that the British North America Act is not a compact, and from a legal point of view could be amended by Parliament without considering the desires of the Provinces."

I agree with Prof. Rogers and Prof. Mackenzie, except, perhaps, as to one section of the B.N.A. Act upon which the Canadian House of Commons has expressed itself, namely, sec. 133, dealing with the (limited) use of the French language. In 1890 Mr. Dalton McCarthy, Q.C., moved in the Canadian House of Commons to amend the North-West Territories Act by repealing section 110, being chapter 50, R.S.C. 1886. This section originally provided that both the English and French language should be used in the records and journals of the Assembly of the North-West Territories and either language might be used in the debates of the Assembly. Mr. McCarthy, supported by a petition of the Legislative Assembly of the

North-West Territories of October 1889, moved for the repeal of this section.<sup>1</sup>

Sir John Thompson, Minister of Justice, moved an amendment to the Bill as follows:<sup>2</sup>

“That this House, having regard to the long continued use of the French language in Old Canada and *to the covenants on that subject embodied in the British North America Act*; cannot agree to the declaration contained in the said Bill as the basis thereof, namely, that it is expedient in the interests of the national unity of the Dominion that there should be community of language amongst the people of Canada. That on the contrary *this House declares its adherence to the said covenants and its determination to resist any attempt to impair the same.* That at the same time this House deems it expedient and proper and not inconsistent with those covenants that the Legislative Assembly of the North-West Territories should receive from the Parliament of Canada power to regulate, after the next general elections of the Assembly, the proceedings of the Assembly and the manner of recording and publishing such proceedings.”

This amendment was carried by 149 votes to 50.<sup>3</sup> In 1891 the Dominion Parliament passed an Act, 54-55 Victoria, chapter 22, amending section 110 accordingly. The House of Commons has, therefore, declared that section 133 of the Act (the only section dealing with the use of the French language) is a covenant, which it will resist any attempt to impair.

I have, so far, dealt mainly with the four provinces that originally entered Confederation. British Columbia and Prince Edward Island, which came into the Dominion by Imperial Orders-in-Council (16th May, 1871, and 26th June, 1873, respectively) pursuant to section 146 of the B.N.A. Act, are in a different position. The Dominion agreed with both of these provinces as to the terms and conditions upon which they would enter Canada, which terms and conditions are set out in full in the Addresses of the Canadian House of Commons praying for the Imperial Orders-in-Council (R.S.C. 1907, Vol. V, pp. 76-94). There is a strong argument in favour of the special terms set out in these addresses being covenants between the Dominion and British Columbia and Prince Edward Island respectively, such as the agreement by the Dominion with British Columbia to provide an efficient mail service fortnightly between Victoria and San

<sup>1</sup> See Debates of the House of Commons, 1890, Vol. I, pages 38 to 51.

<sup>2</sup> *Ibid.*, page 882.

<sup>3</sup> *Ibid.*, page 1018.

Francisco, and with Prince Edward Island to establish and maintain efficient steam service between the island and mainland. But so far as legislative power is concerned, the provisions of the B.N.A. Act are made applicable to these two provinces as if they had each been one of the provinces originally united by the Act, and they would appear to have no special ground for objecting to the legislative power of the Dominion Parliament being increased.

The position of the three Prairie Provinces, however, is again different from the other provinces. They were created by the Dominion Parliament out of the North-West Territories, and it cannot be seriously contended that any one of them entered into a compact or treaty with the other provinces or the Dominion. In fact, Sir George Ross in "The Senate of Canada" (page 36), after expressing his view that the B.N.A. Act is a treaty so far as the older Provinces are concerned, points out that the Dominion granted a constitution to each of the three Prairie Provinces "without any bargain, contract or treaty with the Legislatures it had created." Therefore, if the compact theory can be supported at all, we in Manitoba, Saskatchewan and Alberta would be in the anomalous position that our consent in any event would not be necessary before the B.N.A. Act could be amended. It is true that section 3 of the Saskatchewan Act and similar sections of the Acts creating Alberta and Manitoba provide that the provisions of the B.N.A. Act "shall apply to the Province in the same way and to a like extent as they apply to" the other Provinces "as if the said Province of Saskatchewan had been one of the Provinces originally united." But that provision could not, in my opinion, be fairly interpreted as implying in favour of the three Prairie Provinces the so-called "compact theory of Confederation."

