9. PARDONING POWER

Another change between the Quebec Resolutions and the British

North America Act was with respect to the Pardoning Power.[94] The Quebec Resolutions had given this power to the Lieutenant-Governor in Council, that is, the provincial cabinet, "subject to any instructions he may, from time to time, receive from the general Government, and subject to any provisions that may be made in this behalf by the general Parliament". But the Colonial Secretary, Cardwell, objected to this provision. Indeed it was only one of two provisions arising out of the Conference that the British government formally took objection to.[95] "It appears to her Majesty's Government", Cardwell stated,[96] "that this duty belongs to the representative of the Sovereign, — and could not with propriety be devolved upon the Lieutenant-Governors, who will, under the present scheme, be appointed not directly by the Crown, but by the Central Government of the United Provinees." In spite of the Colonial Office objections, the delegates at the 1866 London Conference reaffirmed the view that the pardoning power belonged to the provinces, but conceded that the federal government should have the sole responsibility in capital cases.[97] The Colonial Office, however, would not accept this version and as a result nothing was stated in the British North America Act with respect to the pardoning power.

After Confederation there was a continuing controversy over the issue. The Colonial Office[98] and the federal government[99] took the position that the pardoning power for federal and provincial offences rested solely with the federal government.[100] The provinces took the

94 See generally, the excellent Carlton University Master's thesis, M. K. Evans, The Prerogative of Pardon in Canada: Its Development 1864-1894 (1971).

95 The other provision objected to related to the life appointment of senators: see the letter from the Colonial Secretary, Edward Cardwell, to Viscount Monck, Dec. 3, 1864, set out in W. P. M. Kennedy (ed.), *Statutes, Treaties and Documents of the Canadian Constitution 1713-1929*, (2nd ed., Oxford U.P. 1930) at pp. 547 *et seq.* The Colonial Office eventually gave in on this matter, but not on the pardoning power.

96 *Ibid.* at p. 548.

97 See Evans, The Prerogative of Pardon at p. 8.

98 See the views of the Colonial Secretaries: Lord Granville, set out in Canadian Sessional Papers, 1869, No. 16, p. 5, and Lord Carnarvon, set out in Canadian Sessional Papers, No. 11, 1875, p. 38.

99 See the views of Sir John A. Macdonald in 1869 (Canadian Sessional Papers, 1869, No. 16, p. 1) and of Sir John Thompson in 1889 (see the correspondence between Thompson and Mowat set out in J. M. Beck (ed.), *The Shaping of Canadian Federalism: Central Authority or Provincial Right?* (Toronto 1971), at pp. 92-3.)

100 Another controversy — this time between the Colonial Office and the federal government — involved the question whether the Governor-General could act on his own without the advice of the federal government. This was resolved in 1877, whereby the Governor-General could not act without the approval of the Cabinet in capital cases and of a cabinet minister in other cases, although he could act on his own in extra-Canadian matters: see the thorough discussion of this issue in Evans, *supra* note 94 at pp. 62 *et seq.*

position that they could pardon those convicted of provincial offences and the 1887 Interprovincial Conference called by the premier of Quebec passed a resolution to this effect.[101] Matters were brought to a head in 1888 when Ontario passed An Act Respecting the Executive Administration of Laws of this Province.[102] The ensuing litigation, known as the *Executive Power Case,* settled the issue in favour of the provinces.[103] Chancellor Boyd stated:[104] "The power to pass laws implies necessarily the power to execute or to suspend the execution of those laws, else the concession of self-government in domestic affairs is a delusion." Thus, today, the pardoning power over offences under federal jurisdiction belongs to the federal government and for offences under provincial jurisdiction belongs to the provinces.

101 Set out in Beck, *supra* note 99 at p. 91.

102 S.O. 1888, c. 5.

103 *A. G. Can. v. A. G. Ont.* (1890) 20 O.R. 222 (Chancery Div.), affirmed (1892), 19 O.A.R. 31 (C.A.), which was affirmed without a decision on the substantive issue, (1894), 23 S.C.R. 458. Before the Supreme Court case, the Privy Council had decided the important *Maritime Bank Case (Liquidators of Maritime Bank v. Receiver General of N.B.)* [1892] A.C. 437, establishing the status of the Lieutenant-Governors. This put the question beyond dispute.

104 (1890), 20 O.R. 222 at 249.