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# ACT OR PACT ANOTHER LOOK AT CONFEDERATION

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## I

There are probably few Canadian historians, and even fewer political scientists, who have not, at some time or another, taken a second glance at the British North America Act of 1867; few of them, too, who have not lectured to their students upon the facts underlying the federal union of which the Act is the legislative expression, and commented upon the nature and essence of Canadian federalism. It is because of the generality of interest in the British North America Act that I have yielded to the temptation, not to present to you, as my presidential address, a detailed paper upon some narrow aspect of the historical researches which have absorbed my time during the last two or three years, but to offer for your consideration a few general comments upon a subject which has both a wide and a topical interest at the present time. My approach is, of course, that of the historian. I am concerned, not with what our constitution is or ought to be — that I leave to my scientifically political brethren — but with how it became what it is.

To my mind the principal factor — I do not suggest it as the sole factor but as one of the most important — in determining the course of Canadian constitutional development, has been the existence, within Canada, of two competing ethnic, cultural groups. The Earl of Durham, in his famous *Report*, chose to refer to them as “two nations warring in the bosom of a single state”.<sup>1</sup> Were he writing in today’s idiom, he might have preferred to substitute the word “co-existing” for “warring”. Certainly “warring” is too strong and too inaccurate a word to describe what has been simply the political struggle on the part of the English-speaking population for supremacy, and on the part of the French-speaking population for survival. This struggle has dominated the whole story of Canadian politics. It probably accounts for the prepossession of Canadian historians with political and constitutional history. The struggle is one which still continues, and the issues are still the same; supremacy as against survival, or to use the contemporary terms, centralization as against provincial autonomy.

\* Although this paper was read partly in English and partly in French, it is printed here entirely in English.

<sup>1</sup> Sir Reginald Coupland, *The Durham Report, an abridged version with an introduction and notes* (Oxford, 1945), p. 15. For an unabridged edition see that published by Methuen & Co. Limited, London, 1902; or Sir Charles Lucas, *Lord Durham’s Report on the Affairs of British North America*, Oxford, 1912, vol. II.

And yet, perhaps, if the word "warring" is unsuitable as a general description of Anglo-French relations within the bosom of this country, Canada, at times it has not been without some aptness; for the bitterness and misunderstandings which have frequently accompanied our relations have cut, on occasions, close to the bone. That civil strife in Canada has never degenerated into civil war has been due, in part at least, to the recognition by both peoples of the necessity of some *modus vivendi* and the recognition by each of the rights of the other. The recognition and definition of these rights is the basis of the entente, understanding, pact, compact, call it what you will, which is the foundation of our political unity. Without such an entente there would have been, and would be no Canada as we know it today. Much has been written, both in the French and English languages about this pact; some of it narrow and legalistic; more of it unhistorical; much of it purely polemical. If we attempt to look upon this pact or entente as a legal contract, freely entered into by two parties and intended by them to be legally enforceable in a court of law, our vision will be so limited as to be distorted; for a pact or compact is not a contract in the legal sense. It is a gentleman's agreement, an understanding based upon mutual consent, with a moral rather than a juridical sanction. The Anglo-French understanding which alone has made government possible within the boundaries of the larger Canada has become sanctified by time and continued acceptance, until today it is looked upon by many as a convention of our constitution. It is my immediate purpose, this evening, to trace for you the origin and growth of this convention, and to discuss some of its implications in the development of our constitution.

## II

It was the cession of Canada to Great Britain in 1763, that initiated the problem of which our bi-racial pact in Canada became the ultimate solution. It brought within an English, Protestant empire, a French, Catholic colony. How the one could successfully incorporate the other was the question which confronted British statesmen following the Treaty of Paris. Previous experience with Acadia offered little in the way of guidance; the expulsion of the inhabitants of the new colony was neither a humane nor a politically satisfying solution. The easy answer seemed to be assimilation; the King's new subjects might even be induced to abandon their heretical ways before they were swamped by British immigration to Canada. Assimilation was the object and essence of the Proclamation issued on October 7, 1763, over the sign manual of George III.<sup>2</sup> It was also the object of the long commission and letter of instructions issued the first British Governor of Canada, James Murray.<sup>3</sup> But

<sup>2</sup> A. Shortt and A. G. Doughty, *Documents Relating to the Constitutional History of Canada, 1759-1791* (Ottawa, 1918) I, 163 ff.

<sup>3</sup> *Ibid.*, 173 ff, 181 ff.

assimilation, particularly a half-hearted assimilation, proved unsuccessful. Its one effect was to stiffen the heart and mind of the French-speaking population, and to give strength and cohesion to its determination to survive as a cultural and as a political group. Ten years of crimonations and recriminations between the King's old and new subjects resulted in a victory for the latter. In 1774, the Quebec Act<sup>4</sup> definitely removed the anti-French, anti-Catholic bias of earlier policy. It cleared the way for French Canadians to accept government appointments; it guaranteed to the French those civil laws and religious privileges which, to this time, had either been denied, neglected, or merely tolerated. In brief, the Quebec Act placed the French Canadians, the King's new subjects, on a basis of political and religious equality with the English and Anglo-Americans, the so-called old subjects. The Act did not father the French fact in Canada; what it did do was to provide it with a juridical foundation. An English-Canadian historian, Professor A. L. Burt, has written "the Quebec Act embodied a new sovereign principle of the British Empire: the liberty of non-English peoples to be themselves";<sup>5</sup> a French Canadian, Etienne Parent, has called the Act, "a true social contract between us and England . . . the consecration of our natural right".<sup>6</sup> The Quebec Act, it might be noted in passing, was never repealed by the British Parliament; some of its provisions have been nullified by subsequent legislation, but it still stands, honoured by French Canadians as the Magna Charta of their national rights and privileges.

From the standpoint of the French Canadians, the guarantees afforded by the Quebec Act had come none too soon. Within several shot-riddled years, the whole demographic premise upon which the British Government had made the concessions embodied in the Act, that of a continuing predominance of the French-speaking population, had been altered by the coming of the United Empire Loyalists. From one-twentieth of the total population, the English-speaking inhabitants of the old province of Quebec increased, in a few months, to one-seventh. Co-existence, or perhaps I should say co-habitation, became more difficult than ever. The constitution of 1774 became an anachronism. It brought neither understanding nor prosperity to the province. It was, in truth, satisfactory neither to the French nor to the English-speaking population; both of whom could unite their voices upon two demands only, political separation from each other and a greater share in the management of their own local affairs. The Loyalists had been accustomed to and demanded elective, representative institutions on the British parliamentary model; many French Canadians, imbued with the pro-English ideas of Voltaire and the Encyclo-

<sup>4</sup> *Ibid.*, 570 ff; 14 Geo. III, c. 83.

<sup>5</sup> A. L. Burt, *The Old Province of Quebec* (Toronto and Minneapolis, 1933) p. 200.

