CONFIDENTIAL

file

October 28th, 1980.

MEMORANDUM FOR THE PRIME MINISTER

Enclosed is a briefing book containing some notes on issues which Premier Blakeney may raise with you in Regina on the Constitutional Resolution.

If you have a chance to read the enclosed notes tonight and wish anything more on this item, you could let me know tomorrow.

Additional notes will be coming tomorrow from Energy, Mines and Resources on energy issues, and from Finance on budget (non-energy) issues.

Also enclosed are:

(1) a note from Roger Tassé on the use of the word provisions in section 43 of the Constitution Act, in response to your request; not attached. *

(2) a note sent to me by Fred Gibson on issues of legislative timetable, with which I fully agree; and +

(3) a note prepared at my request by Roger Tassé on issues surrounding the provincial court challenges to the Resolution. +

With respect to this last, I asked why we were using Scollen and Gibson as Manitoba counsel. It is Justice's view that, particularly in a case such as the present, it is preferable to use eminent local counsel rather than parachuting in an outsider. Eminent local counsel are likely to have more influence on the Court than someone seen as an import, especially one from Toronto. It was pointed out to me that Scollen was our counsel in the Forest case - the decision which struck down Manitoba's unconstitutional language legislation. I understand that, in any event, J.J. Robinette and Michel Robert will be keeping an eye on all three cases since they will be in charge of proceedings at the Supreme Court level. You will notice that the last line of Roger Tassé's note indicates that he will not take any further steps until he hears from me. Are there any particular issues which you want me to raise with him?

Michael J.L. Kirby

Encl.

possible. Since we have not been in a position to agree on details, it can be expected that he will feel there is no "agreement" in the cards.

6. With regard to changes which Premier Blakeney regards as important, perhaps even crucial, there would appear to be only five points. They are as follows:

CONFIDENTIAL

October 27th, 1980.

MEMORANDUM FOR THE PRIME MINISTER

RE: MEETING WITH PREMIER BLAKENEY

Overview

There are several factors which you should be aware of concerning Premier Blakeney which are affecting the way in which he is reacting to our Constitutional Resolution. They are as follows.

1. On the personal level, the Premier badly wants to be viewed as a strong national player in this reform of the Canadian Constitution. He wants to view himself as one of a handful of Canadians who made this constitutional reform possible. Consequently, he wants to be able to point to some element of the Resolution which he is responsible for, in the same way that Broadbent will claim that he is responsible for the resources amendment.

2. Politically, the Premier is torn between supporting the Resolution and opposing it. Even though his Caucus and Cabinet have given him a blank cheque to make an agreement with us, he continues to be under significant political pressure to join the other western Premiers in challenging the legality of the Resolution.

3. This political pressure is compounded by the fact that he will have to shortly announce the date of two provincial by-elections. In one of these, the provincial Conservative Leader will be trying to gain a seat for himself in the Legislature and he has already announced that he will make Premier Blakeney's support of the federal government on the Constitution the key issue in the by-election.

4. Premier Blakeney's working style is such that he always insists on having all details spelled out before he makes an agreement with anyone or anything. That this is his standard method of operating has been confirmed with several people in the private sector who have negotiated with him on various matters over the years. This explains the great attention to detail in the telex I received from my counterpart in the Saskatchewan government, and the daily pressure I have been under to reach an agreement with Saskatchewan officials on the precise wording of amendments to the Resolution which the government will support.

5. In fact, Saskatchewan officials insisted that there was little point in your meeting with the Premier until as many details have been agreed to at the officials' level as possible. Since we have not been in a position to agree on details, it can be expected that he will feel there is no "agreement" in the cards.

6. With regard to changes which Premier Blakeney regards as important, perhaps even crucial, there would appear to be only five points. They are as follows:

- The Premier wants a link between sections 41 and 42 to make it clear that section 42 can only be used as a deadlock-breaking mechanism. We will be able to meet his objective on this point. A deadlock-breaking mechanism for Blakeney means that provincial legislatures should have an opportunity to approve or disapprove a proposed amendment before the federal government is authorized to call a referendum on it.

