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SUBMISSION

to the

SPECIAL JOINT PARLIAMENTARY COMMITTEE
OF THE SENATE AND THE HOUSE OF COMMONS

on

THE CONSTITUTION

concerning

The Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada

Presented by

Honourable J. Angus MacLean, PC, MLA, DFC

on Behalf of the

GOVERNMENT

of

PRINCE EDWARD ISLAND

27 November 1980

CONTENTS

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

It is a very great pleasure for me to be here with you today. As I look around and see so many familiar faces it reminds me of many similar hearings in the past when I had the privilege of sitting on your side of the table. The fact that I am meeting with you as a representative of a provincial government is an indication that all of us as parliamentarians - which someone defined as "politicians away from home" - are temporary players on the stage of history, and our particular role may and does vary rapidly. Perhaps it would be well for all of us to remember our transitory political status as we contemplate and debate something as permanent, and far-reaching as the constitution of our country.

Let me say at the very outset that I consider it a privilege and an honour to appear before you on behalf of the people of the Province of Prince Edward Island. While we were not one of the original colonies who first joined the Confederation in 1867, Islanders are indeed proud that we hosted the first conference, and that our representatives raised some of the issues that are again being discussed, 113 years later. I only hope that in considering these fundamental issues again, we can all be as wise, yet as circumspect, as were the Fathers of Confederation. For while they were wise men, learned in constitutional matters and wise in the art of politics, they also possessed the wisdom to know that they should not bind the freedom of future generations. They were political men, who were content to solve

the problems of their generation and of their age. Therefore, the constitution they wrote was practical and brief. They did not pretend to possess the wisdom for all future generations. So, while I am pleased to be here on behalf of the people of Prince Edward Island, I am also very conscious of the fact that I can speak only for the present, and while I may speculate on the future, I cannot legislate for it. We must leave room for future actors to play their parts - we cannot today write their scripts.

I am most pleased also to appear before this Committee because of its importance. Yours is not an ordinary Committee. You are not asked to deal with ordinary legislation, but you are asked to deal with our constitution. Constitutions are a sacred trust, agreed to, not by governments, not by political parties, and not by politicians. Rather, they embody the spirit of a people, and express how they wish to be governed. Constitutions are not ordinary pieces of legislation, to be enacted, repealed, or indeed amended, like a highway act, or a revenue act, or any other ordinary act. Rather, constitutions provide the ground rules for governments. They tell governments what they can legitimately do and not do, and how they shall do it.

This is particularly true in a federal state where there are competing jurisdictions. Federal constitutions assign responsibilities to each level of government and, in this way, seek to establish and to maintain a harmonious and effective relationship between the two levels of government. This relationship develops and grows over a period of

time, as a result of practice, precedent, and court decisions, all of which are grafted onto, and become part of, the constitution. In this way constitutions, and particularly federal constitutions, protect people from the ill-considered and intemperate actions of a passing political majority. Our presence here is indicative of our belief that you are conscious of this trust.

Constitutions should be written by the people through their elected representatives in all eleven legislatures - in other words, through the political process. Nevertheless, the Government of Prince Edward Island has been forced to the Courts because as the representative of our province, my government feels obligated to use every means at its disposal to preserve what it considers to be the very fibre of the nation. It is only because the political process is being thwarted by the Federal Government that we feel it necessary to protect, in whatever way we can, some semblance of constitutional order, as well as what we think are the basic principles of a federal state.

That is why, while we have joined others in asking the Courts for an interpretation of the legality of the Federal action, we have, at the same time, deliberately chosen to speak to your Committee, because we still seek to deal with our constitution in the only way constitutions should be dealt with - that is through some form of the political process; and in a federal system, the political process must include a federal-provincial consensus.

Let us examine briefly some of the circumstances which led to our presence here today:

The Federal Government's actions have reduced us once again, for the first time in 53 years, to the position of a colony. It has now become obvious that the Federal proposals, because they are without precedent, have subjected our country and our people to public embarrassment by making our constitution the subject of controversy in the British press and the British Parliament. We are incapable of understanding, Mr. Chairmen, the logic of an argument that purports to remove the last vestiges of 53 years of colonialism by returning us to a status we have not known for 113 years. We are not impressed by the logic of a Federal Government that purports to be terribly embarrassed about going to London for constitutional amendments, and yet deliberately seeks from London the most fundamental changes ever to be made to our constitution. Such a situation is, of course, the inevitable result of the action of a Federal Government determined to impose its view of federalism on an unwilling, independent Canadian nation.

