DOMINION-PROVINCIAL CONFERENCE 1931

Memoranda regarding questions of provincial concern arising out of the recommendations of the Conference on the Operation of Dominion Legislation 1929 and the Imperial Conference 1930 for the enactment of the proposed Statute of Westminster 1931

Ottawa, April 7, 1931

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SUMMARY

A P P E N D I C E S

A. Invitation to the Conference addressed by the Prime Minister of the Dominion to the Prime Ministers of the Provinces.

B. Pertinent Sections of the summary of Proceedings of the Imperial Conference, 1926.

C. Report of the O. D. L. Conference, 1929.
(under separate cover)

D. Open letter accompanied by memorandum addressed by the Prime Minister of Ontario to the Prime Minister of Canada.

E. Additional memorandum of the Government of Ontario.

F. Precedents relating to the Provinces and Constitutional Amendments.

G. Draft clauses dealing with the Canadian position under the Statute of Westminster.

H. The Report of the Imperial Conference, 1930.
(under separate cover)

DOMINION-PROVINCIAL CONFERENCE

Ottawa, April 1931

The Dominion Government has invited the governments of all the provinces to send representatives to a Conference to be held at Ottawa, on April 7, 1931, to enable the provinces to present any views they might desire to express with reference to the changes involved in the proposed Statute of Westminster. (For invitation, see Appendix A)

I. ORIGIN OF THE CONFERENCE

The proposed Statute of Westminster is merely the last (or latest) stage in a century-long development in inter-imperial constitutional relations. For present purposes, however, attention may be confined to the action taken at –

1. the Imperial Conference of 1926;
2. the Conference on the Operation of Dominion Legislation in 1929;
3. the Imperial Conference of 1930.

1. The Report of the Imperial Conference of 1926 contained as its central feature a brief declaration of the stage in constitutional development which had been attained as regards Great Britain and the Dominions.

> " They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."

It recognized, however, that existing administrative, legislative, and judicial forms, dating back in many cases to an early period, were not wholly in accord with this broad statement. This was particularly true as to certain points connected with Dominion legislative powers – disallowance, reservation, extra-territorial operation, and the Colonial Laws Validity Act. After setting forth certain principles, or summaries of the existing constitutional as distinct from the existing legal position on each of these points, the Conference recommended the establishment of a Committee with terms of reference on the following lines:

> " To enquire into, report upon, and make recommendations concerning –
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> "(i) Existing statutory provisions requiring reservation of Dominion legislation for the assent of His Majesty or authorizing the disallowance of such legislation.
>
> "(ii) (a) The present position as to the competence of Dominion Parliaments to give their legislation extra-territorial operation,
> (b) The practicability and most convenient method of giving effect to the principle that each Dominion Parliament should have power to give extra-territorial operation to its legislation in all cases where such operation is ancillary to provision for the peace, order, and good government of the Dominion.
>
> "(iii) The principles embodied in or underlying the Colonial Laws Validity Act, 1865, and the extent to which any provisions of that Act ought to be repealed, amended, or modified in the light of the existing relations between the various members of the British Commonwealth of Nations as described in this Report."
>
> (that is, the Report of the Imperial Conference, 1926)

The reference, it will be noted, dealt solely with Dominion legislation - no mention was made of provinces or states.

The Conference of 1926 dealt also with the general question of Merchant Shipping Legislation, and recommended that it should be considered by a special sub-Conference. Eventually it was agreed to organize the Committee and the sub-Conference as a single Conference which met in London in October, 1929. (For the particular sections of the 1926 Report, see Appendix B.)

2. The 1929 Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation reviewed the field assigned to it. The Report, after noting the origin and purpose of the Conference, dealt with the three main phases of United Kingdom control of Dominion legislation on the following lines:

(a) Disallowance and Reservation:

(i) the existing provision was summarised,

(ii) the constitutional position was indicated as being that neither power could now, in practice, be exercised by the United Kingdom government, contrary to the wishes of the Dominion government concerned (except with reference to the Colonial Stock Act, 1900)

(iii) no action was recommended for the abolition of the legal power of disallowance and reservation, but it was stated that any Dominion which wished to bring the legal position into harmony with the

conventional position could do so by amending their constitutions in the customary manner, with the aid of the United Kingdom parliament when required, or by repealing the provisions of United Kingdom statutes providing for reservation of bills dealing with particular subjects.

(b) Extra-territorial operation of Dominion Legislation:

(i) the existing position with all its uncertainties was reviewed

(ii) any limitation of extra-territorial power to particular persons (e.g. Canadian nationals), or to legislation ancillary to peace, order and good government, was considered objectionable

(iii) it was recommended that a declaratory enactment should be made by the United Kingdom Parliament, in the form

> "It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation."

(c) Colonial Laws Validity Act:

(i) The origin and effect of the Act was Reviewed.

It was recommended -

(ii) That a United Kingdom statute should be passed, providing that the Act would cease to apply to any law made by the Parliament of a Dominion, that no such

law should be void or inoperative for repugnancy to United Kingdom legislation, and (in positive terms) that a Dominion parliament should have the power to repeal any United Kingdom Act so far as it was part of the law of the Dominion.

(iii) That while the power of the United Kingdom parliament to legislate for the whole Empire could not and need not be formally renounced, steps should be taken to prevent such legislation except at the express request of the Dominion concerned.

(iv) That in the vital matter of succession to the common throne, action by all the Dominion Parliaments as well as the United Kingdom Parliament should be required to effect a change.

(v) That express provisions should be included in the United Kingdom Act to make.it clear that the new Dominion powers would not confer any new power to repeal or alter the Constitutional Acts of the federal Dominions, or to make laws on any solely provincial or state matter.

(Appendix C. Report of 1929 Conference, especially parts III, IV, V.)

3. The Imperial Conference of 1930 gave extended consideration to the constitutional questions covered in the 1929 Report. Two main resolutions were passed -

(1) Approving the 1929 Report (subject to the conclusions noted below).

(2) Recommending enactment by the United Kingdom parliament before December 1, 1931, of the Statute of Westminster, embodying the positive proposals of the 1929 Report, after the receipt of resolutions from the Dominion parliaments, with any desired further provisions applying to a particular Dominion.

As to Canada, special reference was made, which may be quoted in full:

> "The Imperial Conference examined the various questions arising with regard to the Report of the Conference on the Operation of Dominion Legislation and in particular took into consideration the difficulties which were explained by the Prime Minister of Canada regarding the representations which had been received by him from the Canadian Provinces in relation to that Report.
>
> "A special question arose in respect to the application to Canada of the sections of the Statute proposed to be passed by the Parliament at Westminster (which it was thought might conveniently be called the Statute of Westminster), relating to the Colonial Laws Validity Act and other matters. On the one hand it appeared that approval had been given to the Report of the Conference on the Operation of Dominion Legislation by resolution of the House of Commons of Canada, and accordingly, that the Canadian representatives felt themselves bound not to take any action which might properly be construed as a departure from the spirit of that resolution. On the other hand, it appeared that representations had ben received from certain of the Provinces of Canada subsequent to the passing of the resolution, protesting against action on the report until an opportunity had been given to the provinces to determine whether their rights would be adversely affected by such action.
>
> "Accordingly, it appeared necessary to provide for two things. In the first place it was necessary to provide an opportunity for His Majesty's Government in Canada to take such action as might be appropriate to enable the Provinces to present their views. In the second place

> "it was necessary to provide for the extension of the sections of the proposed Statute to Canada or for the exclusion of Canada from their operation after the Provinces had been place on record the view that the sections of the Statute relating to the Colonial Laws Validity Act should be so drafted as not to extend to Canada unless the Statute was enacted in response to such requests as are appropriate to an amendment of the British North America Act. It also seemed desirable to place on record the view that the sections should not subsequently be extended to Canada except by an Act of the Parliament of the United Kingdon enacted in response to such requests as are appropriate to an amendment of the British North America Act."

In accordance with this understanding, the Prime Minister of Canada, on February 23, 1931, invited the provincial governments to meet in conference.

II. THE ISSUES BEFORE THE APRIL CONFERENCE

Two distinct if related issues must be considered: first, provincial objections to the powers to be conferred on or recognized as possessed by the Dominion, and second, provincial demands for corresponding extension or recognition of provincial powers.

III. PROVINCIAL OBJECTIONS

As the central purpose of this Conference is to enable any province to express any objections it may wish to offer to the proposed Statute of Westminster, it is necessary to consider what, so far as can be determined, are the objections which led to the provincial demands for a hearing.

It may first be noted that though copies of the 1929 Report were sent through official channels to the governments of all the provinces in May, 1930 (and receipt acknowledged by eight provinces), no objection was raised, and no suggestion offered, by any province before or while the Report was being considered, and eventually approved, by the Federal parliament.

Objection was first raised by the Government of Ontario. On September 10, 1930, the premier of that province addressed an open letter to the Prime Minister of Canada, accompanied by a memorandum (See Appendix D). Later this was supplemented by an additional memorandum (See Appendix E). While certain other provinces

endorsed Mr, Ferguson's position, no statement of reason was offered. The premier of Quebec put forward briefly the view that no amendment to the British North America Act should be made without provincial consultation. The Attorney-General of Manitoba in a press statement indicated that Manitoba had no objection to offer.

Recourse must therefore be had mainly to the two Ontario memoranda to determine the grounds of protest.

General Objections: Method of Amendment of the Constitution

Mr. Ferguson's letter of September 10th and the accompanying memorandum, set forth the following objections, which were of a general character, dealing with the method of change in the federal constitution:

1. No changes should be made in the Constitution of Canada without the consent of the provinces, which were parties to the original compact; the Constitution is a "Provincial Treaty".

2. The 1929 Report sins by omission and by commission in its historical reference (Sect. 63) to the reasons why Canada alone has no power to amend its Constitution Act, particularly in its suggestion that the absence of this power was due to special conditions existing in Canada at Confederation and to the fact that the British North America Act was passed at an "early stage of our development".

3. The safeguarding clause,

> Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution Acts of the Dominion of Canada, the Commonwealth of Australia and the Dominion of New Zealand, otherwise than in accordance with the law and constitutional usage and practice heretofore existing,

is not really a safeguard. It is open to the construction that it gives statutory authority to practices which have developed in Canada, whereby amendments have been made without consulting the provinces: on five occasions the Imperial Parliament has passed measures to amend the British North America Act and on only one of these, when the federal subsidy was readjusted, have the provinces been consulted." The memorandum counters this deplorable tendency by emphasizing the desire of the Fathers to safeguard provincial rights, and reviews judicial decisions to show how highly the Privy Council rated provincial powers, and parliamentary and Conference discussions of methods of amending the Constitution to show how uncertain the position is and how much support has been given the view that the Constitution is a "provincial treaty".

This point is also discussed in the fourth section of Memorandum E. It is held that paragraph 66 of the 1929 Report, considered in connection with paragraph 55, implies that with the consent of the Dominion Parliament, the Imperial Parliament may properly pass any legislation affecting Canada, constitutional or other. In other words, it surreptitiously affirms as a binding rule or practice what has been the accident of the method employed in most amendments hitherto of the British North America Act – amendments in which the

Provinces as a whole could have no interest, namely, action by the British parliament following merely a request from the Dominion parliament.

Specific Objections:

(a) As to Extra-territoriality.

i. It is objected in Memorandum E that the recommendation of the 1929 Conference as to extra-territorial operation of Dominion laws (section 43; and clause 1, Statute of Westminster, in Report of the 1930 Imperial Conference), would give the Dominion Parliament power to legislate extra-territorially on subject matters which are within provincial power domestically. Anticipating the answer that the safeguarding clause in Section 66 (repeated as clause 4 in the 1930 Imperial Conference draft statute, but as applying to Australia only)

> Nothing in this Act shall be deemed to authorize the Parliaments of the Dominion of Canada and the Commonwealth of Australia to make laws on any matter at present within the authority of the Provinces of Canada or the States of Australia, as the case may be, not being a matter within the authority of the Parliaments or Governments of the Dominion of Canada and of the Commonwealth of Australia respectively,

covers this point, it is objected that this is not so, because the above declaration "applies only to matters within the authority of a province 'at present', which, having regard to the doctrine in Naden v. The King, does not include the power to pass laws having

extra-territorial effect."

ii. A second objection, made by Keith, may anticipated, to the effect that the power conferred is too sweeping, as it would enable Canada to pass laws having extra-territorial operation in South Africa, or vice versa

iii A third objection, also voiced by Keith, is that the 1929 Conference ignored the limitation in the reference given it by the 1926 Imperial Conference, namely to give effect to "the principle that each Dominion parliament should have power to give extra-territorial operation to its legislation in all cases where such operation is ancillary to provision for the peace, order and good government of the Dominion".

iv. As to the positive contention that the provinces should equally have power to give extra-territorial effect to legislation otherwise within their competence, see below, under "Provincial Demands"

(b) As to the Colonial Laws Validity Act.

(i) It is objected (Memorandum B) that the power to amend any Imperial Act, order, rule or regulation, in so far as the same is part of the part of the law of the Dominion (Section 53 of the 1929 Report, repeated in Clause 2, 1930 Imperial Conference draft statute), would enable the Dominion Parliament

to repeal any such Act, etc., even though the subject matter is exclusively provincial under Section 92 of the British North America Act. For example, the Dominion Parliament could abolish the Appeal to the Privy Council, regardless of the view that the matter of the finality of provincial judgments falls (subject to Dominion jurisdiction under Section 101) within the subject of the administration of justice. Once more, to anticipate the answer that this is covered by the safeguarding clause in Section 66 of the 1929 Report, it is argued that this clause would afford the Provinces no protection, since the authority "at present" belonging to the provinces does not include power to repeal or amend an Imperial statute, etc., to which the Colonial Laws Validity Act applies.

(iii) It may possibly be objected further, by representatives of the province of Quebec, that once the Dominion parliament is free to repeal United Kingdom laws, it may abolish existing protection for <u>minority</u> as distinct from provincial right.

