



REPRESENTATION
OF THE
GOVERNMENT
OF
PRINCE EDWARD ISLAND
CANADA

TO THE
FOREIGN AFFAIRS COMMITTEE
OF THE
HOUSE OF COMMONS
OF THE
UNITED KINGDOM

REGARDING THE
BRITISH NORTH AMERICA ACTS

CHARLOTTETOWN
PRINCE EDWARD ISLAND
CANADA
28 NOVEMBER 1980

Honourable Members
of the
Foreign Affairs Committee
of the
United Kingdom
House of Commons:

The Government of the Province of Prince Edward Island, Canada, is appreciative of the invitation from the House of Commons Foreign Affairs Committee to make its views known on the United Kingdom's "legal and constitutional responsibilities" regarding the British North America Acts.

Should it be that this submission to your Committee is in imperfect form, or otherwise defective, it is hoped that you will receive it nonetheless. Any imperfections arise solely from our inexperience with your procedure and not from any intention to slight the Committee.

In making this submission, Prince Edward Island is mindful that your Committee will not concern itself with any political considerations which continue to surround the constitutional review exercise in Canada. It is submitted that the United Kingdom's role as trustee of the British North America Acts must be as unpleasant for your country as it is unpleasant for Prince Edward Island to oppose, in the forum of your Committee, a probable course of action by the Government of Canada.

The comments which follow are in no sense a legal factum on the subject matter before your Committee. Legal opinion will doubtless be available to you from diverse sources, including submissions from certain of our sister Provinces. While associating ourselves with the more formal arguments of the Provinces of Quebec, British Columbia, Alberta and Newfoundland, it is Prince Edward Island's wish to leave one main impression with you.

It is in the context of the United Kingdom being a trustee of the British North America Acts that Prince Edward Island contends that the Government of Canada will breach a well-established constitutional convention and ethic if it despatches a joint address of the Canadian Senate and Commons which does not have the specific or tacit support of all Canadian Provinces.

Prince Edward Island submits that all previous submissions requesting amendments to the British North America Act, 1867, have, with insignificant exceptions, come to the United Kingdom Parliament with Provincial support.

Of greater significance is the process, in Canada, which led to the enactment of the Statute of Westminster. Realizing the significance of what became Section 7 of that statute, the Canadian Prime Minister of the day assured that Provincial support for the proposal was not only understood but was specifically included in the Joint Address to the United Kingdom. Such was the background for the Canadian response to the most significant alteration in the constitutional framework of the self-governing Dominions. It was both a commendable and sensible procedure which we feel is as valid today as it was in 1931.

Having stated, in general terms, the process which Prince Edward Island feels should precede any Joint Address from Canada, some comment on the nature of the Canadian Federal union is required.

Prince Edward Island rejects any suggestion of an "equality" between our federal and provincial governments. The federal government is the paramount of the two levels of Government of Canada and, to a large extent, the embodiment of the nation, particularly beyond the boundaries of Canada. This

paramountcy was intended by our Fathers of Confederation and made manifest in various powers assigned to the federal government, either specifically or by residue, in the British North America Act, 1867.

But despite the general paramountcy of the federal government, it must not be overlooked that sovereign powers in specific areas of jurisdiction were also assigned to the provinces. And they are, indeed, "sovereign" powers, undiminished by any power of the federal government to over-ride their exercise. Provincial powers are enumerated in Section 92 of the British North America Act, 1867, and their specific nature will be well known to your Committee.

Prince Edward Island's concern for the process of constitutional amendment would be much reduced if it was our opinion that the proposals of our federal government were likely to be confined solely to areas of federal jurisdiction. But constitutional proposals which involve language and education rights and a national amending formula are obvious intrusions into areas of provincial jurisdiction.

Reverting to the concept of trusteeship suggested in an earlier paragraph, it is submitted that the Parliament of the United Kingdom should note that the Joint Address which the Government of Canada now proposes be sent to Westminster is not, in any sense, an amendment to the British North America Act. Rather, it would terminate the United Kingdom's involvement in Canada's constitutional instruments.

While Prince Edward Island supports--and has encouraged--the widespread desire in our country for a "Canadian" constitution, its establishment must be preceded by a significant measure of agreement between the two levels of government in the areas of their responsibilities. Unilateral action by our federal government which lacks this significant measure of provincial support will, we suggest, impose an unconscionable strain on the trusteeship of the United Kingdom.

As members of the Committee will be aware, numerous of the Canadian Provinces have urged that the present proposals of the Government of Canada be referred to the

Supreme Court of Canada for its opinion as to the legality of including matters such as the Charter of Rights in the proposed Joint Address without provincial support. At an earlier time, this process was followed, at the urging of the Provinces, to determine if the federal government could alter, unilaterally, the constitution of the Senate. The decision [Reference re Legislative Authority of Parliament to Alter or Replace the Senate, (1979) 102 D.L.R. (3rd) 1 (S.C.C.)] was, of course, an emphatic "no". In its judgement on the Senate Reference, the Supreme Court of Canada took particular note of an earlier publication (White Paper) of the Government of Canada entitled The Amendment of the Constitution of Canada [Ottawa, Department of Justice, 1965] which enumerated four general principles respecting amendments. The Court included the four general principles in its judgement, the fourth of which was:

".... the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces. This principle did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance."

Lacking a reference to our Supreme Court, six Canadian Provinces (Quebec, Manitoba, Newfoundland, British Columbia, Alberta, and Prince Edward Island) have either commenced or associated themselves with references to the Superior Courts of Manitoba, Newfoundland and Quebec. Argument in the Manitoba references has now commenced and will commence in the remaining two courts early in 1981.

If asked our opinion as to the desirable course of action for the United Kingdom to follow as regards the Canadian "constitution", Prince Edward Island would suggest, unhesitatingly, that some means be found to "patriate" the British North America Acts in their present form with the proviso that subsequent alteration of those Acts would require the unanimous consent of the federal and provincial governments. Such a procedure would result in full Canadian control of its constitutional instruments and the attendant responsibility for resolution of constitutional matters in Canada.

In conclusion, Prince Edward Island thanks the Foreign Affairs Committee for this opportunity to present its views on the British North America Acts. Respectfully, we submit that the United Kingdom's role is much more than simply responding to a request from the Government of Canada. Provincial concurrence, given the nature of our federal state and of established convention, must be an integral component of the constitutional process.