We do not accept the principle of unilateral action. The Federal Government's argument is, basically, that since we have tried for 53 years to patriate our constitution, without success, that we should now abandon the effort, and let one level of government impose its view of the country on everyone else. A subsidiary to this argument is that the British Parliament has always complied with any request contained in a joint resolution of the House of Commons and Senate of Canada. Let us examine the substance of this argument.

First of all, anyone who argues that the Dominion of Canada has for 53 years felt a burning desire to patriate our constitution, displays a wonderful ignorance of our history. The fact is that since 1931 Canadians have not been colonials, nor have they felt colonial. The fact is that the great urgency was created by the Government of Canada.

The subsidiary argument is just as fallicious. To argue that the British Parliament has never refused to act on a resolution of the Canadian Parliament is misleading. The truth is that never before was there concerted provincial opposition. The consent of the provinces was either explicit or implied, for any amendment which would alter the division of powers between the two levels of government. The present situation is unique in our history.

But by far the most serious result of unilateral action is the violence it does to our constitutional practice by establishing a precedent as dangerous as it is wrong. Our federal system has had its difficulties, but all of us agree that it has served us reasonably well. All members have, at some time, accommodated themselves to the needs of others and to the needs of the nation as a whole. What becomes of that spirit of compromise and sacrifice if the provinces' position in the federation can be fundamentally changed, against their will? For if it happens once, it can happen again. The precedent will be the accomplished fact.

Thus, we are here under regrettable circumstances. But the fact that we are here, will, we hope, impress upon you our steadfast faith

in the political process, and our belief that we can still follow, in this country, our well-established constitutional practices. We look to this Committee to renew our faith, by recommending that the Resolution under consideration should request only patriation of the constitution.

DISCUSSIONS THIS SUMMER

We believe such a recommendation from your Committee is necessary to restore, not only our faith, but the faith of all Canadians. This is particularly so because of the serious, dedicated and sincere efforts all Governments made over the summer months to make progress; and much progress was achieved. Other provinces will speak for themselves, but allow me to review the events of the summer from our vantage point.

From our opening statement in Montreal through to our position statements on the 12 agenda items at the First Minister's Conference, our theme was, I believe, one of reasonableness, of the need for consensus, of the need for a strong central government, and of the need for some mechanism wherein the voices of the constituent parts could be heard in the decision-making process.

Our view on the issues was based on the nature of a federal state as opposed to other kinds of states and governments. In a federal state, there is a national economy and a national identity. But there are also provincial, state, or territorial economies, cultures and identities. In almost all federal systems, this duality is recognized in the central government through the existence of two Houses of

Parliament (in our case Commons and Senate). In almost all federal systems, one House represents the nation on the basis of population, and the other represents the partners equally. In this way, a realistic, national consensus is possible. In addition, the provincial, state, or territorial governments deal with those subjects within their areas of jurisdiction.

Based on this concept, it is our view that the particular division of powers is less important than assuring the provinces a significant role in national decisions. It is also our view that Canadian federalism has never provided a significant role for provinces in our national parliamentary institution.

Our opening statement to the First Minister's Conference in September is attached for your information (Appendix "A"), but perhaps the following paragraphs best describe our view:

> "In summary, the principal concern of Prince Edward Island in this process is <u>not</u> to infeeble the central government."
>
> "It must be said again, Mr. Chairman, Canada is much more than our federal government. We as provinces have views and perspectives which are integral to our national well-being. Being cast sometimes as opponents to some supposed national will is as uncomfortable as it is unreasonable."
>
> "Some of our problems are not the division of powers, but it is the role of the constituent parts of the federation in the central institutions that have created some of our problems. We are not interested, necessarily, in significantly more power for the provinces, for our province, but we are interested in some kind of influence and some significant voice in the central institutions so we could have a little influence over how the power of the federal government was exercised."