Any discussion of this theory must take into consideration the following remarks of the Judicial Committee of the Privy Council in the Aeronautics case, 1932 A.C. at p. 70:—

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

Prof. Keith in "The Constitutional Law of the British Dominions," p. 109, says "the theory of contract is clearly recognized by the Privy Council" in this case. The above remarks, although "obiter dicta," are undoubtedly entitled to the greatest respect. However, the debatable question of "the compact theory" does not appear, from the report, to have been argued by counsel. The Privy Council refers to the preservation of the rights of minorities, but these were not in question in the Aeronautics case. Later on in this article I am suggesting that minority rights be safeguarded in the matter of amendment. If the Privy Council, apparently without argument on the point, intended to imply that the division of legislative power between the Dominion and Provinces by ss. 91 and 92 should be treated as a contract, I can only say, with deference, that I do not agree with that eminent tribunal. In any event the Privy Council was interpreting the present B.N.A. Act and not discussing the question of its amendment by Parliament or the constitutional practice established in connection therewith.

But even assuming that, legally and following constitutional precedent, the B.N.A. Act can be amended without the consent of the provinces, that does not settle the question. As Professor Mackenzie points out in his article "The Federal Problem and the B.N.A." (*ante*, page 220), "what is legally possible is not always politically desirable." He then expresses the view that:—

"If Mr. Ferguson and Mr. Taschereau or their successors insist, as they have done very firmly, that the B.N.A. Act is a pact and cannot be amended without their approval, and if the electors of Ontario and Quebec appear to support them in this view, it is unlikely that either Mr. Bennett or Mr. Mackenzie King, or even Mr. Woodsworth for that matter, will push the legal rights of the Dominion Parliament."

There is the further difficulty suggested by Prof. Keith in "The Constitutional Law of the British Dominions," p. 108:—

"Would the British Parliament be justified in enacting a change in the Constitution desired by the Dominion Parliament but strongly objected to by the Province of Quebec or some other Province or Provinces?"

The Provinces are inclined to be jealous of what they consider "provincial rights," and any important amendment launched during the present constitutional controversy might stir up a major political issue that would not be in the interests of Canadian unity. Sir John Macdonald spoke of Confederation as "*founding a great nation.*"<sup>4</sup>

<sup>4</sup> Canada Confederation Debates (1865), page 45.

It is not consonant with this nationhood or with the world status Canada has now attained that one province, even the smallest, could block an amendment desired by the rest of Canada for the good of the nation as a whole. There is too great a tendency on the part of provincial statesmen (and in fact all of us) to have a provincial viewpoint. Present conditions call for the highest in Canadian statesmanship and citizenship if we are going to make a national recovery—this is no time for parochialism or sectional jealousies. After all, Canada is a nation, not a mere collection of provinces. Nevertheless, there are a few minority rights that would have to be considered in settling the constitutional question under discussion.

The Province of Quebec is probably the chief exponent of the theory that the unanimous consent of the provinces is necessary to an amendment of the B.N.A. Act. Its attitude is, I believe, prompted chiefly by the fear that amendments might affect the (limited) right given by section 133 to the use of the French language (as to which the House of Commons expressed itself in 1890 by the resolution, *ante* p. 220). There is also the question of minority rights to denominational and separate schools given by section 93, in which Quebec and Ontario are both interested. Could not the Dominion, without conceding that the B.N.A. Act as a whole cannot be amended without the consent of all the provinces, make an exception of sections 93 and 133? This seems to be along the line of the proposition made by the Hon. Mr. Lapointe to the Dominion-provincial Conference of 1927 at which he said:—

“The questions on which unanimity of the provinces should be required might be specified under sections 93 and 133 and section 92, subsections 12, 13 and 14, of the British North America Act.”<sup>5</sup>

Subsections 12, 13 and 14 of section 92 deal with the solemnization of marriage, property and civil rights and the administration of justice, respectively, in the province. Even these might also be treated specially, although as to “property and civil rights” I think it is generally admitted that the residuary power of the Dominion Parliament to legislate for the “peace, order and good government of Canada” should be made broader even though it may affect, to a certain extent, civil rights in the province.<sup>5a</sup> This could be done without changing the fundamental character of the civil law of Quebec, and might, as a safeguard, require a two-thirds majority of both Houses of Parliament.