- The Premier wants to see an element of reciprocity in the referendum procedure whereby provinces could activate a referendum if a recalcitrant federal Parliament refused to do so. This, we have indicated, is unacceptable.

- The Premier wants to see an independent rules commission instead of Parliament given authority to establish the rules for a referendum. Subject to your agreement, this is something we could probably give Premier Blakeney; it is discussed more fully at page 6 herein.

- The Premier wants to see a redrafted equalization clause which expressly refers to equalization payments. This, we are willing to give.

- The Premier wants "additional assurances on resources". These are likely to take one or both of the following forms:

    - details of an agreement on the issue of international trade in resources. If we cannot give him the details, then he at least wants the outline of the principles of the agreement. Since we have agreed to give Premier Blakeney what he wants on this item, the issue is merely one of timing.

    - Words added to the end of the first section of the resources clause. Justice and E.M. & R. officials believe that we should not meet this request. His lawyers claim that we have misinterpreted the meaning of the words. I doubt, however, that we can agree to what he wants.

The Premier made these points very clearly in a speech given last night in Halifax. "If we are not able to agree on changes along these lines, Saskatchewan will have no option but to oppose the federal resolution". (A copy of the speech is attached.)

The various points about which he is concerned were recently the subject of a memorandum received from Bob Weese (a Saskatchewan Intergovernmental Affairs official). Draft texts were included and our agreement sought thereon. The reply which has been sent generally indicated that it would not be appropriate for us to negotiate texts, and encourages Saskatchewan to present its proposals to the Joint Committee or to arrange to have such presented. At the same time it clearly indicates where the federal government is essentially in agreement with a Saskatchewan proposal (e.g.: equalization); where it agrees in principle but the mechanics have not been worked out (e.g.: linking sections 41 and 42), and where it disagrees with the Saskatchewan proposal (e.g.: adding to clause 2 re resources amendments). Copies of the Weese letter and our reply are attached.

The following are the points Saskatchewan officials raised and which it is likely Premier Blakeney will raise with you.

Non-Discrimination Section of the Charter of Rights (section 15)

Premier Blakeney's preference is to have this section deleted from the Charter, or to have the delayed time within which it comes into force lengthened from three years to some longer period of time. Bob Weese's memorandum indicated that Premier Blakeney intends writing to you on this subject.

His officials were told that dropping the section was quite out of the question but that the government would be sympathetic to any changes in wording which might improve the section. It was indicated that such changes should not be negotiated with the federal government directly but that recommendations should be made to the Joint Senate-Commons Committee either through expert witnesses or through Committee members (presumably N.D.P. members). If you agree, you might continue to take this approach on this issue.

While Premier Blakeney referred to his concerns about the non-discrimination clause in his Halifax speech, he did not list it as a crucial concern.

Equalization

It was indicated to Saskatchewan officials that the government was not wedded to the present text but was willing to consider the Quebec draft or the Saskatchewan-Manitoba draft, which were acceptable to a large number of provinces at the September First Ministers' Conference, or to a variant of those drafts. Bob Weese's memorandum of October 21st contains alternative drafts of the equalization provision and asks which we prefer. It seems preferable not to agree with Saskatchewan to any exact wording of this section both for the strategy reasons mentioned above, and because agreement with Saskatchewan would place us in the position of broker as between the provinces. If we negotiate a preferred wording with Saskatchewan, the consent of Premiers Davis, Hatfield and Buchanan should logically be sought to any such change. Accordingly, it could be suggested to Saskatchewan that they arrange to have their preferred wording presented to the Joint Committee on the understanding that we are sympathetic to change if there is wide preference for the suggested alternative. Changes to the equalization text is one of Premier Blakeney's crucial concerns.

Amending Formula - P.E.I. Problem

Saskatchewan seems to be lobbying on behalf of Prince Edward Island (the memorandum from Bob Weese states "on the basis of discussions we have had with colleagues in the Atlantic provinces, we believe that the original Victoria formulas would be preferred by at least three of the four Atlantics to the formula now contained in 41(1)(b)").

