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THE COMPACT THEORY OF CONFEDERATION.*

From the birth of the Dominion down to the present time the growth of a vigorous Canadian nation has been arrested by two restraining influences. On the one hand the movement towards the assumption of national responsibilities in external affairs has been retarded at times by an exaggerated emphasis on the claims of imperial unity. During the same period and within the narrower circle of domestic affairs the capacity of the federal institutions to respond to the prompting of a developing national sentiment has been impaired by an undue emphasis on the claims of provincial autonomy. If it was the purpose of the first of these influences to keep us a colony, it is the tendency of the other to make us a league of provinces. With the enactment of the Statute of Westminster during the present year, following the historic pronouncement of the Imperial Conference of 1926, the actions of Canada beyond her own threshold will be impeded no longer by the legal prohibitions and mental inhibitions of a colonial status. The remaining obstacles to the recognition of the claims of the national government exist in the main within our own household, having their origin partly in the persistent assertion of provincial rights and partly in expansion of provincial powers as the result of decisions of the Judicial Committee of the Privy Council. Perhaps the most extreme assertion of provincial rights is set forth in the constitutional formula or legend which has come to be known as the compact theory of Confederation. It is not too much to say that this theory presents one of the most serious and embarrassing issues which have arisen since the adoption of our federal constitution.

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The compact theory of federalism in its Canadian form of expression is the deferred result of a sin of omission on the part of the Fathers of Confederation, a sin which in scriptural fashion has now been visited upon their children even unto the third and fourth generation. Sometimes we are tempted to recall with pride that the great task of the Quebec Conference was accomplished in the brief period of sixteen days, and perhaps to congratulate ourselves that this achievement compares most favourably with the four months devoted to the framing of the Constitution of the United States and the much longer period spent upon the Constitution of the Commonwealth of Australia. No one can doubt that those who drafted the Quebec Resolutions performed a difficult task with a high degree of skill and a reasonable measure of foresight, but it is not easy to forgive them for their failure to realize the necessity of providing the means whereby the Constitution might be amended in future years without incurring needless friction between the Dominion and the provinces. Certainly they would be the more entitled to our gratitude today if they had continued their sessions another week if need be in order to erect safeguards against the misunderstandings which must arise when changing conditions and new currents of political and economic thought would lead to a demand for alterations of the original terms of union. It may be argued, of course, that the omission of a procedure of amendment was deliberate. But this does not lessen the gravity of the offence. The very assumption of deliberate omission has encouraged the Dominion and provincial authorities to put their own interpretations on the significance of this alleged intention, and unfortunately there is no preponderance of direct evidence to support the pleadings of either party to the dispute. Whether or not the failure to devise an amendment procedure was the result of intention or oversight, it is certain that the predicament in which we now find ourselves must be laid in the first instance at the door of the Quebec Conference, and in the second instance upon the representatives of the Imperial Government who assisted in drafting the British North America Act at the London Conference of 1866.

The most recent declaration of the compact theory of Confederation is to be found in a Memorandum submitted within the past year to the Prime Minister of Canada by Hon. G. H. Ferguson on behalf of the Province of Ontario.¹ The occasion of this Memorandum was the proposal to repeal the Colonial Laws Validity Act in its application to the Dominions, pursuant to the recommendations of

¹ A memorandum from Mr. G. H. Ferguson, Prime Minister of Ontario, to the Prime Minister of Canada, dated September 10, 1930, and published in the *Globe* (Toronto), September 20, 1930.

the sub-committee of the Imperial Conference of 1926. Mr. Ferguson contended that the repeal of the Colonial Laws Validity Act without some clause protecting the rights of the provinces would be tantamount to conferring upon the Dominion Parliament an unqualified power of amending the Canadian Constitution. Without discussing the propriety of this protest, I shall quote briefly a number of paragraphs from the Memorandum in order to set forth the compact theory of Confederation as it has been presented most recently and forcefully on behalf of the provinces. Mr. Ferguson stated that:

The Canadian Parliament was asked in 1865 to give formal ratification to the resolutions (of the Quebec Conference) as a treaty of union between the various provinces. Hence Parliament was required to consider the resolutions en bloc without amendment. Explaining this proceeding Hon. John A. Macdonald said that "the scheme should be carried out as a whole, that it should be dealt with as a treaty, to be endorsed without one single amendment of alteration." And Hon. George E. Cartier affirmed of the proposal "It is the same as any other treaty entered into under the British system."

After quoting two decisions of the Judicial Committee of the Privy Council which do not appear to be entirely relevant to the main issue, the Memorandum goes on to state:

Further elaboration of this view is rendered unnecessary by the fact that it is not denied by any authority that the resolutions adopted by the Quebec Conference were in the nature of a compact or treaty between the Provinces.

Finally, after further discussion of the significance of the proposed repeal of the Colonial Laws Validity Act, the Memorandum concludes with the following sentence:

It is, therefore, earnestly represented 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.

Since the British North America Act is unique among federal constitutions in not providing within itself a procedure of amendment, the compact theory of Confederation as set forth in the Memorandum from which I have just quoted must seek its justification in history, practice, federal theory, or practical convenience. It would not be going too far to say that proponents of this theory have generally been satisfied to establish their contentions on historical foundations. They argue that the Quebec Conference of 1864 consisted of delegations from the several provinces which were to be united under a federal constitution; that these several delegations

agreed to seventy-two resolutions as the basis of union; that these resolutions received the formal approval of the provincial legislatures and were in fact the basis of the British North America Act; that therefore in the absence of any provisions to the contrary, the future amendment of the British North America Act must follow the same procedure as that by which the Quebec Resolutions were initiated and approved, namely, the unanimous consent of the constituent provinces of the Dominion. This argument is supported with collateral evidence in the form of frequent use of the words "treaty" and "compact" as applied to the Quebec Resolutions by leading members of the Conference, thus indicating that these resolutions were regarded as having a binding character as between the several contracting provinces.

