# Nova Scotia and Constitutional Amendment

**Hon. Judge P.J.T. O'Hearn** *

Nova Scotia was brought into Confederation by Sir Charles Tupper guiding an uneasy Legislature and overriding a mutinous populace. The objections to the scheme that then stood large in the popular mind have coloured the Province's attitude to the union ever since and account in some part for the Nova Scotian attitude towards constitutional amendment. The chief objections to Confederation were set out by Joseph Howe in a letter dated January 19, 1865, to Earl Russell, as follows: [1]

> 1. That, by adopting the principle of Representation by population, the Maritime Provinces will be forever swamped by the Canadians.
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> 2. That, if the Canadas, always in trouble of some sort, and two or three times in open rebellion, should repeat such eccentricities, we should be compromised, and our connexion with the Mother Country endangered.
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> 3. Because the plan of double Legislatures, tried in Scotland and Ireland and swept away, is cumbrous and expensive, and cannot be carried out without raising our ad valorem duty, which is now only 10 percent to 20.
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> 4. That, when we raise our duties to this point, for the benefit of 3,000,000 of Canadians, we burthen our trade with the Mother Country and with our British brethren in 50 other Colonies scattered all over the world.
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> 5. That when the Tariff is thus raised but £250,000 currency will be left for defence, a sum utterly inadequate, for any such purpose while nothing is gained by weakening the unity of command and control now possessed by Her Majesty's Government.

The emphasis here is on mistrust of the Canadians and on money. Howe, in an 1866 pamphlet, expanded on the first part as follows: [2]

> When the American republic was formed, the smaller States which entered it had many guarantees for protection and fair play which this Quebec scheme of government does not give to us. In the first place, no one large State could dominate over all the others...
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> In our case we are to have a confederacy in name, but in reality the centre of power and of influence will always be in Canada. It can be nowhere else.

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* County Court, Halifax, Nova Scotia.

1 *The Speeches and Public Letters of Joseph Howe*, Chisholm, Ed., (Halifax, 1909) Vol. 2, p. 437; J. Murray Beck, *Joseph Howe: Voice of Nova Scotia*, Carleton Library No. 20 (Toronto, 1964), p. 175; from Beck's text which makes more sense.

2 *The Speeches and Public Letters of Joseph Howe*, Vol. 2, pp. 490-1.

> When divided, the eastern and western sections may quarrel as they have always done upon sectional questions, but they may be trusted to combine against us whenever our interests clash,...

The Confederation settlement set up fairly adequate safeguards for the vital interests of the Canadas and the Canadian minorities. These interests were cultural, i.e., educational, linguistic and religious. Nova Scotia being quite capable of keeping her cultural individuality, even in a centralized government, soon found that her vital interests were not cultural but economic. In being made part of the union she was not only deprived of the economic advantages she then enjoyed but no safeguards at all were provided for her.

This mistrust of the Canadas meant that the Nova Scotians of 1867 did not look to Canadians for helpful changes in their constitutional predicament but expended all their efforts in England. Howe and the rest of the Bluenose resistance were probably quite content at that time to accept the method of amendment proposed by the Canadians: that it be the prerogative of the Imperial parliament. The Canadian proponents of Confederation apparently did not contemplate any other way. Thus Galt wrote to Sir Edward Lytton in 1858: [3]

> It does not profess to be derived from the people but would be the constitution provided by the Imperial parliament, thus affording the means of remedying any defect, which is now practically impossible under the American constitution.

And D'Arcy McGee was quite definite about it in the Confederation Debates: [4]

> We go to the Imperial Government, the common arbiter of us all, in our true Federal metropolis — we go there to ask for our fundamental Charter. We hope, by having that Charter that can only be amended by the authority that made it, that we will lay the basis of permanency for our future government.

Others who spoke in the Debates seemed to take this position for granted although a couple expressed the hope that a means would be devised to permit the federal parliament to amend the charter. Some of the more prescient expressed the view that leaving the job to the Imperial parliament would make amendment too facile and too unpredictable. These latter objected to passing the scheme without consulting the electorate, a view expressed also by Howe in his letter to Lord Russell: [5]

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[3] *Sir Alexander Tilloch Galt* by O. D. Skelton (O.U.P., Toronto, 1920), p. 243; abridged reprint, Carleton Library No. 26 (Toronto, 1966) p. 97.