Saskatchewan's officials were told that the federal government was receptive to this change and that the population qualification for the Atlantic region was added with the intention of making the formula equally fair to both the Western and Atlantic provinces; it was not intended to render P.E.I. insignificant. Nevertheless, you might take the position indicating to Premier Blakeney that while you are sympathetic to the suggested change, you are naturally somewhat relunctant to go out of your way to support changes which favour a province who is taking you to court. You might indicate willingness to agree to change the proposal, for example, by supporting amendment in Committee but there seems to be no good reason why you should make a deal, at this time, with Saskatchewan to cure a defect which is detrimental to P.E.I..

This issue was not mentioned in the Halifax speech.

Amending Formula - Toronto Consensus

Premier Blakeney prefers as a final amending formula the Toronto consensus (which required general amendment to have the support of the federal Parliament and two-thirds of the provinces with 85 per cent of the population) or some variant thereof (for instance requiring amendments to be supported by two-thirds of the provinces with 80 per cent or 85 per cent of the population, including two Atlantic and two Western provinces containing 50 per cent of the combined population of the West).

In Halifax he proposed yet another formula: one calling for the consent of all provinces having 20 per cent of the population, two Atlantic provinces and two Western provinces containing 50 per cent of the population of the region. Saskatchewan officials have been told that such a formula was not unattractive but that we were not prepared to introduce an amendment of this nature in Committee. If Saskatchewan could arrange to have such an amendment introducted and obtain significant support for it, then we would be quite happy to also support the proposal. You might continue to take this same approach with Premier Blakeney.

This was not mentioned in Halifax as an issue on which Premier Blakeney expected change in order to give his support.

National Referendum - Deadlock-Breaking Mechanism

Saskatchewan wishes to see referenda used only as a deadlock-breaking mechanism when the federal and provincial governments fail to reach agreement on an amendment. Saskatchewan officials suggested to us a mechanism whereby a referendum could be called if provincial legislatures failed to pass the appropriate resolutions for constitutional amendment after Parliament had done so. Saskatchewan officials proposed and still propose a two-step process whereby Parliament deals with the same issue twice, once to approve an amendment and a subsequent time a year later to launch a referendum on the amendment. The time limits Saskatchewan suggests have varied during the course of negotiations; the most recent suggests a year for provincial legislatures to pass resolutions, and a two-year time limit after that within which Parliament could call for the holding of a referendum. As in other items Saskatchewan is pressing us to agree to, specific texts they have drafted.

This was listed by Premier Blakeney in his Halifax speech as a crucial change.

If you agree, we would suggest that you take the position that it is the federal government's intention to introduce an amendment to convert section 42 into a deadlock-breaking mechanism and that you welcome Saskatchewan's very constructive and helpful suggestions. Nevertheless, you are not prepared to agree to a two-step process which would require Parliament to deal with the same issue twice, once to approve an amendment and a subsequent time a year later to launch a referendum on the amendment. We would see the mechanism working so that Parliament's resolution approving a proposed amendment also authorized, but did not compel, the holding of a referendum. You might indicate that you have no difficulty with the time limits: one year within which provincial legislatures have an opportunity to agree; and two years thereafter during which Parliament may call a referendum on the issue. At the same time, you might indicate that since this will be government amendment, the final decision of course is for Cabinet.

There are two additional issues to consider. While it could be provided in the text that any resolution passed by Parliament should not last past the life of that Parliament, this would occur automatically in any event. A "scaled-down" version of Premier Blakeney's proposition which you might consider is: allowing for a two-step process providing that debate at the second stage could last for no more than three days. Indeed, given the opposition to the referendum procedure which has mobilized you may find it necessary, at some point, to agree with Blakeney's proposition that the referendum process be approved by Parliament separately from the amendment itself. Another alternative to consider is that raised by Premier Davis in his telex of yesterday: that a referendum only be called by the federal government with the approval of four provinces - any four provinces. You may recall that this was an option discussed in Cabinet at one stage.

