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Canada's Post-Colonial Orphan Province: Cape Breton Island's Quest for Autonomy

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ABSTRACT

This note examines the substantive merit of Cape Breton Island's (CBI) sovereignty claims and request for the repeal of the 1820 re-annexation of the Colony of Cape Breton by the Colony of Nova Scotia, pre-Confederation Canada, 1867. The annexation was without the consent of the Governor of the Colony of Cape Breton, nor consent of the residents and without Great Britain's Privy Council approval. It was clearly an arbitrary and arguably capricious administrative action by the Crown, that was in bad faith and ripe for judicial review.

Under principles of restorative justice the challenge becomes how to politically and legally re-establish CBI as an independently self-governing entity within the Canadian Confederation, per its Constitution Acts, 1967-1982².

I. INTRODUCTION

Under the 1763 Treaty of Paris³, CBI then a separate French colony known as Ile Royale⁴, with its capital in Louisbourg, was ceded to the British colony of Nova Scotia and given one magistrate to represent the entire island. No one living in CBI at that time could own land and were required to pay taxes and serve in the militia. It was “taxation without representation.” The Seal of CBI came from King George III, in 1784, when he granted CBI separate colonial status from the colony of Nova Scotia, giving CBI a Lieutenant-Governor, Executive Council, and a House of Assembly⁵. With Scots and others emigrated to CBI, the growing population called for its House to assemble, in order to raise money from taxes to build facilities, new roads and bridges. The House of Assembly, however, was never called. Facing the possibility of the loss of tax income and the rights to CBI coal, the British Colonial Office considered their options and decided that the island's House should be part of the Nova Scotia House of

¹ Author is an Alumni at U. Edinburgh School of Law, India.

² Government of Canada, Department of Justice, *Laws*, <https://laws.justice.gc.ca/eng/Const/FullText.html>

³ Yale, Law School, *Treaty of Paris 1763*, The Avalon Project, Documents in Law, History and Diplomacy. Available at https://avalon.law.yale.edu/18th_century/paris763.asp

⁴ New Scotland, History of Nova Scotia, May 19, 2015, at <http://newscotland1398.ca/hist/nshistory02.html>

⁵ Morgan, Robert J., *Early Cape Breton, From Founding to Famine, 1784 - 1851*, Breton Books, 2000.

Assembly. And so, on October 9, 1820, the island was annexed to Nova Scotia by Britain⁶. Annexation was in response to the crown losing a tax case (1816-1820) to two CBI mine owners over crown tax demands of the residents of CBI⁷. In response, the crown went outside the law and annexed CBI to Nova Scotia, to collect the taxes. CBI's leaders rebuked the annexation because of irregular procedural improprieties used. But the British Privy Council didn't vote on the appeal⁸.

Richard Uniacke served as Cape Breton's Attorney General 1814-1817 and was elected post-annexation as the first MLAs for CBI in the Nova Scotia Legislature, 1820-1830. He also later became puisne judge, Supreme Court of Nova Scotia, 1830-1834⁹. Uniacke supported petitions of his constituents to repeal the union of Nova Scotia and Cape Breton. He fully concurred with constitutional lawyers that the union was illegal. Uniacke felt that "*the people of Cape Breton, who had been transferred without their consent to another country, ought to have the final decision of the Government, or the Tribunals of the Realm*".¹⁰ He further added that he did not believe the union would produce the benefits that NS advocated. During this period nine petitions were sent to the British government, based on the argument that once a House of Assembly is given in constitutional law, it cannot be removed. Petitioners argued that the King simply did not have the right to annex CBI to Nova Scotia. The first 25 years following union with Nova Scotia saw consistent separatist petitions, meetings, travel to England, legal wrangling, and election debates¹¹. By 1845, the British government threatened to send warships into Sydney Harbour to quell the unrest. The following year, 1846, the Privy Council of Britain met to discuss the issue of CBI separatism; no minutes were kept, and the decision was made that despite constitutional improprieties the annexation would stand.¹²

In 1867, Nova Scotia joined Confederation, but petitioned in 1868 to have the Constitution Act repealed.¹³ Nova Scotia is Canada's first 'separatist province.' It seems Sir Joseph Howe was

⁶Morgan, Robert J., *Orphan Outpost: Cape Breton Colony 1784-1820*, University of Ottawa, June 1972. Available at <https://ruor.uottawa.ca/handle/10393/21073>

⁷ Id., p. 212

⁸ ElectricCanadian.com, <https://www.electriccanadian.com/history/novascotia/inverness/chapter2.htm>

⁹ Memoryns.ca, *Uniacke Family*, Available at <https://memoryns.ca/uniacke-family>