It is evident that difficulties arise the moment we attempt to identify the parties to the alleged treaty or agreement of Confederation. Is the Dominion a party? It did not exist prior to the passing of the British North America Act. Are Ontario and Quebec parties to the agreement? They were not distinct provinces during the Confederation negotiations, although it is true that Upper and Lower Canada were accorded a separate status at the Quebec and London Conferences. Are Prince Edward Island and British Columbia parties to the compact? They made no agreement with the other provinces but only with the Dominion. Are Manitoba, Alberta and Saskatchewan to be regarded as parties to the agreement? They were created by Acts of the Dominion Parliament. These difficulties, however formidable they may appear to the lay mind, are swept away by supporters of the compact theory on the ground that the nine provinces occupy a position of complete equality in the Dominion, and that those which entered the union or were created after Confederation must be assumed to have the same rights and obligations as the original members. In other words, the contract was express as regards the Canadas, New Brunswick and Nova Scotia and implied as regards the remainder. This view is thus presented in Mr. Ferguson's Memorandum from which I have just quoted.

When the Dominion came into existence it assumed all the obligations and the conditions that had been accepted on its behalf by its sponsors. Provinces which were subsequently attached to the Dominion or established at its instance under the provisions of the British North America Act occupied the same relations towards the Federal authority.²

It is apparent therefore that the real substratum of the compact theory is the original compact or treaty which it is alleged was made

² *Loc. cit.*

at Confederation. Any useful examination of that theory must begin with an enquiry into the nature and significance of the transactions which preceded the passage of the British North America Act in 1867.

The question whether the Quebec Resolutions constituted a treaty in form and fact would scarcely deserve serious consideration were it not for the explicit statements in this regard which were made by certain delegates at the Quebec Conference who supported the resolutions in the Canadian Legislature. In addition to the declarations of Macdonald and Cartier referred to by Mr. Ferguson in his Memorandum, two further examples may be cited by way of illustration. In his speech in support of the Quebec Resolutions in the Canadian Legislature, D'Arcy McGee is reported as follows:

Sir, by this combination of great abilities—by the coalition of leaders who never before acted together—the treaty was concluded and signed by us all—and there it lies on your table. The propositions contained in it have been objected to, and we were reminded the other evening by the honourable member for Chateauguay that we are not a treaty-making power. Well, in reference to that objection, I believe the Imperial Government has in certain cases, such as the Reciprocity Treaty, conceded to these provinces the right of co-action; and in this case there is the Imperial Despatch of 1862 to Lord Mulgrave, Governor of Nova Scotia, distinctly authorizing the public men of the colonies to confer with each other on the subject of union, and inviting them to submit the result of their conferences to the Imperial Government. We assembled under authority of that despatch, and acted under the sanction it gave. Everything was done in form and with propriety, and 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.³

During the same debate in the Canadian Legislature an interesting exchange occurred between George Brown and L. H. Holton:

Mr. Brown: But the honourable gentleman is entirely wrong when he says we had no power to make this compact with the Maritime Provinces. We had full power, express instructions, to enter into it.

Mr. Holton: Did the Parliament of England give you that power?

Mr. Brown: No; the honourable gentlemen ought to know that the treaty-making power is in the Crown—the Crown authorized us specially to make this compact, and it has heartily approved of what we did.⁴

Now these declarations are utterly inconsistent both with the true character of the negotiations and with existing constitutional practice. The Crown did not authorize the delegates at the Quebec Conference to conclude a binding agreement among themselves. All that

³ *Debates of Parliament of Canada on Confederation* (Quebec: Hunter-Rose, 1865), p. 134.

⁴ *Ibid.*, p. 110.

was sanctioned by the despatch to Lord Mulgrave was a conference on the subject of a union of the provinces of British North America.⁵ There was no grant of powers to conclude a treaty, compact or binding agreement. The colonies of British North America had not acquired in 1864 the right to conclude commercial or political engagements either between themselves or with other countries. The utmost they had achieved during the Reciprocity negotiations in 1854 was the dubious privilege of prior consultation before the terms of the treaty were finally arranged.⁶ The only further progress towards participation in the making of treaties at this period was a formal undertaking given by Henry Labouchere in 1857 that no treaty affecting the rights of a colony would be concluded without the consent of the colonial legislature.⁷ Even in this important feature the treaty analogy is falsified by the procedure adopted with respect to the Quebec Resolutions. As I shall point out presently, these resolutions were never in fact submitted to the Legislatures of New Brunswick or Nova Scotia. Only in the Canadian Legislature did they receive formal legislative approval. They were definitely rejected by the Legislature of Prince Edward Island.

There is also a further objection to the Quebec Resolutions as constituting a treaty or binding agreement. The Crown as advised by its Ministers in Great Britain, whether or not exercising its powers under the guise of treaty negotiations or by explicit instructions, could not, without a breach of constitutional propriety, override the authority of the Imperial Parliament or interfere in the domestic affairs of the provinces. It is true that the constitutions of the Maritime provinces did not have a statutory basis and had been built up and altered by Commissions and instructions from the Crown. But the United Provinces of Upper and Lower Canada possessed at this time a constitution which was enacted as a statute of the British Parliament. The Crown could not of itself authorize any abandonment of that constitution or any variation of its terms. That power lay with the Imperial Parliament which had passed the Union Act of 1840. All that the Crown as advised by its Ministers

⁵ Despatch from the Duke of Newcastle to the Earl of Mulgrave, July 6, 1862 . . . "I should see no objection to any consultation on the subject amongst the leading members of the Governments concerned, but whatever the result of such consultation might be, the most satisfactory mode of testing the opinion of the people of British North America would probably be by means of Resolution or Address prepared in the Legislature of each Province by its own Government." Sir Joseph Pope, *Confederation Documents* (Toronto: Carswell Co., 1895), Appendix V, p. 303.