(c) <u>As to the Conventional Restriction on the United Kingdom Parliament.</u>

It is argued (Memorandum E) that the recommendation that a declaratory enactment be included in the Statute of Westminster (Paragraph 55 of the 1929 Report, and

> Recital and Clause 3 in 1930 draft of the Statute of Westminster), providing that no law made hereafter by the United Kingdom Parliament shall apply to a Dominion, as part of the law in force therein, except at its request and with its consent, may be taken to imply that the United Kingdom Parliament may properly legislate for Canada, at the request of the Dominion, distinct from the provinces.

IV. COMMENT ON PROVINCIAL OBJECTIONS.

The first or general provincial objections have to do with the method of making changes in the Federal constitution. It is necessary to consider several points.

Does the proposed Statute of Westminster involve changes in the federal constitution of Canada?

If so, is the procedure contemplated contrary to the established law or practice in effecting such changes, and particularly, is the consent of all the provinces essential for any change?

In any case, what is involved in the recommendation of the Imperial Conference of 1930, that the sections of the Statute of Westminster relating to the Colonial Laws Validity Act should not apply to Canada unless the Statute is enacted "in response to such requests as are appropriate to an amendment of the British North America Act"? In other words, what is the appropriate procedure for amendment?

It may be assumed that it is not intended at the forthcoming Conference to work out a definite method of future amendment of the British North America Act. The question of procedure will therefore be discussed only so far as raised by provincial objections or involved in the 1930 Conference recommendation noted above.

The Statute of Westminster certainly involves, or records and registers changes which have gradually developed in the Constitution of Canada, but changes in the imperial, not in the federal aspect. The constitution of Canada covers three main divisions·

(l) the relations between the Dominion and the other members of the British Commonwealth, particularly the United Kingdon;

(2) the relations and division of powers between the Dominion and the provinces; and

(3) the organization of the Dominion for the exercise of its powers.

The second and third phases are largely governed by statute, particularly the British North America Acts, but even here a large conventional element enters; in the .first phase, the conventional element dominates. The interest of the provinces in changes in the federal constitution, it is submitted, is confined to the second phase.

The Provinces are rightly concerned in any proposal which would transfer to the federal government authority now within provincial scope. They have surely no concern, no right of veto, as to proposals

for transferring to the national government authority previously exercised by the imperial parliament or government in matters otherwise within the federal sphere.

If the contention were seriously pressed, that no change whatever in the law or convention of the constitution of Canada can be made without provincial consent, this would make impossible any readjustment of relations between London and Ottawa without the consent of every province. Such position would not only be unparalleled in the world today, it would be wholly inconsistent with the unbroken trend of development in Canada itself. Objection would lie not merely against the Conference of 1929, or the Imperial Conference of 1926, but against the Imperial Conference of 1921, against every previous Conference, against the institution of the Imperial Conference itself. On this theory Canada should not have entered the League of Nations, should not have taken over treaty powers from the British Government, without the consent of nine provinces. In brief, it would have meant that no single step taken since 1867 toward the attainment of Canada's national position, as summarized briefly by Sir Robert Borden, should have been taken without provincial consent:

> Constitutional advance from 1867 to 1914 may be thus summed up. In the first instance the Governor-General exercised no inconsiderable influence over certain public affairs; at the close his functions in that character had practically ceased. Appointed with the consent of the Canadian Government, he became in effect a. nominated president, invested with practically the same powers and duties in Canada as those appertaining to the King in the British Isles. Colonial Conferences became Imperial Conferences between governments meeting on a basis of equality. The application of commercial treaties to the Dominions became dependent upon their own determination, and their right of separate withdrawal from general treaties of commerce were secured. In 1912, and again in 1914, the Dominions were represented at International Conference by their own delegates acting under instructions from their own Governments. At first no Canadian Commissioner could take part in the negotiation of a treaty affecting his country; in the end Canada freely negotiated her

> own commercial treaties by her own Commissioners without control or interference, except of a formal character, or for the purpose of conserving Imperial interests. Naturalization granted in Canada became effective in the United Kingdom. Notwithstanding unfortunate and formidable forces of reaction, the right of the Dominion to full control of its Copyright Laws was acknowledged. Legal power became overborne by constitutional right and the power to disallow Canadian Statutes ceased to be exercised. Canada's right to a voice in foreign policy involving her interests began to be recognized; her complete control over her policy in respect of military and naval defence was acknowledged. By such steps Canada gradually but surely had advanced to the portal of her nationhood.#

Surely it is not seriously proposed to turn back the hands of the clock to 1867.

Nor is it any concern of the provinces how the Dominion government and parliament are organized for the exercise of the powers allotted them.+ It would be a hardy provincialist who would contend that the consent of the provinces should be obtained to amend the provision of the British North America Act fixing twenty as a quorum of the House of Commons, or contend that conventions as to the power of the federal cabinet, the functions of the federal Prime Minister in relation to cabinet and parliament, etc., should not be recognized as valid without provincial consent.

Even as regards the federal aspect of the constitution, it is impossible to accept the contention that no change in the law or conventions can be made without the consent of all nine provinces.

Sir Robert Borden: Canada in the Commonwealth: from Conflict to Cooperation, Oxford Press, 1929, p.87.

+ With the possible exception of the basis of the Senate and Commons so far as distribution of members by provinces is concerned.

The result of such a position would be that national development would be blocked and Canada saddled with a rigid and stereotyped constitution. There is no parallel anywhere in the modern world for such a subordination of the federal to the provincial elements. Neither in the United States, nor in Australia, nor in Germany, nor in Switzerland, nor in any other existing federal state, can such a veto of a single state or province be found. These extreme provincial claims are all the more extraordinary in view of the fact that the present-day trend is quite in the other direction, in the direction of recognizing that economic and social changes are making it necessary to adapt old constitutions to new needs, to give the national government the wide scope necessary to deal with the nation-wide scope of present-day business and the growing insistence of international issues.

It is urged in the Ontario memorandum that the Fathers of Confederation intended to give the provinces a controlling position, and that the British North America Act must be regarded as a 'provincial treaty', which cannot be changed except by consent of the parties to it.

The memorandum rightly emphasizes the uncertainties of the position. The omission from the British North America Act of any specific provisions for its amendment, such as is found in the Constitution Acts of other Dominions, has resulted in leaving the question in some confusion On this point note may be made of the comment on the observations contained in paragraph 63 of the 1929 Conference Report; the Ontario memorandum states:

> The avoidance in this statement of reference to the compact of Confederation, and to the attitude of the Provinces as revealed in the Dominion-

> Provincial Conference of 1927, is significant. Still more remarkable is the suggestion that the absence of power to amend the constitution was attributable to special conditions existing in Canada at that time of Confederation and also to the fact that B.N.A. Act was passed at an early stage of our development. These observations indicate a lack of appreciation of the fundamental principles and facts involved.
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> As to this criticism, it may be noted:

1st. The paragraph in question has to do, not with any recommendations but with the explanation given by the 1929 Conference as to why the Canadian constitution presented a special problem, why different action was necessary from that appropriate in the case of certain other Dominions.

2nd. That explanation naturally did not make any references to the compact of Confederation, or to the attitude of some the Provinces in 1927. Such references would have been wholly irrelevant. As the first sentence of the paragraph makes clear, what it was sought to explain was why Canada was the only Dominion that did not possess any power to amend the B.N.A. Act without the intervention of the parliament at Westminster. It would be no answer to this question to say that the B.N.A. Act was a treaty, as presumably treaties may be revised; and incidentally the Constitution of Canada is no more a treaty than the Constitution of Australia. Nor would discussions at the 1927 Conference have been more relevant. The reason advanced for the difference was the simple and obvious one - that Canada's constitution was framed at an early stage in the development of the relations between the several parts of the British Empire (not, "an early stage of our - Canada's development". In 1867, the idea

of equality had not developed as far as it had when Australia received its constitution in 1900, or when the South Africa Act was passed in 1910. It was natural in 1900 or 1910 to provide expressly a mode of amendment wholly (or almost wholly) by the authorities in Australia or South Africa, without reference to the parliament at Westminster. In 1867, that stage had not been reached. That is all.

In default of any express provisions in the B.N.A. Act as to amendment, the attempt is made in the Ontario memorandum to base a claim for a dominant provincial position on two considerations, first, the intention of the Fathers of Confederation, interpreted and reinforced by the Privy Council since, to give the provinces such dominant position, and, second, the contention that as the Constitution arose out of a provincial agreement, so it must continue; in other words, that the B.N.A. Act is a provincial treaty which cannot be changed except by consent of all the parties to it.

The first contention, that it was the intention of the Fathers of Confederation to give the provinces a dominant position, is untenable. It is true that proposals for a legislative union, with only one parliament, were rejected, but the fact that Macdonald and others supported them indicates the strength at that tine of the feeling that a strong central power was essential. The lesson which observers of the Civil War in the United States, which was the example of federation present in the minds of every man in British North America, drew from that conflict was the necessity of creating a strong central

Power.#

Time and space do not permit a detailed consideration of the point: it will suffice to quote Professor Kennedy's summary -

> Macdonald never for a moment abandoned his consistent support of a strong central government. When one of the delegates from New Brunswick pointed out that the proposal to specify the powers of the local legislature tended to create a legislative union, Macdonald accepted the challenge and insisted that any imitation of the United States in this connexion would end in disaster. Macdonald's wishes prevailed. Not only were federal and provincial powers enumerated, with an undefined residuum of powers left to the former, but the federal government was given power to appoint and to dismiss for due cause the provincial lieutenant governors, and to disallow provincial Acts. The conference gave the scheme a strongly centralized bias. Indeed Brown would have been willing to have had a kind of local municipal administration which could not deal with political matters, and a local executive modelled on the American plan. The conference was evidently in general favour of <u>making the federal government as powerful as possible and of controlling the provinces through federal safeguards</u>.+

The quotations in the memorandum from Privy Council opinions, indicating the wide powers to be attributed to the provinces, suggest the observation that if there is

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cf. Sir John A. Macdonald: "The fatal error which they (the United States) have committed, and it was perhaps unavoidable from the state of the American colonies at the time of the Revolution, was in making each state a distinct sovereignty. The fatal error was in giving to each state distinct sovereign power except in those instances where powers were specifically reserved by the constitution and conferred upon the general government. The true principle of confederation lies in giving the general government all the principles and power of sovereignty, and in the provision that the subordinate or individual states should have no powers but those expressly bestowed upon them. We should have a powerful central government, a powerful central legislature, and a powerful decentralized system of minor legislatures for local purposes.

+ W.P.M. Kennedy, The Constitution of Canada, page 303.

any valid ground for complaint as to the trend of constitutional developments since Confederation, it is emphatically not the provinces but the Dominion that can show that we have departed from the intentions of the Fathers. The insistence of Oliver Mowat on provincial rights, an insistence necessary and useful within limits but carried to an extreme, and the Privy Council traditions down to Haldane's day, have resulted in decisions which seriously restrict federal authority, instead of maintaining it or even expanding it, as has been the case in every other federal state which has endured.

The view of the B.N.A. Act as a provincial treaty, is based upon the occasional rhetorical use in pre-Confederation discussion of such terms as 'treaty' and 'compact'. What was implied was simply that the terms of union drafted at Quebec in 1864 had to be accepted or rejected as a whole; or occasionally, with reference to the future, it was implied that Confederation was a solemn engagement under which certain rights and privileges were guaranteed, and that these could not be withdrawn without destroying the basis of Confederation. There was no thought of extending the metaphor to imply that after Confederation the provinces were to hold a position analogous to that of separate and independent states which are parties to an international treaty, and which have a right of veto on any changes in it. In the very act of Confederation the provinces gave up their pre-1867 position, and a new entity, the Dominion, was created. The position has not parallel to the signing of a treaty between states which posses after the treaty exactly the same status they possessed before. In any case, how could the theory be applied? Only the five original provinces could strictly be considered parties or perhaps only three: Nova Scotia, New Brunswick and

Prince Edward Island, as the "Province of Canada" ceased to exist and was broken up into Ontario and Quebec. It is obviously untenable politically to insist that only these five (or four or three) provinces are parties, and so the alternative and equally untenable position is taken of suggesting that all the provinces are parties, - even though owing their existence in some cases and in some measure to federal action.

It may be added, in this connection, that the doctrine of the veto power of a single province to a constitutional amendment has, in practice, never been admitted by either the Dominion or the British Parliament. It has, indeed, been denied by both Parliaments.

It may be useful to summarise the results of an examination of the precedents relating to constitutional amendments and matters involving the same principles. A more extended consideration of these precedents will be found in Appendix F.

The more important of them are as follows:-

Confederation Debates;
Nova Scotia Act, 1869;
British North America Act 1871;
Parliament of Canada Act 1875;
British North America Act 1886;
Canada (Ontario Boundary) Act 1889;
British Columbia (Loan) Act 1892;
Canadian Speaker (Appointment of Deputy) Act 1895;
British North America Act 1907;
British North America Act 1915;
British North America Act 1916;

Resolutions of 1920 and 1924 re extra-territorial effect of Dominion legislation;
Resolutions of 1924, 1925 and 1926 on the question of constitutional amendment;
Dominion Provincial Conference 1927;
Consideration of O.D.L. Report by the Dominion Parliament 1930;
British North America Act 1930.

Consideration of the above permits certain general conclusions to be drawn in respect to the question of provincial consultation before constitutional change.

(1) It cannot be said that in all cases of amendment of the British North America Act the provinces have been consulted.

(2) It cannot even be said that in all cases of important amendment where the provinces were directly or vitally concerned, as in 1871, 1889, 1915, the provinces were consulted. None of them were consulted in 1871; only one or two in the other instances.

(3) It can be said that it has become established that where the rights of a province as a political entity have been directly and immediately affected, that province will be consulted, whether the change takes the form of an amendment to the British North America Act or otherwise.

(4) The Dominion itself will decide whether the rights of a province are so directly affected by the proposed change.

(5) Consultation does not mean that the Dominion is prepared necessarily to accept the provincial position or to refuse to act in a sense contrary to it.

SPECIFIC OBJECTIONS.

(a) Extra-Territorial Operation of Dominion Legislation.

1. The Objection Contained in Appendix E.

The objection is specifically directed to Para. 43 of the "Report of the Conference on the Operation of Dominion Legislation". It is objected that the effect of this clause, even when read in conjunction with the saving clause in Para. 66, would be to enable the Parliament of Canada to make laws having extra-territorial operation in matters assigned to the provinces.

