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A presentation to the
Joint Committee of the House of Commons and the Senate
on the
1987 Constitutional Accord
by
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I. INTRODUCTION

Ladies and Gentlemen of the Committee, I am Michael Ballantyne, the Minister of Justice for the Government of the Northwest Territories.

I come before you as the representative of the Government of the Northwest Territories, with the unanimous support of our legislature. I have been allotted twenty-five minutes to explain to you why people living in the Northwest Territories are dissatisfied with several aspects of the agreement signed in the Langevin Block on June 3 of this year. In this short time, we must attempt to explain the sense of frustration and betrayal which the people of the Northwest Territories feel as a result of the 1987 Constitutional Accord. This is the second time that an elected representative of the people of the Northwest Territories has stood before such a committee to raise some of the issues which I am now about to discuss. In September of 1981 Mr. George Braden, who was then the elected Leader of the Government of the Northwest Territories, was given his few minutes of time to try to present the case for the people of Canada's forgotten Territories.

The Northwest Territories is involved in legal proceedings challenging the Constitutional Accord. In those proceedings we complain about the absence of consultation with the Government of the Northwest Territories. Our appearance at this hearing is not to be taken as derogating in any way from that position. The opportunity to make representations here is vastly different than the right to make representations at the conferences which led to the Accord.

Furthermore the powers of this Committee to make changes to the Accord have been questioned. Senator Lowell Murray's view is that those powers are limited to correcting egregious drafting errors. We urge you, however, to take a broader view of your mandate, and in these remarks we will make specific suggestions to you on what your recommendations should include.

The Constitutional Accord has not been interpreted by any court. Accordingly there can be differences of opinion as to its meaning. Many other submissions before you have stressed that there is ambiguity in the legal meaning of several provisions of the amendment. Courts may be called upon to interpret these provisions if they are adopted. We do not agree with and do not accept all of the interpretations which the federal government has given to the provisions relating to the territories and my appearance here today is not to be taken as an acceptance of any particular legal interpretation.



II. SALUTATION TO QUEBEC

I do not wish my comments today to detract from the sense of pride and relief which we feel as Canadians now that Quebec has achieved many of its constitutional aspirations. Probably the single most pressing issue in inter-governmental relations in Canada during the last forty years has been the resolution of Quebec's demands for a federal system which would accommodate its vision of Canada. Quebec is a province which contributes so much to our unique national character and on behalf of the government, and all the residents of the Northwest Territories, we salute the Prime Minister and the First Ministers on this significant accomplishment.

I want to emphasize that the recommendations that we seek from your Committee will in no way derogate from the considerable accomplishment achieved in bringing Quebec into the constitution. The provisions about which we complain are in no way connected to the provisions affecting Quebec.

III. GRIEVANCES

And while people of the Northwest Territories welcome an agreement that will meet the aspirations and requirements of Quebec, we cannot accept those aspects of the Accord which have for no good reason robbed the people of the Northwest Territories of their opportunity to contribute to the national character of Canada.

Our grievances are founded on the basic sense of unfairness that we in the north feel — unfairness in the process leading to the proposed amendments, in that the Government of the Northwest Territories has been totally excluded. Furthermore, the results of the process are unfair. The people of the north have been left out of this new emerging federalism.

The sections of the proposed Constitution Amendment, 1987 which are most unacceptable to our government are as follows:

1. First, the existing amending formula in the Constitution Act of 1982 will be changed to allow any and every province to prevent the Northwest Territories and the Yukon from becoming provinces. The amendment will also give all provinces a role in the extension of existing provinces into the territories. Provinces may exercise this power arbitrarily and for any reason whatsoever. The amendment means that the only governments which have no say in the process of establishing new provinces are the territorial governments which are directly affected. We expected a better appreciation of constitutional history on the part of First Ministers.