⁶ *Journals of the Legislative Assembly of Nova Scotia*, 1854-55, pp. 568-570.

⁷ *Ibid.*, 1857. Appendix No. 62, p. 377.

in Great Britain had power to do, and all that it proposed to do in the despatch to Lord Mulgrave was to authorize delegations from the several provinces to confer on the subject of union in order that the Home Government might have the benefit of their advice before introducing the necessary legislation in Parliament. There was no grant of authority to conclude a treaty, compact, or binding agreement upon matters which had been dealt with by the Imperial Parliament. Moreover, any mandatory instructions to this end addressed to the Governors of the several provinces would have been a questionable violation of the principles of responsible government.

In the second place the task of drawing up a new constitution for the provinces of British North America attached to the function of legislation and did not lie properly within the field of executive action. The Crown as advised by its Ministers in the several provinces did not possess constituent powers, and could not authorize or instruct delegates to conclude a binding agreement which contemplated such radical changes in the colonial constitutions as were proposed by the Quebec Resolutions. In so far as there was a power to alter a colonial constitution within the provinces that power was legislative in character. Two questions then arise. Did the several provincial legislatures authorize their respective delegations to draw up a scheme of union, and did they subsequently ratify and accept the resolutions which emerged from the Quebec Conference? As to the first question, it is important to observe that so far as the Maritime Provinces were concerned, the provincial delegations were never authorized by their legislatures to consider the proposal for a union of the Provinces of British North America. The procedure actually followed is set forth officially in the Speech from the Throne delivered at the opening of the Nova Scotia Legislature in 1865:

At the opening of the session, the Officer then administering the Government alluded to the identity of the interests of the British North American Maritime Provinces, and laid before you a proposal for devising means of effecting their Union under one Government. The consideration which you then gave to the question led to a resolution requesting the Officer administering the Government to appoint Delegates, not exceeding five in number, to confer on that subject with Delegates from New Brunswick and Prince Edward Island.

When invited by the Governor-General to send Delegates to Quebec to discuss the wider question, I considered it my duty to obtain previously the consent of Her Majesty's Government. I then appointed on behalf of this Province, the same gentlemen who had represented her interests in the first Conference. The second Conference commenced its sittings at Quebec on the 10th of October, and did not conclude them till the 29th of the month.

The result of their labors, proposing a Union of British North America, on certain conditions embodied in Seventy-two Resolutions has already been made public, and will now be officially communicated to you with all the correspondence connected therewith."⁸

It is thus apparent that in Nova Scotia, and the same holds true of the other Maritime Provinces, there was no legislative authorization of the conference with delegates from Canada on the subject of a Union of British North America, much less an authorization to enter into a binding agreement to this end with the other provinces. As was pointed out by Hon. Albert J. Smith, the Anti-Confederate leader of the New Brunswick Government in 1865:

If it was necessary for the delegates appointed to discuss a Union of the Lower Provinces to have Legislative authority, how much more necessary was it to have authority to discuss this larger Union. I do not think another case can be found of a Government meeting in Conference and agreeing to a scheme making an organic change in the constitution of a country.⁹

The next point to consider is whether the Quebec Resolutions, regardless of the manner of their origin, received the subsequent approval of the several provincial Legislatures. On this question the evidence is equally conclusive. When delegates were authorized by Nova Scotia, New Brunswick and Prince Edward Island to consider the narrower project of Maritime Union, it was contemplated that whatever agreement was reached at Charlottetown should receive the sanction of the several Legislatures before any attempt was made to implement it by constitutional enactment. In the same manner the delegates at the Quebec Conference agreed to submit the resolutions of that conference for the approval of the several provincial Legislatures.¹⁰ It is a matter of historical record that this agreement was never carried out. Only in the Legislature of the United Provinces were the Seventy-Two Resolutions submitted for approval and accepted by a majority of the members. In Prince Edward Island the resolutions were rejected by the Legislature. In Newfoundland their discussion was postponed to a more convenient season. In Nova Scotia, at the first session following the Conference, Tupper saw that the moment was not propitious for their submission, and deferred action by securing acceptance of a resolution which revived the project of Maritime Union as a necessary step towards the larger scheme. In New Brunswick a general election was

⁸ *Debates of the Legislative Assembly of Nova Scotia*, 1865-66, p. 3.

⁹ *Debates of the Legislative Assembly of New Brunswick*, 1865, p. 117.

¹⁰ Resolution 70 of the Québec Conference.

held at which the Government sponsoring the Quebec Resolutions suffered a decisive defeat at the polls.