We do not think there can be a significantly different view of any federation, and we applied this view as much as possible to all items on this summer's agenda. (Our position on each of the items is attached as Appendix "B").

I might say that on many of the economic issues, Prince Edward Island had no vested interest. For example, our offshore territory is insignificant, and our mineral wealth is meagre. Thus our positions on a number of issues were taken on principle, and on what we judged to be good for the country. Let me give but one example. We were opposed to giving the provinces the power to levy indirect taxes on natural resources because we think it would be particularly disadvantageous to Prince Edward Island. But we agreed to it because a number of provinces wanted it, and because the Federal Government agreed. And for that kind of spirit of compromise, and our willingness to make that kind of progress, we are now called power-mongers and horse traders.

This kind of spirit was manifested by all provinces; and, as a result, significant progress was made.

Prince Edward Island believes that the discussions this summer were beneficial - there is now a better understanding throughout the country of the legitimate aspirations, concerns, and views of all the constituent parts of this federation. While we did not reach unanimous agreement on all 12 items, we came close. For example:

10 provinces agreed on Communications
9 provinces agreed on Equalization
9 provinces agreed on Offshore Resources
9 provinces agreed on Fisheries
10 provinces agreed on an Amending Formula
9 provinces agreed on Resource Ownership
8 provinces agreed on Family Law

To reach this state of agreement, however, we believe that there exists in this country the basis for a constitutional package, given sufficient time and goodwill. Indeed, many of the premiers on the closing day of the First Minister's Conference stressed the need to continue the debate; to negotiate further because we had reached a plateau from which a sound agreement was attainable. As I stated at that time:

> "I do not believe that we have failed, for we have only failed to accomplish in a week what most of us recognized from the beginning would require more time and effort."

But even if it is considered by some to be a failure, does that mean that drastic, perhaps illegal, steps are justified? No, we must live with this temporary set-back, and renew our efforts. Certainly it is not sufficient excuse for one level of government to act unilaterally to impose its will over all the other parts!

Perhaps, for a moment, we should consider why complete success alluded us. We have already mentioned the time-table absurdity - 12 major items affecting the life-blood of the nation to be discussed, modified and agreed to in 3 months! Part way through the discussions,

the Federal Government introduced a massive document on "Powers Over the Economy" which by itself should have been considered for 3 months, if at all. Then we were subjected to the cyncism and manipulation techniques outlined in the so-called "Leaked Document" which outlined to the Federal Government a strategy for dividing the provinces, for putting those who disagreed on the defensive, and which outlined a plan for unilateral action by the Federal Government. One might be permitted to think that the constitutional reform plan was predestined to fail, by design!

So despite our considerable success in the face of many frustrations, is now all to be lost? For our efforts, premiers have been called by the Federal Government (partners in this exercise, we might add), power-hungry potentates of petty principalities, bartering oil for people's rights, and fish for basic rights. We are accused of thwarting some national will. Indeed, we are accused of lacking a national perspective, and therefore are told that the Federal Government must impose its view of the state, and that there is no legitimate role for provincial economies, provincial cultures, and provincial societies. If this happens, Mr. Chairmen, it will be a denial of our history, and will rend this country to such an extent that the sincere and honest efforts of the past summer may not again be seen for many years to come, because the spirit of federalism will have been fatally weakened.

I would like to consider for a moment what this Resolution is suggesting you approve. Because the Federal Government and the Provincial Governments were unable to reach agreement on a new constitution, the

Government of Canada, through its majority in the House, intends to unilaterally dictate a Canadian Constitution. The legality of this action will be addressed by the courts. The wisdom of it should be decided by this Committee.

The Federal Government maintains that because it is the national government, that because it has a simple majority in Parliament, it has the right to take this action. But there is a vast difference between Statute Law and Constitutional Law.