¹⁰ Cape Breton Advocate, June 11, 1840, Vol. 1, 12. Available at https://beatoninstitute.com/uploads/r/null/d/2/0/d20e30970b105bd3041790a0387def4b3f5c95f4c0db03da11c0566dc1f8f8a9/1840-11-11_-_November_11__1840.pdf

¹¹ MacNeil, Kenzie, *A Short History of Cape Breton Annexation (Part II)*, Cape Breton Spectator, Jan 11, 2018. Available at <https://capebretonspectator.com/2018/01/17/a-short-history-of-cape-breton-annexation-part-ii/>

¹² The Privy Council was the apex Court of Appeal in the Commonwealth. An advisory opinion of the Privy Council had been sought twice in disputes between Commonwealth members. (Re Cape Breton (1846), 5 Moore. P.C. 259 (annexation of Cape Breton to Nova Scotia); Re Labrador Boundary Dispute (1927) 137 L.T., 187.).

¹³ Belshaw, John Douglas, *Canadian History: Post Confederation, Nova Scotia's Second Thoughts*, BC Campus Open Education, <https://opentextbc.ca/postconfederation/chapter/2-2-nova-scotias-second-thoughts/>

furious with Premier Charles Tupper to join Confederation without consent of the electorate. Sir Howe waged a petition with 65 percent¹⁴ of the electorate of Nova Scotia at the time as signatories calling to pull Nova Scotia out of Confederation.¹⁵ On presentation to the Queen, it was rebuffed as a Canadian parliamentary matter. Subsequently, Sir Howe's anti-confederation forces won all seats (except one held by Premier Tupper)¹⁶, formed the new government and unanimously passed legislation declaring Nova Scotia's refusal to recognize the Confederation of Canada. Nova Scotia felt strongly they'd been robbed of their taxes, resources and the ability to make important governance decisions that affect their local economy and wanted the ability to self-determine their own future as they feared Central Canadian motivations conflicted with the best interests of this province.

Given the illegal annexation of CBI by Nova Scotia, the illegitimacy of Nova Scotia's own constitutional status, ongoing fiscal neglect and alienation of our island and region, CBI has a solid claim to reinstate its Colonial Charter granted by King George as Canada's newest province, and under international law via the following:

- The Human Rights Charter of the United Nations¹⁷
- The International Covenant on Economic, Social and Cultural Rights¹⁸
- The International Covenant on Civil and Political Rights¹⁹ which affirm the fundamental importance of the right of self-determination of all peoples by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.

Furthermore, if Canadian federalism logic holds that Quebec is a distinct socio-economic and cultural nation within a nation²⁰, then ideologically it must also hold that CBI is a distinct province within a province. CBI's status as a province within a province is irrefutable. As an

¹⁴ Hansard, House of Commons, London, England, June 12, 1868, v. 192, 1667-1668. Available at https://web.archive.org/web/20100620024409/http://ns1758.ca/antifed/newscot_anticonfed-1868june16.html

¹⁵ Macneill, Mark, *Province of Cape Breton Island needed to strengthen region, combat alienation*, Hill Times, March 19, 2018. Available at <https://www.hilltimes.com/2018/03/19/province-cbi-needed-strengthen-region-combat-alienation/137298>

¹⁶ Government of Canada, Collections Canada, *Confederation* <https://www.collectionscanada.gc.ca/confederation/023001-4000.36-e.html>

¹⁷ United Nations, Human Rights, *Office of the High Commissioner*, <https://www.ohchr.org/EN/pages/home.aspx>, General Assembly resolution 217 A,

¹⁸ United Nations, Human Rights, The International Covenant on Economic, Social and Cultural Rights (ICESCR) is one of three documents that make up the International Bill of Rights, together with the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

¹⁹ United Nations, Human Rights, *Office of the High Commissioner*, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

²⁰ Hansard; 39th Parliament, 1st Session; No. 087; November 27, 2006

island with a distinct social, cultural and political history it is a land and people who were unceremoniously annexed not once but twice by the Colony of Nova Scotia in Canada's brief pre-confederation colonial history. The annexation was covertly orchestrated in England and did not receive conventional parliamentary approval by the government of the day. Furthermore, despite great subsequent protest and non-acquiescence by CBI's populace that was thence pre-dominantly indentured and non-franchised, the Colony of CBI was secretly and irrevocably ceded to the Colony of Nova Scotia. Which even today remains questionable as to its constitutional legality given that the United Kingdom doesn't now (or then) have an enshrined constitution prescribing the legal process for colonial mergers.