<sup>6</sup> Quoted in L. Groulx, *Histoire du Canada français depuis la découverte* (Montreal, 1952) III, 75.

paedists, or perhaps only with those of Pierre du Calvet, likewise demanded the political freedom denied them by the constitution of 1774. Some there were in London who wondered what the effect of the changes would be: some who argued that the establishment of a "separate and local" legislature "under any form or model which can be adopted for the purpose" would lead inevitably "to habitual Notions of a distinct interest", and "to the existence of a virtual independence" and then, "naturally to prepare the way for an entire separation, whenever other circumstances shall bring it forward".<sup>7</sup> But the British government believed that it knew what the situation required: the old province of Quebec should be divided into two new, separate and distinct provinces on an ethnic basis, with the Ottawa river as the line of division; and each province should be provided with a new constitution generally assimilated to that of Great Britain, including an elective assembly as well as appointed legislative and executive councils. On June 19, 1791, Canada's second constitution by British parliamentary enactment received the royal assent and became law.<sup>8</sup>

Few British politicians, or Anglo-Canadians for that matter, fully appreciated what impact the Constitutional Act would have upon the problem of reconciling the French and English-speaking inhabitants of the two Canadas. Grenville seems to have had some vague ideas when he wrote to Lord Dorchester, sending him a draft copy of the new constitution, that "a considerable degree of attention is due to the prejudices and habits of the French Inhabitants who compose so large a proportion of the community, and every degree of caution should be used to continue to them the enjoyment of those civil and religious rights which were secured to them by the Capitulation of the Province, or have since been granted by the liberal and enlightened spirit of the British Government".<sup>9</sup> So too did William Pitt, when he answered Fox's objections to dividing the old province, that any effort to unite the two peoples within a single political entity governed by a single legislature, would lead only to "a perpetual scene of factious discord".<sup>10</sup> But Grenville, when he wrote about the rights of the French Canadians, was thinking only of how the British Government might distract their attention away from what Frenchmen, and French women too, were doing and saying in the streets of the

<sup>7</sup> Shortt and Doughty, *Documents*, II, p. 983; Discussion of Petitions and Counter Petitions re Change of Government in Canada, enclosed in Grenville to Dorchester, Oct. 20, 1789.

<sup>8</sup> *Ibid.*, II, p. 1031 ff.

<sup>9</sup> *Ibid.*, II, p. 988; Grenville to Dorchester, Oct. 20, 1789.

<sup>10</sup> *The Annual Register or a View of the History, Politics and Literature for the Year 1791* (London, 1795), p. 111. Charles James Fox had criticized the proposed division of the old province on the grounds that "the French and English Canadians would be completely distinguished from each other. But he considered such a measure big with mischief; and maintained that the wisest policy would be to form the two descriptions of people into one body, and endeavour to annihilate all national distinctions". (*Annual Register*, 1791, 110).

Paris of the Revolution. And William Pitt beclouded his argument with Fox by talking airy and unrealistically about how the French Canadians, novices in the art of parliamentary government, would be so impressed with the success attending the working of the new English-type constitution in the neighbouring province, that they would strive to enjoy its fullest benefits by uniting with English-speaking Canada. Race, religion, laws and traditions would, one after the other, be discarded as Lower Canadians sought the Holy Grail of political success and economic prosperity. The very fact of splitting Quebec into two provinces, Upper and Lower Canada, of which Fox (and the English-speaking minority in Lower Canada) had complained, would, in the end, be the means of bringing about ultimate unity. Edmund Burke spoke in a similar vein. It was a strange kind of reasoning. Granting the sincerity of their convictions, one may only conclude that they were ignorant of Canada, that they had misread its history, and that they misunderstood the whole concept of nationality.<sup>11</sup>

Far from encouraging the French to abandon their own consciousness of identity, the effect of the Constitutional Act of 1791 was to give renewed vigour to the idea of French Canadian separateness. It provided the French fact with a geographical as well as a political buttress. If the Quebec Act of 1774 guaranteed the survival of the French Canadians, the Constitutional Act of 1791 guaranteed the survival of French Canada. The Act of 1791 was the logical, if not the inevitable sequel to the Act of 1774. It was, in the words of Canon Groulx, "a renewed consecration of the French fact in Canada."<sup>12</sup>

This is not the place to discuss the internal defects of the Constitution of 1791. They are familiar to every student of our history. And yet I wonder, sometimes, whether there has not been too much inclination on the part of Canadians to treat the Act of 1791 as a kind of constitutional whipping boy; whether in trying to be political scientists, we cease to be historians. Do we not sometimes fall into the error of confusing the regime with its institutions? Do we not, all too frequently, look upon the history of Canada in isolation, forgetting that these years are, at the same time, the years of Conservative ascendancy in Great Britain, the years of the anti-liberal restrictive legislation inspired by the excesses of the French Revolution? Is it wholly without significance, when considering the constitutional developments of Canada between 1791 and 1840, to recall that only three weeks before the passage of the Act the same British government which sponsored it issued the first of the decrees against sedition; and that in 1830, only seven years before blood was shed on the banks of the Richelieu, and near Gallow's Hill, the Duke of Well-

<sup>11</sup> W. P. M. Kennedy, *The Constitution of Canada, 1534-1937, an introduction to its development, law and custom* (Oxford, 1938), p. 86.

<sup>12</sup> Groulx, *Histoire du Canada français*, III, 133.

ton had cried that he would never bring forward any measure of parliamentary reform, and that "as long as he held any station in the Government of the country, he should always feel it his duty to resist any such measure when proposed by others".<sup>13</sup> I do not mean to imply that the Constitution of 1791 was without fault. I simply suggest that, taking conditions as they were, there could be no answer during these years to the dilemma of how to reconcile imperial centralization and colonial autonomy. There could be no accommodation between a reactionary, metropolitan Toryism and a revolutionary provincial democracy, within the rigid framework of the constitution. Under other circumstances the Constitution of 1791 might have worked moderately well; under the circumstances such as they were, it collapsed in fire and bloodshed.

The immediate sequel to the rebellions in Upper and Lower Canada was the suppression of the ill-fated constitution and the appointment of a special commissioner, the Earl of Durham, to inquire into the political situation and make recommendations regarding "the Form and Administration of the Civil Government" to be granted to the two Canadas. In his Report, dated January 31, 1839, Durham exposed the weakness of the previous regime, and recommended the concession of effective self-government to the Canadians. But if Durham favoured self-government (or what is known in our history as responsible government) it was only for a government dominated by English-speaking people. Essentially an Imperialist and a centralizer, Durham was the effective advocate of the supremacy of things English. He toyed with the idea of a federal union of the British North American provinces, but cast it aside when he realized that it would inevitably give the French Canadians of Lower Canada control over their own local affairs; instead, he recommended that Upper and Lower Canada be joined together in an indissoluble union with one government and one legislature. "I believe", he wrote, "that tranquillity can only be restored by subjecting the Province to the vigorous rule of an English majority; and that the only efficacious government would be that formed by a legislative union".<sup>14</sup> It was the old policy of assimilation all over again.

In 1840 the British Parliament performed the marriage ceremony. The two Canadian provinces, dissimilar in numbers, as well as in origin, faith, language and tradition, were united by the Act of Union.<sup>15</sup> The new constitution did not, however, follow strictly to the letter the recommendations which Durham had penned the year before. The union was not a thorough-going, punitive, Anglicizing union such as the Earl had contemplated. The demographic situation would not permit it. The fact

<sup>13</sup> Quoted in J. A. R. Marriott, *England Since Waterloo* (London, 1936), p. 88.

<sup>14</sup> Coupland, *The Durham Report*, p. 161.

<sup>15</sup> W. P. M. Kennedy, *Documents of the Canadian Constitution, 1759-1915* (Toronto, 1918), pp. 536-550; 3 & 4 Victoria, c. 35.

was that the English-speaking populations of the two provinces combined did not enjoy what Durham mistakenly believed to be the case, "a clear English majority".<sup>16</sup> A legislative union pure and simple, instead of overwhelming the French Canadians, would have had the opposite result; it would have given them unquestioned control of the legislature of the united province, and this state of affairs, even though it might endure only a few years, was regarded as intolerable. The only way to defeat the French majority would be to crib, cabin and confine it to Lower Canada; and this could best be done by preserving as distinct, political entities the two provinces which it had been proposed to obliterate and by giving each of them equal representation in the new legislature. Since the English-speaking representatives from Upper Canada could always hope to find a few compatriots among the representatives of Lower Canada, together they would outnumber the delegates of French origin. The new constitution was thus, in effect, a vague, unintended, and undefined form of federalism, with the provinces of Upper and Lower Canada continuing in existence under the names of Canada West and Canada East, despite their union in one political entity called the Province of Canada. *Nil facit error nominis, cum de corpore constat*, the name does not affect the substance so long as its identity is manifest, is a maxim familiar to every lawyer.