In Statute Law, we as parliamentarians make laws by passing legislation, normally reflecting the will of the majority in the legislature. And should we find, as we often soon do, that that law or some aspect of it, is unworkable, then we change it. This can be done relatively simply and quickly. If a government persists in making unworkable or undesirable laws because of its majority, the electorate has the right within five years to toss it out of office and substitute for it a government more amenable to the peoples' wishes; but when we write constitutions, we are undertaking a much more awesome task. We are not merely enacting laws that can easily be amended or repealed; rather we are making the rules that determine under what circumstances, and in what fields and by what levels of governments laws shall be made. A constitution by its nature has to consist of stable, abiding and acceptable principles, for by it, the generation that writes it is proposing the rules by which future generations will govern themselves, but it should not, I repeat not, try to dictate from the grave, the decisions future generations, should arrive at under these rules. These rules should therefore be generally acceptable, and should have the almost unanimous support of all society and all parts of the nation.

It is an awesome responsibility that should not be entered into lightly or hurridly, much less clouded by political antagonisms. If a proposal for a constitution does not have wide consensus, general support, and as near unanimity of purpose as possible, it should not be proceeded with.

My point is that a constitution is no ordinary law; thus it must not be imposed on the people by a group which has only a simple majority. Indeed, most constitutions require either unanimity to change them, or at the very least a 2/3 majority. This principle is recognized in section 4(2) of the draft Constitution Act which is before you, when it states a House of Commons or a Legislative Assembly can only continue beyond five years with the consent of at least two-thirds of its membership even in times of apprehended war, invasion or insurrection. This is a sound provision borrowed from a wiser age.

Thus, I very seriously question whether it is proper or legal for this Parliament to impose its will on the rest of us on such a fundamental but crucial matter as our national constitution.

In considering the propriety of majority rule, I would like to refer this Committee to a document with which you are all very familiar - Beauchesne's Parliamentary Rules and Forms, section 67, and I quote:

> "Decision by a majority is not an absolute and unquestionable principle. 'Our constitution, to use Burke's phrase, is something more than a problem in arithimetic.' There is no divine right of a mere numerical majority any more than of King's. Majority decision is a measure of convenience essential to the dispatch of business, the result, 'of a very particular and special convention, confirmed by long habits of obedience.' The idea that a majority, just because it is a majority, is entitled to pass, without full discussion, what legislation it pleases, regardless of the extent of the changes involved or of the intensity

> of the opposition to them, the idea in fact that majority edicts are the same things as laws, is wholly alien to the spirit of the constitution.
> Rt. Hon. A. S. Amery, in "Parliament, A Survey".

> "We may add that the majority of the House of Commons does not always represent the majority of the electors in the country. It often happens that, owing to the redistribution of electoral districts, a party may come out of the general elections with a majority of elected members without having received the majority of the votes given by the electors who went to the polls or whose names are on the electoral lists. That party may form a Cabinet, but the official Opposition together with other anti-ministerial groups, though sitting to the Speaker's left, are the real representatives of the people; and their right to challenge by legitimate means every measure or proceeding sponsored by ministers cannot be disputed. In such cases, when the House divides, members who oppose the Administration may act on behalf of the majority while Government supporters represent the minority of the people in Canada."

Thus, it is the belief of my provincial Government that the Canadian Constitution should be written in Canada, by Canadians, through their elected representatives in Parliament, and in the legislatures of the provinces. This is the only way we can truly say that our constitution was decided upon by the majority in our country, and not by only the arithmetical majority in one institution. We believe that this sentiment was expressed in the second Whereas clause on page 10 of the Resolution where it states:

> "and whereas it is in accord with the status of Canada as an independent state that Canadians be able to amend their constitution in Canada in all respects".

We have to conclude as I am sure you will, that that principle of "majority will" on a constitutional matter is not being adhered to in the unilateral action proposed by this Resolution before us.

There are many other comments I could make, both on the intent and the form of the proposed act. However, I would like now to deal rather briefly with the substance of the Resolution, and elaborate on certain specific concerns we have with it.

AMENDING FORMULA

Much has already been said in the House, in the Senate, and before this Committee about the Amending Formula proposed in the Resolution. My province has been mentioned prominently in this debate as the focal point in one of the problems with the federal proposal. I will comment on its unfairness to Prince Edward Island shortly; but, first, a more general observation.

The process whereby a constitution can be amended is a critical element in any constitution - that is self-evident. We have argued earlier that a substantial majority, not an arithmetical majority in one institution, should agree on a constitution before it becomes law. By the same reasoning, a substantial majority must agree on a specific formula to amend that constitution in the future. But the proposal before you does not provide for this consensus! The most likely outcome of the provisions of the Resolution is that the "modified Victoria Formula" will be forced upon Canadians, either directly by the Resolution or indirectly through a referendum.