II. NATIONAL & INTERNATIONAL LEGAL ELEMENTS

(A) National

- As an island with a distinct social, cultural & political history CBI is a land and people who were not once but twice unceremoniously annexed by the Colony of Nova Scotia in Canada's brief pre-Confederation history. That definition would define CBI as a 'nation'.²¹
- Neither annexation by NS received parliamentary approval from Great Britain, nor was approval granted from the Governor or the people of CBI. On that grounds the annexation was clearly invalid and a voidable transaction in common law, under fundamental principles of; fairness, good neighborliness, due process and natural law. i.e. bad faith.
- Nova Scotia's annexation of CBI was without precedence under Great Britain's laws and represents a violation of the Canada's Constitution Act of 1867 recognizing existing constitutions of the provinces, and the 1982 Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms.
- 1867 British North America Act recognized and protected the Nova Scotia Constitution as pre-existing the Confederation of Canada.
- 1868 Nova Scotia Legislature spurned recognition of Confederation.
- 1982 Constitution Act includes amending formula requiring two thirds of provinces representing 50% or more of population to approve. Not necessarily required where the boundary of only one Province is affected.
- International Law calls for the exhaustion of local remedies with national domestic courts first. When that fails parties then have recourse to international legal avenues.

²¹ The Free Dictionary, <https://www.thefreedictionary.com/Nation>

(B) International

The international bill of rights comprised of (a) The Human Rights Charter of the United Nations; (b) the International Covenant on Economic, Social and Cultural Rights; and (c) the International Covenant on Civil and Political Rights; all affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development. As an island and a people with a distinct social, cultural and political history CBI clearly has been deprived of the universal rights and liberties of human kind recognized in international law, and not only was CBI's annexation illegal and a voidable transaction and its quest for provincehood is also capable of being fought at the international level if Nova Scotia and Canada do not cooperate with a fundamental right of self-determination, and CBI's inherent right to freely determine its political status and pursue its socio-economic and cultural development.²²

The International Covenant on Economic, Social and Cultural Rights²³ is a multilateral treaty adopted by the United Nations General Assembly on December 16, 1966, and in force from January 3, 1976. It commits the 155 states parties to work toward the granting of economic, social, and cultural rights to individuals. A further 6 states have also signed on, awaiting ratification. It was introduced as a second generation human rights treaty developing some of the issues contained in the Universal Declaration of Human Rights, at the same time as the International Covenant on Civil and Political Rights. Selected convention extracts are: PART I, Article 1 (1): All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. (3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations. PART II, Article 2 (1): Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively

²² Supra note 19.

²³ Id.

the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. (2). The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3: The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4: The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5 (1): Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

Article 28: The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

III. CANADIAN CHARTER OF HUMAN RIGHTS AND CAPE BRETON ISLAND'S COLONIAL OPPRESSION: 1820-2020

The Canadian Charter of Rights and Freedoms (the Charter) supports Cape Breton Island's (CBI) quest for autonomy.²⁴ The Charter came into effect with the signing of Canada's Constitution Act in 1982.²⁵ It constitutionally protects the fundamental rights and freedoms of Canadians.²⁶ These guaranteed rights include fundamental freedoms, democratic and legal

²⁴ Abacas Data, *Cape Breton Regional Municipality: Public Attitudes Toward More Autonomy And a Potential By-Election For Mayor*, Summer 2019, at 8-11. Accessed 02/02/20 at https://lookaside.fbsbx.com/file/New-Dawn-CBRM-Report.pdf?token=AWzKeeRUktkojr3P3bUinDQ20fHQpElcvxkbKU2ZdFYDBihxKwC1ggpoYItxNVwfvG7SVQJkWrGhTXJhgXUYLRd7KVb7--rnI_dmmEwIsc0MIe_4roacjZaSh8gl9YGoYOVdaBLzOQHhU_r3oWHkjcgx

²⁵ Parliament of Canada, *Our Country, Our Parliament: An Introduction To How Canada's Parliament Works*. Accessed 02/02/20, at https://lop.parl.ca/About/Parliament/Education/ourcountryourparliament/html_booklet/constitution-act-1982-e.html

²⁶ Brian Dickson, *The Canadian Charter of Rights and Freedoms: Context and Evolution*, (2013), 61 SCLR (2d) 3 - 24, at 2.

rights, and numerous other human rights.²⁷

CBI has experienced protracted systemic fiscal discrimination dating back to its very earliest competitive and rivalrous relations with Nova Scotia. CBI was twice a colony under France, and twice a colony under Britain with a colonial charter including an executive, judiciary and legislature (although while requested never allowed to be formed) granted by King George III, before being undemocratically annexed by Nova Scotia in 1820.²⁸

