

Jennifer Smith

Origins of the Canadian Amendment Dilemma

The Supreme Court of Canada's decision on the federal government's proposed resolution to amend the British North America Act, the major document of the Canadian Constitution, marks the end of a very long and drawn out debate in this country on the subject of constitutional amendment. The resolution or Constitution Bill, 1981, contains the most significant and comprehensive amendments ever contemplated, among them a Charter of Rights and a set of amending formulae, and these have sparked considerable debate, indeed, outright opposition from several provincial governments. However, vigorous debate over the substance of the resolution, a mark of the vitality of Canadian politics, could hardly have been unexpected. It is the other point in dispute, the heated controversy surrounding the federal government's determination to proceed "unilaterally" with its resolution, that has surprised many Canadians. And it is to this point that the Supreme Court's decision speaks.

The Constitution Bill must meet the test required of all proposed amendments to the B.N.A. Act - a British statute - that fall outside the unilateral amending power of Parliament and the provincial legislatures, namely, the approval of the British Parliament. In dispute before the Court was the extent of agreement that is constitutionally required among Canadian authorities before a request for amendment is put forward. The federal government, supported by the provinces of Ontario and New Brunswick, argued that the Canadian Parliament alone may make such a request. The other eight provinces contended that any amendment affecting the rights, privileges and powers of the provincial legislatures requires in addition the consent of the provinces, although they differed on whether unanimous consent or something short of it is sufficient. On September 28, 1981, the Supreme Court ruled that there is a constitutional convention requiring provincial consent, although it need not be unanimous. It also ruled that there is nothing in law to prevent Parliament from proceeding with its

resolution in the absence of such consent. By distinguishing sharply between law, which is enforceable by the courts, and convention, which is not, the Court affirmed the legality of the federal government's strategy while at the same time vindicating the eight provinces' interpretation of conventional practice. Faced with the apparent logic of the Court's decision, Canadians must wonder how the contending parties could have come to disagree so profoundly on the question.

The origins of the dispute lie in the well known fact that the B.N.A. Act as passed by the Parliament of the United Kingdom in 1867 contained no comprehensive formula for its own amendment. The Act was not, of course, an inflexible document. Some of its provisions are alterable at the hands of Parliament alone, for example, Section 41 which deals with federal elections. Moreover, under Section 92 (1), the provincial legislatures are empowered to modify their constitutions "except as regards the Office of Lieutenant-Governor." Apart from such instances, however, the Act was silent about its own amendment with the result that it could be altered in the only way any British statute can be, that is, by an act of the British Parliament. One effect of this omission was to postpone the task of arriving at a formula acceptable to all parties, a task of considerable difficulty to which the number of failed attempts in the past attests. The set of procedures contained in the federal government's Constitution Bill represents only the most recent in a long line of proposals. The other and increasingly bitter legacy has been the dispute referred to above that finally culminated in the case before the Court. As the positions of the contending parties indicate, the absence of explicit directives that only a formula could provide has left a great deal of room for disagreement over the extent of consent required among the eleven governments of Canada before a request for amendments affecting the provinces is put to the British Parliament.

In light of the political miseries occasioned by the amending question, we might well ask why the Fathers of Confederation failed to supply a comprehensive amending formula in 1867. Why did they leave their work incomplete? A number of constitutional scholars have examined the question, some finding it more than a little perplexing and others fully intelligible. In this article I propose to examine their conflicting views and then test them against those of the founders themselves and their opponents. Remarkable as it may seem, insufficient attention has been paid to these earlier views with the result that the reasons for the lack of an amending formula in the Act have been made to appear more obscure than is necessary.

Students of Canadian politics will not be surprised to learn that opinion on the origins of the amending problem tends to take the form

of a debate over federalism, that is, a debate between partisans of a strong central government and partisans of vigorous local government. For example, the constitutional scholar, Frank Scott, a keen defender of the primacy of the central government within Confederation, interprets the omission of a comprehensive amending formula in the light of that primacy. According to Scott, the founders cannot be said to have failed to provide such a formula since there was no need for one. Past practice in the colonies already supplied a procedure for securing constitutional amendments that was well understood by all, namely, a request from the colonial legislature concerned to the British Parliament. And this procedure was expected to govern amendments to the new constitution.