Subsequently, in 1866, the Imperial Government used all the pressure at its command to further the scheme of union, and due in large measure to the tactics pursued by Gordon, the Lieutenant-Governor of New Brunswick, the Anti-Confederate administration in that province was defeated, and following another general election a Government was formed which was favourable to Union. But even then, the Quebec Resolutions were not submitted to the Legislature. Instead, a course was taken which reveals I think the true position of the provinces in the events leading to the passage of the British North America Act. The Resolution adopted by the Legislature of New Brunswick on the subject of Confederation, and the only resolution expressing legislative approval of union, makes no reference whatever to the Quebec Resolutions, but is expressed in the following terms:

That an humble Address be presented to His Excellency the Lieutenant-Governor, praying that His Excellency will be pleased to appoint Delegates to unite with Delegates from the other Provinces in arranging with the Imperial Government for the Union of British North America upon such terms as will secure the just rights and interests of New Brunswick, accompanied with provisions for the immediate construction of the Inter-Colonial Railway, each Province to have an equal voice in such Delegation, Upper and Lower Canada to be considered as separate Provinces,¹¹

In other words the Delegation from New Brunswick was appointed to assist and advise the Imperial Government in arranging terms of union which would secure the just rights and interests of the province. The only express condition attached by the Legislature to this representation was the immediate construction of the Inter-Colonial Railway.

The course of proceedings in Nova Scotia is also instructive. Here, too, the Quebec Resolutions were never formally submitted to the Legislature. In the beginning the sentiment of the Assembly was distinctly hostile to the proposal for union, and especially to the scheme as set forth in the Quebec Resolutions. The change in opinion was due in large measure to the persistent pressure of the Imperial Government and the sympathetic support of the new Lieutenant-Governor, General Fenwick Williams, a native son who had won fame as the hero of Kars, and whose appointment as Governor was a shrewd move on the part of those who believed his avowed advocacy on Confederation would not be without its influence on

¹¹ *Journals of the Legislative Assembly of New Brunswick*, 1866, p. 153.

recalcitrant members of the assembly. The reversal of opinion in Nova Scotia, however, cannot be regarded as favourable to the Quebec Resolutions. Indeed, Mr. Miller, the gentleman who was mainly responsible for the Confederation Resolution as passed by the Nova Scotia Legislature in 1866 made no secret of the fact that his chief object in supporting such a resolution was to prevent the acceptance of the Quebec Resolutions. This is made very evident by the following quotation from the speech delivered by Mr. Miller which led to the introduction of the Confederation Resolution:

The object of my present movement is—and I fearlessly avow it—to defeat the Quebec scheme. Before it is too late—before we are borne down by the powerful influences against which we are now contending—while yet we have a formidable army in the field, while our opponents respect our strength and hesitate at an engagement—is it not wise to seek the most advantageous terms of compromise.

If the Government will publicly abandon the Quebec scheme, and introduce a resolution in favour of a Federal Union of British America—leaving the details of the measure to the arbitrament of the Imperial Government, properly advised by delegates from all the provinces, I promise them my cordial support. This would be commencing rightly. By getting the endorsement of the Legislature in the outset—of the principle of Union, and its authority to enter on the settlement of the details of a scheme, the friends of the measure would occupy a very different position from that occupied by the delegates to the Quebec Conference, who went to Canada in 1864 without any authority from Parliament.¹²

To this proposal Tupper replied in the following terms:

We feel that difficulties have arisen in connection with the Quebec scheme which require such an arrangement as has been proposed in order to remove the objections that exist. I can only say in reference to this matter, that Canada has accepted the basis of the Quebec scheme by a large majority, and that any alteration in the terms obtained from the Imperial Government must be even more favourable to the Maritime Provinces.

The Imperial Government and Parliament will have an opportunity of largely improving that scheme, and giving us an amount of consideration that otherwise we might not obtain. It must be remembered that let Canada, Nova Scotia and New Brunswick pass any scheme they please that does not unite British North America. The only means by which we can be united is by an act of the Imperial Parliament. The Government can only say what bill they will submit to the Imperial Parliament; they cannot tell what will come out of that Parliament. This resolution therefore provides all the guarantees that can be had for a plan of Union being adopted by the Imperial Parliament, advised during the passage of the Act by able and intelligent representatives of all parties while it is under consideration.¹³

¹² *Debates of the Legislative Assembly of Nova Scotia*, 1866, p. 189.

¹³ *Ibid.*, p. 222.

Under these circumstances and with the understanding referred to by Tupper, the Nova Scotia Legislature passed the following resolution:

Whereas, in the opinion of this House it is desirable that a Confederation of the British North American Provinces should take place.

Resolved, therefore, that his Excellency the Lieutenant-Governor be authorized to appoint delegates to arrange with the Imperial Government a scheme of union which will effectually ensure just provisions for the rights and interests of this Province, each Province to have an equal voice in such delegation, Upper and Lower Canada being for this purpose considered as separate Provinces.²⁴

From this recital of the events which preceded and followed the Quebec Conference, it is clear that the Resolutions of that Conference were handicapped from the beginning by the bar sinister. Their birth, so far as the Maritime Provinces were concerned, was illegitimate and they were never accorded legal recognition. To recapitulate briefly, up to the meeting of the London Conference in 1866, the Quebec Resolutions had been accepted only by the Legislature of the United Provinces of Upper and Lower Canada. In Nova Scotia and New Brunswick they had been abandoned to all intents and purposes, and the only point upon which the Legislatures of the provinces were of a common mind was the desirability of Confederation provided it could be effected on just and equitable terms. So far as there was any compact, consensus, or general agreement among the Legislatures of the provinces, it was confined to the fact of union and did not extend to any specific terms by which that union was to be achieved. It is equally clear that the Legislatures of New Brunswick and Nova Scotia agreed to leave the final terms of Confederation to the arbitrament of the Imperial Government and Parliament, as advised by delegates from the provinces. Further confirmation of this view is found in the fact that the Legislatures of these provinces rejected proposals whereby the scheme arranged at London should be referred back to the provincial Legislatures for approval before being implemented in legislation by the Imperial Parliament. The true function of the provincial delegations at the London Conference was advisory in character. The details of the Act of Confederation were left to the Imperial authorities with the counsel and assistance of representatives of the several provinces. It is true that the Quebec Resolutions were used at London as the basis of the proposals which were later submitted to the Imperial Government, but this was obviously a matter of convenience since