[4] *Confederation Debates* (Quebec, 1865; reprinted Ottawa, 1951 by the King's Printer) p. 146.

[5] *Op. cit.*, note 2, pp. 436-7.

> In England no important change in the machinery of government is made without an appeal to the country. In the United States no amendment can be made to the constitution which is not sanctioned by two-thirds of the members of both Houses, and ratified by a majority of the electors.
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> Your Lordship will readily understand how our people would feel if their institutions, enjoyed for a century, were swept away by a surprise, without the constituencies, who have worked them peacefully and successfully, being consulted.

Howe and his group failed to make any change in England and the Nova Scotians of 1868 lost faith in the Imperial parliament without gaining any in the Canadians. The resistance split into two groups: — those, with Howe, who tried to make the best of a bitter deal and negotiate 'better terms'; those who toyed with secession while accepting provincial government as a means to achieve ascendency and to further their views. Because of Howe's preëminence but also because his stand involved an apparent change of principles on his part, neither group ever captured majority support until after World War I, when secession was finally relegated to the realm of the ideal: it is not yet quite dead.

The ambivalent nature of this outlook is apparent in an entry in the proceedings of the first Interprovincial Conference, held at Quebec in 1887:[6]

> In view of recent movements in the Province of Nova Scotia, the Representatives of that Province desire to place on record that they participate in the deliberations of this Conference upon the understanding that, while they join the Representatives of the sister Provinces in seeking reforms in matters which are of common interest, they do so without prejudice to the right of the Government, Legislature or people of Nova Scotia to take any course that may in future be by them deemed desirable with a view to the separation of the Province from the Dominion.

The Interprovincial Conference recommended several amendments to the British North America Act. The Imperial government refused to act on these recommendations and this, coupled with the ease with which it was now apparent that the federal government could secure Imperial amendments led to a demand for consultation of the provinces. Nova Scotia, however, has never taken an extreme position on this: its constitutional lawyers have, on the whole, been opposed to the Compact Theory, and have tended to recognize that there is a sphere of constitutional law that is solely of federal concern.

What Nova Scotian governments have insisted on, in season and out, is a constitutional readjustment of financial resources to enable the provinces to fulfill their functions properly. This, as noted, was

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[6] *Dominion-Provincial and Interprovincial Conferences from 1887 to 1926* (King's Printer, Ottawa, 1951) p. 19.

the main vital interest of the Province affected by Confederation and it was adversely affected without constitutional guarantees or adequate compensation. Indeed, it is almost impossible to deal with within the framework of Confederation, except by money payments. The device of *equalization*, first formulated in the *Rowell-Sirois Report*, and developed by the King ministry in World War II at the hands of finance Minister J. L. Ilsley, and by the succeeding ministries, seemed to offer a way out to some extent, without need of constitutional amendment.

Consequently, constitutional amendment no longer poses to Nova Scotians an issue of vital importance and they tend to be unexcited about it. They share the general Canadian view that it is desirable that amendment be a wholly Canadian process but, as there are no entrenched educational or linguistic rights operative in the Province, they can afford to be dispassionate. There were attempts in the past to establish such rights and, at the time, these caused high feelings which could be easily roused again. Most of our public men seem to be prepared to establish for the Acadiens whatever linguistic rights they desire, but denominational schools pose a much more touchy problem despite *de facto* settlements in Halifax and one or two other places.

Nova Scotian governments, of whatever political hue, have not differed in their approach to fiscal reform. This is not unique: it occurs in most provinces with respect to their primary interests.[7] Nor have successive administrations in the Province differed in their attitude to what has become for them almost a primary constitutional purpose. This is to get over the barriers to effective government posed by the 'watertight compartment' doctrine of legislative powers in Canada. That is, it has been found by long experience that there are certain problems falling within the federal legislative field which are not of sufficient national importance to warrant legislation at that level but which are of local importance and need regulation at that level. The situation exists also in reverse. Under the O'Connor approach this would be sufficient to justify legislation by the body concerned but that approach has not (as yet, at any rate) been accepted by the courts.