CBI is akin to a tethered spouse in a non-consensual marriage, abused, used and mocked, like a colonial remnant languishing economically into the twenty first century under the continued aimless administrations of Nova Scotia. This represents a tragic and alarming social injustice for an island and a people who while administrated by Halifax and Ottawa, have been cleared from their lands and homes,²⁹ endure chronic unemployment,³⁰ poverty³¹, consumer debt,³² capital investment prejudice, school closures and are left with an aged population faced with a health care crisis.³³ Furthermore, federal transfers and equalization funds received by Nova Scotia are hoarded for its own needs for the Halifax area³⁴ e.g. to build stadiums³⁵ and convention centres.³⁶ Whereas in CBI, Nova Scotia is pulling up the rail service³⁷, ending programs and closing government facilities.³⁸

²⁷ <http://www.canadafaq.ca/canadian+charter+of+rights+and+freedoms/>. Accessed 02/20/20.

²⁸ Ronald W. D. MacDonald, *A Letter To The Prime Minister*, Cape Breton Post, Oct. 17, 2019. Accessed 02/02/20 at <https://www.capebretonpost.com/opinion/local-perspectives/letter-a-letter-to-the-prime-minister-364974/>

²⁹ Wade Locke and Stephen G Tomlin, *Good Governance, a Necessary but Not Sufficient Condition for Facilitating Economic Viability in a Peripheral Region: Cape Breton as a Case Study*, Memorial University, 2003, at 4.

³⁰ *Ibid*, at 7.

³¹ Nancy King, *High levels of child poverty persist in Cape Breton*, *Cape Breton Post*, Jan. 21, 2020. Accessed 03/02/20 at https://www.capebretonpost.com/news/local/high-levels-of-child-poverty-persist-in-cape-breton-401045/?fbclid=IwAR0KqKU_COSBdYIkZSrmRB5fOX6LvAO3RT573L1EcDiZn8SjYRVsel6YR8

³² Statistics Canada, *Annual Consumer Insolvency Rates by Province and Economic Region, 2010-2018*. Accessed 03/02/20 at <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01820.html>

³³ Graeme Benjamin, *Hundreds of Cape Bretoners protest pending hospital closures along Canso Causeway*, *Global News*, Nov. 16, 2018. Accessed 02/02/2020 at <https://globalnews.ca/news/4671958/cape-breton-hospital-closure-protest/>

³⁴ Paul Patterson, *Cape Breton: A Node Not An Island*, Centre 200 Presentation, 2018, Nova Scotians For Equalization Fairness.

³⁵ 3 DOWN NATION, *DETAILS OF THE CFL STADIUM PROPOSAL IN HALIFAX*, SEP.26, 2019. ACCESSED 02/02/2020 AT [HTTPS://3DOWNNATION.COM/2019/09/26/DETAILS-OF-THE-CFL-STADIUM-PROPOSAL-IN-HALIFAX/](https://3DOWNNATION.COM/2019/09/26/DETAILS-OF-THE-CFL-STADIUM-PROPOSAL-IN-HALIFAX/)

³⁶ GLOBAL NEWS, *HALIFAX CONVENTION CENTRE OFFICIALLY OPENS FIVE YEARS AFTER FIRST PROPOSED*, DEC. 15, 2017.

“Built with \$169 million in taxpayer funding, the Halifax Convention Centre portion of a massive \$500-million construction project that dominates downtown Halifax.” Accessed 02/02/20 at <https://globalnews.ca/news/3919323/halifax-convention-centre-opens/>

³⁷ Transportation Action Atlantic, *Scotia Rail Development Society continues efforts to save Cape Breton rail line*, Aug. 18, 2016. Accessed 02/02/20 at <http://transportactionatlantic.ca/scotia-rail-development-society-continues-efforts/>

³⁸ SUPRA NOTE 10.

The Constitution Act, 1982 contains two relevant provisions for a review of CBI's right to autonomy i.e. self-determination within Canada. They are:

“(1) the institution of the Charter of Rights and Freedoms; and. (2) the spelling out of a joint federal and provincial commitment to the pursuit of equality of opportunity, the lessening of regional disparities and the provision of basic public services, and of a federal responsibility in the area of equalization.”³⁹

The Charter applies to Canada's Parliament and Government, and to each Provincial Government and Legislature. The Charter guarantees: “freedom of religion, speech, peaceful assembly, and association (Section 2). It enshrines democratic rights (sections 3 to 5), the mobility rights of persons (Section 6). Legal rights (sections 7 to 14), and equality rights (Section 15).”⁴⁰ In the context of this study, Sections 2 (c) and (d), 7 and 15 are potentially the most important. The Charter also provides for ‘Enforcement’ of guaranteed rights and freedoms, Section 24 and ‘General’ Rights which includes Sections 26 and 27, as ‘Other rights and freedoms not affected by the Charter’, both of which bear relevance. Also of relevance if a challenge is made in Nova Scotia or Canada's courts by Cape Breton Island, are Sections 32 and 33, which respectively hold the provinces accountable and the latter is known as the notwithstanding clause which can provide Nova Scotia or Canada a window to avoid any decision or pursuit of the matter.