But British policy in the end defeated itself. By denying French Canadians the temporary advantage of representation according to population, the British authorities not only strengthened French determination to hold securely every privilege gained in 1774 and 1791, they unwittingly provided them with the very means of holding these privileges, when as expected, the numbers of the French-speaking population fell below those of their English-speaking rivals. Equality of representation for the two provinces which were the political and geographical expressions of the two racial groups, was a sword which cut both ways.

The federal nature of the new constitution became more and more apparent as the years passed. Voting and acting as a political unit, the French Canadians were too large and too significant a *bloc* to be ignored. Government by one province alone, Canada West, was impossible; the collaboration of Canada East was not only desirable, it was a political necessity. And this collaboration could only be obtained upon French Canada's own terms. Sir Charles Bagot recognized this fact when, in 1842, he finally took Louis LaFontaine, the French Canadian leader, into his ministry along with his English-speaking colleague, Robert Baldwin. Sir Charles wrote to an infuriated Colonial Secretary in London:

I knew... that I could not hope to succeed with the French Canadians as a Race... and not as a mere party in the House, unless I could secure the

<sup>16</sup> Coupland, *The Durham Report*, p. 161.



services of men who possessed their confidence, and who would bring to my assistance, not only their own talents, and some votes in the House of Assembly, but the goodwill and attachment of their race, and that I could not obtain such services unless I was willing to place the individuals in a position in my Council which would prevent them from feeling themselves a hopeless minority against a suspicious and adverse majority.<sup>17</sup>

Bagot congratulated himself that he had "satisfied" the French Canadians that the Union was "capable of being administered for their happiness and advantage, and have consequently disarmed their opposition to it". He had, however, done a great deal more. He had established the first of the dual ministries with their premiers and their attorneys-general from both Canada East and Canada West; he had pointed the way to the development of the principle of the double-majority; he had given official sanction to the federal idea implicit in the Act of 1840. The two old provinces of Upper and Lower Canada might have ceased to exist in law, but they did exist in fact and in practice, and continued to exist throughout the whole of the Union period. There was real truth in John A. Macdonald's statement in 1865, "although we now sit in one Parliament, supposed constitutionally to represent the people without regard to sections or localities, yet we know, as a matter of fact, that since the union in 1841, we have had a Federal Union".<sup>18</sup> There was a wide gap between intention and reality. In spite of Bagot's precedent, the original idea behind the Union died hard. Metcalfe tried to win French support by appealing not to a race but simply to individuals of French origin. He failed. In the end Lord Elgin gave the *coup de grâce* to Durham's policy of denationalization and assimilation. He reverted to Sir Charles Bagot's policy, and in so doing restored the principle that an Anglo-French entente or understanding was the *sine qua non* of the successful operation of the Canadian political system. It is a principle which has lasted to the present day. Not only did Lord Elgin recall Baldwin and LaFontaine to his ministry, he also set the seal of approval upon the bi-national character of the regime by obtaining from the British authorities the abrogation of Article XLI of the Act of Union declaring English to be the one language of official record. And then, at the opening of the legislative session in January 1849, he read the speech from the throne both in French and in English.<sup>19</sup>

The Union did not, however, enjoy a long or peaceful life. Fundamentally the explanation for its early demise is to be found in the internal contradiction upon which it was based, for it was neither frankly federal nor unequivocally unitary. The union, indeed, managed to survive its twenty-five harried years only by applying the principles of disunion.

<sup>17</sup> K. N. Bell and W. P. Morrell, *Select Documents on British Colonial Policy, 1830-1860* (Oxford, 1928), pp. 62-71: Bagot to Stanley, Sep. 26, 1842.

<sup>18</sup> *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces* (Quebec, 1865), p. 30.

<sup>19</sup> Kennedy, *The Constitution of Canada*, p. 257.

The heavy hammer blows which finally brought about its end were those wielded by the French-baiting, Catholic-hating Clear Grits of Canada West and their francophobe journalist leader, George Brown. *No Popery* and *No French Domination* were the constant Grit refrain; to which was added, once Canada West had passed the neighbouring province in population, the more positive and more politically dangerous slogan, *Rep. by Pop.* Representation by population was a denial of the political understanding upon which LaFontaine and Canada East had agreed to collaborate with Baldwin and Canada West in the administration of the United Province. It meant the end of the principle of equality, the collapse of the federal concept, the exposure of Lower Canada to the rule of a hostile, alien majority, the overthrow of the entente which had alone made government possible. As the new slogan gained adherents so too did the idea that the premise upon which Anglo-French collaboration was based, namely the mutual acceptance of equality of status, was a vital and fundamental principle of the constitution; that it constituted, if not an unbreakable pact, at least a gentleman's agreement between the two racial groups which went to make up the population. In 1849 LaFontaine had replied to Papineau:

It is on the basis of the principle of looking upon the Act of Union as a confederation of two provinces . . . that I hereby emphatically declare that never I will consent to one of the sections of the Province having, in this House, a greater number of members than the other, whatever the numbers of its population may be.<sup>20</sup>

Hincks, Cartier and Macdonald all spoke in a similar vein. In April 1861, during one of the periodic debates on representation by population, Macdonald uttered what may possibly be the first statement in English of what we today speak of as the Compact theory of Confederation, when he said "The Union was a distinct bargain, a solemn contract".<sup>21</sup> This was no slip of the tongue. In 1865, during the Confederation debates, he again referred to "The Treaty of Union" between Lower and Upper Canadians.<sup>22</sup>

### III

There is no need for me to discuss the various factors leading to Confederation — the threat of American imperialism, the fear of the westward expansion of the United States, the necessity for improved railway communications, the political impasse in Canada; all of this is familiar

<sup>20</sup> Quoted in Groulx, *Histoire du Canada français*, IV, p. 21.

<sup>21</sup> *The Leader*, Toronto, April 30, 1861. *La Minerve* (April 25, 1861) praised Macdonald for his stand against *Rep by Pop*: "Soyons francs! est-ce qu'il ne faut pas un grand courage, une grande force d'âme et beaucoup d'honnêteté pour agir ainsi? Mettez donc cette conduite ferme et sincère en parallèle avec la lâche conduite d'un de ses adversaires, et dites où est l'homme d'état, où est l'allié naturel des Bas Canadiens?"

<sup>22</sup> *Confederation Debates*, p. 28.

ground to generations of Canadian students. Nor is it necessary for me to chronicle the erratic course of the ambulatory conference of 1864 or to follow its members, bottle by bottle, as they travelled through the Maritimes and Canada, dispensing good will and self-congratulatory speeches to all who were prepared to listen to them. However, I do wish to direct your attention, for a moment, to the fundamental problem which faced the delegates who met at Charlottetown and at Quebec, that of reconciling the conflicting interests of the two racial groups and of the conflicting principles of centralization and provincial autonomy. Broadly speaking — and there are, of course, exceptions to this general statement — the English-speaking representatives, pragmatists, suspicious of ideas and generalizations, preoccupied with economic and political interests and secure in their every increasing majority over the French Canadians, were disposed to favour a strong central government, if not actually a legislative union; the French Canadians, empiricists, uneasy, apprehensive, and deeply concerned with the survival of their culture, were by religion and by history in favour of a constitution which would, at the very least, secure them such guarantees as they had already extracted from the British government during the hundred years which had gone before. No French Canadian, intent upon preserving his national identity or bettering his political future could ever agree to a legislative union. Only federalism would permit the two, distinct, and separate, cultures to co-exist side by side within the bosom of a single state. Federalism, not a half-way, hesitant, ill-defined, semi-unitary federalism like that which had evolved out of the Act of Union, but an honest, whole-hearted, clearly-stated, precise federalism was the only solution acceptable to the French Canadian leaders. Thus, the one group was, at heart, for unity and fusion; the other for diversity and co-operation; the one was dominated by economic fact and the other, philosophical principle.