There are also situations where the limits imposed by the interlocking jigsaw of powers do not permit the most efficient employment of administrative forces and efforts: fisheries is one such

[7] Cf. *op. cit.*, note 6, p. 13 for remarks of Hon. H. Mercier, Premier of Quebec. I have cited other instances in *Peace, Order and Good Government* (MacMillan, Toronto, 1964) Ch. 20 & 21.

field.[8] The device proposed to alleviate these situations is the delegation of legislative authority between the federal and provincial legislatures. This is, of course, presently beyond the powers of either.[9]

The case for delegation is summed up concisely in the *Rowell-Sirois Report* [10] in Volume I at page 259:[11]

> Where legislative power over a particular subject matter is divided, it is ordinarily desirable that these powers should be pooled under the control of a single government in order to secure unified effort in administration.

There is a tradition in the Attorney General's Department that Nova Scotia first proposed the idea of delegation at the 1927 Dominion-Provincial Conference when Premier E. N. Rhodes' Conservative government held power in the Province. I have not been able to find mention of it in the précis of proceedings. Nor have I been able to find it in the proceedings of the 1935 Conference. In the *Rowell-Sirois Report,* Vol. 2, p. 72 it is noted that delegation was suggested by Nova Scotia, Saskatchewan and the Canadian Chamber of Agriculture and Nova Scotia's Liberal Premier, Angus L. Macdonald, pointed this out in making a renewed plea for delagation at the 1950 Federal-Provincial Conference.[12]

At that conference, Premier Macdonald also proposed to add a new section 148 to the British North America Act, to enable the Act to be amended in Canada.[13] Following the plan of the continuing committee of the 1935 Conference [14] this would have divided the sections of the Act into four classes with a different formula of federal-provincial legislative concurrence for each class. The Nova Scotia proposal also provided for delegation of powers.

A committee of the 1950 Conference later enlarged the number of classes to six, a classification again elaborated in the Fulton and Fulton-Favreau formulas by the sections dealing with education.

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[8] Cf. J. S. Corry, *Difficulties of Divided Jurisdiction,* Appendix 7 to the *Rowell-Sirois Report* (King's Printer, Ottawa, 1939); *Rowell-Sirois Report* (King's Printer, Ottawa, 1940) Vol. 1, pp. 254-9.

[9] *Nova Scotia Delegation Case: A.G. Nova Scotia* v. *A.G. Canada* [1951] S.C.R. 31, [1950] 4 D.L.R. 369.

[10] I.e., *Report of the Royal Commission on Dominion-Provincial Relations* (King's Printer, Ottawa, 1940; reprinted in one volume, 1954).

[11] Cf. also Volume II at pp. 72-3.

[12] *Proceedings of the Constitutional Conference of Federal and Provincial Governments, January 10-12, 1950* (King's Printer, Ottawa, 1950) p. 21.

[13] *Ibid.,* pp. 52-5.

[14] Cf. *The Amendment of the Constitution of Canada,* Hon. Guy Favreau, (Queen's Printer, Ottawa, 1965, J2-1665) pp. 20-23.

While Nova Scotia has consistently taken the position that education should remain a provincial responsibility it sees no particular threat in federal financial support and, as there is no legal establishment of denominational schools, the Province's stand on education lacks the passion that others feel towards the federal threat to cultural values. Indeed, one questions why the Maritimes would want subsection (1) of section 4 of the two formulas, which requires the concurrence of all provinces (with the exclusion of Newfoundland) in any constitutional change affecting education in any one of them. This seems designed to freeze the present educational settlement forever. Surely the solution adopted for Newfoundland is preferable. Possibly the Maritime governments went along in the hope that it would save them any future bother over this troublesome question.

On the whole, this history indicates that Nova Scotia is in a position to be disinterested on constitutional questions: her chief concerns are fiscal soundness and effective administration. The first has not yet entered the constitutional reform problem to any extent; the latter can be dealt with by the delegation of powers.

The Nova Scotian ministers were therefore rather surprised to find that neither the Fulton Formula nor the Fulton-Favreau Formula, as originally presented, contained any provision for delegation of powers. It had to be pressed for each time, apparently against strong opposition from some quarters but also with considerable support from others. Nova Scotia wanted full powers of delegation both ways, and the settlement of the question in the formulas was felt to be an inadequate compromise. Nevertheless, Attorney General R. A. Donahoe stated on September 13, 1961, that he was satisfied to recommend it for approval. He noted that Nova Scotia had been particularly interested in the delegation of powers and that under the proposals any delegation would have to have the consent of at least four provinces, even though it involved directly only one.[15]

[15] *Halifax Chronicle-Herald*, Thursday, Sept. 14, 1961, p. 31.