The applicability of the older practice to a federation composed of two levels of government poses no difficulty for Scott since he maintains that the central government alone was meant to possess the competence to request amendments. He bases this contention on an interpretation of the powers assigned by the Act to the provinces. Nothing in Section 92, in his view, suggests the provinces were intended to be parties to amending the Act. On the contrary, the fact that the first head of Section 92 vests them with the power to amend their own constitutions, excepting the office of the Lieutenant-Governor, has the effect of denying them such a role. Of course Section 91, which outlines the legislative competence of Parliament, says nothing at all about amendment, but he reasons that since the provinces possess only those powers explicitly assigned to them while Parliament possesses the residual power encompassed by the peace, order and good government clause, the general amending power, nowhere provided for, would "logically" belong in Section 91: "Only the ancient doctrine of Imperial sovereignty, which made it impossible for any colony to change an Imperial act extending to it, prevented a full power of amendment vesting in Ottawa's hands."¹

Convention may thus have enabled the founders to avoid specifying the terms of an amending provision. But in a second and bolder argument, Scott is able to dispense even with the utility of convention for he maintains that the new constitution was, in effect, self-amending. The internal mechanism for this was Parliament's legislative power over residual matters. The residual power, in other words, precluded the need for formal amendment. By way of explanation, he contrasts the B.N.A. Act with the constitutions of United States and Australia, in which this power is vested in the states or in the people. In the latter cases, the central legislature cannot move into new fields of jurisdiction falling under a residual power lodged in other hands except under the terms of formal amendment procedures. In Canada,

however, any new fields or matters "ripe for central control" move, or should move, within Parliament's legislative ambit by virtue of its power over residual matters. That this has not happened Scott attributes to restrictive interpretation of the Act on the part of the courts. Referring to their delineation of the legislative competence of the central and provincial legislatures, he observes pointedly: "If they would only draw a more intelligent line, one more in conformity with the clear intentions of the Fathers as expressed in innumerable speeches at Confederation, and one more in harmony with the very words of the Act itself, they would solve the problem of amendment by rendering it superfluous."²

Scott's view of the self-amending capacity of the B.N.A. Act found support in the testimony of W. S. Edwards, then Deputy Minister of Justice, before a Special Committee of the House of Commons appointed in 1935 to consider the amendment question. Edwards too argued that the framers, far from failing to anticipate the need for future alterations to the constitution, "deliberately" made it "subject to expansion by its own terms" by vesting the residual power in a central legislature already possessed of jurisdiction over national matters.³ In place of a formal amending formula, then, they substituted a simpler internal mechanism that would effortlessly accomplish the same thing. The constitutional scholar, H. McD. Clokie, also found this interpretation plausible, albeit on different grounds. He called attention to the fact that the Colonial Laws Validity Act, passed by the British Parliament in 1865, secured to the legislatures of the self-governing colonies the authority to amend their constitutions if exercised "in such manner and form as may from time to time be required by any Act of Parliament . . . in force in the said colony." The Canadian framers, he reasoned, mindful of this provision, may well have contemplated formal amendment as one of those matters in relation to which the central Parliament might properly legislate for the "peace, order, and good government" of the country. Yet Clokie, writing in 1942, went on to observe that no court had ever accepted such an "heretical" interpretation.⁴

Clokie's somewhat speculative account of the absent amending formula together with those of Scott and Edwards affirms the view—strongly held by the present federal government—that the central government alone was intended to initiate amendments. Norman McLeod Rogers, although more sensitive to the status of what he called "provincial communities," ultimately sounded a similar note. Rogers was puzzled at the framers' neglect to provide for a comprehensive amending formula, especially since they were conversant with the federal constitutions of Switzerland and the United States and the

importance of amendment in both cases. Finding no explanation for this in the records of the Confederation debate, he looked elsewhere to account for their "extraordinary oversight or indifference." It was possible, for example, that the form of the new constitution, a statute of the British Parliament amendable only by subsequent statutes, "obscured" the need to specify which Canadian authorities ought to request amendments of the mother Parliament. O. D. Skelton put the same point succinctly to the Special Committee: "An Act of Parliament does not ordinarily provide for its own amendment." Or perhaps John A. Macdonald, in an effort to establish a strong central government within the federation, managed to postpone the "delicate question" of amendment until after Confederation with a view to later persuading the provinces to accept an entirely subordinate role in the matter. Yet Rogers was quick to point out that if the latter account were true, Macdonald's strategy backfired since the provinces were persuaded to do nothing of the kind.