²⁴ *Ibid.*, 1866, pp. 66-70.

the majority of the Quebec Resolutions were not objected to by the delegates from Nova Scotia and New Brunswick, and it was of tactical importance to Macdonald to be able to assert that the Quebec scheme was the true foundation of the Act of Confederation. There is an interesting sidelight on this point in the account of the discussions at the London Conference. Mr. McDougall, one of the Canadian representatives, asked if the Conference was at liberty to alter the Quebec Resolutions. Mr. Ritchie declared that in the Legislature of Nova Scotia it was understood that all matters should be entirely open. The New Brunswick delegates took substantially the same view. Macdonald's cryptic reply is most significant:

We are quite free to discuss points as if they were open, although we may be bound to adhere to the Quebec scheme.¹⁵

As a matter of fact substantial changes were made in the Quebec Resolutions which were never referred back to the provincial Legislatures but were effected by the authority of the Imperial Parliament. These changes did not relate merely to matters of detail but affected in a very direct way the arrangements between the Dominion and the provinces. It would not be going too far to say that in this respect the entire procedure by which the Canadian confederation was accomplished is without parallel in the history of federal government. There was never any ratification of the actual terms of union either by the Legislatures or by the peoples of the federated provinces. As Confederation was accomplished in legal form by a statute of the Imperial Parliament, so it was accomplished in fact by the persistent pressure of the Imperial Government on the Governments and Legislatures of New Brunswick and Nova Scotia.

For the purpose of emphasizing the peculiar character of the federal Constitution of Canada it may be useful to compare the preamble of the British North America Act with the preambles of two other federal constitutions for which final provision was made by the Imperial Parliament. In 1871 an Act of Parliament was passed establishing the federation of the Leeward Islands. The preamble of this Act begins as follows:

Whereas the several legislative bodies of her Majesty's Leeward Islands have, by certain resolutions, signified their desire for the Union of the said Islands under one government in manner therein set forth, and have requested that the said resolutions may be embodied in an Act of the Imperial Parliament with all such provisions as may be necessary to give them full force

¹⁵ Pope, *op. cit.*, pp. 120-122.

and effect, and it is expedient that the said union should be established: Be it enacted, etc.¹⁶

In 1900 an Act of Parliament was passed establishing the Constitution of the Commonwealth of Australia. The preamble of this Act begins as follows:

Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established: Be it therefore enacted, etc.¹⁷

In the first case it is declared that the several legislative bodies of Her Majesty's Leeward Islands had agreed to certain resolutions upon which the union of the islands was to be based, and had requested that these resolutions be embodied in an Act of Parliament. It is instructive to note that despite the formal and regular adherence of the legislatures of the several Islands to this scheme of federation, it is provided in Section 30 of the Act that the Constitution may be amended by the general Legislature "provided that every such law shall be reserved by the said Governor for the signification of Her Majesty's pleasure." Under such a provision, opportunity was afforded to any member of the federation which might feel itself prejudiced by such an amendment to make its representations to the Imperial Government within the time allowed for the signification of Her Majesty's pleasure. In the second case it is declared that the people of the several States of Australia had agreed to unite under the specific terms of a Constitution which was to be embodied in an Act of the Imperial Parliament. This Constitution also provided a procedure for its own amendment which was approved by the electorates of the several States.¹⁸ When we come to the British North America Act, we find no reference either to the Legislatures or the people of the several provinces, and no provision for amendment. The preamble is expressed in the following terms:

Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principal to that of the United Kingdom, etc.

In other words, neither the Legislatures nor the people of the provinces of British North America had given their consent to the

¹⁶ A. P. Newton, *Federal and Unified Constitutions* (London: Longmans, Green & Co., 1923), p. 263.

¹⁷ *Ibid.*, p. 324.

¹⁸ H. E. Egerton, *Federations and Unions in the British Empire* (Oxford: Clarendon Press, 1911), p. 65.

terms of union as set out in the British North America Act. The Canadian Legislature had accepted the Quebec Resolutions, but was not given an opportunity to consider the changes made at the London Conference. The provinces of New Brunswick and Nova Scotia had expressed their desire to be federally united, but approval of the terms of union was expressed not by the Legislatures or by the people, but by the Governments of these provinces. The only legislative authority or approval behind the Canadian Constitution was that of the Imperial Parliament. The only agreement of provincial Legislatures was confined to the acceptance of the principle of a federal union. The so-called compact of the Quebec Resolutions is without historical or constitutional basis. The London Conference was an advisory body. There is no inference from the negotiations that amendments of the British North America Act were to be based on provincial consent. The more reasonable position would appear to be that if a province felt itself aggrieved by an amendment proposed by the Dominion Parliament, its representations might be referred to the Imperial Government for consideration before the proposed amendment was implemented by imperial legislation. Certainly such a procedure would be more consistent with the status of the New Brunswick and Nova Scotia delegations at the final negotiations, and offers the most plausible explanation of the omission of a specific amendment procedure from the British North America Act, assuming that such an omission was deliberate and not due to oversight.