The so-called "modified Victoria Formula" has been the subject of controversy since it was introduced on October 2nd. Many have spoken eloquently about its unacceptablity to many provinces, and its utter unfairness to Prince Edward Island. To suggest that the two approving provinces required to approve an amendment must represent 50% of the population of the Atlantic region is to relegate Prince

Edward Island to a third class status in Canada. As a member of the Federal Government and of this Committee pointed out in the House, "it would be impossible for Prince Edward Island in concert with any other singular province of the Atlantic Region to be representative of 50% of the population of that region".

Surely, it is not necessary for us to go into a great deal of verbiage to point out how inequitable this is, and how it results in a degradation of one of the principles of Confederation which allocate certain rights to provinces, not only to large provinces.

Prince Edward Island does not seek a veto power on constitutional amendments - it seems the Federal Government will maintain that right for itself and for Quebec and Ontario. However, we do seek, and insist upon, the right of a voice in this nation's affairs, in a manner befitting a province of a confederation.

We note that there has been some indication that the Federal Government might consider an amendment to the Resolution which would delete the need for two of the Atlantic provinces to constitute 50% of the population of the region in order to have a say on a particular amendment. Obviously, we welcome such a change - in fact, as Prince Edward Islanders, we must insist on such a change.

But, even if this inequitable provision is changed, we maintain that the proposal is wrong when it imposes an Amending Formula on the country. We believe that the B.N.A. Act should be patriated, and that an Amending Formula be developed through agreement of the provinces and the Federal Government.

USE OF A REFERENDUM

It would appear to me that most of the concern about this Resolution centres around this new so-called "deadlock breaking" mechanism. Quite frankly, I am at a loss to understand why this mechanism should be introduced in such a high profile to our conventional ways of dealing with our constitution. We have a tradition in this country of consensus, of compromise, of cooperation. More importantly, we have the tradition that the legislature speaks for the jurisdiction. We do not rule by the popular mood of the majority on a specific issue at a particular point in time.

More specifically, I object to this section of the proposal because:

a) the process could be used to by-pass totally the provincial legislatures.

b) The process permits a referendum where provincial legislatures fail to agree to a federal proposal for constitutional change, but does not provide for a referendum where Parliament fails to agree to a proposal for constitutional amendments passed by all the provincial legislatures.

c) All the rules respecting the referendum are solely within federal control.

d) It substitutes the concept of majorities in regions rather than the will of provinces. The constituent parts that joined to create this country are provinces, not regions.

e) Is a simple majority enough? I think not!

Quite frankly, I believe this Committee should strongly and unanimously recommend to the House that any reference to the use of a Referendum be deleted from any Canadian Constitution.

CHARTER OF RIGHTS

Everyone agrees that society through its governments must protect rights and freedoms in this country. The issue is not whether we should, but how we should protect them.

Our position was clearly stated at the First Minister's Conference in September: "in no sense is Prince Edward Island's position one of opposition to fundamental rights, but, rather, how these time-honored rights are best protected and developed. Our unease on this matter is based on our fear that an entrenched Charter of Rights would weaken our parliamentary democracy. Our position is one of principle. Our parliamentary institutions over centuries have not just defined and nurtured our rights, but in many instances, Parliament expressing the will of the people, has devised our rights. Transferring the definition of our basic social values from our legislatures to the Supreme Court would weaken our parliamentary traditions and weaken the very rights which now concern us".

One argument against entrenchment is that in the course of deciding what is meant by a broad phrase such as "freedom of religion", Judges will be asked to make decisions which shape the character of a community; I maintain these decisions should be make by the elected representatives of the people.

I believe that it is not wise to entrench rights phrased in sweeping generalities in the constitution, because by so doing we run the real risk of changing the character of our governments and our courts.

As Premier Blakeney so clearly put it:

> "What the charter of rights proposed by the Federal Government undoubtedly does, is change the legislative power of Parliament and of the provinces. It raises matters of a type which under existing conventions governing constitutional change, require unanimous consent of all eleven (11) governments, and it assuredly does not have that unanimous consent."