In looking at Section 2 of the Charter, subsections (c) freedom of peaceful assembly and (d) freedom of association, may by extension be construed beneficially for CBI's wish to assemble their own legislature peacefully, as a distinct people as Canada's eleventh Province. Furthermore, there is Section 7, Legal Rights, within the Charter. And, when CBI is experiencing dramatic dis-equities with the rest of Canada, its residents demonstrably are not being given the opportunity to sustain life, liberty and security to a reasonable standard. Section 15, Equality Rights, may also apply. (For instance, CBI is considered distinct by many, and it is an identifiable people.) It calls for “Equality before and under the law and equal protection and benefit of the law.” And, Subsection 1 reads as:

“15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without

³⁹ Paul Hobson, David Cameron and Wade Locke, *A Question of Balance – An Assessment of the State of Local Government in Nova Scotia*, A discussion paper prepared for The Union of Nova Scotia Municipalities as part of their Fair and Equitable Funding Project, Final Report, April 2005, p. 20.

⁴⁰ Ibid.

discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

To make this section apply it seems discrimination would first have to be proven to have occurred. Arguably fiscal and demographic statistics seem to support a legacy of extreme social conditions on CBI. Yet, even if discrimination by Nova Scotia and or Canada toward CBI is proven under Section 15, will the courts recognize the discrimination under any of the respective heads of subsection 15 (1), i.e. based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability? Capers are not per se a race, but rather a mix of cultures coming from diverse ethnic backgrounds, color, religion and representing all genders, ages, and mental/physical disabilities. So this element of the Charter seems a challenge for CBI to apply for its cause. Nevertheless, CBI is viewed as distinct. And, arguably as its own colony multiple times prior to annexation and joining Canada, a latent form of a province in waiting. Be it a sub-province within Nova Scotia and within Canada, or be it a fully devolved province partitioned from Nova Scotia.⁴¹

Presumable Sections 2 and 7 may apply, if Section 15 is deemed not to apply, to further boost the case for self-governance, alternatively there are Sections 26 and 27 under ‘General and Other Rights and Freedoms Not Affected by the Charter’. Section 26 protects other rights people may have that aren’t identified in other sections, and Section 27 specifies the preservation of multicultural heritage of Canadians, and while CBI’s Acadian (French) and Aboriginal communities in Canada are allowed to preserve their cultures then generally so to should CBI which is considered the first multi-cultural society in Canada, and similarly seeks to preserve its heritage and direct its own future.

In a broader context, the Charter is part of the Constitution and the former protects the rights of Canadians, including with the application of the constitution. Given a failure in the implementation of ‘Equalization’ by both the Governments of Canada and Nova Scotia, contributing to the slow socio-economic death of CBI, it holds that Section 36 (Equalization)⁴² of the Constitution has been selfishly abused by Nova Scotia.

⁴¹ Jamie Lluich, *The Constitutional And Political Recognition Of Stateless Nations in Canada and the United States*,

⁴² Section 36 reads as: “Commitment to promote equal opportunities: **36.** (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to: (a) promoting equal opportunities for the well-being of Canadians; (b) furthering economic development to reduce disparity in opportunities; and (c) providing essential public services of reasonable quality to all Canadians. Commitment respecting public services: (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial

CBI is a distinct colonial entity in Canadian history and geo-politics. Nova Scotia too protested Confederation in 1867⁴³ (Canada's first separatist province) and two months later during dual provincial and federal elections, its Anti-Confederation Party swept all but two legislative seats (including CBI) and all but one federal seats.⁴⁴ Subsequently it petitioned Britain to exit Confederation⁴⁵, and passed legislation in the Nova Scotia Legislation denouncing Confederation.⁴⁶ Ironically CBI formally protested to Britain as well for over two decades, its annexation by Nova Scotia, in 1820.⁴⁷ Interestingly CBI's colonial constitution including its right to a legislature and an executive, granted by King George III,⁴⁸ were never repealed by Nova Scotia. Plus, subsequently the BNA Act of 1867 protects the constitutions of New Brunswick and Nova Scotia within Confederation.⁴⁹ Thus presumably CBI's Constitution is preserved and can be restored to CBI under the Charter's Sections 2 and 7.

