(c) Conventions

Constitutional amendments may take the form of changing existing law or may take the form of making a new law. Authority to make constitutional amendments is, therefore, simply authority to make constitutional laws.

The question arises: Who now has authority to amend the Constitution of Canada? Considering that expression in its widest sense as indicated above, we must look first at the British North America Act of 1867. We find that there are provisions in that Act that are subject to alteration either by the legislatures of the provinces or by the Parliament of Canada. Thus Sections 40, 41, 47, 130 and 131 begin with the words "unless the Parliament of Canada otherwise provides". These provisions are therefore amendable by the Parliament of Canada. Similarly, Sections 78, 83, 84, 134 and 135 apply unless the appropriate legislature "otherwise provides" and they are therefore subject to alteration by provincial enactment. Under Head (1) of Section 92, the legislatures of the provinces have express authority to amend the constitution of the province, except as regards the office of lieutenant governor. Under this authority, the legislatures have authority to change and have changed Sections 70, 72, 73, 77, 80, 83, 84 and 85. It should be pointed out, however, that the actual text of these provisions of the British North America Act are not subject to change by Parliament or the legislatures; it is not the Act as such that is amendable, but rather the law as expressed in those provisions. The enactment by Parliament or the legislatures, as the case may be, substitutes a new law for the law contained in those sections of the British North America Act; but that is, in every sense, a constitutional amendment.

Constitutional laws may also be made by Parliament or the legislatures under the enumerated heads of Section 91 or 92. Thus, under Head (8) of Section 91 or Head (4) of Section 92, laws could ge made respecting offices involved in the Constitution.

Section 129 of the British North America Act continues existing laws in force, but subject to be repealed, abolished or altered by the Parliament of Canada or by the legislature of the respective provinces, according to the authority of Parliament or of the legislature under the British North America Act; originally excepted from this provision were Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland. It follows that any pre-Confederation laws of a constitutional character are amendable by Parliament or by the legislature of the provinces according to their jurisdiction under the British North America Act. The exception, however, was an important limitation on the powers of Parliament or the provincial legislatures.

The laws of England applicable in the colonies are of two kinds, namely those that are applicable by adoption by the local legislature and those that are applicable in proprio vigore. The former, being enactments of the local legislatures, may be repealed by them. The latter, however, are applicable by force of their own terms and could not be altered by the local legislatures.

Shortly before the passage of the British North America Act the Parliament of the United Kingdom enacted the Colonial Laws Validity Act of 1864. This Act had the effect of nullifying a colonial enactment if it was repugnant to any Act of the Parliament of the United Kingdom. It has been held by the courts that this limitation applies only to Imperial Acts in force in a colony in proprio vigore, and not such as are applicable by adoption. The Colonial Laws Validity Act was therefore a further fetter on the legislative power of Parliament and the provinces. Thus, neither