The fundamental opposition of these two divergent points of view does not, unfortunately, appear in the documentary fragments of the conferences which we possess; it does, however, emerge clearly in a letter written by Sir Arthur Gordon, Lieutenant-Governor of New Brunswick, following his visit to Charlottetown and his conversations with Cartier, Brown and Galt. In a lengthy despatch to the Colonial Office outlining the details of the union scheme as the Canadians had put it up to the Maritimers, Gordon wrote:

With regard to the important question of the attributes to be assigned to the respective Legislatures and Governments, there was a very great divergence of opinion. The aim of Lower Canada is a local independence as complete as circumstances will permit, and the peculiarities of race, religion and habits which distinguish its people render their desire respectable and natural.<sup>23</sup>

<sup>23</sup> Public Archives of Canada, New Brunswick, C.O. 189, vol. 9: Gordon to Cardwell, confidential, Sep. 22, 1864. This letter is reproduced, in part, in W. F. O'Connor, *Report pursuant to Resolution of the Senate to the Honourable the Speaker*

It was at Quebec that the new constitution took form and shape. To the old capital of New France came delegates from the six provinces, the four seaboard provinces of Nova Scotia, Newfoundland, Prince Edward Island and New Brunswick, and the two provinces of Canada, which, if they did not have a juridical basis, had, at least, as I have pointed out, a factual foundation. This gathering at Quebec was the first and only constituent body in the whole of our constitutional history. All previous constitutions had been drafted, considered, and passed, by an outside authority; in 1864 the thirty-three representatives of the British North American provinces met, with the blessing and approval of the British Government, to do what had hitherto always been done for them.

The constitution which they adopted in the form of seventy-two Resolutions had already been prepared in draft form before the Canadian delegates had ever disembarked at Charlottetown. In many respects it bore a striking resemblance to an outline plan which had appeared over the name of Joseph Charles Taché in *Le Courrier du Canada* in 1857, and which had been published as a book in the following year.<sup>24</sup> In summary form, what the Quebec Conference decided was that the new union should be federal in character; that its central parliament should comprise two houses, the upper based on representation by provinces, and the lower upon representation by population; that the powers of the central government should be of a general character and those of the provincial legislatures of a local nature. These powers were carefully enumerated, but the legislative residuum was given to the central parliament. The French and English languages were to enjoy equal status in the central parliament and courts and in the legislature and courts of the province of Lower Canada.

Georges Cartier, generally, was satisfied with what had been achieved. He felt that even though he had been obliged to yield much to the demands of Macdonald and Brown and other advocates of a strong central government, he had, nevertheless, succeeded in preserving the rights and privileges of his own people and of the province in which they lived.<sup>25</sup> He

by the *Parliamentary Counsel* (Ottawa, 1939), Annex 2, pp. 84-6. Large sections of the original letter were, however, omitted in the printed version. The quotation given here is one of the omitted portions.

<sup>24</sup> J. G. Taché, *Des provinces de l'Amérique du Nord et d'une union fédérale* (Québec, 1858).

<sup>25</sup> "Objection had been taken to the scheme now under consideration, because of the words, 'new nationality'. Now, when we were united together, if union were attained, we would form a political nationality with which neither the national origin, nor the religion of any individual would interfere. It was lamented by some that we had this diversity of races, and hopes were expressed that this distinctive feature would cease. The idea of unity of races was utopian—it was impossible.... We could not do away with the distinctions of race. We could not legislate for the disappearance of the French Canadians from American soil, but British and French Canadians alike could appreciate and understand their position relative to each other". (Cartier, Feb. 7, 1865, *Confederation Debates*, p. 60). Subsequently, in answer to the criticisms of A. A. Dorion, Cartier said, "I have always had the

had, moreover, succeeded in maintaining the fundamental principle of the entente between the two racial groups in Canada, equality of race, equality of religion, equality of language, equality of laws. Even George Brown, the old francophobe, had gone as far as to admit to the Canadian legislature "whether we ask for parliamentary reform for Canada alone, or in union with the Maritime Provinces, the French Canadians must have their views consulted as well as us (*sic*). This scheme can be carried and no scheme can be that has not the support of both sections of the province."<sup>26</sup> The new constitution might not be designed to be the most efficient, but it would, at least, be just.

The next step was as easy as it was logical. Since both races were equal, a decision taken, an agreement arrived at by the equal partners on the fundamental character of the new constitution, could not be changed without the consent of each. It was, in fact a treaty, a compact binding upon both parties. This was a view which scarcely roused a dissenting voice in the Canada of 1865. Not one of the Canadians who fathered the resolutions at Quebec failed to stress the unalterable character of the agreement they had made. Macdonald said, "these resolutions were in the nature of a treaty, and if not adopted in their entirety, the proceedings would have to be commenced *de novo*".<sup>27</sup> McGee, in his high-pitched but not unmusical voice, cried:

And that there may be no doubt about our position in regard to that document, we say, question it you may, reject it you may, or accept it you may, but alter it you may not. (Hear, hear.) It is beyond your power, or our power, to alter it. There is not a sentence — ay, or even a word — you can alter without desiring to throw out the document . . . . On this point, I repeat after all my hon. friends who have already spoken, for one party to alter a treaty is, of course, to destroy it.<sup>28</sup>

Taché, Cartier, McDougall, Brown, all of them described the Quebec Resolutions as a "treaty" or as a "pact", and argued for adoption without amendment.<sup>29</sup>

interests of Lower Canada at heart and have guarded them more sedulously than the hon. member for Hochelaga and his partisans have ever done". (*Confederation Debates*, p. 714). Hector Langevin, the Solicitor-General, took the same view. He said, "We are considering the establishment of a Confederacy — with a Central Parliament and local parliaments. The Central or Federal Parliament will have the control of all measures of a general character . . . , but all matters of local interest, all that relates to the affairs and rights of the different sections of the Confederacy, will be reserved for the control of the local parliaments . . . . It will be the duty of the Central Government to see that the country prospers, but it will not be its duty to attack our religion, our institutions, or our nationality, which . . . will be amply protected". (*Confederation Debates*, pp. 367-8. See also pp. 373, 392.)

<sup>26</sup> *Confederation Debates*, p. 87.

<sup>27</sup> *Ibid.*, p. 16. Macdonald repeated this idea several times throughout his speech; see pp. 31-2.

<sup>28</sup> *Ibid.*, p. 136.

<sup>29</sup> *Ibid.*, pp. 83, 88, 714, 720. See also Chapter II in Sir George Ross, *The Senate of Canada, its Constitution Powers and Duties Historically Considered* (Toronto 1914).

It is easy for the lawyer or the political scientist, three generations later, to reply that in 1865 there was no treaty really made at all, that the Compromise of Quebec could not possess the attributes of a treaty or of a legal contract. Nevertheless the historical fact remains that the men who used these terms were the men who drafted the Resolutions; they chose their words with deliberation; many of them were lawyers, they knew what they were saying. They were not, every one of them, trying to becloud the issue before the legislature or to confuse the legislators. I have found no evidence which would lead me to question their sincerity or to believe that they disbelieved their own assertions. In strict law it is probably true that the terms they used to describe the Quebec Resolutions were not all that could be desired in the way of legalistic exactitude; but to my mind these terms adequately expressed the ideas which the Fathers of the Confederate Resolutions wished to convey to their listeners and to posterity, for they spoke to both. The idea of a compact between races was not a new one in 1865; it had already become a vital thing in our history. It influenced both the political thinking and the political vocabulary of the day; and it was already on the way to become a tradition and a convention of our constitution.