Although uncertain of the reasons for the framers' "extraordinary oversight or indifference," or their "sin of omission" as he had described it elsewhere, Rogers was prepared to outline what they would have done if they had triumphed over temptation and responsibly viewed the "formulation of an amendment procedure as a portion of their task." Speaking before the Special Committee, he argued that they would have found the proposal that Parliament alone initiate all requests for amendments as undesirable as the requirement of the unanimous consent of Parliament and the provincial legislatures. Instead, they would have steered a middle course between these extremes, one requiring "co-operation" between both levels of government for changes affecting such "federal relationships" as the distribution of legislative powers.⁵ Since co-operation falls short of formal consent, it is evident that in Rogers' view, the framers would have preferred Parliament to have the dominant role in amendment. This was certainly his own preference. In an article published earlier in which he analyzed existing conventions surrounding amendment, he had maintained that "federal practice" and "political expediency" alone, not constitutional necessity, demanded a "limited measure of provincial consultation and consent." In much the same way he argued from the depression of the 1930's that the central government ought to assume the leading role in the nation's economic life.⁶ Despite his concern for the claims of provincial communities and, perhaps more importantly, linguistic and religious minorities, nothing in Rogers' theory of federalism prevented him from advocating the primacy of the central over the provincial governments.

His reconstruction of the type of amending formula that the "history of the federation movement" pointed to represented for Rogers a genuine compromise between the position of Scott and Edwards, on the one hand, and that advanced by Howard Ferguson during his term of office as Premier of Ontario. Of these two "extreme proposals", he reserved his harshest criticism, not surprisingly, for the latter. In a memorandum sent to Prime Minister Bennett in the fall of 1930 on the subject of the proposed Statute of Westminster, Ferguson reiterated both the "compact theory" of Confederation and its implications for constitutional amendment. Briefly stated, he argued on the basis of historical evidence, in particular the use of the term "treaty" by the founders, that the B.N.A. Act of 1867 was the result of a compact or treaty between the provinces forming the union. These provinces, and, by implication, later entrants, were equal partners in a union they had created. It was not "without significance," then, that the Act conferred on the provinces a limited power to amend their constitutions while remaining silent on Parliament's power of amendment. This silence he interpreted as a "precaution" vindicated by history, for it had served to prevent Parliament from denying provincial rights and privileges successfully pressed in the courts and thereby to protect the federal character of the union. By "federal character," Ferguson clearly had in mind a far looser, or more de-centralized union than Rogers. In accordance with the notion of Confederation as a compact, he concluded that "there should not be any amendment [of the Act] without the consent of the provinces, and no request should be made of the British Parliament without first ascertaining whether or not the provinces would consent."⁷ Amendment, like the original compact, ought to be subject to the test of unanimous agreement.

In Rogers' well known rejoinder to Ferguson's claims, he argued that the provinces initially party to the union had no authority to conclude any sort of treaty, that the legislatures of two of them had never ratified the Quebec Resolutions, and that, in any case, the Act passed by the British Parliament, although based on the Resolutions, contained "substantial changes" that none of the provincial legislatures were asked to sanction. In addition, he suggested that the founders employed the term "treaty" either for "purely rhetorical" purposes or, as in the case of the Province of Canada, simply as means of facilitating passage of the Resolutions in the legislature. It certainly possessed none of the significance imputed to it by the compact theorists.⁸ Commenting on Rogers' argument, Paul Gérin-Lajoie points out that critics of the compact theory, especially its requirement of unanimous provincial consent for amendments, have had no "middle course" available to them since there exists no rule stipulating that

only some of the provinces need consent. In order to repudiate the unanimity theory, then, they are obliged to support the alternative, namely, that provincial consultation and consent, while desirable, are constitutionally unnecessary and therefore matters of "political expediency" on the part of the federal government and Parliament. Rogers' compromise or middle position, in Lajoie's view, is hardly distinct from what Rogers himself styled the "extreme" proposal that initiating amendments be the prerogative of Parliament alone.