In 1965, in introducing the resolution to approve the Fulton-Favreau Formula in the House of Assembly, Mr. Donahoe said:[16]

> ... from the very beginning of the conferences with respect to the Constitution the province of Nova Scotia has always insisted that there should be this feature of delegation in any amending formula.
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> This is done, was done and continues to be done because we were convinced, as previous delegations to previous conferences were convinced, that this would introduce into our legislative framework an element of fluidity,

[16] *Nova Scotia House of Assembly Report of Debate*, February 15, 1965, pp. 175-6.

> an element of ease, which could solve a good many difficult problems, and I want to say that the power of delegation which is included — which is, as you see, hedged around by a number of restraints and restrictions — is by no means the full and broad powers of delegation which we urged upon the conference.
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> If we had had our way, we would have been prepared to say that any province should have been free to delegate in a particular matter the right to the Parliament of Canada to legislate in that matter, and that, vice versa, the Parliament of Canada should have been free to delegate to any one province the right for that province to legislate in a matter which was, under the Act, reserved for the Parliament of Canada alone.

The resolution to approve the formula was introduced by Mr. Donahoe on February 15, 1965, the same day that the new Canadian flag was dedicated on the premises. It was seconded by Premier R. L. Stanfield. Only Mr. Donahoe, Hon. Peter Nicholson (Leader of the Opposition) and Hon. Layton Fergusson (Minister of Labour) spoke. Mr. Nicholson said that he thought adoption of the formula represented a very significant development in our national status and urged all the members to support the resolution.[17] Mr. Fergusson wanted to know whether French could be made an official language in Nova Scotia without the consent of the Province. Apart from this possibly sour note, the resolution passed without opposition and with general satisfaction. It incorporated the draft as revised by the federal parliamentary draftsmen.

The writer has expressed his attitude to the device of delegation of powers elsewhere.[18] It may be restated thus: (1) it will complicate the law needlessly, (2) it will add the threat of going beyond the powers delegated to the cases of *ultra vires* legislation already possible, (3) it is unlikely to be used to the extent needed: if the Parliament of Canada is going to enact delegating legislation it might as well go to the trouble to enact the original legislation; different but analogous considerations apply to provincial delegating legislation.

These objections do not make delegation inoperable, merely untidy and inefficient in practice. The sensible alternative to meet the problem of effective administration — which is a real problem — is to confer full parliamentary powers on both the Federal and Provincial governments with each one having the right to override the other where it now has exclusive authority.[19] This means that each legislature could deal fully with any topic unless there were some repugnancy between its laws and paramount legislation.

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[17] *Ibid.*, pp. 184-5.

[18] *Peace, Order and Good Government*, pp. 5, 7-8, 27-8, 134, 274.

[19] *Ibid.*, pp. 7-8, Ch. 16, 17.

This solution was not discussed at either the Fulton or Favreau talks. Delegation seemed to be the more innocuous way to approach the problem without making active the fears of encroachment that exist in some quarters. In any case, the conferences had no desire to tackle fundamental changes: everyone wanted to get a workable law with the least disturbance of existing arrangements.

Indeed, Mr. Fulton suggested that the repatriation be achieved in two stages: (1) by enabling the Parliament of Canada to amend with the concurrence of all the provinces while retaining recourse to the Imperial Parliament; (2) by enacting a comprehensive amending formula to replace action at Westminster. Nova Scotia did not favour this suggestion. Mr. Donahoe contended that it would embarrass the United Kingdom Parliament if it were called upon to enact an amendment that did not have the concurrence of all the provinces once Canada had that method of amendment available and he further contended that it would probably 'postpone the day when Canada would have its own constitution'.[20]

The last quotation permits an inference that Nova Scotia contemplated a new constitution with some basic changes. This was and is hardly the case. Mr. Donahoe commented that there was no basic objection to the constitution of Canada as established at the present time by the British North America Act. He said, 'It is true that many people would suggest amendments, but basically there has been agreement that we might pursue our discussion as relating to the constitution as it now exists'.[21] In fact, all Nova Scotia governments since World War I have favoured a federation of strong provinces and a strong central government within the structure of the British North America Acts and have favoured a fairly rigid demarcation of powers, with flexibility introduced through delegation to deal with problems *ad hoc*.