The idea of a compact as I have outlined it was essentially, in its origin, a racial concept. But the meeting of the maritime delegates with those of Canada at Charlottetown and at Quebec introduced a new interpretation which has had mighty impact upon the course of our later history, namely, the idea of a compact between the politico-geographic areas which go to make up Canada. Even before the conferences it had become the common practice to identify the racial groups with the areas from which they came. When thinking of French Canadians or of Anglo-Canadians, it was all too simple to speak of them in geographical terms, as Lower Canada and Upper Canada. It was a confusion of mind and speech of which we in our own day and generation are all too frequently guilty. Almost without thought "Quebec" and "French Canadians", or "Ontario" and "Anglo-Canadians", become synonymous terms in the mouths of Canadians of both tongues. It is, of course, a slipshod way of thinking as well as of speaking, for there are French Canadians in Ontario and English Canadians in Quebec; and in many ways it has been unfortunate, for it has limited to Quebec language rights which might, under happier circumstances, have been accorded French Canadians in other parts of the country. That English did not suffer the same fate in Quebec as did the French tongue in other provinces, was due in part to the effective role of English-speaking Quebecers, like McGee and Galt, in the drafting of the federative act, as well as to a greater appreciation on the part of French Canadians of the need for toleration. However, the point which I really wish to make is this; once Canadians (as distinct from Maritimers) began to identify provinces with specific linguistic groups, the idea of a pact between races was transformed into the idea of a pact between provin-

ces. And the Compromise of Quebec became a compact between the provinces which participated in the conference. I have no need to labour this point. It emerges in all clarity from a careful reading of the speeches to be found in the Confederation Debates of 1865.

However, the compact idea, was still, in 1865, peculiarly a Canadian one. It was not shared by the delegates of the several Maritime colonies who had journeyed to Quebec. From what I have seen of the debates in the legislatures and the speeches reported in the press of Nova Scotia and New Brunswick, the words so familiar in Canada, words like "pact", "treaty" or "compact" were rarely used in reference to what had been decided upon at Charlottetown or Quebec. There was never any idea in the minds of the Maritime representatives that the Seventy-Two Resolutions were sacrosanct. Thus, when Nova Scotia and New Brunswick resolved in 1866 to renew the negotiations for a federal union with Canada, they sent their representatives to London with full authority to make any changes and to conclude any new arrangement they might see fit. In the case of Nova Scotia, Sir Charles Tupper, an ardent exponent of federation on the basis of the Quebec Scheme, accepted without comment a proposal that the Quebec Resolutions should be abandoned and a new confederate agreement drawn up in conjunction with the other provinces concerned.<sup>30</sup> This distinction between the Canadian and Maritime approaches to the Quebec Resolutions was brought out when the Canadian and Maritime representatives met in conference in London in December 1866. Macdonald, Galt and McDougall, all agreed that the Canadians, at least, were bound to adhere to the details of the Quebec scheme. Jonathan McCully and J. W. Ritchie of Nova Scotia took the view that, as far as they as Nova Scotians were concerned, they were bound by nothing. Said John A. Macdonald in reply, "The Maritime delegates are differently situated from us. Our Legislature passed an address to the Queen praying for an Act of Union, on the basis of the Quebec Resolutions. We replied to enquiries in our last Session of Parliament that we did not feel at liberty ourselves to vary those resolutions".<sup>31</sup> W. P. Howland, another Canadian delegate, added, "We place ourselves in a false position in every departure from the Quebec scheme".<sup>32</sup>

In the end, the terms of the agreement drafted and adopted at the Westminster Palace Hotel in London in December 1866, were substantially those which had previously been discussed and accepted at Quebec. A great deal has, I know, been made of the London Resolutions as a new departure and as an effective denial of the idea of a binding pact having

<sup>30</sup> *Nova Scotia Parliamentary Debates, 1866. 3rd Session. 23rd Assembly.* See debate April 3, 1866. Quotations from these debates will be found in O'Connor, *Report*, Annex 2, pp. 67-71.

<sup>31</sup> Joseph Pope, *Confederation: being a series of hitherto unpublished documents bearing on the British North America Act* (Toronto, 1895), p. 121.

<sup>32</sup> *Ibid.*, p. 122.

been concluded at Quebec; but a detailed comparison of the two sets of resolutions reveals no really substantial points of difference. The outline is similar; the wording in many instances is unchanged. Such alterations as were made, appear to have been either of a minor nature intended to clarify an ambiguity or inserted to strengthen, rather than to weaken the bi-racial, bi-cultural aspect of the pact. Certainly the people of the day who were most concerned viewed the revised resolutions after this fashion. On January 5th, 1867 the editor of *The Morning Freeman* of St. John, N.B., wrote, "If the Quebec Scheme has been modified in any important particulars they are profoundly ignorant of what the modifications are".<sup>33</sup> Two months later he wrote again while the British North America Bill was before Parliament:

We ask any reasonable, intelligent man of any party to take up that Bill, compare it with the original Quebec Scheme, and discover, if he can, anything that could possibly have occupied honest, earnest men, for even a week, no matter what the particular objections to the few changes that have been made. . . . Could not all these matters have been settled as well and as much to the satisfaction of the public by letter, at an expense of a few shillings postage . . . as by this large and most costly delegation?<sup>34</sup>

The London Resolutions of 1866 were, in a word, little if anything more than an edited version of the Quebec Resolutions of 1864; the contractual nature of the pact remained unaffected.

The British seemed to like the idea of a provincial compact. Both the Colonial Secretary, Lord Carnarvon and his undersecretary, the Honourable Charles Adderley, accepted it as an accurate description of what was intended and what was achieved. Mr. Adderley, who introduced the Bill based on the resolutions into the British House of Commons, urged upon the members, in words which might have come straight from the mouth of Macdonald or Cartier, that no change or alteration should be made in the terms of the Bill:

The House may ask what occasion there can be for our interfering in a question of this description. It will, however, I think, be manifest, upon reflection, that, as the arrangement is a matter of mutual concession on the part of the Provinces, there must be some external authority to give sanction to the compact into which they have entered. . . . If, again, federation has in this case specially been a matter of most delicate mutual treaty and compact between the provinces — if it has been a matter of mutual concession and compromise — it is clearly necessary that there should be a third party *ab extra* to give sanction to the treaty made between them. Such seems to me to be the office we have to perform in regard to this Bill.<sup>35</sup>

Lord Carnarvon, in the House of Lords, said:

the Quebec Resolutions, with some slight changes, form the basis of a measure that I have now the honour to submit to Parliament. To those resolutions

<sup>33</sup> *The Morning Freeman*, Saint John, N.B., Jan. 5, 1867.

<sup>34</sup> *Ibid.*, March 7, 1867.