But if the Quebec Resolutions did not constitute a treaty in form or fact, how are we to account for the repeated use of the word "treaty" by leading members of the Conference? Are we to conclude that regardless of the confusion of thought and language in the debates in the Canadian Legislature the resolutions were intended by the delegates to operate as a binding agreement and that the Constitution to be based upon them was not to be altered except with the unanimous consent of the contracting parties? I have already indicated certain reasons why this view cannot be adopted, but it may be useful at this point to offer a possible explanation of the language used by Macdonald, Cartier and others with reference to the scheme elaborated at the Quebec Conference. In the first place it is significant that the use of the term "treaty" as applied to the Quebec Resolutions is confined to the delegates from the United Provinces. I have examined the debates in New Brunswick and Nova Scotia with some care and nowhere do I find that the resolutions were presented in these provinces as a treaty. On the con-

trary, the subsequent actions of the delegates from New Brunswick and Nova Scotia are entirely inconsistent with the view that they were regarded in this light.

It would appear then that there had been no formal understanding at Quebec that the resolutions should be presented to the several Legislatures as a treaty, but that their presentation in this form to the Legislature of the United Provinces was simply the result of a ministerial decision to adopt a manoeuvre which would ensure their passage with the least possible delay and a minimum of discussion with respect to details. If this view is correct, it deprives the use of the word "treaty" by Macdonald, Cartier and others of the significance attached to it by proponents of the compact theory. It is equally important to observe that the language of "treaty" and "compact" was introduced before the rejection of the Quebec scheme by New Brunswick and before it became apparent that the resolutions would have to be modified in important respects before the Nova Scotia Legislature would express approval. This being the case, it seems reasonable to conclude that the use of the word "treaty" as applied to the Quebec Resolutions in the Canadian Legislature was either purely rhetorical or was adopted as a means of confining discussion to the acceptance or rejection of the resolutions in toto. It may be readily admitted that there was an obvious advantage in securing a general agreement on the proposals which should be presented to the Imperial Government as the common views of the provinces at the final conference in London. But even when this is conceded, it does not follow that the constitution growing out of this agreement should be regarded as a treaty or binding compact in relation to any future alteration of its terms. On this point it is pertinent to ask if the conduct of the leading members of the several provincial delegations who afterwards held ministerial office in the Dominion Government is consistent with the view that they regarded the Quebec or London Resolutions as a treaty or compact which could only be altered by the unanimous consent of the contracting parties. The answer to this question brings me to the next stage of my enquiry, namely, an examination of the actual practice which has been followed since Confederation in securing alterations of the terms of the British North America Act.

During the past sixty years the terms of the British North America Act have been altered at quite frequent intervals, though not often by the formal process of amendment. It has so happened that revisions of the financial terms of union have usually been accomplished by legislation of the Dominion Parliament and have

not involved the statutory amendment of the British North America Act. Nevertheless, when it was proposed to extend better terms to Nova Scotia in 1869, it was argued very forcefully by Edward Blake that this involved a substantive change in the terms of Confederation and ought to be effected by the process of constitutional amendment, and Mr. Holton, on the second reading of the bill, moved as follows:

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.¹⁹

This resolution, which was in effect a formal enunciation of the compact theory of Confederation, was rejected by a Government presided over by Sir John Macdonald and by a House of Commons which included among its members not a few of the delegates who had represented their provinces at the Quebec Conference. It is interesting to note that the division lists reveal that Macdonald, Cartier, Galt, Tilley and Tupper voted against the acceptance of the doctrine of unanimous consent as set forth in this resolution.²⁰ Two years later the question of provincial consent was revived during the discussion of the draft bill which was proposed to the Imperial Parliament for the purpose of removing doubts as to the competence of the Canadian Parliament to pass the Manitoba Act. On this occasion, Mr. Mills proposed a series of resolutions protesting against the procedure followed by the Government. The last of these resolutions was as follows:

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.²¹

This resolution contains the second definite assertion of the compact theory following the creation of the Dominion. Once more the Government declined to give approval to the principle. The provinces were not consulted and there was no united protest on their part against the procedure that was followed.

¹⁹ *Journals of the House of Commons (Canada)* 1869, p. 260.

²⁰ *Ibid.*

²¹ *Ibid.*, 1871, p. 254.

In 1886, the British North America Act was formally amended by an imperial statute pursuant to a Joint Address of the Dominion Parliament. The purpose of the amendment was to enable that Parliament to provide representation in the Senate and House of Commons for the territories. Since this proposal when adopted would have a potential effect on the balance of representation as between East and West, it would appear to have been a matter in which the provinces were vitally concerned, but they were not consulted by the Dominion Government and never gave their consent to the amendment which was enacted by the Imperial Parliament in accordance with the Joint Address.

There is not time to enter into a detailed examination of other amendments of the British North America Act. It will suffice to say that while in certain cases amendments affecting a certain province or a group of provinces have been passed after consultation, as for example, the amendment of 1930 providing for the return of the natural resources to the Western Provinces, the only case in which all the provinces were consulted as a preliminary to an amendment was on the occasion of the revision of provincial subsidies in 1907. This precedent has been cited in support of the compact theory of unanimous consent, and Sir George Ross in his book entitled *The Canadian Senate*, has expressed the view that it marks the definite acceptance by the Dominion Parliament of the compact theory of Confederation. He states:

It was not till 1907 that the Parliament of Canada formally admitted the doctrine of consent. The Subsidy Act of 1907, by which the allowances to the Provinces provided in the Union Act were to be substantially increased, 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.²²

There is little confirmation of this opinion in the procedure adopted with respect to later amendments. The precedent of 1907 stands alone. It is without ancestors and without descendants. It was created to meet the special circumstances of a general revision of subsidies payable to the provinces. Hitherto the provinces themselves, individually and by groups, had been quite willing to disturb the financial basis of Confederation without invoking the doctrine of unanimous consent. It may be said in all fairness that they had connived at the repudiation of the compact theory whenever it was to their advantage to do so. The Dominion now wished to avoid