In Lajoie's authoritative and comprehensive work, *Constitutional Amendment in Canada*, he too confronts the question of why the B.N.A. Act contains no general provision for its amendment, indeed, why the problem of amendment was "more or less deliberately left untouched." His choice of the word "deliberately" is hardly accidental for, like Rogers, he maintains that the founders were well aware of the issue: D'Arcy McGee had referred to it in the debate on the Quebec Resolutions in the Province of Canada; a Special Committee of the Province, airing the idea of Confederation in London as early as 1858, had mentioned it in a letter to the Secretary of State for the Colonies; and there remained the example of the American Constitution, with its well known amending provisions. Moreover, there was nothing in the notion of a comprehensive amending formula that was especially foreign in the circumstances. Five years after New Zealand had acquired a constitution initially lacking one, the British Parliament had passed an act to supply it. There was the provision in the recently enacted Colonial Laws Validity Act, which appeared to anticipate the inclusion of amending powers in colonial constitutions, a point Clokie had also noted. Finally, all drafts of the federation bill, including its final form in the B.N.A. Act, reserved for the provinces a power to amend their own constitutions. Lajoie points out that Lord Carnarvon, in his observations on the bill before the House Of Lords, described this feature as "in conformity with all recent colonial legislation." He suggests that the Canadian framers could not have supposed a comprehensive amending formula "repugnant to the nature of a British statute or to Imperial supremacy generally," and concludes that they left it out for "other reasons".

Among these was the psychological effect on the framers of the American Civil War, a debacle that, by highlighting the desirability of stability or permanence, may have minimized their concern to provide for future amendments. Moreover, since the framers were confronted by a number of difficulties before they could reach agreement, they may have thought it best not to tackle the amendment question lest it prove insurmountable, and they could do this knowing that a constitution embodied in an act of the British Parliament could always be

amended by that body. Finally, there is the "very plausible" hypothesis of Macdonald's efforts to avoid the question in the hopes of prevailing upon the provinces to leave it to the determination of the central government, an hypothesis that Rogers too entertained. Yet Lajoie is concerned above all to make "one point" which to him appears "beyond doubt," namely, that since the British Parliament stood as the final arbiter for any amending proposal, as it did for the scheme of Confederation itself, it was "thus considered as the ultimate safeguard of the rights granted to the provinces and to minorities" in the B.N.A. Act. There is "no other explanation for withholding from the federal Parliament the power to amend the Constitution." And it is a point reaffirmed for him four years after Confederation when the Macdonald-Cartier government sought an amendment empowering Parliament to create new provinces in the territories and to confirm the Manitoba Act, 1870. He cites Cartier's words in a memorandum submitted to the Privy Council of Canada to the effect that Manitoba and any other province thereafter established should possess the same status as those originally forming the union and as well, like them, should possess their constitutions "subject only to alteration by the Imperial Legislature." Noting that Cartier's recommendation was in fact sanctioned by the Canadian Parliament and heeded by the British Parliament in the B.N.A. Act, 1871, Lajoie concludes: "One could not expect to find a clearer indication that in the minds of the Fathers of Confederation the Imperial Parliament was intended to safeguard the provinces against constitutional changes at the mere will of the federal Parliament."⁹

This view takes us a considerable distance from that propounded by Scott. Nevertheless, Lajoie is careful to distinguish his position from the ground occupied by the compact theorists. He cannot agree that the framers deliberately overlooked the amending question because they thought their work constituted a pact alterable only with the consent of all the provinces. On the other hand, it included a number of federal features, none of which were thought to be subject to amendment by the British Parliament in opposition to the express will of any province. By rejecting as a necessary condition of constitutional change the indiscriminate principle of unanimity flowing from the notion of Confederation as a compact, yet at the same time demonstrating the role of the British Parliament as guarantor of the rights accorded both the provinces and specified minorities in the B.N.A. Act, Lajoie, not Rogers, appears to hold the true middle ground. The same might be said for Louis St. Laurent. During his term as Minister of Justice in the King government, St. Laurent contended that the solution to the amendment question lay in the division in the consti-

tution between matters assigned to the exclusive jurisdiction of the provinces, and those allocated to the exclusive jurisdiction of the federal Parliament. Proposed amendments affecting the first category would require the consent of the provinces. Amendments affecting the second category, on the other hand, were the concern of the federal Parliament alone.¹⁰ Regrettably, from Lajoie's point of view, St. Laurent took a large view of the items included in this latter grouping.