<sup>35</sup> Quoted in O'Connor, *Report*, Annex 4, p. 149.



all the British Provinces in North America were, as I have said, consenting parties, and the measure founded upon them must be accepted as a treaty of union.<sup>36</sup>

Later in the same speech Carnarvon, after pointing out that a legislative union was "impracticable", because of Lower Canada's jealousy and pride in "her ancestral customs and traditions" and her willingness to enter Confederation "only upon the distinct understanding that she retains them", stated emphatically that the terms of the British North America Bill were "of the nature of a treaty of union, every single clause in which had been debated over and over again, and had been submitted to the closest scrutiny, and, in fact each of them represented a compromise between the different interests involved". "There might be alterations where they are not material", he continued, "and do not go to the essence of the measure . . . . But it will be my duty to resist the alteration of anything which is in the nature of a compromise between the Provinces, as an amendment of that nature, if carried, would be fatal to the measure."<sup>37</sup>

The legalist will, of course, reply that the intervention of the Colonial Office and the passing of the Bill as an Act of the British Parliament in effect destroyed the compactual — I prefer to avoid the word "contractual" with its juridical connotation — basis of the historical process of confederation. Perhaps it does; to the lawyer. But to the historian the simple fact remains that the officers of the Colonial Office accepted without question the assessment of the situation given them by the colonial delegates. To them the Bill was in the nature of a colonial treaty, even if such a treaty were not to be found in the classifications usually given in the text books of international law. In consequence they were prepared to leave the colonial delegates alone, to let them make their own arrangements, thresh out their own differences, draft their own agreement. Neither Lord Carnarvon nor the members of his office entered the negotiations or took part in them until the Quebec Resolutions had undergone the revision or editing to which I have referred. When they did, it was at the specific request of the delegates, with the object of acting in an advisory capacity only. Perhaps the British role is best expressed in the suggestion that the Colonial Secretary acted in the capacity of a notary reducing to proper legal terms an understanding already arrived at by the parties concerned. That certainly was the role in which Carnarvon saw himself. The British North America Act was, therefore, not the work of the British authorities, nor the expression of ideas of the British Colonial Office; it was, in essence, simply the recognition in law of the agreement arrived at originally in Quebec and clarified later in London, by the representatives of the provinces of Nova Scotia,

<sup>36</sup> Sir R. Herbert, *Speeches on Canadian Affairs by Henry Howard Molyneux, fourth Earl of Carnarvon* (London, 1902) p. 92.

<sup>37</sup> *Ibid.*, pp. 110, 130.

New Brunswick, and Canada with its two divisions, Canada East and Canada West.

The British North America Act passed through its necessary readings in the House of Commons and in the House of Lords without change or alteration; on March 28, 1867, it received the Royal Assent. By royal proclamation it came into effect on the first day of July following. The new constitution was, without question, a statute of the British Parliament, and as such possessed the attributes of an ordinary statute. But it was a statute distinctly unlike any other previously passed by the Parliament at Westminster. The Quebec Act of 1774, the Constitutional Act of 1791, the Act of Union of 1840, all of them had been devised, drafted, and enacted, without reference to the people of the provinces concerned. Individuals and groups of individuals had been consulted, it is true; but the work was done and the responsibility was taken by the Imperial authorities. The British North America Act, however, was, to all intents and purposes, the work of the several self-governing, quasi-sovereign colonies themselves. The Colonial Office did no more than put the words into proper form and the British Parliament no more than give them legislative sanction. The British North America Act was, therefore, to use the words of an early Canadian jurist, "a simple ratification by the Mother Country of the agreement entered into by the provinces, which in confirming its provisions rendered them obligatory by giving them the authority of an Imperial Act".<sup>38</sup>

#### IV

But the legal supplementing of the interprovincial pact, both by the Canadian and British governments, did not mean that the problems of the coexistence of the two contending races within the bosom of a single state had been solved. Agreement there could be on broad lines of how to divide authority between the central and provincial governments, but disagreement on the details of the division was inherent in the very nature of a federal constitution, and particularly in Canada where federal union in the mouth of a Lower Canadian usually meant "the independence of his Province from English and Protestant influences"<sup>39</sup> and in that of

<sup>38</sup> Hon. Justice T. J. J. Loranger, *Letters upon the Interpretation of the Federal Constitution known as the British North America Act 1867* (Quebec, 1884) p. 63.

<sup>39</sup> O'Connor, *Report*, Annex 2, p. 83; Gordon to Cardwell, Sep. 12, 1864. After visiting Charlottetown during the meeting of the provincial delegates and receiving daily reports from the New Brunswick delegation, Lieutenant-Governor Gordon wrote to the Colonial Secretary:

A "Federal Union" in the mouth of a Lower Canadian usually means the independence of his Province from English and Protestant influences. In the mouth of an inhabitant of the Maritime Provinces it means the retention of the machinery of the existing local Executive Government, the expenditure within each Province of the revenue raised from it, except a quota to be paid towards Federal expenses, and the preservation of the existing Legislatures in their integrity, with the somewhat cumbrous addition of a central Parliament

the Upper Canadian, a preference for a strong central government.<sup>40</sup> Ministers and Prime Ministers might pay lip service to the doctrine of a Pact; <sup>41</sup> they might honestly believe in its validity; they could shelve but could not shed their centralizing proclivities. There was never any under-hand conspiracy to destroy the Anglo-French entente; but there was an open-handed effort to add to the powers of the central government at the expense of those of the provinces. I need only mention the names of Macdonald, Mowat and Mercier to recall to mind the early trials of strength of the two opposing points of view. Fortunately the arbiter was there, the courts: the controversies which opposing points of view engendered were resolvable by due process of law. The powers of the federal parliament and those of the provincial legislatures had, in 1867, been carefully tabulated. All that was necessary was to apply the tabulation to each specific dispute.

Although Canadian judges were at first disposed to take the view that the British North America Act was something more than a simple British statute,<sup>42</sup> the judges of the Privy Council preferred to base their judgments upon the principle that the courts should always "treat the provisions of the Act . . . by the same methods of construction and exposition which they apply to other statutes".<sup>43</sup> These rules or methods are well known: the meaning of a statute is primarily to be gathered from the words of the statute itself, and not from what the legislature may be supposed to have intended;<sup>44</sup> if the words of a statute are ambiguous, recourse must be had to the context and scheme of the Act;<sup>45</sup> if there are seemingly conflicting provisions in a statute, the conflicting provisions must be read together and, if possible, a reasonable reconciliation effected;<sup>46</sup> and, the "parliamentary history" of a statute may not be referred to for the purpose of explaining its meaning, although "historical knowledge" of the circumstances surrounding the passing thereof may, on occasions, be used as an aid in construing the statute.<sup>47</sup> This one con-

to which the consideration of some few topics of general interest is to be confined under restraints prompted by a jealous care for the maintenance of Provincial independence.

<sup>40</sup> *Confederation Debates*, p. 29.

<sup>41</sup> See, for instance, statements by Sir Wilfrid Laurier (*House of Commons Debates, Canada*, Jan. 28, 1907, p. 2199); Robert Borden (*Ibid.*, Jan. 28, 1907, p. 2199); Ernest Lapointe (*Ibid.*, Feb. 18, 1925, pp. 297-300); Arthur Meighen (*Ibid.*, Feb. 19, 1925, p. 335) and Richard B. Bennett (*Ibid.*, Feb. 24, 1930, p. 24).

<sup>42</sup> See Strong J. in *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13, S.C.R. p. 606. For a criticism of this point of view see W. H. P. Clement, *The Law of the Canadian Constitution* (Toronto, 1916), p. 364; and V. C. Macdonald "Constitutional Interpretation and Extrinsic Evidence" (*The Canadian Bar Review*, Feb. 1939, XVII, 2).

<sup>43</sup> *Bank of Toronto v. Lambe* (1887), 12 App. Cas., p. 579.

<sup>44</sup> *Brophy v. Attorney-General for Manitoba* (1895), A.C., p. 216.

<sup>45</sup> *Attorney-General for Ontario v. Attorney-General for Canada* (1912), A.C., p. 583.

<sup>46</sup> *Citizens Insurance Company of Canada, v. Parsons* (1881), 7 App. Cas., p. 109.

<sup>47</sup> *Edwards v. Attorney-General for Canada* (1930) A.C., p. 134.

cession to the historical approach did not, however, mean very much. Rarely, if ever, did references to the Quebec and London Resolutions ever have a controlling or determining effect upon the decisions handed down by the Judicial Committee of the Privy Council. Judges and lawyers are bound by precedent and rule; they cannot shake off the shackles of a rigid legalism to enjoy the freedom of historical speculation.