2. Second, we are concerned by the new provisions in the Constitution Act of 1982 that will exclude the elected representatives of the two territories from the fundamental and obviously critical processes of executive federalism which have come to dominate political decision-making in this country. I am speaking of the annual constitutional conferences on the economy, and on senate reform and other matters, which will be established by the amendments to section 148 of the Constitution Act of 1867 and section 50 of the Constitution Act of 1982.
3. Third, the Constitution Act of 1867 will be amended to include new provisions relating to the Supreme Court of Canada. Territorial governments have been given no role in nominating candidates for appointment to the Supreme Court of Canada.
4. Finally, some of the witnesses before this Committee have indicated that the provisions relating to the Senate might be interpreted unfavourably in the context of the Northwest Territories and the Yukon. It may be technically possible for the territories to nominate senators, however it is far from clear as the proposal now stands.

I can only hope that by now some of the signatories to the Langevin Agreement have begun to realize that re-drafting will be necessary. Some changes might not be particularly important to them or their advisors but they are of fundamental concern to other Canadians.

IV. PROCEDURE

Before I address these four major concerns, I wish to say something about the procedures that led to the Meech Lake Accord and the Langevin Block Agreement. In December of 1981 the House of Commons and Senate adopted the resolution that patriated our constitution, and that resolution contained an important principle in its preamble. It stated:

. . . It is in accord with the status of Canada as an independent state that *Canadians* be able to amend their constitution. . .

I emphasize the word "Canadians" because I believe that all Canadians through their elected representatives are intended to participate in changes that directly affect them.

We have been told by Senator Murray and by the Prime Minister himself that these hearings are in essence a mere formality. Premier Bourassa has been quoted as saying that this amendment is a *fait accompli*. The message that has been given to the governments and people of the territories is that they have no right to share in the political life of this nation, nor do they have any right to share in the constitutional processes which directly affect the part of Canada in which they live. Although some Canadians in provinces may believe that affecting a mere 75,000 northern souls is not of great consequence, we ask them to consider

the implications of the process that we have seen in Meech Lake. If you move to the Northwest Territories or the Yukon you must check your rights at the border.

Our Charter of Rights and Freedoms expresses a fundamental tenet of Canadian constitutional life. All Canadians are to be treated equally by and under the law. A superior court in this country has held that the Constitutional Accord under consideration by this Committee is subject to the provisions of the Charter. Clearly the Accord does not treat our citizens in the territories equally with citizens living in a province. It would be wrong for an amendment to our constitution to be adopted which a court has said may be contrary to the Charter. It would be wrong for this accord to be adopted tainted with illegality. The changes which we propose would bring the provisions of the Accord relating to the territories into conformity with the Charter and avoid this unsatisfactory result.

V. EXTENSION OF PROVINCIAL BOUNDARIES

I would like to discuss now those proposed amendments that relate to the extension of existing provinces into the territories and the creation of new provinces.

The Langevin Block Agreement proposes that any amendment to the Constitution of Canada which relates to the extension of existing provinces into the territories must have the approval of the Senate and House of Commons and the Legislative Assembly of each province. The provision in question would become paragraph 41(h) of the Constitution Act, 1982. *This concept should be struck out of the Constitution.* It holds no place in a modern democratic society. Can you imagine the reaction of any province if the Constitution provided for the extension of existing provinces into other *provinces*? Quebec could take over Labrador. Prince Edward Island could be annexed to Nova Scotia. Manitoba could become western Ontario.

The arrogance of this sort of provision is astounding. The provinces have been given power to displace the legislatures and democratic institutions in the territories. This arbitrary power is totally unacceptable. For those members of the Committee who might think that this territorial expansion would not be considered by any provincial government, I can remind you that at least one Premier made such a suggestion at a constitutional conference of federal and provincial Premiers in February, 1969. I repeat, this concept is antiquated and obsolete and has no place in our Constitution. The concept dates from a period in our history when boundary extension simply meant extension into unorganized territories not having the benefits of even rudimentary governments. Those days passed long ago. The Northwest Territories has a fully elected responsible government with legislative, executive and judicial branches largely the same as each of the provinces. Annexation or encroachment by other governments is totally repugnant. The proposed constitutional amendment should repeal the existing provisions relating to the extension of provincial boundaries into the territories.