Finally, the Charter's Sections 26 and 27 provide recognition and protection of other rights outside the Charter, and despite CBRMs thwarted court challenge⁵⁰ versus the Province of Nova Scotia over funding, Section 36 of the Constitution (Equalization), has been breached by Nova Scotia, who has ignored the underlying intended goal of equity with respect to CBI. And, regardless whether Canada's Charter applies, there are international human rights conventions supporting CBI's quest for autonomy.⁵¹

IV. ALTERNATIVE FRAMEWORKS FOR CBI GOVERNANCE AND INDEPENDENCE

(A) Status quo – within Nova Scotia with negligible governance change

CBI continues to die in the face of mass out migration at a rate of 1000 people per year for the past 40 years representing a decline in population of 23% while other regions of North America

governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.”

⁴³ Dean Jobb, *Canada's First Separatist, Joseph Howe was determined to keep his beloved province of Nova Scotia from being forced into Confederation*, Canada's History Magazine, June/July 2017. Accessed 02/02/20 at <https://www.canadahistory.ca/explore/in-this-issue/june-july-2017>

⁴⁴ Ibid, at 8.

⁴⁵ Ibid.

⁴⁶ See https://archive.org/details/cihm_23506/page/n5/mode/2up. Accessed 02/02/20.

⁴⁷ Kenzie MacNeil, *A Short History of Cape Breton Annexation (Part 1)*, Cape Breton Spectator, Dec. 20, 2017. Accessed 02/02/20 at <https://capebretonspectator.com/2017/12/20/cape-breton-annexation-britain/>

⁴⁸ Ibid.

⁴⁹ BNA Act 1867, S64.

⁵⁰ *Cape Breton (Regional Municipality) v Nova Scotia (Attorney General)*, [2009] SCCA No 284, [2009] CSCR no 284.

⁵¹ United Nations Human Rights, *Rule of Law – Democracy and Human Rights*, Office of the High Commissioner. Accessed 02/02/20 at <https://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/Democracy.aspx>

grew exponentially during the same period⁵². Data shows that government policies and programs directed by external governance have not remedied and many suspect have exasperated or accelerated the mass clearance of people from CBI. For residents of CBI the status quo must change.

(B) Provincial Status out-with Nova Scotia

Provincial status appears merited for residents of CBI but Canada's Constitution Act of 1982 basically assures Canada will preclude any further provinces to its Confederation because the amending formula calls two thirds of the province with 50% or more of the population to approve. Ontario and Quebec together as 2 provinces collectively have veto power.⁵³ It will render smaller entities such as the three existing territories or CBI technically barred from joining Confederation unless significant federal concessions are extended to Ontario and Quebec to support such an amendment to the Constitution. One ray of hope for CBI is whereas it was involuntarily annexed into a union with NS and CBI was a pre-existing Colony with a constitution bestowed by King George III, then it may argue as a constitutional challenge that a 'grandfather' condition exists under Article 129 of the Constitution Acts, 1867-1982⁵⁴, whereby it can revert to precedence be added to Confederation by the equivalent to royal assent, which would be by passing an Act of Parliament.

⁵² Statistics Canada, Census of Population 1976-2016

⁵³ Dupras, Daniel, *The Constitution of Canada: A Brief History of Amending Procedure Discussions*, Government of Canada, Collections, Law and Government Division, January 1992, BP-283E Available at <http://publications.gc.ca/collections/Collection-R/LoPBdP/BP/bp283-e.htm> The general amending formula (sections 38, 39, 40 and 42). Note in particular Section 38 and 42. Section 38 of the Act provides that the Constitution of Canada may be amended, if there is no specific provision to the contrary, by resolutions of the Senate and House of Commons and two-thirds of the provinces (seven) having at least 50% of the population of all the provinces combined. The territories have no role in the amending process. A province that does not agree with an amendment affecting provincial legislative powers, or propriety rights, or other privileges, can dissent from it, also by resolution. In that case, the amendment has no effect within that province. After the last necessary resolution is passed, the Governor General can make the amendment by proclamation. Section 42 specifies that amendments with respect to the following matters in particular must be made using the general amending formula: 1. the principle of proportional representation of the provinces in the House of Commons; 2. the powers of the Senate and the method of selecting Senators; 3. the number of Senators representing a province and the residence qualifications of Senators; 4. the Supreme Court of Canada (except for its composition); 5. the extension of existing provinces into the territories; and 6. the establishment of new provinces.