The remarkable thing is that the courts have, nevertheless, rarely misunderstood the meaning of the union. This is, indeed, a tribute to the skill with which the Resolutions of 1866 were transformed into legal parlance by the lawyers of the Colonial Office. And perhaps it is just as well that the lawyers have not been prepared to take readily to the historian's approach; for nothing could be more frustrating to the legal mind than the effort to determine the "intentions" of the Fathers of Confederation. Including, as they did, some Fathers favouring a unitary state and others aiming at a wide degree of provincial autonomy, to try to determine the common denominator of their joint intentions from their speeches and their public statements before and after 1867 would produce only a series of irreconcilable contradictions.<sup>48</sup> The one sure guide as to what the Fathers really agreed to agree upon, was the language of their resolutions, or better still, the language of the British North America Act itself. And in construing this Act in the way they have, the judges probably arrived at a more accurate interpretation than have the multitude of critics who have so emphatically disagreed with them.

There have been many and severe critics of the judgments laid down by the courts. Within the last twenty years in particular it has been the common sport of constitutional lawyers in Canada to criticize, cavil and poke fun at the *dicta* of the judges of the Privy Council and their decisions in Canadian cases. Canadian historians and political scientists have followed the legal party line with condemnations of "the judicial revolution" said to have been accomplished by Lord Watson and Lord Haldane, and the alleged willful nullification of the true intentions of the Fathers of Confederation.<sup>49</sup> The explanation of these attacks on the part of lawyers, professional and lay, court and class-room alike, may

<sup>48</sup> See, for instance, the conflicting points of view of Sir John A. Macdonald and Sir Oliver Mowat after Confederation, although both of them had been delegates to the Quebec Conference. It is equally difficult to reconcile some of the statements of men like Galt and Macdonald, who hoped that federal union might develop into a legislative union, and those of Cartier and Langevin who upheld provincial rights, all of whom were "Fathers of Confederation."

<sup>49</sup> The most complete criticism from a legal standpoint is to be found in O'Connor, *Report*. See also N. M. Rogers, "The Compact Theory of Confederation", (*Proceedings of the Canadian Political Science Association*, 1931), pp. 205-30; F. R. Scott, *Canada Today, a Study of her National Interests and National Policy* (Toronto, 1938) pp. 75-8; A. R. M. Lower, *Colony to Nation, a History of Canada* (Toronto, 1946) pp. 328-9. For views contrary to those of O'Connor, see V. E. Gray "The O'Connor Report on the British North America Act, 1867" (*The Canadian Bar Review*, May, 1939, XVII, 5, pp. 309-337).

be found in the impact of the Great Depression of the 1930's upon the economy of the country and the inability of governments, provincial and federal, to deal with it. It is natural for the human mind to seek simple solutions and to find scapegoats for their ills.<sup>50</sup> If, by the simple process of an Act of Parliament, full employment can be secured and that Act of Parliament is unconstitutional, then change the constitution and the problem is solved. No provincial jurisdiction, no acknowledged right or privilege, no historic pact should be allowed to stand in the way of such an easy solution for the economic problems of the day. Facts, not principles should be the decisive determinants of history. Unfortunately, however, neither the causes nor the solution of the Great Depression were as simple as all that. The economic crisis of the 1930's was the result of a multiplicity of factors, external as well as internal, and a change in the interpretation of the British North America Act or in the Act itself would have given rise to as many new problems as it might have solved of the old. In any event, it is no part of the task of the judges to try to make the constitution fit the constantly changing facts of economic and political history.

Here is the criticism in its simplest terms. Proceeding from the basic premise that the fundamental intentions of the Fathers of Confederation were to limit strictly the powers of the provincial legislatures and give the central government a real, effective, and dominating position in the federal scheme, the critics of the courts contend that the tabulated or enumerated powers given to the federal parliament by Section 91 are, in fact, not specially allocated powers, but rather illustrations of an overriding general jurisdiction embodied in the well-known words "And it shall be lawful for the Queen, by and with the Advice and Consent of the Senate and the House of Commons, to make Laws for the Peace, Order and Good Government of Canada . . ." <sup>51</sup> They argue that the enumerated powers which follow later in the wording of the same section are not in addition to this general power, but flow from it and are examples of it. The critics take the view that the courts, by attaching a "primacy" to the enumerated powers, have altered the balance of Sections 91 and 92, and have, in consequence, distorted the aims and objects of the founding fathers and given greater authority to the provincial legislators than it was ever intended that they should have. The cumulative effect of judicial decisions over the years has been to establish a union in which the sovereign provincial legislatures, in effect, possess a field of jurisdiction so great, and the federal parliament a field so restricted, as to alter the whole purpose of the original federative Act.

It is not for me, at this point, to discuss the syntax of the controversial sections of the British North America Act. As I said at the begin-

<sup>50</sup> L. Richer, *Notre Problème Politique* (Montreal, n.d.), pp. 20-1.

<sup>51</sup> O'Connor, *Report*, Annex 1, pp. 18-51.

ning, my approach is, of necessity, historical. And, the pre-parliamentary history of the Act appears to me to confirm the interpretation of the criticized rather than that of the critics. From the date of the publication of the first practical scheme of confederation, framers of federal constitutions in Canada have followed the procedure, not of enumerating only the subject matters upon which one party to the federation may legislate and giving all the rest (the residuum of powers) to the other, but rather of tabulating or enumerating the legislative powers of both parties. The scheme advanced by Joseph Charles Taché in 1857, upon which the later Canadian scheme is sometimes said to have been based, followed this course. Taché allocated to the federal parliament "Commerce, including laws of a purely commercial nature, such as laws relating to banks and other financial institutions, of a general character; moneys, weights and measures; customs duties, including the establishment of a uniform tariff and the collection of the revenues which it produces; large public works and navigation, such as canals, railways, telegraph lines, harbour works, coastal lighthouses; postal service as a whole both inside and outside the country; the organization of the militia as a whole; criminal justice including all offences beyond the level of the jurisdiction of police magistrates and justices of the peace". All the rest "dealing with civil laws, education, public welfare, the establishment of public lands, agriculture, police, urban and rural, highways, in fact everything relating to family life in each province, would remain under the exclusive control of the respective government of each province as an inherent right".<sup>52</sup> The draft scheme of 1864, presented by the Canadians to the Maritime delegates at Charlottetown, likewise included a series of enumerated powers to be allocated to the federal and provincial legislatures. According to this scheme the "Federal Legislature" was to be given "the control of — Trade, Currency, Banking, General Taxation, Interest and Usury Laws, Insolvency and Bankruptcy, Weights and Measures, Navigation of Rivers and Lakes, Lighthouses, Sea Fisheries, Patent and Copyright Laws, Telegraphs, Naturalization, Marriage and Divorce, Postal Service, Militia and Defence, Criminal Law, Intercolonial Works". The local legislatures were "to be entrusted with the care of — Education (with the exception of Universities), Inland Fisheries, Control of Public Lands, Immigration, Mines and Minerals, Prisons, Hospitals and Charities, Agriculture, Roads and Bridges, Registration of Titles, Municipal Laws".<sup>53</sup>

When the delegates finally convened at Quebec to settle the details of the federation which they had agreed upon at Charlottetown, these lists of items, were thoroughly discussed between the 21st and 25th of October. The simplest method of proceeding would have been, once it had been decided to concede the residuum of powers to the federal parlia-

<sup>52</sup> J. C. Taché, *op. cit.*, p. 148.