The proposed charter also protects the use of the French and English languages. I agree that a new constitution should preserve the existing constitutional rights, privileges and obligations respecting the French and English languages. I have no quarrel with the obligation for all Federal undertakings to be made available in both official languages. But, beyond that, I believe it is the responsibility of the individual legislatures to determine the extent to which undertakings will be conducted in which language. Legislatures must, of course, respect the rights and wishes of their minorities on the language question. I believe, for example, that the legislation recently enacted in our own province whereby a School Board must provide French Language education where the parents of a minimum of 25 students over 3 grade levels request it, is typical of how legislation can and should protect the rights of its minorities.

Another area of concern is the proposed Non-Discrimination Rights in section 15. It appears to us and to many others that this proposal may require the abandonment or alteration of some highly-valued legislative schemes. For example, Human Rights legislation has limits and exceptions which would be in violation of this section. Also, many age-based schemes would be in jeopardy. .

I would be remiss if I did not compliment the Federal Government on the following point. As some of you may know, the Federal position all summer was that "the right of a citizen to own land in any province" would be included in the Charter of Rights". Our province, so dependent on our land, would have been vulnerable to massive instances of "absentee landlords" again, if such a right was made available. Our Attorney-General, Mr. Carver, made a spirited attack on that proposal during the First Minister's Conference, and we are gratified to see that the Federal draft no longer contains such a proposal.

EQUALIZATION

The principle of Equalization is one which has been accepted by all governments in Canada for many years. The necessity of and benefits from such a practice have been well stated in previous debates in both Houses and before this Committee.

Prince Edward Island has an interest in ensuring that this necessary practice continues. We were very pleased with the discussions this summer when all governments agreed with entrenching the principle of Equalization in the constitution. We also understood that 10 governments (British Columbia being the exception) agreed on the specific wording to go in the constitution.

You can then, no doubt, appreciate our shock when we saw that the wording in the Resolution on this matter had been altered considerably from what had been agreed to this summer. What we now have is a diminished statement of intent.

Specifically, the proposed wording:

a) does not mention the words "equalization payments"

b) does not indicate that the payments will be made to provincial governments

c) uses very unclear and ill-defined terms as "undue burden of taxation".

CONCLUSION

Mr. Chairman, Prince Edward Islanders have a great love for this country. They wish to see it unite, to grow in strength, and to prosper. They do not want to see partisan politics and personality conflicts diminish the stature of this great nation. I believe they want their representatives to argue for the larger interests of Canada. Thus, I am sure that I represent their views when I state that it is more in sorrow than in anger that I see the divisive effect of this unilateral action on our nation. If a constitution does not have the support of a great majority of its citizens, then instead of healing a nation's wounds, it exacerbates the fires of divisiveness or even separatism in a country.

In essence, I am here to plead with you, for Canada, that you recommend to Parliament that the present course of action be stopped, and the BNA Act be patriated as it is, to be changed by Canadians, in Canada.

We plead with you to do this for all the reasons I have mentioned. But, for more than any other reason, I urge you to act to prevent this destruction of the very fabric of Canadian federalism. If the powers and rights of Prince Edward Island, and any province can be altered by the Federal Government acting alone, then I can honestly tell you that we can never again feel secure about the position of our province in Confederation. For the truth is that we will have neither a federal state nor provinces. Provinces will no longer be provinces. They will be the equivalent to municipalities, with their powers and

jurisdiction subject to change by a future Federal Government that may decide to act in a similar fashion. In fact, similar action in the future will be easier, because a dangerous precedent will have been established. Provinces will live forever in a state of apprehension.

Speaking of fear, it has been said by some that Prince Edward Island is "biting the hand that feeds it". We don't believe that. We refuse to believe that any Federal Government will treat provinces differently just because provinces express sincerely-held views about the fundamental issues of Canadian federalism. But even if we did believe it, we would still speak our mind. For anything else would condemn us to a demeaning and pitiful existence. Besides, there are times when one must say what he thinks is right, simply to preserve the dignity and self-respect of the people he represents, and because he thinks it is right.

Thank you.

APPENDIX "A"