Referendum - Provincial Right to Initiate or Some Alternative Thereto

Saskatchewan insists that the referendum procedure must include an element of "reciprocity". By this they mean that provincial governments as well as the federal government should have a right to call a referendum. In the recently received memorandum, they propose as a fallback position that where the required provincial resolutions for an amendment had been passed but the federal government refused to introduce a concurring resolution to Parliament, Parliament, nevertheless, should be required by the Constitution to consider whether it would approve the holding of a national referendum on the proposed amendment. Premier Blakeney in Halifax, however, seemed to indicate that the change he was seeking was the ability of the provinces to initiate the referendum procedure directly; and he considers such a change an essential one.

In my memorandum to you of October 17th (copy attached), you indicated that you were opposed to the fallback position on the ground that "If several provinces want an amendment but not the whole nation (i.e.: Parliament), why consult the whole nation by referendum?". The point I was trying to make in my memorandum is that Saskatchewan's proposal is designed to ensure that it is indeed Parliament and not the government which decides whether an amendment should be agreed to, or whether a referendum should be held. It would compel Parliament (as opposed to the government) to state in a public forum why it did not intend to proceed with a resolution if this were the case.

Such a provision would have significance only in the case of a minority government. In that case, the requirement that Parliament must decide on the amendment could allow the provinces to "gang-up" on a badly weakened federal government and, in order to survive, such government might accept changes which were not in the national interest. Therefore, I would recommend that you not accept Blakeney's amendment. Indeed, even without such an express provision, nothing would stop Parliament from considering the amendment proposed by the provinces and from considering whether a referendum should be held. Any private member could introduce a motion for approval of the provincial amendment and could introduce a private member's Bill calling for the holding of a referendum. Thus, the Blakeney proposal really adds nothing. (Since it adds nothing, as the final gesture to get Blakeney's support, you may want to accede to his request.)

Referendum Rules Committee

Saskatchewan officials proposed a very constructive alternative which they have now reduced to a draft text. This is attached to the Weese letter as Appendix D, being page 12 of that letter. Instead of allowing Parliament to make rules for referenda, which is perceived as one-sided and unfair, Saskatchewan proposes the creation of a three-man independent commission: one member appointed by the federal government, a second member appointed by majority vote of the provinces, and the Chief Electoral Officer to be the third; if the provinces failed to agree by majority vote on their representative then the Chief Justice of Canada would choose such person. This was identified by Blakeney in his Halifax speech as a crucial issue.

You might, if you agree, express gratitude for their very constructive proposal but resist committing yourself to particular wording.

Part IV

Saskatchewan has a number of criticisms of the interim amending formula and the replacement mechanism. The most recent, enunciated in Bob Weese's memorandum of October 21st, are as follows:

1. That the level of support for the provincial alternative be reduced from eight provinces to seven provinces, at the same time keeping the 80 per cent requirement.

2. That the provincial alternative be able to challenge both aspects of the amending procedure proposed in the Resolution (i.e.: the referendum procedure, as well as the provincial consent formula).

3. That the federal government not be permitted to advance a new amending proposal, following the submission of the provincial alternative.

4. That the Part IV referendum be required to be held within six months or one year, rather than two years, following the coming into force of this Act, except Part V.

Saskatchewan officials have been told that the government does not have strong views on the first item; that item 2 was unacceptable, and that items 3 and 4 are probably unacceptable but we would consider them. A shortened time period for holding referenda, as suggested under point 4, does not allow enough flexibility for unexpected events. The present two-year time period does not mean the federal government would necessarily have to wait two years to hold a referendum; it is able to do so within the shorter period of time if practical.

None of these issues were mentioned in Blakeney's Halifax speech.

Resources - Amendment to Section 2

Premier Blakeney will undoubtedly raise with you his request for a change in the resources draft, as agreed to with Broadbent, to add certain words to clause (2) to refer to the export of production from the province. The text which has been agreed to with Mr. Broadbent is attached. What is referred to by Premier Blakeney, and in this memorandum as clause (2), appears in the Broadbent text as clause (1). Section (1) of the Broadbent text follows with the words which Blakeney wants added thereto underlined:

92A(1). In each province the legislature may exclusively make laws in relation to:

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy,

whether or not such production is exported (removed) in whole or in part from the province.