Nova Scotia's support for strong central government stopped short of approving section 91 (1) of the B.N.A. Act as enacted by the 1949 (No. 2) Amendment. This was the reef upon which the Fulton Formula foundered and the Province added its opposition to those that would not accept the formula without revision of section 91 (1). The root of the Maritimes' objections were the danger to provincial representation in the federal Parliament that the 1949 (No. 2) Amendment represented. This was not an issue in the Favreau talks, as the federal delegation conceded the point at the outset.

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[20] *Halifax Chronicle-Herald*, Friday, Oct. 7, 1960, pp. 1, 6.
[21] *Ibid.*

While opposed to entrenching too many clauses, Nova Scotia took the initiative in securing section 51A of the B.N.A. Act in an entrenched position, a matter of importance to the Atlantic Provinces. This initiative may have fallen in the lap of the Province's delegation by virtue of what Mr. Donahoe termed the 'batting order' at the conferences. Provincial delegations speak in order of provincial seniority in Confederation which has been determined in some unaccountable [22] way as Ontario, Quebec, Nova Scotia, New Brunswick, etc., but Quebec often defers its comments until it has heard the other delegations. Thus, Nova Scotia was frequently the first to express the view of the less populous and less favoured provinces and in many cases struck a note that evoked their sympathy.

The Province's representatives also took the view that the phrase 'the Constitution of Canada' in Class (1) of section 91 of the B.N.A. Act was too vague to be healthy and, on the other hand, that it was not feasible, in the light of the 1950 Conference, to get agreement on lists of specific sections to make up the classes of topics that would be subject to the different amendment procedures. Moreover, a single amendment might require changes in two sections of different classes. Accordingly, Nova Scotia favoured the idea of general classes of such topics, such as were agreed upon.

The views of the government and people of Nova Scotia have been considered identical throughout this article. While this is largely true it can only be gathered from the short debate in the House of Assembly and one or two editorials. There has been little public discussion on the subject in the province and even the failure of Quebec to ratify the plan has produced little of the usual comments from the francophobes, such as the flag debate brought forth. Perhaps that effort exhausted them, or it may be that failure to achieve the goal when it was apparently so near, has raised some fears about the future of the confederation, and a consequent tendency to tread softly. There may even have been some comprehension of the predicament of the Quebec government with respect to the Legislative Council although that was not well reported or interpreted in Nova Scotia.

What criticism there has been follows the line originally voiced by the New Democrats about the Fulton Formula, that it is too restrictive and would place Canada in a constitutional straitjacket. Mr. Diefenbaker was converted to this view when the plan became the Fulton-Favreau Formula but this does not seem to have made much

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[22] Probably on the strength of s. 5 of the British North America Act. But who decided it for the Act ?

impression on his followers in Nova Scotia, probably because they are also Premier Stanfield's followers and Mr. Stanfield's views carry great weight both within and outside his party. He has expressed himself, when at all, as in favour of the plan.

My own hope is that the pause occasioned by the setback in Quebec will encourage all to take a new, critical look at the exclusiveness of our legislative powers and also at the alternative, fully concurrent powers subject to traffic rules to determine which law shall prevail in cases of conflict. It is easy to see why Quebec, for example, would be leery of the latter regime, but the fear is not a truly rational one but the product of history and rigid points of view. The regime of concurrency would enable any province to achieve a *statut particulier* to any extent that it desired within the federation and would certainly encourage more effective administration than is possible under the present structure, even with powers of delegation added.

A Parthian shaft at the Formulas: it is perhaps a sign of the times, automated and computerized, that while the Fulton and Fulton-Favreau formulas are marvellously well drafted, it requires one skilled in algebraic logic to work out their implications and there may be contradictions: e.g., does section 9 of the last draft preserve Class 1 of section 91 of the B.N.A. Act as it now is?

Meanwhile, Nova Scotians, while anxious to see the Constitutional amendment process brought home to Canada in terms that are fair to all provinces and all Canadians, find in the present proposals no constitutional solution to the chief constitutional difficulty they find themselves in, — their unnatural subjection to the Canadian economy. Someday, perhaps, the constitution will take as much care of this as it does of the vital interests of other bodies.