<sup>5</sup> Sessional Paper No. 69, 1928.

<sup>5a</sup> As to the jurisdiction of the Dominion in this regard, see *Aeronautics case*, 1932 A.C. 54 at pp. 71-72.

As to all other amendments, why should it not be definitely laid down that the consent of the provinces is not required, whether the amendment be made by the Imperial Parliament at the request of the Canadian Parliament, or by the Canadian Parliament itself? The latter, of course, would be a more expeditious procedure, but no headway can be made in that direction until settlement of the issue as to what consent of the provinces is necessary. Professor Mackenzie in his article "The Federal Problem and the B.N.A. Act"<sup>6</sup> expresses the view that the Dominion Parliament should be given power of amendment and favours procedure similar to that suggested by the Hon. Mr. Lapointe:—

"My plan, then, would be to put religion, language, education, and such other matters as seemed of fundamental importance to the Provinces in a separate part of the Act and state definitely that these sections could not be amended without the consent of all the interested parties or Provinces. The rest of the Act I would have capable of amendment by the Canadian Parliament itself without any undue formalities."

In my opinion the situation demands that a Dominion-provincial conference be called at an early date to discuss the whole matter. The Prime Minister of Canada apparently has the calling of such a conference in mind,<sup>7</sup> and it is hoped he will convene it after the labours of the present session are ended. The situation is a delicate one but it must be squarely faced and a solution reached. As Professor Rogers says in his article, "Our Incredible Constitution":—<sup>8</sup>

"We must face the problem courageously and with the same spirit of forbearance and conciliation which actuated the provincial delegations at the Quebec and London Conferences. The subversive doctrine of unanimous consent must be rejected with finality. A Constitutional Convention should be summoned for the express purpose of formulating a reasonably flexible amendment procedure which shall be incorporated in the British North America Act."

Canada is the only self-governing Dominion that has no power of amending its constitutional Act. Incidentally, Sir George Ross in "The Senate of Canada" at page 36, says that the constitutional Acts of the three Prairie Provinces may be amended by the Canadian Parliament. In my opinion this is not correct. Section 6 of the B.N.A. Act of 1871, dealing with the establishment of provinces by

<sup>6</sup> *Ante*, page 220.

<sup>7</sup> *Ante*, page 211.

<sup>8</sup> *Ante*, page 220.

the Parliament of Canada, provides that it shall not be competent for the Parliament of Canada to alter the provisions of the Act establishing the Province of Manitoba "or of any other Act hereafter establishing new provinces in the said Dominion" except as provided in section 3, which deals only with the alteration of the limits of the Provinces by the Parliament of Canada with the consent of the Legislature.

I might add that, since I began to prepare this paper Mr. F. W. Turnbull, M.P. for Regina, advocated in the House of Commons on February 6th last that the B.N.A. Act should be amended in the interests of national recovery. Mr. Woodsworth, leader of the C.C.F. party, also urged in the House of Commons on February 15th that the Act be revised. On March 5th the Right Hon. Arthur Meighen, Government leader in the Senate, expressed the view at a meeting in Toronto (according to the daily press) that "the time has arrived when we shall have to seriously review the Act upon which Confederation was based."

On February 19th last Sir Henry Drayton, while in Regina on a campaign sponsored by the Canadian Chamber of Commerce for greater economy in government, requested the Regina Bar Association to study the whole question of amendment of the B.N.A. Act with a view to strengthening the federal jurisdiction, and incidentally to eliminate overlapping of federal and provincial departments. I understand he has made a similar suggestion to other Bar Associations. The Regina Bar Association adopted the suggestion and appointed such a committee. I trust that the study I have given to the question of *how* to amend the B.N.A. Act will be of some assistance. I have, of course, not pretended in the above remarks, except incidentally, to consider *what* amendments are desirable in the national interest.

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Regina.

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