The federal position, since a similar proposal was first made by Saskatchewan in the course of the C.C.M.C. discussions, has been to refuse to agree to such an addition. It has been the view that such wording might bring in by the back door extended provincial jurisdiction over international trade and commerce, which is what we have been continually rejecting in another form. In addition, the authority given to provincial legislatures in clause (2) is an exclusive power so that any addition to provincial authority thereby could be interpreted as a subtraction from federal authority. In particular, it should be noted that "management" and "rate of primary production" in clause (2) could be interpreted very broadly and we would not be able to override provincial regulation affecting exports by paramount federal legislation. We do not agree with Saskatchewan's position that these additional words are necessary to ensure that a province's resource management laws will not be characterized as laws relating to trade and commerce.

Saskatchewan argues that clause (5) (clause (4) in the attached Broadbent text), which gives provinces authority over indirect taxation, includes a similar provision and that to be consisent one should add such a provision to clause (2). Clause (5), however, does not give provincial legislatures exclusive jurisdiction; it is a concurrent power. Officials have indicated that without such a clause, Saskatchewan is not prepared to support the resources amendment and the resolution as a whole. It is odd that Premier Blakeney's lawyers are arguing that the additional words would not have significant impact on federal authority and yet this change is one they are claiming is essential to obtain Blakeney's support. This would indicate that either Premier Blakeney is bluffing or that he is not going to give his support in any event. If the correct reason is the former then we should call his bluff; if it is the latter then there is no point in making any convessions.

It is not clear from Premier Blakeney's Halifax speech whether the addition of the extra words to clause (2) is his "bottom-line", or whether he will settle for an agreement on administrative arrangements, referred to below. His Halifax speech merely indicates that he is seeking "additional assurances on resources".

Resources - Administrative Arrangements

Premier Blakeney is likely to press for some commitment that the "administrative arrangements" about which you talked will be put in place within a fairly short period of time. Saskatchewan officials have been pressing us to provide them with a proposal as quickly as possible. Saskatchewan is proposing federal legislation which would provide for a delegation of administrative authority to a board or commission (presumably provincially controlled) which would regulate the export of resources from the province. They envisage that the authority of this board would be circumscribed by a number of conditions, for example, that it could not exercise its powers so as to interfere with Canada's international obligations. (Referred to by them as a delegation of authority similar to that in s. 33 of the Citizenship Act. Section 33 enables provincial Governor in Council to control foreign ownership of land and is a delegation of administrative authority.)

Federal officials have been taking the position that Saskatchewan should not expect us to develop a proposal in the near future since our human resources will be fully occupied during the coming months, particularly while the Resolution is before the Parliamentary Committee.

Resources - Condition or Test for Operation of Federal Concurrent Authority

The Premier might press again for some test to be added to the resources clause which would restrict federal paramountcy in the newly concurrent field to cases where Parliament expressly declared such legislation to be "necessary to override provincial legislation". It is to be noted that the condition is not that Parliament's authority could only be exercised when "necessary to override provincial legislation" but that it is merely a requirement that Parliament declare such to be the case. Once declared, the courts would not go behind Parliament's declaration. It has been made very clear to Saskatchewan officials that this is unacceptable to the federal government. While such a condition might not have significant legal consequences, it could have enormous political consequences if every time it was thought desirable to pass paramount federal legislation in the field, the government had to argue in Parliament that it was "necessary to override provincial legislation".

This was not expressly mentioned in the Halifax speech.

Exchange of Letters with Mr. Broadbent

Premier Blakeney knows that while only the letters were made public, that there is in fact a text which you and Mr. Broadbent have agreed to. He also knows that the text is identical to the C.C.M.C. draft insofar as it relates to the areas agreed upon. (Copies of the letters are attached.)

Desired Outcome of Meeting with Premier Blakeney

The purpose of your meeting with Premier Blakeney is to find out whether what you are willing to give with respect to the essential issues he raised in Halifax is sufficient to gain his public support. If it is not, then there is no point in proceeding further.