To this objection there are two answers:-

(1) The Imperial Conference 1930, eliminated Canada from the terms of the saving clause (Para. 66, O.D.L. Report 1929; Imperial Conference Report 1930, p. 20, Clause 4). It was intended, both in 1929 and in 1930 to restrict the extension of the powers involved in the proposed Statute of Westminster to matters that would, in the ordinary course, be within the competence of the Parliament of Canada, were it not for the restraint involved in the theory of the territorial limitation or in the existence of repugnant Imperial legislation. It was not intended to enable the Parliament of Canada to make laws having extra-territorial operation relating to questions such as property and civil rights, or civil procedure.

In order to carry out this intention the Imperial Conference Report, p.20, Clause 4, provided that a clause dealing with the Canadian position would be inserted after the representations of the provinces had received consideration.

Draft clauses are subjected for consideration in Appendix (G).

(2) While the fact that the interpretation of the same clause has been questioned by eminent legal authority may make it desirable to adopt a new draft that will eliminate doubt, it is submitted that the doubts are not well founded.

The saving clause reads:-

> "Nothing in this Act shall be deemed to authorise the Parliaments of the Dominion of Canada and the Commonwealth of Australia to make laws on any matter at present within the authority of the provinces of Canada or the states of Australia, as the case may be, not being a matter within the authority of the Parliaments or Governments of the Dominion of Canada and of the Commonwealth of Australia, respectively".

The word, <u>"matter"</u> is a word that is appropriate to the <u>subject matter</u> of the law and not to the extent of its operation. An examination of Section 91 and Section 92 of the B. N. A. Act indicates that the word "matter" in those sections is used in this sense. An extra-territorial law dealing with the subject matter that apert from its extra-territorial extent would be within the legislative power of a province is, it is submitted, a law on a matter at present within the authority of the province in question. It is not a law within the authority of the province, but it is a law relating to a matter that is within that authority. Accordingly, it could not validly be enacted by the Parliament of Canada, unless it was also a law relating to a matter within the Dominion power. This last question would arise if the matter came within one of the enumerated powers of Section 91, or within the range of ancillary legislation.

Applying this principle to the specific illustration cited in Appendix E, Section 1, it is submitted that the enactment of the Statute of Westminster in the form proposed in 1929, would not have enabled the Dominion Parliament to deal with the jurisdiction of the Judicial Committee to review the judgment of provincial courts. It is submitted in the first place that the proposed enactment would not have enabled the Parliament of Canada to repeal the Judicial Committee Acts in so far as they related to appeals from the provinces. This is subject to the qualification that such legislation might be effective under the powers conferred by Section 101 of the British North America Act. It is submitted, further, that legislation, inconsistent with such appeals – even though it might be regarded as extra-territorial in its operation - would not be valid. The reason for both of these submissions is the same, viz. that, subject to the above qualification, the Dominion enactments would be laws on a matter at present within the authority of the provinces of Canada. It is true that they would not be laws within that authority, but the subject matter would be civil procedure, which is clearly one of the matters committed to the provinces by Section 92 of the B.N.A. Act. The reason why such laws would not be within the authority of the provinces is not that the matters are beyond their competence, but that, in the first instance, such laws would be void and inoperative for repugnancy under the Colonial Laws Validity Act; and, in the second instance, invalid because of a territorial limitation, the matter being provincial but the extent of the operation of the laws being beyond the powers of the

province, if that phase of the judgment of Nadan v. the King is accepted.

The same principle would apply if any other illustration is taken of a law extra-territorial in character relating to any provincial subject matter.

2. Second Objection.

The second objection, namely that the power conferred is too sweeping, is raised by Keith (Responsible Government, pp.337 and 338). He suggests that an unrestricted power of extra-territorial legislation would enable an Englishman doing deeds permitted by English law in England, to be punished in Canada if found there; and, also, that he might be held to be liable to extradition. It is difficult to see any good reason why an Englishman under such circumstances should not be punished if he has property in Canada, or if he comes to Canada after the commission of such an offence. If an Englishman in England conspires to smuggle rum into Nova Scotia, to wreck the Trans-Canada, to dynamite the Senate, or to defraud the Bank of Montreal, there seems to be no good reason why he should be immune from the Canadian courts if he chooses to come to this country. It is, of course, conceivable that if the extreme power were used unintelligently, trouble would arise. On the other hand, the general policy of British constitutional law has always been to confer or to recognize the existence of unrestricted powers in parliamentary bodies and to rely upon good sense rather than legal limitations to prevent their abuse.

3. The Third Objection.

The third objection is that the 1929 Conference ignored the limitation in the reference given to it by the 1926 Imperial Conference, viz. to give effect to "the principle that each Dominion Parliament should have power to give extra-territorial operation to its legislation in all cases where such operation is ancillary to provision for the peace, order, and good government of the Dominion."

Upon examination of the legal position of the Dominions at the Conference in 1929, it was found that, generally, the legislative powers of all of the Dominions were subject already to a limitation to laws for the 'peace, order and good government of the Dominion' concerned. It was the opinion of the Conference that to impose an additional limitation in the Statute of Westminster would cause confusion and would give rise to grave difficulties of interpretation. It was found, further, that in exceptional instances the legislative powers were not so restricted, and it was felt that it would be a mistake to impose a fresh limitation in respect to one special phase of such legislation. A good illustration of this point is to be found in legislation under Section 132 of the British North America Act. Provision might be made for joint police action of fisheries on the high seas. It might well be necessary under such a treaty to enable, by statute, Canadian protective vessels to seize foreign fishing vessels acting under the treaty. Such a seizure could not be authorized if the power was limited to legislation for the peace, order, and good government of Canada.

For these reasons, it was found to be impracticable to make any recommendation subject to the limitation in question. It was felt that the limitation implied in the terms of reference, 1926, was satisfied in principle by the fact that it already existed under the Dominion constitutions. It was further the opinion of the Conference that in this, as in other matters, it was more consistent with British constitutional policy to avoid constitutional limitations.

(b) Colonial Laws Validity Act.

1. The Objection Contained in Appendix E.

By Section 2 of this memorandum, the first point taken is that the provinces should have corresponding power. This matter is dealt with below, under V.

The more important objection is precisely similar to that taken in respect to extra-territorial legislation. It is an objection to conferring upon the Parliament of Canada the power to repeal Imperial legislation when the subject matter of such legislation is exclusively provincial in its character.

The answers to this objection are precisely the same as those to the objection taken in relation to extra-territorial power. They depend entirely upon the saving clause, because the objections are not to the enlargement of the Dominion power as such, but only to the extension of that power over fields of legislation provincial in their character. The answers may be shortly stated, as follows:-

(1) It is proposed that the saving clause shall prevent such a result. (Appendix F).

(2) For the reasons given above (IV. (a.) 1 (2)) it is

submitted that the doubts as to the efficacy of the saving clause are not well founded.

2. The possible objection as to minority rights.

It may be urged that if the Colonial Laws Validity Act no longer applies to Dominion legislation, there will be nothing to prevent the federal parliament from repealing legislative safeguards for racial or religious minorities in Canada, and that the declaratory enactment regarding future United Kingdom legislation would prevent the passage of new laws for minority protection.

To this it may be replied:

The provinces are not the guardians of federal minority rights. As a matter of fact, the chief minority rights, those set forth in Section 93 of the British North America Act, are rights which the federal government is empowered to defend against the provinces. It is in the parliament of Canada that minority claims will find the appropriate ground for discussion and will find support and safeguard.

The United Kingdom is not the guardian of minority rights. One hundred and fifty years ego the British Government may have shown, in the passing of the Quebec Act, an unusual measure of tolerance toward the religious and civil aspirations of the people of the province of Quebec, largely, in fact, as a tactical move in the controversy with the English-speaking colonists to the south. But that ancient precedent has no application to the present day. The British Government has troubles enough of its own without thinking of adding to them by intervening to override a Canadian majority bent on action which a Canadian minority claims is harmful. No British parliament would consider such a course of action for a moment.

So far as federal action is concerned, it must be recalled that there is no United Kingdom legislation now in force, and subject to repeal if the Statute of Westminster is passed, which protects minority rights. The safeguarding provisions of Sections 93 and 133 of the British North America Act will be beyond the competence of the federal parliament to alter. It is, further, a common ground that in the event of a formal method of amendment of the British North America Act being adopted in the future, these provisions should be made impossible of alteration except by a special and substantially unanimous procedure.

(c) <u>As to the Conventional Position under the United Kingdom Enactment.</u>

The objections under this heading are set forth in the Ontario Memorandum, Appendix E, Sections 3 & 4, and they raise two distinct questions:-

(1) The objection arising out of Para. 55 of the O. D. L. Report (Sec also Imperial Conference Report 1930, p.20, Clause 3; p, 21, first recital).

It is suggested that the clause would be interpreted as applying an affirmative statement that, at the request of the Dominion, as distinct from the provinces, the Imperial Parliament may properly legislate for Canada in relation to matters within provincial jurisdiction.

This objection might be regraded as extending both to ordinary matters that are within provincial power and even to the constitution itself.

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the Natural Resources legislation in 1930. In that instance the proposed legislation directly affected four provinces and the request to His Majesty included and transmitted the formal authority embodied in the Statutes of the Provinces in question.

If there is any doubt with regard to this matter, it could be settled by placing on record on the proceedings of this Conference, an appropriate resolution. Further, there would not appear to be any difficulty in drafting the saving clause so as to eliminate any possibility of misunderstanding in the matter. (See Appendix G).

(2) The second objection is taken in Appendix E, Section 4. It is based upon the interpretation of the first sub-section of Para. 66, in the O.D.L. Report, 1929. It might also be founded upon the same considerations as are dealt with in the next preceding section of this note.

It is suggested that the last words in the first subsection of Para. 66, namely "Otherwise than in accordance with the law and constitutional usage and practice heretofore existing", imply a statutory recognition and approval of the procedure followed in the past 64 years in respect to the amendment of the B. N. A. Act. It is also suggested that the words read in conjunction with the declaration in Para. 55 involve a statutory embodiment of the view that the only authority that is entitled to be heard or considered in respect to the legislative action of Imperial Parliament affecting Canada, is the Dominion Parliament.

To this objection there are two answers:-

(1) The words in the first sub-section complained of have been eliminated from the Statute of Westminster and provision is made for the drafting of a saving clause applying to Canada alone which will undoubtedly clarify this situation. (See Appendix G.)

(2} It is submitted that the views taken in Appendix E, Section 4, are not well founded. They proceed upon the theory that the law and constitutional practice heretofore existing relate solely to amendments in which the provinces as a whole would have no interest. It is submitted that an examination of the constitutional usage and practice since confederation establishes by the precedents that in matters in which there is no provincial interest, necessary Imperial legislation will be enacted upon the request of the Dominion alone, but that, in matters in which provincial rights are affected the interested provinces will first be consulted. It must, however, be admitted that the precedents do not justify the view that one province can veto a change that is supported by the request of the Dominion, and the other eight provinces, at any rate in a matter that is not fundamental.

It is further submitted that the words in question cannot properly have any application to Canada whatsoever. The sub-section was drafted to cover Canada, Australia and New Zealand, and the words were included so as to make it clear that the existing powers of amendment in Australia and New Zealand would not be impaired. The words are

not appropriate to Canada because Canada never had power to repeal or alter the Constitutional Acts in any way, and there was no law or constitutional usage or practice relating to alteration of the Constitutional Acts by the Government or Parliament of Canada; they had always been subject to change only by the Imperial Parliament. When the sub-section was redrafted in 1930, the representatives of Australia and New Zealand at that time did not think that they were necessary for their purposes, and they were eliminated from the saving clause designed for Australia and New Zealand (See Imperial Conference Report 1930, p. 20, Clause 4).

V. PROVINCIAL CLAIMS FOR EXTENDED POWERS UNDER THE STATUTE OF WESTMINSTER.

The Ontario Memorandum, Appendix E, suggests that certain of the provisions of the Statute of Westminster should be applied to the Provincial Legislature.

The question of the extension of the powers of the legislatures of the provinces was considered in Para. 71 of the O. D. L. Report 1929. It was there stated that it will be a matter for the proper authorities in Canada and in Australia to consider whether and to what extent it is desired that the principles to be embodied in the new Act of the Parliament of the United Kingdom should be applied to Provincial and State legislation in the future.

The matter was not specifically referred to at the 1930 Conference, but the general approval of the O. D. L. Report, 1929, would carry with it an approval of Para. 71. Further, while nothing was placed on the records either in the reports or in the formal discussions, there was a definite understanding that the question of extension of the powers to the provinces or states was a matter solely for the Dominion of Canada, or for the Commonwealth of Australia. It was understood that there was no desire to take any action in respect to the Commonwealth of Australia, but the informal view of all of the delegations was that a revision of the Draft Statute for the purpose of extending any of its provisions to the provinces of Canada would not meet with any objection. Accordingly, it is necessary to consider whether it is desirable to provide for the grant of the extended powers to the provinces under the Statute of Westminster.

There are only three provisions of the Statute of Westminster which could possibly have any application to the provinces, viz. Sections 2, 3 and 4, set forth in the Report of the Imperial Conference 1930, pp. 19 and 20, as clause 2, 1 and 3, respectively. Accordingly, it will be convenient to deal with the matter under those three heads.

(a) The Colonial Laws Validity Act.

It is difficult to see any good reason for not extending the provisions of the Colonial Laws Validity Act section to the provinces on precisely the same basis as to the Parliament of Canada. Its extension is suggested in the Ontario Memorandum, Appendix E. The retention of the legal position, in which the legislatures of the provinces are in a state of subordination to the Parliament of the United Kingdom, is absolutely inconsistent with the Resolution of the 1926 Conference. There could be no such thing as 'equality of status' between Canada and the United Kingdom, if Canada's legislative powers, as represented by the powers of the provincial legislatures continued to be subordinate to the legislative power of the Parliament of the United Kingdom, as expressed in an important series of statutes extended to Canada in matters that are within the provincial field.