<sup>53</sup> Gordon to Cardwell, confidential, Sep. 22, 1864, (*cf. supra*, note 23).

ment, to define only those powers which would belong exclusively to the provinces. This course was, in fact, suggested. "Enumerate for Local Governments their powers, and give all the rest to General Government, but do not enumerate both", said J. M. Johnston of New Brunswick; William Henry of Nova Scotia echoed this view, "We should not define powers of General Legislature. I would ask Lower Canada not to fight for a shadow. Give a clause to give general powers (except such as given to Local Legislatures) to Federal Legislature. Anything beyond that is hampering the case with difficulties".<sup>54</sup> But the Conference did not agree. From Henry's remark we may infer that Cartier and his colleagues were determined to follow the plan of specifying in detail the powers of *both* the federal parliament and the provincial legislatures. Accordingly, sections 29 and 43 of the Quebec Resolutions contained an enumeration of the powers of each party to the federation. Section 29 read: "The General Parliament shall have power to make laws for the peace, welfare and good government of the Federated Provinces (saving the sovereignty of England), and especially laws respecting the following subjects", and then listed thirty-seven specific matters upon which the federal parliament would be free to legislate. Section 43 outlined eighteen matters over which the provinces would have exclusive jurisdiction, ending with what may be regarded as a provincial residuum of powers: "generally all matters of a private or local nature, not assigned to the General Parliament".<sup>55</sup> From the evidence afforded by Joseph Pope, it would appear that the delegates at no time seriously attempted to define the scope of the enumerated items or their possible overlapping, beyond George Brown's suggestion that "the courts of each Province should decide what is Local and what General Government jurisdiction, with appeal to the Appeal or Superior Court".<sup>56</sup> The same procedure was followed at London. Sections 28 and 41 of the London Resolutions are almost identical (with one or two small exceptions) with their counterparts in the resolutions of Quebec.

The evolution of these two sets of resolutions through the various drafts of the British North America Bill supports the view that the Fathers intended that primacy should attend the enumerated heads. Section 36 of the first "Rough Draft" of the Bill prepared by the Canadian and Maritime delegates themselves, read simply that "The Parliament shall have power to make laws respecting the following subjects" and then listed thirty-seven, one of which was the power to pass laws for "the peace, welfare and good government of the Confederation respecting all matters of a general character, not specially and exclusively herein reserved for

<sup>54</sup> Pope, *Confederation Documents*, p. 87.

<sup>55</sup> Copies of the Quebec and London Resolutions will be found in Pope, *Confederation Documents*, pp. 38-52, 98-110; in O'Connor, *Report*, Annex 4, pp. 49-66, and in *British North America Act and Amendments 1867-1948*, (Ottawa, 1948), pp. 39-58.

<sup>56</sup> Pope, *Confederation Documents*, p. 85.

the Legislatures [of the provinces]".<sup>57</sup> This was altered in the draft prepared by the Imperial Government's draftsman and dated January 23, 1867, which adopted a wording which, with only insignificant changes, was to be that of section 91 of the British North America Act.<sup>58</sup> Thus, only in the final stages, after the Imperial authorities had been invited to put the bill into final shape, were the introductory words of Section 91, as we know them, interpolated, apparently for the purpose of lessening the possibility of overlapping jurisdiction. The colonial delegates had believed the enumerated powers to be mutually exclusive; only agriculture and immigration, which had been included among the powers assigned to both federal and provincial legislatures, seemed to provide any real problems, and these were to be obviated by giving federal legislation in respect to these matters precedence over that of the provinces. While there is no documentary evidence directly bearing on this point, it seems more than likely that the British draftsman pointed out the possibility of further overlapping and therefore revised the first draft of the Bill in such a way as to ensure, syntactically, the unquestioned paramountcy of the enumerated federal powers, upon which the delegates, ever since 1864, had placed so much emphasis.

That some of these conclusions may appear to be based upon circumstantial historical evidence is a valid criticism; but historians, no more than lawyers, are not to be debarred from using circumstantial evidence. The majority of the problems of historical synthesis are really problems of probability.

## V

But to return to the question of the Confederative pact. Despite the frequency with which Canadian political leaders have reiterated the existence of the pact, despite the legal support afforded the concept of the pact by the highest court of appeal — as late as the 1930's, the Privy Council referred to the British North America Act as a "contract", a "compact" and a "treaty" founded on the Quebec and London Resolutions<sup>59</sup> — the pact concept was never universally understood or wholly accepted by each and all of the provinces of Canada. Indeed the popularity of the pact idea seems to vary in some provinces in inverse ratio to their fiscal need. The concept of the pact was slow to be accepted in the Maritimes. In the early years after Confederation, there was still strong opposition to the very fact of union, and the pact upon which it was based was never very popular. In 1869 the Saint John *Morning Freeman* criticized the idea of a pact of confederation, denying that there

<sup>57</sup> *Ibid.*, pp. 130-2.

<sup>58</sup> *Ibid.*, pp. 152-4.

<sup>59</sup> *Attorney-General for Australia v. Colonial Sugar Co.* (1914) A.C., p. 253; *In re the Regulation and Control of Aeronautics in Canada* (1932) A.C., p. 70; *Attorney-General for Canada v. Attorney-General for Ontario and others* (1937) A.C., p. 351.



was any continuity between the pre- and post-confederation provinces.<sup>60</sup> From time to time, various provinces have supported the doctrine of the pact, including New Brunswick, Alberta and British Columbia; but their support has not been marked by unanimity or consistency. Only in Ontario and Quebec has the concept remained undiminished in strength and popularity, at least in political circles, if not always in legal and academic. The Ontario-Quebec axis has transcended both time and political parties. The original alliance of Mowat and Mercier, has carried on through that of Whitney and Gouin, Ferguson and Taschereau, and Drew and Duplessis. It has always been the principal buttress of provincial autonomy.

The explanation why the pact idea has remained most vigorous in the two central provinces is to be found in their history. We need only recall the point I have established earlier this evening, the fact that the pact was, in its origin, an entente between the two racial groups of Old Canada, between the two provinces which were each the focus of a distinctive culture. Only in the two provinces of Old Canada did the racial struggle play any real part in our history; only in the two provinces of Old Canada did this struggle have any real meaning. The Maritimers of 1864 were not concerned with racial problems; their interest in federal union was largely financial, in the recovery of a passing age of sea-going prosperity. The western provinces, with the exception of British Columbia which found its own version of a compact in the terms of union in 1871, were the offspring of the federal loins; their interest in federal union was in their maintenance and subsistence. But in Upper and Lower Canada federation was the solution of the politico-racial contest for supremacy and survival, which had marked their joint history since the day Vaudreuil and Amherst signed the Capitulation of Montreal. The concept of a pact of federation was thus peculiarly a Canadian one (I use Canadian in the sense in which it was used in 1864, and in which it is still used in some parts of the Maritimes today); it still remains peculiarly Canadian. Duality of culture as the central feature of the constitutional problem has a meaning and a reality to the people of the two provinces of Old Canada which it cannot have to those of the other provinces. That is why neither Ontario nor Quebec has departed in its provincial policy from the strict interpretation of the federal basis of the constitution, or from the concept of a federative pact. The identification of the racial pact, which was a very real thing in the 1850's and 1860's, with the compromise arrived at by the several provinces in 1864 and 1866, has tended to obscure the racial aspect of the bargain and to deprive it of some of its strength. The Canadian delegates to Quebec and London were thoroughly convinced that their bargain was a treaty or a pact; however, this conviction was always weaker among the Maritimers than

<sup>60</sup> *The Morning Freeman*, Saint John, N.B., Nov. 25, 1869.

among the Canadians, and especially the French Canadians, whose principal concern as a vital minority, has been and must be the survival of their culture and the pact which is the constitutional assurance of that survival.

It is the racial aspect of the pact of Confederation which gives the pact its historicity and confirms its continued usage. If the population of Canada were one in race, language, and religion, our federation would be marked by flexibility; amendment would be a comparatively easy matter where there was agreement upon fundamental issues. Since history has given us a dual culture, with its diversities of race and language, we must maintain a precarious balance between the two groups; and our constitution is rigid and inflexible. That is what I meant, when I said at the outset, that the historic pact of the Union has become, by acceptance and usage, a necessary convention of our constitution. It will continue to be such so long as the minority group retains its numbers and its will to survive.