If any Committee members are tempted to ask why we have not complained about the existing provision (s.42(1)(e)) in the Constitution which gives seven provinces and Ottawa this power, I will shortly explain to you our efforts and expectations in this regard since 1981.

VI. CREATION OF NEW PROVINCES

The proposed provision relating to the creation of new provinces is equally repugnant to the Government of the Northwest Territories. It would provide that "notwithstanding any other law or practice", the establishment of new provinces would require the unanimous consent of the Senate and House of Commons and all the provincial legislatures. The Canadian public has been told that this agreement between the Prime Minister and Premiers is to bring Quebec back into the federation. Why is it necessary to further subordinate the two territories in order to achieve this result? What purpose is served by enhancing the powers of the provinces at the expense of the territories? I must say to the Premiers of Saskatchewan, Alberta and Newfoundland: "How soon you forget".

In the Northwest Territories and Yukon we have not forgotten the promises of provincehood over the years. Let me cite you a few examples:

In 1922 the constitutional expert Mr. W.P.M. Kennedy wrote in a leading constitutional law text of the day:

"It is true that the dominion of Canada which was created by proclamation on July 01, 1867 consisted of only four provinces, but a little vision might have seen that the clauses in the British North America Act allowing territorial extension were at least pregnant with magnificent possibilities."

In 1958 Alvin Hamilton, the Minister of Northern Affairs and National Resources stated in the Commons in relation to proposed amendments to the Northwest Territories Act and Yukon Act:

"I think the House will recognize that our responsibilities with regard to the Yukon and the Northwest Territories take us into the field of provincial and municipal government. . . .These amendments forward steps in the administration and growth of our new parts of Canada towards provincial status."

And as recently as two months ago, Mr. Hnatyshyn in the present government stated in the House on June 08, 1987:

I do not think anyone can challenge the fact that my party and this government have taken a *leadership role* in respect to ensuring that, as quickly as possible, we move forward in this area of *the territories controlling their destiny and attaining provincial status.*"

I am challenging the government on this point. Show me how the proposed Constitution Amendment, 1987 moves the territories forward in controlling their destiny and attaining provincial status.

VII. VISION OF CANADA

Ladies and gentlemen of the Committee, do Canadians in 1987 not have a vision that can encompass the two northern territories? We believe that the Constitution does contain a vision of Canada. According to the Constitution Acts we are to be "federally united into one dominion"; we are to have "a Constitution similar in principle to that of the United Kingdom". We are to have fundamental rights and freedoms which are subject only to such reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society. Our Constitution provided for the admission of other colonies and provinces into the union and for the establishment from time to time of new provinces. There was a time when the Northwest Territories was the promise of Canada's future in all its constitutional, political, economic and social aspects. Until the turn of the century the Northwest Territories was virtually all of Canada: It was northern Quebec, it was northern Ontario, it was most of Manitoba, it was all of Alberta, Saskatchewan and the Yukon. Since 1867 the promise of Canada's constitution for Canadians in the two territories has been in the development of representative, responsible government in the territories. We've measured our progress and we believe we are on the threshold of provincehood. We expected to become part of one federally-united country. The representative and legislative institutions in the Northwest Territories are as comprehensive as those in the provinces. However, there seems to survive in some of the provincial governments and in the Government of Canada, an attitude that the territories are still colonies of Canada.

The legislatures and governments of the Northwest Territories and the Yukon are not glorified municipal institutions: they legislate in respect of taxation, in respect of the administration of justice, in respect of municipal institutions, in respect of corporations, businesses, trades and industries. These legislatures exercise their authorities over an area as large as India. The governments of the two territories enter into agreements with the governments of Canada and the provinces. Government leaders, ministers and officials of the government of the Northwest Territories have participated in inter-governmental conferences on all manner of issues. Let me read to you a short excerpt from a federal document produced and approved by the Prime Minister. It was entitled "Guidelines for Federal Departments Respecting Representation of Territorial Governments at Federal/Provincial Conferences and Meetings".