An examination of the Imperial statutes extending to Canada discloses that a number of enactments of an important character relate to provincial matters such as evidence, civil procedure and property in civil rights. Indeed, the most recent instance of Imperial Legislation extending to Canada is the Trustee Act of 1925, (c. 19, s.56,) which deals with purely provincial matters.

This is an instance of inadvertent legislation, because there was obviously no intention on the part of the Parliament of the United Kingdom to extend the provisions of the Act to Canada. It is a result of the difficulties of draughting which are obviated by the proposed clause 3, Imperial Conference Report 1930, p.20.

The proposed Statute of Westminster could readily be adapted so as to apply to provincial legislation and draft clauses for this purpose are included in Appendix G.

(b) Extra-territorial Legislative Power.

There has been no suggestion that this clause should be extended to provincial legislation. The question is governed by principles different from those relating to the Colonial Laws Validity Act clause. The following observations might be made with regard to the desirability or necessity of extending extra-territorial legislative power to the legislatures of the provinces.

(1) The reasons that lead to the desirability of obtaining extra-=territorial legislative power, for the Parliament of Canada, do not apply with equal urgency to the legislatures of the Provinces. Extra-territorial legislative power is essential in order to enact legislation relating to criminal law, customs, navigation and shipping, fisheries, extradition, deportation, militia, naval service and defence, and external affairs including the implementation of treaty obligation. In practically all of the instances in which Colonial or Dominion legislation of an extra-territorial character has been claimed and questioned in the different parts of the British Empire, the legislation in question has been a matter committed to the Dominion under the British North America Act.

On the other hand, practically there is no need for extra-territorial power in relation to the main fields of legislation committed to the provinces. Speaking generally, the fields of legislation given to the provinces come within the principles of private international law and there is no difficulty in enacting legislation which is in a sense extra-territorial but which depends for its recognition and enforcement upon those principles. Consequently, where an essentially extra-territorial phase of provincial legislation has been questioned, as in Ashbury v Ellis, or in the Bonanza Creek case the provincial legislation has been upheld.

(2) Another difficulty arises from the fact that in Section 92 of the B. N. A. Act there are specific limitations of a territorial character, particularly in

Clause 2:- "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes."

Clause 6:- "The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province."

Clause 7:- "The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals."

Clause 9:- "Municipal Institutions in the Province."

Clause 11:- "The Incorporation of Companies with Provincial Objects."

Clause 12:- "The Solemnization of Marriage in the Province."

Clause 13:- "Property and Civil Rights in the province."

Clause 14:- The Administration of Justice in the Province, etc."

Clause 16:- "Generally all Matters of a merely local or private Nature in the Province."

Reference may also be made to the other clauses in the section. The extension to the province of a general extra-territorial legislative power might be construed as overriding these limitations and might give rise to serious difficulties of interpretation.

(3) In addition to the difficulties of interpretation arising from the factors dealt with in the preceding paragraph, there are further difficulties arising from the fact that interprovincial rights are largely based upon the territorial limitations contained in Section 92 of the Act. A Dominion extra-territorial power would enable the Dominion to enact laws governing Acts taking place without Canada. A corresponding provincial power would give a province not only the power to enact laws taking governing acts taking place abroad, but also governing acts taking place in another province. Further, it might create serious difficulties in relation to the distribution of provincial taxing power, as settled by the judicial decisions of the present time. For example, the existing limits upon the power to enact death duties, might go by the board, in the event of the province being given a general and unrestricted territorial power.

(4) Generally it may be said that the question of whether extra-territorial legislative power should be extended to the provinces is one in which the Dominion interest is not great. Primarily it is a matter of provincial concern. The only instances in which it might conceivably affect Dominion interest are in relation to external affairs, in the event of extra-

territorial provincial legislation inducing results that would be contrary to international law or that would give rise to conflicts with other Governments of the British Empire

(c) The question of the application of the principle involved in Para. 55 of the O. D. L. Report 1929 requires consideration. It seems to be clear that the provisions of this proposed clause of the Statute of Westminster should apply equally to the provinces and this matter could readily be arranged in the drafting of the clause reserved for the protection of the Canadian position, (See Appendix G).

(d) Measures Necessary to Comply with the Provincial Claims.

These are outlined in the draft clauses in Appendix G, and they do not require general comment. Attention is directed to the two alternative drafts, based upon the extension of some of the provisions of the Statute of Westminster to the provinces. One is based upon immediate extension and the other is based upon extension as a result of provincial action.

APPENDIX A.

Letter of Invitation sent to the
Government of each Province of Canada.

Ottawa, February 23, 1931.

Sir,

I have the honour to invite the Government of the Province of (……) to be represented at a conference which it is desired to hold with the Governments of the Provinces of Canada, at Ottawa, commencing on Tuesday, the 7th day of April of this year. The holding of the conference before the opening of the Parliament of Canada was considered, but it was felt to be advisable to defer it in order to meet the requirements of the legislative programmes of the majority of the provinces concerned. Further delay would defeat the purpose of the conference, namely of affording the provinces an opportunity of presenting any views they might desire to express with reference to the changes that are involved in the proposed Statute of Westminster, which the Government of the United Kingdom has undertaken to bring before Parliament during the current year.

At the Imperial Conference, in 1926, consideration was given to certain questions relating to the operation of Dominion Legislation. These matters are referred to in the Summary of Proceedings at pp. 14 and 15, under heading (c) "Operation of Dominion Legislation", and at p.16, under the heading (d) "Merchant Shipping Legislation". By the action of the Imperial Conference in 1926, the questions regarding the operation of Dominion legislation were referred to an Expert Committee, and certain merchant shipping questions were referred to a Sub-Conference on Merchant Shipping Legislation.

With the consent of all the Governments, the Expert Committee and Sub-Conference were combined in the Conference

on the Operation of Dominion Legislation and Marchant Shipping Legislation, which was held in the autumn of 1929, and submitted a report. Your attention is invited particularly to Part V of the report dealing with the Colonial Laws Validity Act.

The Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation was submitted to the consideration of the Imperial Conference held at London in the autumn of 1930. The action taken by the Conference in regard to the matter is reported at pp. 18, 19, 20 and 21. Your attention is invited, particularly, to the two last paragraphs on p. 17, and the first paragraph on p.18, which read as follows:-

> "The Imperial Conference examined the various questions arising with regard to the Report of the Conference on the Operation of Dominion Legislation and in particular took into consideration the difficulties which were explained by the Prime Minister of Canada regarding the representations which had been received by him from the Canadian Provinces in relation to that Report.
>
> "A special question arose in respect to the application to Canada of the sections of the Statute proposed to be passed by the Parliament at Westminster (which it was thought might conveniently be called the Statute of Westminster), relating to the Colonial Laws Validity Act and other matters. On the one hand it appeared that approval had been given to the Report of the Conference on the Operation of Dominion Legislation by resolution of the House of Commons of Canada, and accordingly, that the Canadian representatives felt themselves bound not to take any action which might properly be construed as a departure from the spirit of that resolution. On the other hand, it appeared that representations had been received from certain of the Provinces of Canada subsequent to the passing of the resolution, protesting against action on the Report until an opportunity had been given to the Provinces to determine whether their rights would be adversely affected by such action.
>
> "Accordingly, it appeared necessary to provide for two things. In the first place it was necessary to provide an opportunity for His Majesty's Government in Canada to take such action as might be appropriate to enable the Provinces to present

> their views. In the second place it was necessary to provide for the extension of the sections of the proposed Statute to Canada or for the exclusion of Canada from their operation after the Provinces had been consulted. To this end it seemed desirable to place on record the view that the sections of the Statute relating to the Colonial Laws Validity Act should be so drafted as not to extend to Canada unless the Statute was enacted in response to such requests as are appropriate to an amendment of the British North America Act. It also seemed desirable to place on record the view that the sections should not subsequently be extended to Canada except by an Act of the Parliament of the United Kingdom enacted in response to such requests as are appropriate to an amendment of the British North America Act."

Your attention is also invited to the resolutions of the Conference, at p. 19, which read as follows:-

> "(i) The Conference approves the Report of the Conference on the Operation of Dominion Legislation (which is to be regarded as forming part of the Report of the present Conference), subject to the conclusions embodied in this Section.
>
> (ii) The Conference recommends:-
>
> (a) that the Statute proposed to be passed by the Parliament at Westminster should contain the provisions set out in the Schedule annexed.
>
> (b) that the 1st December, 1931, should be the date as from which the proposed Statute should become operative.
>
> (c) that with a view to the realization of this arrangement, Resolutions passed by both Houses of the Dominion Parliaments should be forwarded to the United Kingdom, if possible by 1st July, 1931, and, in any case not later than the 1st August, 1931, with a view to the enactment by the Parliament of the United Kingdom of legislation on the lines set out in the schedule annexed.
>
> (d) that the Statute should contain such further provisions as to its application to any particular Dominion as are requested by that Dominion."

You will observe that it was contemplated that the Statute of Westminster would be enacted so as to become operative on the 1st December, 1931, and that it is

necessary that its application to Canada should be determined so as to enable resolutions to be passed by both Houses of the Dominion Parliament in time to be forwarded to the United Kingdom, if possible by the 1st July, 1931, and in any case not later than the 1st August, 1931.

It is my purpose to introduce resolutions in order to ascertain the views of both Houses of the Parliament of Canada, in order that they may be presented to His Majesty, if possible by the 1st July, 1931, and, in any case, not later than the 1st August, 1931. It is in order to enable the provinces to present their views in this matter that the present Conference is being arranged.

On account of the necessity of action being taken promptly, it is not intended to consider any other matters at the proposed Conference.

I am forwarding herewith copies of the Report of the Imperial Conferences of 1926 and 1930, and of the 1929 Conference on the Operation of Dominion Legislation.

Yours sincerely,

R.B. BENNETT.

APPENDIX B. PERTINENT SECTIONS OF SUMMARY OF PROCEEDINGS, IMPERIAL CONFERENCE, 1926.

(c) Operation of Dominion Legislation.

Our attention was also called to various points in connection with the operation of Dominion legislation, which, it was suggested, required clarification.

The particular points involved were: –

(a) The present practice under which Acts of the Dominion Parliaments are sent each year to London, and it is intimated, through the Secretary of State for Dominion Affairs, that "His Majesty will not be advised to exercise his powers of disallowance" with regard to them.

(b) The reservation of Dominion legislation, in certain circumstances, for the signification of His Majesty's pleasure which is signified on advice tendered by His Majesty's Government in Great Britain.

(c) The difference between the legislative competence of the Parliament at Westminster and of the Dominion Parliaments in that Acts passed by the latter operate, as a general rule, only within the territorial area of the Dominion concerned.

(d) The operation of legislation passed by the Parliament at Westminster in relation to the Dominions. In this connection special attention was called to such Statutes as the Colonial Laws Validity Act. It was suggested that in future uniformity of legislation as between Great Britain and the Dominions could best be secured by the enactment of reciprocal Statutes based upon consultation and agreement.

We gave these matters the best consideration possible in the limited time at our disposal, but came to the conclusion that the issues involved were so complex that there would be grave danger in attempting any immediate pronouncement other than a statement of certain principles which, in our opinion, underlie the whole question of the operation of Dominion legislation. We felt that, for the rest, it would be necessary to obtain expert guidance as a preliminary to further consideration by His Majesty's Governments in Great Britain and the Dominions.

On the questions raised with regard to disallowance and reservation of Dominion legislation, it was explained by the Irish Free State representatives that they desired

to elucidate the constitutional practice in relation to Canada, since it is provided by Article 2 of the Articles of Agreement for a Treaty of 1921 that "the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada."

On this point we propose that it should be placed on record that, apart from provisions embodied in constitutions or in specific statutes expressly providing for reservation, it is recognised that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs. Consequently, it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion.

The appropriate procedure with regard to projected legislation in one of the self-governing parts of the Empire which may affect the interests of other self-governing parts is previous consultation between His Majesty's Ministers in the several parts concerned.

On the question raised with regard to the legislative competence of members of the British Commonwealth of Nations other than Great Britain, and in particular to the desirability of those members being enabled to legislate with extra-territorial effect, we think that it should similarly be placed on record that the constitutional practice is that legislation by the Parliament at Westminster applying to a Dominion would only be passed with the consent of the Dominion concerned.

As already indicated, however, we are of opinion that there are points arising out of these considerations, and in the application of these general principles, which will require detailed examination, and we accordingly recommend that steps

should be taken by Great Britain and the Dominions to set up a Committee with terms of reference on the following lines:–

> "To enquire into, report upon, and make recommendations concerning –
>
> “(i) Existing statutory provisions requiring reservation of Dominion legislation for the assent of His Majesty or authorizing the disallowance of such legislation.
>
> “(ii) (a) The present position as to the competence of Dominion Parliaments to give their legislation extra-territorial operation,
>
> (b) The practicability and most convenient method of giving effect to the principle that each Dominion Parliament should have power to give extra-territorial operation to its legislation in all cases where such operation is ancillary to provision for the peace, order, and good government of the Dominion.
>
> “(iii) The principles embodied in or underlying the Colonial Laws Validity Act, 1865, and the extent to which any provisions of that Act ought to be repealed, amended, or modified in the light of the existing relations between the various members of the British Commonwealth of Nations as described in this Report."

(d) Merchant Shipping Legislation

Somewhat similar considerations to those set out above governed our attitude towards a similar, though a special, question raised in relation to Merchant Shipping Legislation. On this subject it was pointed out that, while uniformity of administrative practice was desirable, and indeed essential, as regards the Merchant Shipping Legislation of the various parts of the Empire, it was difficult to reconcile the application, in their present form, of certain provisions of the principal Statute relating to Merchant Shipping, viz., the Merchant Shipping Act of 1894, more particularly clauses 735 and 736, with the constitutional status of the several members of the British Commonwealth of Nations.

In this case also we felt that although, in the evolution of the British Empire, certain inequalities had been allowed to remain as regards various questions of maritime affairs, it was essential in dealing with these inequalities to consider the practical aspects of the matter. The

difficulties in the way of introducing any immediate alterations in the Merchant Shipping Code (which dealt, amongst other matters, with the registration of British ships all over the world) were fully appreciated and it was felt to be necessary, in any review of the position, to take into account such matters of general concern as the qualifications for registry as a British ship, the status of British ships in war, the work done by His Majesty's Consuls in the interest of British shipping and seamen, and the question of Naval Courts at foreign ports to deal with crimes and offences on British ships abroad.