²² Sir George Ross, *The Canadian Senate* (Toronto: Copp Clark Co., 1914), p. 115.

these periodic disturbances of the financial terms of union, and the summoning of the Dominion-Provincial Conference was for the purpose of obtaining a final and unalterable settlement without incurring the ill-will of any province which believed it had legitimate claims against the Dominion treasury. As Sir Wilfrid Laurier expressed it:

We thought we could not do better than have a friendly conference with the provinces, and ascertain what was the most they deemed requisite in order to prevent their coming again to Ottawa and knocking at the door of parliament.²²

In other words, this method was adopted as a matter of convenience and was not intended to operate as a formal acknowledgment of the theory of provincial consultation and consent. The Joint Address of the Dominion Parliament upon which the amending statute was based does not differ in form or phraseology from those which have been passed when the provinces have not been consulted. Moreover, there is nothing in the preamble to the Act which suggests that the proposal for amendment had been made after consultation with the provinces. It is equally important to observe that if the 1907 procedure created a precedent for consultation with the provinces, it certainly does not constitute a precedent for the more important aspect of the compact theory which requires not only consultation but the unanimous consent of the provinces as a preliminary to constitutional amendment. In this case, British Columbia was not a consenting party to the settlement arrived at, but this did not prevent the Dominion Parliament from proceeding with the Joint Address, nor did it prevent the Imperial Parliament from passing the amending Act. To sum up, the practice hitherto adopted with respect to the amendment of the British North America Act is definitely against the implications of the compact theory. The principle of unanimous consent has never been conceded by the Dominion, and where the provinces have been consulted in certain cases this procedure has been adopted as a measure of convenience and has not been conceded as a matter of right. Moreover, with regard to the frequent disturbance of the financial foundations of Confederation, the provinces have themselves adopted a position which is wholly inconsistent with the compact theory.

Having considered the basis of the compact theory in Canadian history and precedent, I come now to the general theory and practice of federal government in relation to the procedure of constitutional amendment. In the history of federalism a distinction has

²² *House of Commons Debates* (Canada) 1907, Vol. III, p. 5304.

grown up between two main types of federations. In the one case, the bond of union is loose and is attached not so much to the peoples of the federated states as to their governments. This type is known as a "Confederation" or Staatenbund. As Professor Newton has defined it:

The states are connected together by a compact which does not essentially differ from an ordinary treaty of alliances, and the internal sovereignty of each state remains unimpaired, for the resolutions of the federal body are not enforced upon individual citizens, but through the agency of each state government which gives to them the force of law.²⁴

As distinguished from this loose type of federation there is the "federal state" or Bundestaat which may be described as:

. . . a perpetual union of several sovereign states based first upon a treaty between those states or upon some historical status common to them all, and secondly upon a federal constitution accepted by their citizens. The central government acts not only upon the associated states but also directly upon their citizens.²⁵

This distinction, it should be pointed out, is not always clearly marked, and there has been much confusion of thought in the use of the term "Confederation." It is evident, however, on any examination of the British North America Act that the federal constitution of Canada belongs to the second type rather than to the first. It does not simply set out terms of association between sovereign states for particular purposes, but actually creates a new political entity, and provides a central government with wide authority over the citizens of the federated provinces. So far as the distinction suggested by Newton has real validity, the term "Confederation" as applied to the Canadian union is a misnomer. What was actually set up by the British North America Act was a federal state or federation. Certainly it was in this sense that it was designed by Macdonald and other delegates at the Quebec Conference who were strongly predisposed to a legislative union. On this point Macdonald's testimony is worth quoting:

The true principle of Confederation lay in giving to the General Government all the principles and powers of sovereignty, and that the subordinate or individual states should have no powers but those expressly bestowed upon them. We should have thus a powerful Central Legislature, and a decentralized system of minor legislatures for local purposes. These, sir, were the opinions I uttered in a speech delivered in 1861, and I say that the Constitution which this House, by a majority of three to one, has carried out so far as it is concerned is, in spirit and letter, that which I then pointed out.²⁶

²⁴ Newton, *op. cit.*, p. 5.

²⁵ *Ibid.*

²⁶ *Debates of Parliament of Canada on Confederation*, 1865, pp. 1002-1003.

Now the compact theory of unanimous consent cannot be attached to this type of federation. So far as it has any antecedents in the history of federal government, they are to be found in the experience of Confederations as defined by Newton, and of which an excellent example is offered by the Constitution of the United States between 1781 and 1789. During this critical period of their history the thirteen states were governed by an instrument known as "The Articles of Confederation." This Constitution was phrased in the manner of a treaty, and was adopted by the Legislatures of the several states before it came into effect. Here the doctrine of unanimous consent was not left to inference but was actually incorporated in the Constitution. In its thirteenth article it provided as follows:

Nor shall any alteration, at any time hereafter, be made in any of them (the Articles of Confederation) unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislature of every state.²⁷

The fate of this Constitution is well-known. It was abandoned because it proved to be unworkable. As a matter of fact, it brought the United States to the verge of anarchy, and the main cause of its failure was the requirement of unanimous consent of the states for its amendment. Alexander Hamilton, a very shrewd observer, has this to say of it:

A sixtieth part of the Union, which is about the proportion of Delaware and Rhode Island, has several times been able to oppose an entire bar to its operations. . . . When the concurrence of a large number is required by the Constitution to the doing of any national act, we are apt to rest satisfied that all is safe, because nothing improper will be likely to be done; but we forget how much good may be prevented, and how much ill may be produced, by the power of hindering the doing what may be necessary and of keeping affairs in the same unfavourable posture in which they may happen to stand at particular periods.²⁸

In the case of true federal states there is no precedent whatever for the compact theory as advanced in Canada. Provision is made as a rule for the participation of the state legislatures or electorates in the amendment procedure as in the case of the United States, Australia, and Switzerland, but there is no support in the theory or practice of federal government for the requirement of unanimous consent of the constituent states of a federal union as a preliminary to constitutional amendment.