Of course, nothing short of evidence gleaned from the Confederation debate itself can supply an answer to the question of why the framers omitted to include a general amending provision in the constitution. Yet the commentators reviewed above tend to give short shrift to this evidence, the only material available to test their own conflicting claims. For example, Rogers maintained that the negotiations preceding federation threw "little light" on the question and, further, that the debate on the Quebec Resolutions in the Parliament of Canada, 1865, yields "no suggestion" that the framers had "any clear perception of the significance of this feature of a federal constitution." Clokie said that the issue "does not appear to have been discussed by the Fathers of Confederation". In a footnote to this claim he cited the "sole reference" thought to be available, a passage from D'Arcy McGee's address to the Parliament of Canada in which McGee stated that the "Charter" would be amended by "the authority that made it," the Imperial Parliament. Lajoie similarly concludes that amendment was never "openly considered." That the evidence is lean is undeniable. However, it seems that commentators occasionally take a narrow view of what constitutes the Confederation debate. It is not at all confined to records of discussion at the Quebec Conference and in the Parliament of Canada, but includes as well discussions in the legislatures of New Brunswick and Nova Scotia, and numerous recorded speeches and pamphlets. Moreover; the project of union summoned considerable opposition from various quarters, and the contributions of those opposed to it, for example, the anti-Confederates in Nova Scotia, ought not to be overlooked. They were certainly not dismissed by the framers, or pro-unionists generally, many of whom publicly joined issue with their opponents.

An examination of this larger body of evidence indicates that the amending question did provoke concern. For example, the editor of the *Montreal Herald*, E. G. Penny, who was adamantly opposed to the Quebec scheme, maintained that the parliamentary legislature of any self-governing British colony possessed constituent powers, that is, the power to treat constitutional matters in precisely the same way as ordinary subjects of legislation: "legislating upon them itself and by a simple majority." In accordance with this principle of colonial self-

government, he reasoned that the self-chosen legislators who drafted the Quebec Resolutions had no authority to request the British Parliament to impose a new constitution on the Province of Canada. Only the legislature of that Province could properly enact constitutional change. And he criticized the Resolutions themselves on the same ground, that is, for leaving the general amending power in British hands: "We are to have a charter *octroyé* by a superior authority, in place of a statute [the Province of Canada's existing constitution] enabling us to exercise recognized inherent rights; to this superior authority we must revert whenever we desire ameliorations..."¹¹ What is of interest here is his view that the theory and practice of colonial self-government as it had evolved between 1848 and 1867 permitted colonial legislatures significant powers of constitutional amendment. Seen from this angle, the Quebec Resolutions conceded to the British Parliament a power the colonies composing it once held. In not probing the reasons for this, Penny differed from Lajoie who, as we have seen, not only shares this older opinion but sees in it considerable significance for the provinces.

While the editor of the *Montreal Herald* castigated the lack of a general amending provision from the perspective of parliamentary principles of government, another group was attacking it from the republican standard of the American Constitution. In their *Letter to Lord Carnarvon*, under the heading "Federal Safeguards," Joseph Howe, William Annand and Hugh McDonald described the omission as a "radical defect" that failed to provide a means by which the people might "improve it [the constitution] from time to time." As a result, whenever the people deemed a change desirable, they would have to turn to the Imperial Parliament. By contrast, they noted that the "wise framers" of the American Constitution did include an amending formula in that "great instrument," although they were somewhat unclear about its provisions: "It [the American Constitution] cannot be changed or amended till the alterations proposed have been accepted by the people, and ratified by a two-thirds vote of both Houses of Congress." Their commentary on this formula indicated approval of its restrictive nature. Although the American Constitution was democratic in origin and character, it was "wisely protected from the hazard of rash innovation" by the explicit and strict requirements of its amending formula. The constitutions of the states were likewise protected, as indicated by the state amending formulas of Connecticut and Mississippi, both of which they cited in full.¹²

What the three Nova Scotians saw in the fixed formulas the Americans had devised was a guarantee to the people that their constitution would not be altered unless their consent was obtained through the

prescribed forms. They were concerned to gain this surety of constitutional propriety if only because the "Canadians," in their view, were seeking to implement Confederation by unconstitutional means, that is, by using the British Parliament to impose upon the Maritime provinces a constitution their legislatures had neither approved nor sanctioned. They feared the precedent established by the passing of the B. N. A. Act by which a "chance combination of a few rash politicians," appealing to the British Parliament over the heads of the electors, was able to achieve major constitutional change. The absence of a general amending provision in the Act itself gave further substance to that precedent, for it meant that nothing stood in the way of future change being secured in the same way.