We came finally to the conclusion that, following a precedent which had been found useful on previous occasions, the general question of Merchant Shipping Legislation had best be remitted to a special Sub-Conference, which could meet most appropriately at the same time as the Expert Committee, to which reference is made above. We thought that this special Sub-Conference should be invited to advise on the following general lines:–

> "To consider and report on the principles which should govern, in the general interest, the practice and legislation relating to merchant shipping in the various parts of the Empire, having regard to the change in constitutional status and general relations which has occurred since existing laws were enacted."

We took note that the representatives of India particularly desired that India, in view of the importance of her shipping interests, should be given an opportunity of being represented at the proposed Sub-Conference. We felt that the full representation of India on an equal footing with Great Britain and the Dominions would not only be welcomed, but could very properly be given, due regard being had to the special constitutional position of India as explained in Section III of this Report.

APPENDIX D.

Letter from the Prime Minister of Ontario

to the Prime Minister of Canada

September 10, 1930,

With Accompanying Memorandum

on

The Amendment of the Canadian Constitution

and the Report of the 1929

Conference on Operation of Dominion Legislation.

OFFICE OF THE PRIME MIINISTER
AND PRESIDENT OF THE COUNCI1
ONTARIO

TORONTO
September 10,
1930

My dear Mr. Prime Minister:

You will recall that in some discussions we have had with reference to the Report of the Imperial Conference, and, in particular, the recommendations made in the report of 1929, I have endeavoured to make clear to you the attitude of the Province of Ontario.

The Conference appears to have ignored the fact that the Confederation of the Provinces of Canada was brought about by the action of the provinces. Our Constitution is really the crystallization into law by an Imperial Statute of an agreement made by the provinces after full consultation and. Discussion. The Province of Ontario holds strongly to the □view that this agreement should not be altered without the consent of the parties to it.

On behalf of this Province, I desire to protest most vigorously against any steps being taken by the Dominion Government, or the Imperial Conference, to deal with the Provincial Treaty until the matter has been submitted to the provinces and they have had ample time to give the subject proper consideration.

To pursue the course indicated by the report of 1929 will not only greatly disturb the present harmonious operation of our Constitution, but I fear may seriously disrupt the

whole structure of our Confederation.

Ontario is genuinely alarmed about the situation and I earnestly urge upon you, representing the Dominion, and through you upon the Imperial Conference, that this whole matter be left in abeyance until it can be dealt with in a proper manner and to the satisfaction of the parties to the original compact.

I am enclosing you herewith a memorandum which embodies in a brief form the story of Confederation, together with the views of a number of public men who wore leaders in the movement; the interpretation of the Courts upon the status of the provinces; and the recent trend of the Dominion authorities upon the question.

With this story as a back-ground, I am sure that a perusal of the reports of the last two conferences will convince you that the provinces have ample ground for serious alarm.

Yours very truly,

(sgd.) G. H. FERGUSON.

The Right Honourable R. B. Bennett,
Prime Minister of Canada,
Parliament Buildings,
Ottawa, Ontario.

Encl.

MEMORANDUM RE AMENDMENTS TO THE BRITISH NORTH AMERICA ACT 1867
ACCOMPANYING LETTER WRITTEN BY PRIME MINISTER OF ONTARIO
TO THE PRIME MINISTER OF CANADA DATED SEPTEMBER 10TH, 1930,
PROTESTING AGAINST ANY CHANGES IN THE CONSTITUTION OF CANADA
WITHOUT PREVIOUS CONSULTATION AND CONSENT OF THE VARIOUS
PROVINCES OF THE DOMINION.

It is respectfully submitted that the right of the various provinces comprising the Dominion of Canada to an equal voice concerning any contemplated changes in the law or the convention of the constitution of the Dominion rests upon fundamental considerations and historic facts which are as binding to-day as ever they were upon all the parties to Confederation. The Constitution of Canada is partly written and partly unwritten. As a distinguished writer has pointed out, the unwritten constitution includes all the great landmarks of British and Canadian History as well as generally recognized conventions and usages. The written constitution is found in the Imperial legislation, known as the British North America Acts passed at various dates.

The British North America Act, 1867, is usually referred to as the compact of Confederation. This expression has its sanction in the fact that the Quebec resolutions, of which the Act is a transcript, were in the nature of a treaty between the Provinces which originated the Dominion At the time of Confederation these provinces had before them two proposals for union of a widely different nature. There were those who considered that the most advantageous arrangement would be a legislative union under which the law-making power would be centralized in one Parliament following the British precedent up to that time. There were others who believed that the best arrangement would be a federal union, with a Federal Parliament charged with authority over matters of a general nature but preserving to the provinces legislative control over local objects and the guardianship of provincial

interests. It was realized at an early stage of the proceedings that a legislative union was not acceptable. The plan as discussed at the Charlottetown conference and was deliberately set aside by all parties to the negotiations. Therefore, when the delegates of the provinces met in Quebec in October, 1864, it was to draft a plan for a federal union of the provinces of British North America. The equality of all the provinces, irrespective of population and dimensions was recognized by the fact that each province was allowed one vote, Ontario and Quebec having one vote each, though they were at the time united under the Union Act.

At the outset of the proceedings Hon. John A. Macdonald declared himself in favour of a powerful central government. He added, however:- "Great caution is necessary. The people of every section must feel that they are protected, and by no overstraining of central authority should such guarantees be over-ridden. Our constitution must be based on an Act of the Imperial Parliament, and any question as to over-riding sectional matters determined by "Is it legal or not?". The judicial tribunals of Great Britain would settle any such difficulties should they occur." (Pope's Confederation Documents, page 55).

On this same subject, Sir E. P. Tache, Chairman of the Conference, said, "The Majority of the people believe if their rights and privileges are left to the local Legislatures they will be safe in the liberties guaranteed to them and ratified by solemn treaties even if we do not come to an understanding on the subject of confederation. (From Notes on the Conference by A. A. Macdonald, of Prince Edward Island, in the Canadian Archives.)

The first declaration of the conference was in the following terms: "The best interests and present and future prosperity of British North America will be promoted by a Federal Union, provided

such union can be effected on principles just to the provinces." Additional emphasis was given to this declaration in the second resolution by the statement that the proposed Federation would provide a system "best adapted, under existing circumstances, to protect the diversified interests of the several provinces and secure efficiency, harmony and permanency in the working of the union."

Thus in the foreground of all the proceedings in the formative stage of the union is the plain intimation that the Dominion was being created at the instance of the provinces, and that all undertakings made by them on their own behalf would be strictly observed.

On this basis the resolutions of the Quebec conference setting out in detail the plan of confederation were drafted, considered and adopted, and eventually presented to the Canadian Parliament for ratification.

The Canadian Parliament was asked in 1865 to give formal ratification to the resolutions 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 or alteration." And Hon. George E. Cartier affirmed of the proposal "It is the same as any other treaty entered into under the British system." Some doubts were expressed as to whether changes might be made in the draft Act by the Imperial Parliament. On this subject, Hon. George E. Cartier gave a very explicit and earnest assurance to Parliament. He said: "I have already declared in my own name and on behalf of the Government, that the delegates who go to England will accept from the Imperial

Government no Act but one based on the resolutions adopted by this House, and they Will not bring back any other. I have pledged my word of honour and that of the Government to that effect." (Confederation Debates, P.1022).

It is not without significance that the British North America Act, as arranged for by the treaty and as enacted by the Imperial Parliament, did not confer upon the Federal Parliament any power to amend the constitution of Canada, although each province was given the power to amend its constitution, except as regards the office of Lieutenant-Governor. History has vindicated this precaution. If the power to amend the constitution had been vested in the Dominion, it is probable that the long and hitherto successful controversy as to the constitutional rights of the provinces would have had a very different outcome, because at any stage of the struggle the Dominion Parliament would have had power to enact legislation setting aside the pretensions of the provinces. The wide measure of power wisely reserved to the provinces at Confederation and their relations to the federal authority have been clearly set forth by the Judicial Committee of the Privy Council on several occasions of which the following are notable:

Lord Watson in Liquidators of the Maritim Bank of Canada vs. Receiver General of New Brunswick, 1892, A.C. 441-2, referring to the British North America Act, 1867, said:-

"The object of the Act was neither to weld the provinces into one nor to subordinate provincial governments to be central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the provinces all powers, executive and legislative, and all public property and revenues which had previously belonged to the provinces, so that the Dominion Government should

be vested with such of these powers, property and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. But, insofar as regards these matters which, by s. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion and as supreme as it was before the passing of the Act.

In Hodge v The Queen, 9 A.C. 131-2, Sir Barnes Peacock, delivering the opinion of the Board said:

"When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in Section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by Section 92 as the Imperial Purloinment in the plenitude of its power possessed and could bestow. Within these limits of subject and area, the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion."

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. 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 Act occupied the same relation towards the Federal authority as the original parties to the compact of Confederation.

It is not contended that the British North America Act is unalterable or that it is complete or perfect in its terms. After twenty years' experience the representatives of five of the Provinces, being all of the original Provinces, and the Province of Manitoba, held the first inter-provincial conference in the city of Quebec. That conference of which Sir Oliver Mowat, one of the Fathers of Confederation, was Chairman, declared that in many respects what was the common understanding and intention had not been expressed in the B.N.A. Act and that important provisions in the Act are obscure as to their true intent and meaning. Accordingly the conference drafted some seventeen amendments as a basis on which the Act should be amended subject to the approval of the several Provincial Legislatures". The conference did not produce any practical results beyond the precedent which it established.

On five occasions the Imperial Parliament has passed measures to amend the British North America Act and on only one of those, when the federal subsidy was adjusted, have the Provinces been consulted. Altogether during the first sixty years of Confederation thirty-three Acts have been passed by the Parliament of the United Kingdom, modifying the original Act.

The result of these precedents has been to undermine the constitutional right of the Provinces to be consulted regarding amendments to the British North America Act. Recently it has been contended that the Dominion Government has the authority to decide whether or not the Provinces should be consulted. In 1924, when the Federal Parliament was asked to approve of an amendment to the British North America Act regarding extra-territorial legislation, the Government of Ontario formally protested against the proceeding until the amendment had been submitted to the various Provinces. The Minister of Justice denied the Provinces any voice in the matter on the

ground that it did not in any way concern them; although it was urged upon him by the Attorney-General of Ontario in a letter dated July 10th, 1924, that "In the opinion of the law officers of the Province of Ontario, an amendment to the British North America Act in the words of your resolution might be interpreted as forming a basis of encroachment upon matters of legislation unquestionably given to the Province by the British North America Act."

On this occasion the Attorney-General of Ontario also ventured the following protest on the broader issue involved:- "I do not need to remind you that the British North America Act was a product of representatives from all the provinces as such, and not as representatives to a Dominion Parliament. The Government of this Province is of opinion that the Dominion Parliament should not act in the matter of obtaining constitutional changes without the sanction of the Provinces to its proposals to the Imperial Government."

These official representations were followed in a few days by a public declaration by the Prime Minister of Ontario in an address delivered at Prescott on July 12th. The Toronto Globe of July 14th reports the Hon. Mr. Ferguson as follows: "I was surprised and disturbed the other day by the introduction in the House of Commons of a resolution by Hon. Ernest Lapointe. That move is not only inadvisable, but if the Dominion Parliament were given this right it would be a breach of faith with the Provinces. Confederation was the result of certain compromises between the Provinces entering into it. It amounts to an agreement, and my view is that there should not be any amendment 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. The Province of Ontario feels so strongly about this that we have already made a protest to the Federal Government against making any

such move without conference with and the co-operation of the various Provinces. All our personal and civil rights are now in the keeping and protection of the Provinces, and any amendment that would extend the authority of the Dominion might easily be a serious menace to our national unity."

Other incidents in the recent constitutional developments of Canada invite particular attention. In the speech of His Excellency the Governor-General to the Canadian Parliament on the occasion of the opening of the Session of 1925, the following announcement was made: "You will be asked to sanction the calling of a conference between the Federal and Provincial Governments to consider the advisability of amending the British North America Act with respect to the constitution and powers of the Senate, and in other important particulars."

The adoption of the address in reply to the Speech from the Throne carried with it the approval of both Houses of Parliament of this proposal.

At a later stage in the Session a motion was offered in the House of Commons declaring in general terms for a reform of the Senate, and the House approved of the proposal of the Government to submit the question to a conference between the Dominion and the various Provinces.

The larger question of the method of amending the British North America Act was discussed on a motion by W. F. Maclean in the same Session. This motion proposed that the Imperial Parliament be requested to enact a measure giving the Parliament of Canada power to amend the constitution except as regards rights guaranteed to minorities.

During the debate it was pointed out by the Prime Minister (Rt. Hon. Mr. King) "That this House, I believe, is practically unanimously of the view that if an amendment of this kind is to be sought, due regard should be had to the view that a compact was made at the time of Confederation, and that an amendment of the important

that such an amendment certainly would have, ought only to be proposed after there had been a conference and agreement between the Dominion and the Provinces."

Yet the distinguished speaker did not consider it inconsistent with this view to maintain that Canada now has the right to amend it constitution. Pointing out in the past whenever the Canadian Parliament had approached the British Parliament in a regular way, requesting any amendment to the constitution, it was carried out according to the wishes of Canada, Mr. King concluded: "That being the case, this country has the full constitutional right to amend its constitution."

The assertion of such a constitutional right based upon precedents the propriety of which is open to grave question may be regarded as illustrating the danger of allowing such precedents to go unchallenged.

The "procedure in amending the British North America Act" was discussed at the Dominion Provincial Conference of 1927. Hon. Ernest Lapointe, the Minister of Justice, submitted that the Dominion should ask for legislation from the Imperial Parliament to authorize Canada to amend her Constitution. He proposed that in the event of ordinary amendments being contemplated the Provincial Legislatures should. be consulted and a majority of the Provinces obtained; while in the event of vital and fundamental amendments being sought involving such questions as Provincial rights, the rights of minorities, or rights generally affecting race, language and creed, the unanimous consent of the Provinces should be required.