“Over the last fifteen years, an important evolution has taken place in the arrangements under which the governments of the Northwest Territories and Yukon Territories are represented at federal/provincial conferences and meetings of ministers and officials. Previously, the territories took part on relatively rare occasions. When they were invited, they were normally represented by federal civil servants, or by federally appointed officials from the territories who were made part of the federal delegation. The situation is quite different now. The broadening of the territorial democratic institutions and the strengthening of the public service in the north have given the territorial governments a new capacity to play a more effective role in inter-governmental conferences and meetings . . . For federal/provincial conferences of ministers it has now become the practice to extend invitations to territorial representatives at the political level.”

Those guidelines date from 1984.

The Constitution Act of 1982, which is part of the Supreme Law of Canada, provided for the participation of the governments of the Northwest Territories and the Yukon in First Ministers' conferences convened on the subject of aboriginal rights. Our government leaders attended these First Ministers' conferences as participants in 1983, 1984, 1985 and 1987. Members of this Committee may recall that in March of 1983 the Prime Minister of Canada, all provincial Premiers except Quebec, the Government Leaders of the Northwest Territories and Yukon, and four aboriginal leaders signed a Constitutional Accord that eventually resulted in amendments being made to the Constitution Act, 1982.

That Accord provided that there would be future conferences at which certain outstanding agenda items and other constitutional matters such as the rights of the aboriginal peoples, which we supported, would be discussed and given full consideration. One of those agenda items, which is listed in the preamble of the 1984 Accord is, and I quote: “The repeal of section 42(1)(e) and (f).” You will recall that sections 42(1)(e) and (f) are those portions of the amending formula which now permits the extension of existing provinces into the territories and the establishment of new provinces. The government of the Northwest Territories took the 1983 Accord to be a clear indication that these provisions of the Constitution directly affected the Northwest Territories and the Yukon, and we took the 1983 Accord to be a solemn promise to include the governments of the two territories in any discussions relating to those provisions. I am shocked at the insensitivity of leaders who can recognize at one First Ministers' conference that these matters directly affect the two territories, and who then promptly sit down in a private meeting and ignore their prior commitments.

VIII. CONCLUSION

The purpose of the Constitution, among other things, is to place legal constraints on the use of power by our governments, Ministers and even Prime Ministers. The Constitution gives us the broad principles on which the Canadian federation was built and has grown, and since 1982 the Constitution has provided for the recognition of certain fundamental rights and freedoms. This amendment will become part of the Supreme Law of Canada and will guarantee for most Canadians that there will be more local control over their affairs. Canadians in the Northwest Territories and the Yukon will have no such guarantees. Eleven First Ministers should not be able to decide that citizens residing in the Northwest Territories or the Yukon will not participate in the constitutional life of the nation.

Ladies and gentlemen of the Committee, I had come to expect more vision from Canada's leaders. We should all certainly welcome Quebec into its rightful place in the constitution of Canada but I can see no legal or political rationale to justify crushing the hopes and aspirations of the people of the Northwest Territories and the Yukon to achieve this goal.

IX. RECOMMENDATIONS

Our recommendations are as follows:

1. Delete from the amendment those provisions relating to the establishment of new provinces. At the same time, repeal the clauses of the Constitution Act 1982 which involve existing provinces in the establishment of new provinces.
2. Change the provisions of the Accord dealing with extension of provincial boundaries into the territories by providing that any extension of provincial boundaries must require the consent of the Legislatures of the territories.
3. Provide in paragraphs 8 and 13 of the amendment for the attendance of representatives of the two territories at all future constitutional conferences and First Ministers' meetings.
4. Empower the territorial governments to submit to the Minister of Justice of Canada the names of any persons whom they feel should be considered for appointment to the Supreme Court.
5. Clarify the provisions for the appointment of senators and the right of the Northwest Territories and the Yukon to the appointment of our senators. Empower the territorial governments to submit lists of proposed candidates in the same way that the provinces will be able to do.

I encourage this Committee to make itself heard and to provide direction to the First Ministers in the re-drafting of the Constitution Amendment, 1987.