⁵⁴ Government of Canada, Justice Laws Website, Constitution Acts 1867-1982, Continuance of existing Laws, Courts, Officers, etc. **129.** Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act. (65). Available at <https://laws-lois.justice.gc.ca/eng/Const/page-7.html>

Furthermore, Section 45, "Amendment by provincial legislatures, Subject to the provisions requiring unanimity, each province may exclusively amend the constitution of that province"⁵⁵, provides whereby NS and CBI had pre-existing constitutions prior to Confederation, and whereby Confederation recognized these pre-existing provincial constitutions and protected them, if Ottawa could motivate NS to release CBI from its involuntary union with NS, NS has the ability to amend its provincial constitution and can devolve powers to CBI and restore the colonial/provincial powers that were granted to CBI. Thus subordinate to an extent to NS, but a Province nevertheless - without having to go through the amending formula introduced in 1982. An admission and approval to join as a fully independent province (from NS) in the Canadian family of provinces could come later after it is successfully negotiated and the amending formula process is satisfied. This isn't an easy path, but doable.

(C) Territorial Status out-with Nova Scotia

To become a federal territory of Canada, CBI would have to be carved out of the existing Province of Nova Scotia who holds a veto under the Constitution Act 1982 Section 43⁵⁶, which they would surely exercise. Even if Nova Scotia approved, to make CBI a Territory of Canada it would have to be approved by Parliament. To do so the amending formula requires which two-thirds Provinces (7 of 10) and half or more of the population approve. However, whereby amendments that deal with some but not all of the provinces (for example, changing the boundary between two provinces) may be made by the Senate, the House of Commons, and the relevant provinces, and/or whereas CBI had an existing constitution in union with NS prior to Confederation which may be read as protected by the Constitution, and whereas CBI would be severed out of NS exclusively to create CBI as a territory, with no other Provinces boundaries affected (CBI's is an island), only the boundary of Nova Scotia would be affected.

(D) Regional Self-Governing status within Nova Scotia

It's an option for CBI to be a self-governing region, district or territory within Nova Scotia, without leaving Nova Scotia. This likely does not require other provinces consent, instead an intra-provincial devolutionary style agreement. And in fact that is the very nature of CBI's 1784 Colonial Charter, as a self-governing colony subordinate to Nova Scotia⁵⁷. As a recent

⁵⁵ Supra 26

⁵⁶ **43.** An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including (a) any alteration to boundaries between provinces, and (b) any amendment to any provision that relates to the use of the English or the French language within a province, may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

⁵⁷ Supra, Note 6

Canadian example, "Nunavik, Quebec and Canada signed self-government whereby Nunavik (population approximately 10,000)⁵⁸ won't be a province, but it will have regional autonomy within the province of Quebec⁵⁹. This type of "nested"⁶⁰ regional autonomy within and subordinate to the Province of Nova Scotia is another political option that circumvents any need for a constitutional amendment and would lead the way to create a 'province within a province' concept for CBI, which could revert in part or in full to the colonial powers granted to it initially in 1794 by King George III. This concept expands the notion of devolution and decentralized government offices and services to the region, further down the devolutionary path toward self-government whereby regions are given practically a full slate of powers with limited reserve powers retained by the parent authority. At a national level Wales, Scotland & Northern Island within the UK are examples of this. In essence, CBI exists within and could operate quasi-independently within Nova Scotia's constitution. Essentially like Nunavik the creation of an autonomous region of CBI within the province of Nova Scotia, "would constitute a new phase in the development of Canadian federalism."⁶¹ Nunavik representing one third the land area of Quebec would be a comparable existing model, and "the system of nested federalism in the Russian Federation offers a useful comparative tool for examining the internal and external features of Nunavik's evolving system of government, as well as the challenges of operationalizing and embedding such a system within the Canadian federal structure"⁶² and adapting it as a framework for a Government of Cape Breton Island within the Province of Nova Scotia.

(E) Independent Nation Status and/or Sovereignty Association with Canada

CBI becoming its own nation is not an alternative that is readily discussed nor proposed in private or in public. There are many small nations in the world and CBI is certainly distinct and relatively endowed with resources. Furthermore it is possible if any of the existing Provinces within Canada were to leave Confederation effectively breaking up Canada, it's conceivable CBI would be seeking new alliances and political associations which may usurp an era in the future whereby CBI may seek independent nation status. Presently though, it might use such an assertion as a negotiation tactic in constitutional talks with Nova Scotia, Canada and other provinces.