This proposition, emanating as it did from the Federal Government is strikingly different from the practice which has hitherto prevailed, as the Minister of Justice pointed out that with respect to constitutional amendments not affecting Provincial autonomy or individual rights "it had not been regarded as necessary to consult the Provinces."

The offer to recognize the right of the Provinces to be consulted with respect to all amendments was, however, coupled with the proposal that full power to amend the constitution be vested in the Dominion Parliament. As to this, the official precis of the conference reports that "The Conference divided sharply on the proposal, a portion of the members being entirely opposed to any change in the present procedure." The opponents of the change represented, further more, that there was no widespread demand for it, and that if Canada had the right of herself to amend her constitution all sorts of demands for changes would be made.

It is clear that the suggested change not only failed to secure unanimous approval, but that it was strongly opposed from different quarters and for various reasons. In spite of this, however, the Imperial Conference of 1929 proceeded to consider the procedure for amending the Canadian constitution and presented the following general finding:

"Canada alone among the Dominions has at present no power to amend its Constitution Act without legislation by the Parliament of the United Kingdom. The fact that no specific provision was made for effecting desired amendments wholly by Canadian agencies is easily understood, apart from the special conditions existing in Canada at that time, when it is recalled that the British North America Act, 1867, was the first Dominion federation measure and was passed over sixty years ago, at an early stage of development. It was pointed out that the question of alternative methods of amendment was a matter for future consideration by the appropriate Canadian authorities and that it was desirable therefore to make it clear that the proposed Act of the Parliament of the United Kingdom could effect no change in this respect. It was also pointed out that for a similar reason an express declaration was desirable that nothing in the Act should authorize the Parliament of Canada to make laws on any matter at present within the authority of the Provinces, not being a matter within the authority of the Dominion."

The avoidance in this statement of reference to the compact of Confederation, and to the attitude of the Provinces as revealed in the Dominion-Provincial Conference of 1927, is significant. Still more remarkable is the suggestion that the absence of power to amend the constitution was attributable to special conditions existing in Canada at that time of confederation and also to the fact that B.N.A. Act was passed at an early stage of our development. These observations indicate a lack of appreciation of the fundamental principles and facts involved. Though the conference of 1929 conceded that the question of alternative methods of amendment of the constitution was a matter for future consideration by the appropriate Canadian authorities, it recommended the enactment by the Imperial Parliament of a measure declaring the powers of a Parliament of a Dominion which has an important bearing on our constitution. This enactment was couched in the following terms:-

> "No law and no provision of any law hereafter made by the Parliament of the Dominion shall be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of Parliament or to any order, rule or regulation made thereunder, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation insofar as the same in part of the law of the Dominion."

In order that this clause might not effect any change in the procedure for amending the constitution of Canada, Australia and New Zealand, the following proviso was added:

1. Nothing in this Act shall be deemed to confer any power to repeal or alter the constitution Acts of the Dominion of Canada, the Commonwealth of Australia and the Dominion of New Zealand, otherwise than in accordance with the law and constitutional usage and practice heretofore existing.

Whatever may be the intention of the framers of this proposed legislation, it is open to the construction that it permits amendments to the constitution when obtained "in accordance with the law and constitutional usage and practice heretofore existing."

It is obvious that the proposed enactment is not wholly applicable to Canada because amendments to the constitution are not governed by law. As to the warrant for the constitutional usage and practice that have prevailed there are wide differences of opinion. While this subject is under discussion it would not be opportune to give Imperial statutory authority to incidents which have been allowed through inadvertence or otherwise to find a footing in our constitutional procedure. Such en enactment would confirm and give statutory authority to a constitutional situation which has been and is likely to be a source of friction and weakness to the Dominion of Canada. It is, therefore, earnestly represented that no restatement 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.

APPENDIX E.

Additional memorandum of
the Government of Ontario

From the provincial point of view the proposals of the report of the conference, (so called,) on the operation of Dominion legislation of 1929 is open to rather serious objections. Some of these objections are now indicated.

1. Paragraph 43 contains a recommendation, the purpose of which is a little obscure. It is probably intended to mean that, in so far as a Dominion has power to enforce its own laws, they are to take effect without regard to locality. Read literally, the declaration proposed would apply to all laws enacted by a Dominion Parliament, without regard to the limitations as to subject matter affecting the legislative authority of such a Parliament in respect of laws having only a domestic operation. If this be the effect of it, it would endow the Dominion Parliament with unrestricted power to pass laws relating to civil rights in matters not falling within any of the enumerated heads of section 91, provided the operation of such laws was extraterritorial only. It would enable the Dominion, for example, to deal with the jurisdiction of the Judicial Committee to review the judgment of provincial courts (assuming the Colonial Laws Validity Act out of the way) by removing the objection (which prevailed in Nadan v The King) that the powers of a Canadian legislature "are confined to action to be taken in the Dominion." The subject of the administration of justice is given to the provinces by section 92, and at least there is much to be said for the view that, except in relation to judgments in matters coming under the heads of Criminal Law and Criminal Procedure, and, possibly. to other matters falling under the enumerated heads of section 91, it should be left to the provinces to say, whether and to what extent the judgments of

their courts should be final - subject, of course, to the Dominion jurisdiction under section 101. (Court of Appeal for the Dominion).

And generally, it might fairly be argued that if the enactments of any Canadian legislature on the subject, say of Civil Rights, are to have exterritorial operation, the authority to enact them ought to be vested in the legislatures which have domestic control over such matters. The declarations recommended in paragraph 66 do not affect what has been said about the recommendation in 43, because the declaration proposed in sub-section 2 of paragraph 66 applies only to matters within the authority of a province "at present", which, having regard to the doctrine in Nadan v. The King, does not include the power to pass laws having exterritorial effect.

2. Paragraph 53 of the report deals with the subject of the Colonial Laws Validity Act. The recommendation deals with the subject only in its relation to statutes of a Parliament of a Dominion. The report itself recognizes, in paragraph 71, the interest of the provinces in this subject and states that it must be a matter for the proper authorities in Canada to consider whether the principle of the recommendation shall be applied to provincial legislation. It seems pretty obvious that the plenary authority of a Canadian Province must be very seriously curtailed in the absence of authority (in the province) to legislate fully in relation to subjects within its jurisdiction, notwithstanding the existence of some Imperial statute governing some matter included in one of such subjects.

But the recommendation of section 53 as it stands, would, if accepted, have the effect of vesting in the

Parliament of Canada the power to repeal or amend any Imperial Act, Order, Rule or Regulation which is "part of the law" of any one of the provinces of Canada even though the subject matter of it should be exclusively provincial under Sec. 92. The phrase "part of the law of the Dominion" seems clearly to include all such cases. Consider again, in this connection, the matter of the right of His Majesty to review the decisions of Canadian Courts of Justice. This recommendation, if adopted, (added to that in paragraph 43) would confer upon the Dominion Parliament (as already observed) unqualified authority to repeal the Judicial Committee Acts, 1833 and 1834, or to amend them. The Dominion Parliament might, that is to say, under this recommendation, deal generally with the power of review by the Judicial Committee, or abrogate or restrict it in its application to the judgments of the courts of one or more of the provinces; and this without regard to any question, whether (but for the view that has been taken of the effect of the Colonial Laws Validity Acts,) the matter of the finality of provincial judgments falls (subject to Dominion jurisdiction, under section 101) within the subject of administration of justice. Such recommendation should be allowed to take effect in the form of Imperial legislation only after consultation with the provinces. It should be observed that the declaration of subsection 2 paragraph 66 of the report would afford the provinces no protection as against the declaration recommended in paragraph 53 for the reason that under the doctrine of Nadan v The King the authority "at present" belonging to the provinces does not include power to repeal or amend an Imperial Statute etc to which the Colonial Laws Validity Act applies.

3. The recommendation in paragraph 55 seems to imply, (when read with paragraph 54,) that at the request of the Dominion, as distinct from the provinces, the Imperial Parliament may properly legislate for Canada. This is not stated explicitly. The proposed declaration is in the negative and excludes the Dominion from the operation of any Imperial Act, the enactment of which has not been requested by the Dominion. But by paragraph 54, it appears that this is intended as a statement of an established conventional usage. Assuredly, there would be not a little risk that such a declaration would be interpreted as implying an affirmative statement as to the circumstances in which the Imperial Parliament might properly act.

However this may be, it has been considered necessary that the Dominion should be protected by a declaration such as that proposed. There would appear to be just as much reason for the protection of the provinces by a similar declaration in relation to matters within provincial jurisdiction.

It may be said of course, that the Dominion would naturally consult the provinces with regard to any such matters. But under the British North America Act the guarantees for the provinces are not conventional or constitutional in the English sense but legal; and to place the provinces in a position in which they should hold their powers by leave of the Dominion would be a departure from the spirit of the British North America Act.

4. Paragraph 66 deserves a word of comment. The meaning of sub-section 1 of that paragraph is not quite clear. The legal power to repeal or alter the Acts referred to is now vested in the Imperial Parliament and would continue

to exist after the enactment of the proposed legislation, subject to the declaration of paragraph 55, which conditions the exercise of the power upon the consent of the Dominion alone. Sub-section 1 would probably strengthen the inference which might be drawn from the declaration in paragraph 55 that with the consent of the Dominion Parliament, the Imperial Parliament may properly pass any legislation affecting Canada, constitutional or other. In truth there have been very few amendments of the British North America Act, and these were amendments in which the provinces as a whole could have no interest. It cannot be affirmed that there is any existing constitutional usage or practice with regard to such amendments. The report seems to proceed upon the assumption that in the matter of legislative action by the Imperial Parliament affecting Canada, the only Canadian authority which is entitled to be heard or considered is the Dominion Parliament; and it seems to afford evidence of an intention to bring about indirectly and almost surreptitiously the embodiment of that view in the form of a binding rule or practice.

Indeed, throughout the report there is a disregard of the role of the provincial legislatures and executives under our existing polity. Broadly speaking, as has been said many times, the provinces exercise a legislative authority which is co-ordinate with, and not in any sense subordinate to, that of the Dominion. And although the Lieutenant-Governors are appointed by the Dominion, once appointed, the Lieutenant-Governor becomes the direct representative of His Majesty as Supreme Head of the province. The framers of the report have treated these legislatures and executives with scant courtesy.

APPENDIX F.

PRECEDENTS RELATING TO THE PROVINCES AND CONSTITUTIONAL AMENDMENTS

Summary

A P P E N D I X F.

PRECEDENTS.

(a) Confederation Debates

During the debates that preceded the passing of the British North America Act, though the subject of the proposed confederation was exhaustively discussed and though a considerable part of this discussion was devoted to the nature of the union and the relation between the Federal and Provincial Governments, yet the specific question of the amendment of the constitution was scarcely mentioned. The relation of the provinces to such amendment was definitely not considered. It might be argued, of course, that the emphasis laid by certain speakers on the contractual nature of the proposed agreement indicates that it was understood that the parties to that contract would have to be consulted before its terms were changed. On the other hand it should be pointed out that any examination, however cursory, of the Confederation debates must Provo that the statesmen at that time were more concerned with strengthening the federal power than safeguarding provincial rights. As Sir John A. Macdonald stated, "We strengthen the Central Parliament and make the confederation one people and one government, instead of five peoples and five governments with merely a point of authority connecting us to a limited and insufficient extent."

There was, however, no definite mention, let alone a discussion, of the problem of the relation of the provinces to the amendment of the constitution. This difficulty seems to have escaped the attention of the Fathers, as did indeed the

whole question of amendment. Thus is not really surprising in view of the conditions at that time and the more pressing problems that had to be settled.

(b) The Nova Scotia Act, 1869

The first instance of a change in the agreement reached in 1867 is not technically an amendment to the constitution as it was brought about by a Dominion statute. It may not, therefore, be strictly relevant to the subject under discussion, but as it embodies important principles relating to the subject it seems advisable to give it some consideration.

The occasion referred to is the granting of better financial terms to Nova Scotia pursuant to a resolution of 1869. When this resolution was moved Mr. Edward Blake objected to the procedure proposed, in the following resolution:-

> That the British North America Act, 1867, has fixed and settled the mutual liabilities of Canada and of each province in respect of the public debt, and the amount payable by Canada to each province for the support of its government and legislature;
> That the said Act does not empower the parliament of Canada to change the basis of union thereby fixed and settled;
> That the unauthorized assumption of such power by the Parliament of Canada would imperil the interests of the several provinces, weaken the bond of union, and shake the stability of the constitution;
> That the proposed resolutions on the subject of Nova Scotia involve the assumption of such power;
> And that therefore this House while ready to give its best consideration to any proposals to procure in a constitutional way any needed changes in the basis of union, deems it inexpedient to go into committee on said proposed resolutions.

His views were not accepted at the time, though, as Sir Wilfrid Laurier later asserted, "there was statesmanship in them". There is also a strong case for their legal soundness and for the argument that such assistance as that granted to Nova Scotia, and later on numerous occasions to other provinces,

was substantially a constitutional amendment and should have been proceeded with on that basis.

This is, then, a Dominion Act essentially constitutional in nature which alters provincial arrangements agreed upon two years before. But there is no record of the provinces complaining because they were not all consulted when one received an increased subsidy.

The fact is that the provinces, though never hesitant about questioning the propriety of Dominion action when such action seemed to infringe upon rights under the "confederation contract", did not seem to be equally solicitous about such rights when the Dominion action meant a gift or a subsidy. The fear of losing a constitutional right was neutralised by the hope of receiving practical advantages.

If Quebec had demanded that she be consulted in 1869, Nova Scotia might reciprocate in the future when Quebec was being given a subsidy. That might be inconvenient. It was not a case with the provinces of "timeo Danaos et dona ferentes."

In this connection two lines from the debate of 1907 on the proposal to increase provincial subsidies are amusing.

Mr. Fielding. "The provinces are independent····"

Mr. Bergeron. "Not when they come for money."

In 1869 the objection made by Mr. Blake to the procedure followed, was supported by Mr. Holton. He, however, went further and for the first time specifically brought up the question of "provincial consultation before constitutional change", by an amendment, which read 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."