As delegates of the League of the Maritime Provinces sent to London to oppose passage of the Quebec scheme in the British Parliament, Nova Scotian anti-confederates had a very practical interest in airing the question of amendment. Defenders of the scheme, on the other hand, were reluctant to pursue it. Certainly it was not openly canvassed at the Quebec Conference. But an issue closely related to it was, namely, that of judicial review. The framers' deliberations on this subject are worth close attention because judicial review, like formal amendment, is a mode of constitutional change. It is, of course, much slower and more uncertain, resulting as it does from the courts' decisions in cases involving disputes about the meaning of the constitution. These decisions, taken together, form a body of constitutional law that serves as a guide to the interpretation of constitutional documents. They give life to dry, legal prose, but they also involve choices, for many constitutional provisions necessarily lack precision, and men can argue over the correct meaning to be ascribed to them. Hence the element of change involved in interpretation. The framers' discussion of judicial review, then, should reveal something of their attitude to constitutional change and, indirectly, formal amendment.

In his opening remarks at the Quebec Conference, Macdonald introduced a theme which he stressed throughout the proceedings, namely, the need to establish a strong central government. Yet this was clearly a matter of some delicacy. He openly conceded the possibility, for example, that the new government might seek to override sectional or local matters, and therefore warned his fellow delegates that they must reassure the people of each province that their local autonomy was secure. But what kind of reassurance could the delegates offer, apart from statements of good intention? Macdonald held out a remedy, and it was not the mechanism of formal constitutional amendments designed to further safeguard local powers should the need arise. Instead, he suggested reliance on the courts. Since the new

constitution would be an act of the Imperial Parliament, "any question as to overriding sectional matters [should be] determined by [the question of] 'Is it legal or not?'" The courts of Great Britain, he continued, would adjudicate such disputes whenever required.¹³ By admitting that establishment of a strong central government within a union informed by the federal principle would not wholly suppress the cause of partisans of local government, Macdonald implied that the new constitution was not immune to constitutional dispute and change. His preference for judicial arbitration over formal amendment, however, left open the important question — certainly from the standpoint of future disputants — of the most suitable judicial forum.

The question was raised towards the end of the Conference when R. B. Dickey of Nova Scotia, supported by George Brown, a leading Reform figure in Upper Canada, proposed a "Supreme Court of Appeal to decide any conflict between general and state rights." Both men appeared to contemplate a Canadian court of last resort on constitutional issues. Jonathan McCully of Nova Scotia disputed the proposal. As an advocate of strong central government and an admirer of legislative union rather than federalism, he succinctly stated the difficulty posed by a constitutional court: "Mr. Brown will land us in [the] position of [the] United States by referring [the] matter of conflict of jurisdiction to [the] courts. You thus set them over the General Legislature." McCully would have been quite happy to follow the example of New Zealand, where the laws of the general government controlled and superseded any local laws repugnant to them, a provision that certainly removed the need for a constitutional court. But Macdonald pointed out that the "New Zealand constitution was a Legislative Union, ours Federal." A "third party" was required to decide jurisdictional disputes and he thought the existing court system suitable.¹⁴

Despite, or indeed because of his argument that the availability of a judicial remedy would reassure local partisans fearful of an aggressive central power, Macdonald did not support the notion of establishing a general court of appeal in Canada. Delegates to the Conference, however, did include a provision in Quebec Resolutions enabling the central Parliament to set up such a court, and Macdonald's treatment of it is interesting in that he always took pains to emphasize that enabling was not the same as requiring. The upshot was that the Judicial Committee of the Privy Council in London, the highest court of appeal on colonial law in the Empire, would retain its role in relation to the new constitution. The records of the Conference reveal no reference to the Judicial Committee, but during debate on the

Resolutions in the Parliament of the Province of Canada, Joseph Cauchon, editor of the influential *Le Journal de Québec* and member from Montmorency in Canada East, saw fit to mention it. Noting the provision for a general appeals court, he pointed out that a court of this type already existed, the Judicial Committee, and that because of its "imperial character," it would dominate any court the central Parliament chose to establish. Nevertheless, he applauded the "national" outlook of the framers in including the provision: they "foresaw evidently in the future the day of colonial emancipation."