⁵⁸ Government of Quebec, *Secretariat aux affaires autochtones* (Inuit), Available at [http://www.autochtones.gouv.qc.ca/relations_autochtones/profils_nations/inuits_en.htm](http://www.autochtones.gouv.qc.ca/rerelations_autochtones/profils_nations/inuits_en.htm)

⁵⁹ Government of Makivik, *Nunavik*, <https://www.makivik.org/nunavik-government/>

⁶⁰ Wilson, Gary N., *Nested Federalism in Arctic Quebec: A Comparative Perspective*, *Canadian Journal of Political Science / Revue canadienne de science politique* Vol. 41, No. 1 (Mar., 2008), pp. 71-92

⁶¹ Id.

⁶² Id.

V. RECOMMENDATION

As one of many paths available for CBI's independence the concept of "cooperative provincialism" is culturally appropriate for CBI and its people. This concept is rooted in the notion of a devolutionary process of decentralizing power from the current Halifax based executive of the Province of Nova Scotia to a CBI Assembly which will be formed through a process of negotiation and cooperation among the four municipal counties of CBI. Alphabetically they are Cape Breton County, Inverness County, Richmond County and Victoria County.

Under the concept of "cooperative provincialism" presumably regardless of geographic land area, economic size, or population each of CBI's counties will have an equal say and share of the CBI government's powers. It's further envisioned under a decentralized cooperative provincial structure devolved from a Legislative act of Nova Scotia, with agreement by the Government of Canada, the four CBI counties comprising the Government of CBI would host an equal number of CBI's governance ministries. The selection of these hosted ministries may either be fixed by agreement which would outline the sharing of powers between the Government of CBI and its four Counties, or negotiated with an equal number of ministries to be guaranteed for each county under CBI's provincial constitution.

The cooperative provincialism path to self-governance is the method most likely to be successful in bringing the four diverse counties of CBI together for the purpose of setting forth a coordinated plan for the sharing of power across the island. With 4 strong county municipal infrastructures already in place, the Wardens and Councilors should take a broad island wide perspective, and come together to form an interim CBI Assembly. The Assembly initially will serve as a quasi-shadow government - until a new governance status is formalized with Nova Scotia and Canada. To do so CBI's municipalities must recognize and appoint at least one member each to a 'provisional' CBI Assembly. Presumably, all motions to be passed by the CBI Assembly will require a minimum of a 3/4 majority vote so that at least 3 of our 4 Counties must support all motion and bills of legislation to be past.

Given an absence of current cooperation by Nova Scotia or Canada, to implement a quad County-style island-wide 'co-operative provincial' governance model on CBI, a majority of Council seats would have to be won imminently in the 2020 Municipal Elections. Then CBI could pass a motion in the counties to hold a plebiscite on CBI self-governance. Next a CBI Commission could be formed to negotiate with Nova Scotia and Canada for an agreement and timeline for the implementation of self-government, and to serve as an advisory committee to

strategically oversee the transition to a new governance structure and implementation of powers.

VI. CONCLUSION

The unconventional and undemocratic annexation of CBI to Nova Scotia in 1820 has ever since deprived CBI of the inestimable privilege of self-government and swindled the residents of CBI out of their rights, liberty, and independence. It has also effectively robbed CBI of its revenue, taken away its regulation of trade and taxation, exposed it to arbitrary legislation over which it has had little or no control, and in which CBI possess a politically marginalized and ineffective representation.⁶³ The annexation scheme of 1820 also deprived CBI of its invaluable natural resources, roads, ports, railroads, and other property, and reduced this otherwise free, happy, hard-working and culturally rich island to a degraded condition of ‘servile dependency’ on the governments of Nova Scotia and Canada.⁶⁴

CBI needs to ‘change’. Whereas ironically, in 1868 Nova Scotia - Canada’s first separatist province - passed a motion in the Nova Scotia House of Assembly refusing to recognize the legitimacy of Canadian Confederation, and, whereas the 1868 Act has never subsequently been rescinded, CBI seeks self-governance and to have its independence endorsed by Nova Scotia and Canada. CBI’s Counties of Inverness, Richmond, Victoria and Cape Breton are called upon to form a Legislative Assembly on an equitably appointed basis to serve until an elected assembly is gathered.

Lacking cooperation from Nova Scotia, CBI calls Canada to act within its powers to recognize the People of CBI have expressed the desire for recognition of CBI as a distinct society and whereas admission as a new Province within Canada may be constitutionally blocked under the amending formula, Canada is called upon to facilitate and negotiate with Nova Scotia and CBI to recognize that CBI is a distinct society within Canada and within Nova Scotia, and to facilitate an agreement establishing CBI as an autonomous self-governing region within Nova Scotia.

⁶³ Adapted from Sir Joseph Howe’s plea for Nova Scotian independence from Canada. Available at <https://www.electriccanadian.com/makers/confederation/chapter16.htm>

⁶⁴ Ibid.

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