This amendment was not accepted.

(c) Rupert's Land Act, 1668

This statute was enacted pursuant to the Confederation compact and did not require any request from Canada.

(d) The British North America Act, 1871

This was an amendment for the purpose of settling doubts as to the competence of the Canadian Parliament to pass the Manitoba Act by enacting that, among other things,

> The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.

This would seem to be a change which was of very real, if of general interest to all the provinces. This new power granted to the Dominion, if and when used, must materially alter the balance established in 1867 between province and province, and province and Dominion. Here, if ever, it might be argued the provinces would be consulted before any action was taken, for this is no minor and unimportant, but a substantial and considerable, change.

The amendment was thoroughly discussed in the Dominion House and the procedure by which it was brought about strongly attacked. The attack, however, was not on the grounds that the provinces were no consulted - no mention was made of their position in the debate - but because the amendment was made by Westminster at the request of the Canadian Government without

parliamentary sanction.

It is true, however, that the question of the possibility of a requirement of provincial as well as Dominion action was raised at this time, as in 1869. But it was done in a series of resolutions moved by the Honourable Mr. Mills merely for purposes of record. They were not accepted, not even debated. 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 parties 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."

(e) Parliament of Canada Act, 1875

This Act, which amended the British North America Act, was designed to give validity and legislative power in a matter in which the Parliament of Canada had legislated and in which the statute had been disallowed at Westminster; also to confirm an existing ultra vires Canadian statute. In spite of the discussion of 1871, it was enacted pursuant to a request from the Government only as it was considered that Parliament by legislating had by implication approved of the request for necessary power. A resolution questioning the propriety of the enactment of the statute without the previous assent of the Dominion Parliament was withdrawn.

The provinces were neither mentioned nor consulted in connection with the matter. It concerned the privileges and

immunities of the Dominion House of Commons and they were not considered to be interested.

(f) British North America Act, 1886

This statute, which was enacted pursuant to an address of the Dominion Parliament, enabled that Parliament to provide representation in the Senate and House of Commons for the territories.

This is a matter which the provinces might claim was of interest to them but they were not consulted as to the proposed change. The question comes up again in the amendment of 1915 where it is discussed in more detail.

(g) Canada (Ontario Boundary) Act, 1889

This statute, enacted pursuant to an address of the Canadian Parliament, declared the westerly, northerly, and easterly boundaries of the Province of Ontario.

It appears that the Governments of both Ontario and Quebec were consulted beforehand; that Ontario agreed but Quebec raised objections. The other provinces were not consulted, though they might have claimed that anything that altered the boundaries of a province, thereby altering the balance established between the provinces in 1867, concerned them all.

(h) British Columbia (Loan) Act, 1892

This is not an amendment, technically, to the Act of 1867 and was not passed at the request of the Government or Parliament of the Dominion. It is merely a British Act authorizing the British Treasury to make an advance to the British Columbia Government and providing for securities in respect to the advance.

It is interesting and indeed significant in that it shows that one province at least did not grant the Dominion the right of consultation in circumstances where it now claims such a right when the Dominion proposes to act.

The provincial position re consultation is based largely on the idea of a "contract" between province and dominion. On that ground, the Dominion would have the right to be consulted when, as in this case, a province breaks the financial terms of that contract. Furthermore, Section 4 of the Act technically appears to trench on Dominion rights. It provides that any provincial legislation impairing the validity or the security of the Loan shall be void unless made with though previous consent of the Treasury. This measure clearly infringes a fundamental matter in that it virtually supersedes Dominion reservation and disallowance, in so far as bills relating to this Loan are concerned. It substitutes supervision by the Treasury for supervision by the Dominion Government. In this case the usual situation is reversed. Here there is legislation passed in London for a province and at the request of that province. Though the Dominion's interests are involved, the Dominion was not consulted and the whole matter was treated as the concern of the Parliaments of British Columbia and the United Kingdom only.

(i) Canadian Speaker (Appointment of Deputy) Act, 1895

This statute was considered of such minor importance that it was enacted pursuant to a simple request of the Government of Canada. The provinces wore not consulted as the matter obviously had nothing to do with them.

(j) British North America Act, 1907

This statute, enacted after a request of the Dominion Parliament, increased the scale of subsidies paid to the Provincial Government under the original terms of the Act of 1867. In this case the address of the Canadian Parliament was based upon a series of resolutions passed by a Provincial Conference in 1887, and reaffirmed with some changes by similar conferences in 1902 and 1907. Sir Wilfrid Laurier, referring to the Conference of 1907, spoke as follows in the House during that year:-

> "At that conference all the provinces were represented including the new provinces of Alberta and Saskatchewan. After debating the matter with the conference, we came to the conclusion that it would be advisable to recommend parliament to act not on the resolutions of 1902, but on those of 1887, as affording a basis for the permanent settlement of a question which had been open since the first days of confederation. Such is the history of this particular disposition of our constitution. Such is the situation as it now exists, and such is the prayer now made unanimously by all the provinces."

Sir George Ross, in his book entitled "The Senate of Canada", has affirmed that in 1907 the Parliament of Canada formally admitted the doctrine of consent:-

> "The Subsidy Act of 1907", he declares "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 Provincos 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".

The above statements, however, are themselves misleading. They do not indicate that British Columbia did not accept the arrangement of 1907, going so far as to send her Premier to London to protest against the. passing of the Bill at Westminster. Her position is set out in the following excerpts from Mr. McBride's report to the British Columbia Government, a report which throws an interesting

light on the relation of the provinces to the amendment of the British North America Act.

> With reference to the various discussions I had on the subject of my mission, I found that the feeling at first prevailed that as the Dominion Parliament and the Governments of the Provinces of Canada, with the single exception of that of British Columbia, had asked for the Bill in the form proposed, the Imperial Parliament was bound to respect their wishes and give them effect. Otherwise it would appear as an interference in the domestic affairs of Canada, a course to which His Majesty's Government or the members of the Imperial Parliament would be wholly averse. I had some difficulty in dissipating this view of the case, but I was, as you will observe by the correspondence, quite successful. I endeavoured to make it clear that, while in soma respects Confederation might be regarded as a pact among Provincos as well as with the Dominion, the Terms of Union, in each instance, represented a separate and distinct treaty with Canada entered into without reference to the terms granted to other Provincos, and that, therefore, it followed that in changing the Terms of Union we had to deal with the Dominion alone. To say that British Columbia was bound to accept the terms of subsidy recommended by the other Provincos would be to coerce that Province and to seriously invade provincial rights. I asked that the Province be permitted to settle its claims for increased allowance with the Dominion Government in its own way; and pointed out that, so far from such a course being one of interference in the domestic affairs of Canada, it left the Imperial authorities in a position of perfect neutrality; whereas passing the Act in the form proposed, the Imperial Government was taking sides with the Dominion of Canada against the Province in their dispute and confirming an Act to which the people of British Columbia were utterly opposed. I am happy to say that this view ultimately prevailed and the Bill in its modified form with the words "final and unalterable" eliminated, was introduced and passed the House of Commons without opposition.
> Tho,:,.

The British Columbia position, then, that provincial unanimity was required before such an amendment could be passed was not accepted by the Colonial Office, though in deference to the provinces' representations the words "final and unalterable" applying to the revised scale were omitted from the Bill.

The letter to Mr. McBride embodying the decision of the British Government in this matter is interesting and might be quoted here:-

DOWNING STREET,

June 5th, 1907.

"Sir,--I am directed by the Earl of Elgin to inform you that his Lordship has given the most careful consideration to the documents which you presented to him and to the views advanced against the proposed amendment of the British North America Act fixing the scale of payments to be made by the Dominion of Canada to the several Provincos.

"2. Lord Elgin fully appreciates the force of the opinion expressed that the British North America Act was the result of terms of union agreed upon by the contracting Provincos and that its terms cannot be altered merely at the wish of the Dominion Government.

"3. But, in this case, besides the unanimous approval of the Dominion Parliament, in which British Columbia is of course represented, to the proposed amendment of section 118 of the British North America Act, his Lordship is bound to take into account the fact, that at the Conference of 1906 the representatives of all the other Provinces of Canada have concurred in fixing at $100,000 annually for ten years the additional allowance payable to British Columbia, while rejecting the claim of Manitoba, Alberta and Saskatchewan for additional grants, and that they also rejected the proposal that the claim of any province should be referred to arbitration.

"4. His Lordship feels, therefore, that in view of the unanimity of the Dominion Government and. of all the Provincial Governments, save that of British Columbia, he would not in the interests of Canada be justified in any effort to override the decision of the Dominion Parliament or to compel the reference of the question to arbitration.

"5. I am to add that no mention will be made in the Imperial Act of the settlement being 'final and unalterable,' such terms being obviously inappropriate in a legislative enactment.

"6. His Lordship also desires it to be understood that he expressed no opinion upon the sufficiency or otherwise of the quantum of extra contribution awarded to British Columbia.

"I am, Sir,
"Your obedient servant,

(sgd) "H. Bertram Cox"

From this interesting episode and the debates concerning it certain conclusions might be drawn.

(1) The Dominion will not act in any amendment to the British North America Act which definitely concerns the provinces, without consulting those provinces.

(2) The consent of all the provinces so consulted is not required. This is shown also by the amendment of 1889.

(3) The contract idea is weakened.. If confederation is a contract between provinces and Dominion, then, as British Columbia contended, it is also a contract between each individual province and the Dominion. But Ottawa and London, by passing the amendment over the objections of British Columbia, specifically deny that doctrine. If the contract theory is sound the Dominions and eight Provinces would have no more right to alter its terms with respect to the ninth province, than that province would have to alter its terms with respect to the Dominion and the other eight Provinces.

(4) The British Parliament will not refuse to pass an amendment to the British North America Act when requested by the Dominion Parliament merely on the ground that one province considers its interests adversely affected thereby.

(5) The British Parliament, however, may alter the terms of such an amendment in deference to the representations of a single province.

(k) British North America Act, 1915

This statute, enacted pursuant to an address of the Parliament of Canada, increases the number of senators and alters the senatorial divisions.

It is based on resolutions that were drawn up in the first place by a Committee representing both parties in the Commons. Representatives of the Provincial Government of Prince Edward Island, including the Prime Minister and Attorney General, appeared before this Committee in order to have that clause of the resolution changed which particularly affected their Province. Their representations for such change were not accepted. There is no evidence as to consultation with the other provinces, though the Legislative Assembly of the Province of British Columbia did apply in 1914 to the Federal Government to increase the number of senators from that Province, which increase was embodied in the Act. If the extreme Provincial contention is accepted, all the provinces should certainly have been consulted, as the change affected them all by affecting their representation in the Canadian Parliament. Certainly New Brunswick and Nova Scotia were definitely interested, and their representatives in the Federal House emphasized such interest.

The resolutions were first brought up in 1914 but were allowed to drop owing to an unacceptable amendment made by the Senate. They were revived in 1915 and in the debate on them objection was raised to the whole procedure by Mr.). Turgeon (Gloucester) who spoke in the House as follows:-

> ... I am perfectly willing to accept this proposal as a very moderate one, but, in order to secure its acceptance by the Imperial Parliament, would it not be better first to submit it to an interprovincial conference; for it is scarcely two years ago that a conference of the provinces denied this right to the maritime provinces. I believe that if the Prime Minister referred this proposal to the judgment of the Provincial Legislatures and secured their assent or, at least, their favourable comment, the proposal would be sanctioned by the Imperial Parliament. I join with my hon. friand from Prince Edward Island in suggesting that this proposal be separated from the other, in order that it may be submitted to the Provincial Legislatures for their assent...

The address, however, was accepted without any further reference to the provinces.

The above incident would seem to show that, while the Dominion Government is perfectly willing to hear an interested province in respect to a proposed amendment to the Constitution, it will not hesitate to pass the address over the objections of that province.

The precedent here is somewhat similar to those of 1907 and 1889.

(l) British North America Act, 1916

This was a statute, enacted pursuant to an address, to extend the life of Parliament for one year. The provinces were not consulted, or even referred to, in the debate in the Canadian Parliament.

(m) Resolutions of 1920 and 1924

They were designed to amend the British North America Act in order to insure that Dominion Legislation should have extra-territorial effect.

The first resolution was sent in the form of an address to Westminster where certain changes were suggested that proved unacceptable to the Dominion and the matter was allowed to drop.

The second resolution, though accepted by the Canadian Parliament, was apparently allowed to lapse. No address was sent to His Majesty.

There was, then no amendment made to the Constitution, but in the debates on the resolutions several points arose of interest in regard to this question of provincial consultation.

The 1924 resolution which was submitted by Mr. Lapointe, and the wording of which had been agreed upon both by Ottawa and Westminster, read:-

> An enactment of the parliament of Canada, if expressed to operate extra-territorially, shall have and be deemed to have had, that operation, if and in so far as it is a law for or ancillary to the peace, order and good government of Canada.

Some objection was voiced in the Canadian House to this resolution by Dr. Baxtor (St. John) on the grounds that it gave the Dominion powers which might conceivably interfere with provincial rights as established by the British North America Act and that therefore the original parties to that compact of 1867 should be consulted before any request, such as that above, was made to the British Government. The point raised by Dr. Baxter would appear to be a very narrowly theoretical one and is embodied in the following excerpt from his remarks in the House of Commons at the time:-

> The moment there is legislation in the words of the proposed enactment I think it is absolutely apparent that we could not interfere with any provincial legislation within Canada, but we could take a provincial subject of legislation and deal with it extra-territorially. Now, the provinces, it will be said, have no extra-territorial affect to their legislation. That would be the answer that would come to anyone's mind. That is true in a qualified sense but I think it is pretty well established that the provinces have the right to incorporate companies and that while they can only create a company within their territorial ambit yet they may endow it with powers which are capable of being exercised beyond its territorial jurisdiction. That is the result of a series of Privy Council cases decided within the last tan years. That is only one subject that I think of, and the minister will see at once the action that might be taken by some federal parliament in dealing, for instance, with company legislation by the exercise of the extra-territorial power.