Cauchon's nationalist enthusiasm was a little misplaced. Still apprehensive about the court contemplated by the provision, he inquired further whether it would be civil or constitutional. Cartier carefully replied that no general court of appeals ought to be set up until sometime after the union was established. As for the functions it might exercise, he commented: "Time alone can tell us that; but I do hold, and the spirit of the conference at Quebec indicated, that the appeal to the judicial committee of Her Majesty's Privy Council must always exist, even if the court in question is established."¹⁵ Like Macdonald, Cartier relied on the continuing role of the Judicial Committee, preferring not to encourage the view that it would be replaced by a constitutional court within the union. Evidently the promise of judicial review by the Judicial Committee rather than a new national court was more reassuring to provincial governments.

There is a striking resemblance between Cartier's reference to the need to retain the Judicial Committee and his later statement, cited by Lajoie, to the effect that the provinces held their constitutions "subject only to alteration by the Imperial Legislature." In both instances, the provinces' protection against constitutional change prejudicial to their interests rested with an outside body. In the case of the Judicial Committee, such change took the slowly evolving form of judicial review. Although we now understand judicial review as a species of constitutional change, we might well ask if the framers viewed it likewise, and it appears that in some sense they did. At the Quebec Conference they discussed the question of a final court of appeal in relation to conflict between "general and state rights" or "conflict of jurisdiction." McCully openly referred to the experience of the American Supreme Court and made the point that a court dealing with constitutional questions inevitably stood above the general legislature. While they did not use the phrase "judicial review," the framers understood that a court deciding jurisdictional questions was engaged in shaping or fleshing out a constitution.

Lajoie, as we have seen, argues that whatever the framers' views on amendment, the one point "beyond doubt" is that they considered the

Imperial authority the "ultimate safeguard" of the rights and privileges accorded the provinces by the B. N. A. Act. This, he suggests, accounts for the fact that they withheld from the central legislature the power to amend the Act. The parallel argument presented here is that the retention of the Judicial Committee of the Privy Council, another Imperial authority, was intended to provide a similar safeguard in the sense that it promised not only impartial adjudication of disputes between the central and local legislatures but as well the continuation of an older legal tradition well understood in the British American colonies. Since the question of the role of a constitutional court is closely related to that of formal amendment, the framers' handling of the Judicial Committee is consistent with and supports Lajoie's view of their action on amendment. Yet this is of little account if, as Scott asserts, the "ancient doctrine of Imperial sovereignty" meant that the framers had no choice but to withhold the power of amendment from the central Parliament. Both Clokie and Lajoie, as noted earlier, dispute this point, as did the well known student of Commonwealth constitutions, A. B. Keith. In his *The Dominions as Sovereign States*, Keith explained that the Colonial Laws Validity Act, 1865, included a provision granting the colonies constituent power but attaching to it one vital condition, namely, that subsequent amendments comply with the terms of any British law or regulation in force at that time in the given colony. He pointed out that as far as Canada was concerned, this simply referred to the binding character of the terms of any amending formula the Canadian authorities chose to adopt. In Britain, on the other hand, no Parliament could bind its successors with a particular mode of constitutional change.¹⁶ His interpretation of this provision of the Act, then, confirms Lajoie's view that it was indeed open to the framers to incorporate an amending formula in the Quebec scheme if they had determined to do so.