²⁷ Newton, *op. cit.*, p. 77.

²⁸ *The Federalist*, No. 22, pp. 114-115.

Finally, on grounds of practical convenience the compact theory of Confederation is wholly untenable as applied to the conditions existing in Canada. The economic interests of the several provinces or groups of provinces are dissimilar. Provincial sentiment slumbers but does not sleep. Differences of race and religion are a potential cause of misunderstanding and friction. A single province sometimes labours under a deep sense of injustice against the Dominion Government. The interests of the extremities of the Dominion are frequently in opposition to the interests of the central provinces. With such elements of instability in the political situation, consider the potential dangers in the doctrine of unanimous consent. If the compact theory were accepted with all its implications, an amendment of the British North America Act might be effectively countered by a single province. The representatives of one hundred thousand people in Prince Edward Island might set at naught the will of nine million in the other provinces. There could be no more effective brake on the development of our national institutions. No adequate means would exist to give effect to the national will. Our constitution would tend to become rigid at a time when changing currents of social and economic thought call for a serious re-consideration of the distribution of powers and delimitation of fields of taxation as laid down at Confederation. The purpose of unanimous consent is security through stability. But political societies are not static but progressive. If their needs and aspirations grow with the times, stability of constitutional arrangements will produce friction instead of security. It is the virtue of the English constitution that it can adapt itself readily to any change in the temper of the nation, or any demand for an extension or contraction of the boundaries of political action. With a federal constitution this quality of flexibility is not attainable to the same degree for the constitution is a written one and necessarily calls for a more formal procedure of amendment. Within those limits, however, which are inherent in federalism, there ought to be an effort to obtain the maximum of flexibility consistent with a reasonable security to the legitimate aims and interests of minorities and provinces.

Moreover, there is another consequence of the compact theory which is closely related to the paper which is to follow. If the doctrine of unanimous consent should be adopted in the amendment of the British North America Act, it would leave the future development of the Canadian Constitution very largely, if not wholly, in the hands of the courts, and particularly in the hands of the Judicial Committee of the Privy Council. The rigidity of our amendment

procedure would frustrate the will of the Canadian people in the field of legislative amendment, and the prevailing system of judicial appeals would deny to the Canadian Supreme Court the power of giving constitutional direction by judicial interpretation. This is not a situation which is pleasant to contemplate. It would be hollow mockery to speak of Canada as enjoying a national status when the amendment of its constitution was placed beyond the legislative control of its people, and its judicial interpretation beyond the influence of Canadian opinion and sentiment upon the court of final appeal.

At the close of the first stage of this enquiry, I pointed out that there was no clear inference from the Confederation negotiations that amendments of the British North America Act were to be based on provincial consent, and suggested that more reasonable historical interpretation would lead to the conclusion that if a province felt itself prejudiced by an amendment proposed by the Dominion Parliament, its representations to this end might be referred to the Imperial Government for consideration before the proposed amendment was implemented by imperial legislation. It is interesting to discover that as late as 1907, this view seems to have been supported by Mr. Winston Churchill, then Under-Secretary for the Colonies, on the occasion of the revision of provincial subsidies in that year. Being dissatisfied with the terms of the Joint Address of the Dominion Parliament, Sir Richard McBride, who was then Premier of British Columbia, went to London and endeavoured to prevent the arrangement from going through in the form proposed by the Dominion Parliament, and if possible to secure an arbitration of British Columbia's special claims. He failed in his main object, but Mr. Churchill, in introducing the amending bill in the House of Commons, made this very significant observation:

He would be very sorry if it were thought that the action which His Majesty's Government had decided to take meant that they had decided to establish as a precedent that, whenever there was a difference on the Constitutional question between the Federal Government and one of the Provinces, the Imperial Government would always be prepared to accept the Federal point of view, as against the Provincial. In deference to the representations of British Columbia, the words "final and unalterable" applying to the revised scale, have been omitted from the Bill.²⁹

If, as indicated in this declaration, the Imperial Government in 1907 felt itself entitled to decide as between the request of the Dominion and the claims of a province with respect to a particular

²⁹ *Parliamentary Debates*, 4th series, Vol. 175, p. 1616.

amendment, it is obvious that with the abdication by the Imperial Government of legislative authority over the Dominion in accordance with the terms of the Statute of Westminster, a constitutional void will be created which must be filled by appropriate action of the Canadian people. That void cannot be filled with a formula so weak and unsubstantial as the compact theory has proved to be. In this paper I have not attempted to deal with any alternative to the amendment procedure implied in the doctrine of unanimous consent. My purpose has been to reveal the fallacies of that doctrine and to point out the grave dangers that would attend its acceptance. It would appear that federal practice and political expediency call for a limited measure of provincial consultation and consent in the future amendment of the Canadian Constitution, and for definite guarantees with respect to the rights of certain minorities. But that is a far different proposal from the logical implications of the compact theory. The alarming feature of that theory is the doctrine of unanimous consent which has been based upon it. It is essential that an amendment procedure should be adopted in the near future which will set at rest the present uncertainty and make it possible for the will of the Canadian people to prevail in the conscious development of their own Constitution. The first task, however, is to remove the barbed-wire that has been set in our path by the proponents of the compact theory of Confederation. This must be cut down and destroyed if the major objective is to be attained.

NORMAN McL. ROGERS.

Queen's University.