The position of the Dominion was that the amendment required did not in any way, shape or form invade the jurisdiction or the rights of the provinces as established by our Constitution and that therefore the Provinces need not be consulted.

This question of provincial rights was also raised at this time by the Attorney General of Ontario in a letter to the Minister of Justice, July 10, 1924. The Ontario Government felt that an amendment to the British North America Act in the words of the above resolution might be interpreted as forming a basis of encroachment upon matters of legislation unquestionably given to the province by the above Act.

Therefore the Ontario Government suggested that, in order to avoid any such construction being placed upon this amendment, the words "otherwise within its competence" be inserted immediately after the word "Canada" in the first line.

The Attorney General concluded his letter as follows:-

> ... I do not need to remind you that the British North America Act was a product of representatives from all the provinces as such, and not as representatives to a Dominion Parliament. The government of this province is of opinion that the Dominion parliament should not act in the matter of obtaining constitutional changes, without the sanction of the provinces to its proposals to the Imperial parliament.

The Ontario suggestion was not accepted by the government, but when the resolution was before the Senate the point was again raised and it was decided to remove all possible objection from provincial sources by including the three words "otherwise intra vires" after the words "Parliament of Canada", as was done in the resolution of 1920. Senator Dandurand, in making this suggestion in the Senate, expressed himself as follows:-

> ...This in my judgment adds nothing to the resolution; but it will satisfy our friends in the provinces, and will allay their fears, and prevent any discussion arising at university seats or elsewhere, without in any way impairing the effects of the resolution.

The amended resolution was passed by the Senate, referred back to the House and accepted there.

In submitting the amended resolution to the House, the Minister of Justice, Mr. Lapointe, made one statement which seems to be at variance with others which he had made previously and was to make subsequently on the matter. It does, however, embody an interesting and, it may be held, sound doctrine. He declared that in respect to the proposed amendment the rights of the provinces were not infringed by non-consultation because the provinces "were in no way interested and in no way concerned in our demand of the Imperial Parliament to recognize that our federal legislation has extra-territorial affect." In other words, Mr. Lapointe admits on this occasion that the only amendment which would require provincial consultation is one in which the Dominion feels the provinces have an interest.

Mr. Meighen, in the debate on Mr. Woodsworth's resolution, 1924, that the Dominion be given power over its constitution, gave utterance to the same view as Mr. Lapointe's, both in regard to the principle of consultation and its application to the question of extra-territoriality.

He said: "if this Parliament is of the view that, in respect of extra-territorial jurisdiction we should have added powers, there would be, I am convinced, no difficulty in procuring them. Be it remembered that, in the present position we occupy, whenever a request is made for added powers, if it concerns only the Dominion as a whole and does not at all affect provinces or minorities, the address of this Parliament is sufficient."

(n) Constitutional Resolutions of 1924, 1925 and 1927

The first and third of these Resolutions were moved by Mr. Woodsworth (Winnipeg); the second by Mr. W. F. Maclean (York).

They were all designed to give the "governing powers" of Canada constituent powers; "governing powers", Mr. Woodsworth admitted, being both Dominion and Provincial Parliaments. There was an exhaustive debate on each of these resolutions, with varying opinions expressed and much confused and loose reasoning. All speakers did lip service to the contract idea, but there was a great divergence of view as to the logical implications of that idea. Some speakers held that it meant that all the provinces must consent to every change in our constitution written or unwritten; others that it only meant that every province must consent to every change in the British North America Act. Thero were some who felt that it meant provincial consent merely to those changes which affected a province, while one member held that only the consent of the original parties to the contract, four provinces, was required. Some emphasized the danger of giving the Federal Parliament constitutional power; others the danger of giving the provinces a veto over every constitutional change, however unimportant. Many asserted that a contract was sacred. A few suggested that the realities of political development should not be forgotten.

There was, however, general acceptance of the view that, in any amendment which affected the rights of the provinces as established by law, the consent of those provinces must be obtained before any address could be sent to Westminster. There was also general agreement that the rights of minorities must be rigidly respected, even at the sacrifice of ease and plasticity of constitutional change.

(o) Dominion Provincial Conference, 1927

The question of the right of the provinces to be consulted in constitutional change arose during this Conference in the

discussion of Senate Reform and Procedure of Amending the British North America Act.

The Dominion Minister of Justice, M. Lapointe, considered that amendments to the constitution could be divided into two classes; those which might have the affect of increasing the power of the Dominion Parliament or Government at the expense of the provinces. and those not affecting provincial autonomy or individual rights. In the past, he stated, it had not been regarded as necessary to consult the provinces in connection with proposed amendments of the latter class. He added, somewhat inaccurately, that only once, in 1907, had the provinces been consulted, thereby implying that the other amendments did not concern them. In the event of vital and fundamental amendments being sought involving such questions as provincial rights, the rights of minorities, or rights generally affecting race, language and creed, Mr. Lapointe admitted that the unanimous consent of the provinces should be obtained.

Mr. Taschereau, for Quebec, emphasized the fact that the British North America Act was the result of a contract between the constituent provinces and that therefore all the provinces should agree to any changes to that Act.

Manitoba and British Columbia agreed that in matters of detail there was no necessity for the Dominion to consult the Provincial Legislatures, but Saskatchewan thought that all amendments should be submitted to the provinces.

(p) British North America Act, 1930, for the Return of Their Natural Resources to British Columbia, Alberta, Saskatchewan, and Manitoba.

This statute was passed pursuant to an address, and after the Dominion had reached an agreement with the provinces directly affected.

In the debate on the Resolution the question was raised as to whether all the provinces should not have been consulted.

It was argued by the member for St. John, Dr. Maclaren, that such should have been the case. "I contend", he said, "that amendments to the British North America Act, especially those of the importance of the one we have before us, should be submitted not in an informal but in a very official way to all the provinces in order to obtain their concurrence therein, or to give them an opportunity of expressing objections. The procedure now suggested is contrary to both confederation and the British North America Act. It is not following out the spirit in which that act was framed; it is not giving to the provinces the opportunity of expressing objection or acquiescence. I do not see how it can be considered that the simple passage by this House of this petition represents the will of the provinces. Therefore, Mr. Speaker, I enter my protest that a petition of this character should be forwarded without consulting all the provinces of the Dominion with a view of obtaining their assent thereto or their objections."

Mr. Bourassa did not see how the Canadian Parliament could agree to renounce the right to make an agreement with various provinces upon matters concerning those provinces, and suggested that if another province objected it should take its objection to Westminster.

The Prime Minister, then Mr. King, felt the Government's course to be correct. "I do not think it necessary", he said, "to have any formal submission of this address to the other provinces before this Parliament takes action upon it. It relates exclusively to the western provinces, and should the other provinces have any matters to be discussed growing out of

what we are now doing, those matters will receive every consideration."

(g) Debate in the House of Commons, May, 1930, on the Report of the O. D. L. Conference, 1929

The question of provincial consultation was brought forward here, though the Report did not necessitate any change in the British North America Act.

Mr. Cahan objected to the omission of the Federal Government to consult the provinces before going to London and to their acceptance of the recommendation on extra-territoriality in that it disregarded the terms of the Resolution of 1924 on this matter and ignored the question of provincial rights by giving the Dominion unrestricted powers. "I submit", Mr. Cahan said, "that this Government, this House and Parliament have no moral or constitutional right to change the constitution of Canada in vital respects without calling together the representatives of the provinces and obtaining their opinion in regard to the proposed changes." And again, with respect to the proposed repeal of the Colonial Laws Validity Act:

> Mr. Cahan - ... The provinces should have been consulted in respect of the proposed increase of federal powers and the proposed extension of the federal legislative jurisdiction, which are embodied in this report, and in which are involved the power of this parliament to repeal imperial enactments.
>
> Mr. Ilsley - It does not involve power to repeal the British North America Act.
>
> Mr. Cahan - Possibly it does not; I have discussed that point and have given my opinion with regard to it. I think that is very much in doubt, but it does expressly vest in the Dominion parliaments the right to repeal a large number of acts of the parliament of the United Kingdom which form the very basis of civil rights in each and every province of Canada, and I defy anyone successfully to contradict that statement.

To this it was replied that under the recommendations of the Roport, the Dominion receives no power as far as the provinces are concerned which is not given to it by section 91 of the British

North America Act, which Act is in no way affected by the legislation recommended pursuant to the Report.

The then Leader of the Opposition. Mr Bennett, felt, however, that the provinces should be consulted. "I would ask", he said, "that these amendments should not be made without full and fair consideration by the provinces, by all those who are concerned in the far-reaching consequences of a change in the system, a change that strikes at the very foundation of that unity which makes possible the strength of this country as a part of the greatest maritime power in the world."

. . . .

APPENDIX G.

This Appendix contains drafts of saving clauses.

Part 1. Alternative saving clauses drafted upon the assumption that the provisions of the Statute are not extended to the Provinces.

7. Nothing in this Act shall be deemed to confer upon the Parliament of Canada any power to repeal, amend, or alter any of the Acts of the Parliament of the United Kingdom or of the Parliament of Canada, set forth in the schedule to this Act, or any of the orders, rules, or regulations made thereunder.

7. Nothing in this Act shall be deemed to confer upon the Parliament of Canada any power to repeal, amend, or alter the British North America Acts 1867 to 1930, the Parliament of Canada Act 1875, the Canada (Ontario Boundary Act 1889, or any orders, rules or regulations made thereunder.

8. Nothing in this Act shall be deemed. to confer upon the Parliament of Canada the power to make laws in relation to any subject matter that would be within the competence of the provinces of Canada, not being laws that would otherwise be within the competence of the Parliament of Canada, if the laws were not laws having extra-territorial operation or laws repugnant to the provisions of any existing or future act of Parliament of the United Kingdom, or to any order, rule, or regulation made under any such Act, or laws repealing or amending any such act, order, rule, or regulation, in so far as the same is part of the law of the Dominion.

8. The powers conferred by this Act, upon the Parliament of Canada, shall be deemed to be confined to laws that would otherwise be within the competence of the Parliament of Canada, if the laws were not laws having extra-territorial operation or laws repugnant to the provisions of any existing or future act of Parliament of the United Kingdom, or to any order, rule, or regulation made under any such Act, or laws repealing or amending any such Act, order, rule, or regulation.

9. The ----- recital and Section 4 of this Act in their application to the Dominion of Canada shall be deemed to require the request and consent of the Dominion in relation to Acts of Parliament of the United Kingdom in matters within the competence of the Parliament of Canada and of the provinces in matters within the competence of legislatures of the provinces.

9. The ----- recital and Section 4 of this Act in their application to the Dominion of Canada shall be deemed to require the request and consent of the Dominion in relation to Acts of Parliament of the United Kingdom in matters within the competence of the Parliament of Canada and of the provinces in matters within the competence of legislatures of the provinces.

Part 2. Alternative Saving clauses· drafted upon the assumption that the provisions of Sections 2 and 4 of the Statute of Westminster are to be extended to the Provinces.

Alternative based upon extension to the Provinces on adoption by the provincial legislature.	Alternative based upon immediate extension to the Province.
7. (1) The provisions of Section 2 of this Act shall extend to laws made by any of the provinces of Canada that adopt this Section and to the powers of the legislatures of such provinces.	7. (1) The provisions of Section 2 of this Act shall extend to laws made by any of the provinces of Canada and to the powers of the legislatures of the provinces.
(2) Nothing in this Act shall be deemed to confer upon the Parliament of Canada, or upon the legislatures of the provinces any power to repeal, amend or alter the British North America Acts 1867 to 1930, the Parliament of Canada Act 1875, the Canada (Ontario Boundary) Act 1889, or any orders, rules or regulations made thereunder.	(2) Nothing in this Act shall be deemed to confer upon the Parliament of Canada, or upon the legislatures of the provinces any power to repeal, amend or alter the British North America Acts 1867 to 1930, the Parliament of Canada Act 1875, the Canada (Ontario Boundary) Act 1889, or any orders, rules or regulations made thereunder.
(3) The powers conferred by this Act, upon the Parliament of Canada, or upon the legislatures of such provinces, shall be deemed to be confined to laws that would otherwise be within the competence of the Parliament of Cannda or of the legislatures of such provinces, if the laws were not laws having extra-territorial operation or laws repugnant to the provisions of any future Act of Parliament of the United ·Kingdom, or to any order, rule, or regulation made under any such Act; or laws repealing or amending any such Act, order, rule, or regulation.	(3) The powers conferred by this Act, upon the Parliament of Canada, or upon the legislatures of the provinces, shall be deemed to be confined to laws that would otherwise be within the competence of the Parliament of Cannda or of the legislatures of the provinces, if the laws were not laws having extra-territorial operation or laws repugnant to the provisions of any future Act of Parliament of the United ·Kingdom, or to any order, rule, or regulation made under any such Act; or laws repealing or amending any such Act, order, rule, or regulation.

(4) Any law of a province of Canada adopting the provisions of Section 2 of this Act may provide that the adoption shall have effect either as from the commencement of this Act or as from such later date as may be specified by the adopting Act.

(5) The ----- recital and Section 4 of this Act in their application to the Dominion of Canada shall be deemed to require the request and consent of the Dominion in relation to Acts of Parliament of the United Kingdom in matters within the competence of the Parliament of Canada and of the provinces in matters within the competence of legislatures of the provinces.

(4) The ----- recital and Section 4 of this Act in their application to the Dominion of Canada shall be deemed to require the request and consent of the Dominion in relation to Acts of Parliament of the United Kingdom in matters within the competence of the Parliament of Canada and of the provinces in matters within the competence of legislatures of the provinces.

SAVING CLAUSES ADOPTED FOR AUSTRALIA AND NEW ZEALAND

Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the laws existing before the commencement of this Act.

Nothing in this Act shall be deemed to authorise the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.

SAVING CLAUSE FOR PROVINCIAL RIGHTS AND POWERS SUBMITTED AS AN ALTERNATIVE FOR SECTION 8 ABOVE BASED ON THE CLAUSE DRAFTED IN THE O.D.L. REPORT 1929

Nothing in this Act shall be deemed to authorise the Parliament of Canada to make laws on any matter within the authority of the Provinces of Canada, not being a matter within the authority of the Parliament or Government the Dominion of Canada.