Both Lajoie's argument on amendment and that presented here concerning the Judicial Committee lead to the conclusion that the Imperial authorities were intended to assume a protective stance in relation to the provinces, a kind of trustee role. This in turn suggests that the provinces were vouchsafed a stronger position within the federation than has generally been conceded. Such ideas of course fly in the face of received opinion about Macdonald's lukewarm attitude to the "federal principle" and his desire to modify it by establishing a central government that dominated its local counterparts. Yet, if his objectives were so straightforward, surely he would have attempted to further them by seeking both an amending formula favouring the central government's interests and the institution of a national court of final resort. He pressed for neither of these things. Hence it would

appear that, however undeniable his preference for the strong government of a legislative union, his "nationalism" was not the sort that inspired Cauchon's enthusiasm for "colonial emancipation." For Macdonald there was no inconsistency between the desirability of a powerful general government on the one hand, and that of the continuing close connection with the mother country on the other. Indeed both were major themes he pressed throughout the Confederation debate. Far from viewing British institutions as somehow foreign to the new constitution, he saw their ongoing association with it as an important aspect of continuity with the constitutional past and as reassurance of the triumph of British principles of government in North America. If local partisans were also reassured by the constitutional presence of the British connection, so much the better.

Moreover, Macdonald's interest in a strong central government must be set against his realization that a union of the colonies of British North America had to be devised in accordance with federal rather than wholly unitary principles. At the Quebec Conference, for example, he cautioned those of his colleagues who looked to the example of New Zealand that it was inappropriate because it was a legislative rather than a federal union: "That is just what we do not want. Lower Canada and the Lower Provinces would not have such a thing." Neither the French-speaking community of Lower Canada nor the Maritime Provinces, in other words, were interested in a central law-making body with paramountcy over local bodies in all spheres of jurisdiction. If Macdonald's assessment was correct, they were likely to have been even less interested in an amending formula favouring the central power. Certainly such a formula would have supplied a clear answer to the question of who controls the constitution. But this is precisely the sort of answer the federal principle does not readily yield, entailing as it does a delicate balance between central and local powers.

Faced by the necessity — begrudged by some — of adhering in part to the federal principle, delegates to the Quebec Conference backed away from the difficulties it posed for an amending formula. And these difficulties have proven stubborn. Not only has uncertainty over the application of the federal principle to amendment plagued all subsequent efforts to fashion an acceptable formula, but it also lies at the heart of the controversy dealt with here over the proper way to amend the B.N.A. Act in the absence of such a mechanism. Ironically, the Supreme Court's two-fold resolution of that controversy only confirms this view. By upholding the federal principle in relation to the convention of provincial consent yet denying its validity as a point of law, the Court has demonstrated that the status of this principle as a standard for amendment is a matter of considerable complexity. Yet

the same is true for many aspects of Canadian political life and it reflects ultimately a striking ambivalence on the part of the framers. This is particularly clear in the case of Macdonald's attempt to combine the strong central government of legislative union and the federal principle of autonomy in the parts. The issue of constitutional amendment, according to the Supreme Court, resists this type of combination.

NOTES

1. "The Special Nature of Canadian Federalism", in his *Essays on the Constitution* (Toronto, 1977), p. 186.
2. *Ibid.*, p. 188.
3. *Minutes of Evidence of Special Committee of the House of Commons on the British North American Act* (Ottawa, 1935), p. 2.
4. "Basic Problems of the Canadian Constitution", *CJEPS*, VIII (February, 1942), p. 13.
5. "The Constitutional Impasse", *Queen's Quarterly*, XLI (Winter, 1934), pp. 482-3; and *Minutes of Evidence of Special Committee*, pp. 107-8.
6. "The Constitutional Impasse", pp. 475-6.
7. Letter and Memorandum dated September 10, 1930, found in *Report to the Senate of Canada*, prepared by W. F. O'Connor (Ottawa, 1939), p. 138; see also pp. 134-9, *passim*.
8. "The Compact Theory of Confederation", *Proceedings of the Canadian Political Science Association* (1931), pp. 205-30.
9. *Constitutional Amendment in Canada* (Toronto, 1950), p. 39; see also pp. 33-40 *passim*.
10. *Ibid.*, pp. 112, 119-20.
11. *The Proposed British North American Confederation: Why it should not be imposed upon the colonies by Imperial Legislation* (Montreal, 1867), p. 13; see also pp. 9-14 *passim*.
12. *Letter Addressed to the Earl of Carnarvon* (London, 1867), pp. 13-14.
13. Joseph Pope, *Confederation: Being a series of hitherto unpublished documents bearing on the British North America Act* (Toronto, 1895), p. 55.
14. *Ibid.*, pp. 85-6.
15. *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces* (Quebec, 1865), p. 576. See also pp. 574-6.
16. *The Dominions as Sovereign States* (London, 1938), pp. 167-70.