THE AMENDING POWER IN 1867

Historically, it was assumed that colonial legislatures such as those of the early American colonies had the inherent right to amend their own constitutions in the same way as Parliament. However, these early colonies had been given constitutions by various kinds of royal grant, but in the case of colonies whose constitutions were provided by the Parliament of the United Kingdom it was assumed that the right of amendment still rested in Parliament unless expressly conferred. Since the constitution of the two Canadian provinces (now Ontario and Quebec) had been provided by the Quebec Act (1774), the Canada Constitution Act (1791) and the Act of Union (1840), it could be amended only by Imperial statute, such as the Act of 1854 which provided for the election of the Legislative Council. Thus, unless some amending procedure was provided in the British North America Act in 1867, the amending power would be deemed to remain in the British Parliament.*

Very little consideration seems to have been given to this question in the Confederation Debates in the Canadian Parliament in 1865, and the matter is not referred to at all in the Quebec resolutions except indirectly where the general power of the central parliament to legislate for the "peace, welfare, and good Government" is qualified by the saving clause "saving the Sovereignty of England". In the London Resolutions, which were the final basis of the British North America Act, a power to amend their own constitutions was provided for the provinces but not for the central legislature nor for the federation scheme as a whole. The most explicit reference to the question is the statement of D'Arcy McGee, "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."† It may well have been that the question of an amending procedure was deliberately set aside because it could have added a further difficulty to the number of complex questions which had to be settled if the Union was to be achieved. Furthermore, it has been suggested that "the Imperial authority was . . . considered as the ultimate safeguard of the rights granted to the provinces and to minorities by the constitution". ‡

However that may be, the role of the United Kingdom Government and Parliament as an external balancer in the Canadian Constitution has been fundamentally altered by the change in the constitutional relations of Canada and the United Kingdom since 1926. In that year, an Imperial Conference declared that the United Kingdom and the self-governing dominions were "autonomous communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs". Subsequently, by the Statute of Westminster, 1931, the dominions were brought into full equality with the United Kingdom by the removal of all restrictions on their legislative jurisdiction.

The Statute of Westminster did contain one important saving clause in relation to Canada. Its liberating provisions did not apply to the British North America Act and its amendments. The reason for this was simple. Had the Statute of Westminster been applied without reservation to Canada its effect would have been to enable the Parliament of Canada to amend the British North America Act. There was objection in Canada to denying to the provinces the right to be consulted about or to participate in the amending procedure. Accordingly, it was necessary to exclude the British North America Act from the operation of the Statute of Westminster, on the assumption that agreement would have to be reached later on an amending procedure which contained appropriate safeguards to the position of the provinces. Sect. 7 of the Statute of Westminster repealed the Colonial Laws Validity Act, 1865, under which laws were invalid if they were repugnant to British statutes that had effect in Canada. This repeal extended only to legislation enacted by the Federal Parliament and the provincial legislatures in the spheres assigned to them

* See Martin Wight *The Development of the Legislative Council 1606-1945* (London, 1946) 122.
† *Confederation Debates, 1865*, 146.
‡ Paul Gerin-Lajoie *Constitutional Amendment in Canada* (Toronto, 1950) 38.