What you have indicated you are willing to give is as follows:

(1) A linkage for sections 41 and 42.

(2) If you agree, a referendum rules commission.

(3) On equalization, we are leery about agreeing to a specific text since other provinces have been involved in the development of the various texts and Premier Hatfield, at least, may make representations to the Committee on the issue. Nevertheless, we agree with the essence of all three of Premier Blakeney's drafts and encourage him to introduce them or have them introduced in Committee.

(4) You have agreed to work out administrative arrangements with respect to international trade in resources. Here there is a question of timing, however, and development of details as well. While the positive aspects can be stressed with Premier Blakeney, it is our recommendation that you not agree to provide precise details at an early date.

The one item on which you have indicated you are unwilling to give, and which Premier Blakeney has identified as crucial for his support, is allowing the provinces to have a role in initiating a referendum for amendment. As we mentioned earlier, there are ways of giving the provinces a role to play, such as that suggested by Premier Davis which requires the consent of any four provinces.

Further specific details on the issues are contained in our reply of October 24th to Bob Weese.

Attachs.

MRS. Reed. (1)

NOTES FOR REMARKS BY PREMIER ALLAN BLAKENEY,
DALHOUSIE LAW ALUMNI ASSOCIATION,
HALIFAX, NOVA SCOTIA,
OCTOBER 27, 1980. 8 p.m. (EST.)

CONSTITUTION - INTRODUCTION

You will be aware of the fact that at the September First Ministers' Conference agreement was not reached.

Following the conference the federal government introduced into the House of Commons and the Senate a resolution providing for substantial changes in the British North America Act with a view to requesting the British Parliament to enact the changes in the B.N.A. Act set out in the resolution. I want to take some time this evening to review the resolution and to comment on some of the major changes proposed.

Let me make my comments under two broad headings - the contents of the resolution and the process proposed.

Contents - Patriation

The resolution provides for patriation of the Constitution. By this is meant that the British Parliament would no longer be able to legislate with respect to the Constitution of Canada. The British are anxious to complete this process and have been so since 1931. I know of nobody in Canada who opposes this move in principle. Some groups, notably Indians and others of native origin and a generation of political leaders in Quebec including Mr. Levesque and Mr. Ryan, take the position that patriation should be accompanied by, in the one case clear protection for the rights of native Canadians, and in the other - a major overhaul of the B.N.A. Act and of the federal structure for which it provides.

Subject to such questions relating to what should accompany patriation, simple patriation of the constitution is not a matter of dispute.

Contents - Amending Formula

But, regrettably, there is nothing simple about simple patriation.

TELECOPIER MESSAGE

TO: Michael Kirby

FROM: Robert D. Weese
Saskatchewan Intergovernmental Affairs

October 21, 1980

Phone - 565-6308

Total message - 13 pages + cover page

F.-P.D. I.R.F.P.
Michael Kirby
OCT 22 1980

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October 24th, 1980.

Robert D. Weese,
Saskatchewan Department of Intergovernmental Affairs,
Regina, Saskatchewan.

Dear Mr. Weese:

I am replying to your letter of October 21st which followed up on our meetings of October 16th and 17th. I will deal with each of the issues you raised in the same sequence as appears in your letter.

First, however, I would make the general comment that in many places your letter indicates that you expect the federal government to give its assent to specific draft texts and hence presumably to indicate either that it intends to introduce such changes in committee or that it will support such changes in committee regardless of other proposals which might be brought forward in that forum. I have difficulty responding as you seem to expect me to. One of the stated purposes of the committee process is to give interested Canadians and parliamentarians an opportunity to try to improve on the wording of the draft Resolution. If the government were to agree with outside parties on all the amendments it will introduce or support at the committee stage, I am sure you would agree, it would be seriously undermining the parliamentary committee system. Therefore, agreement on the exact wording of amendments is not possible at this time.

Having said this, however, I am quite willing to give you reactions and comments on the proposals you are making and to indicate the areas where the federal government is in agreement with the intent and substance of your proposed amendments, even though for the reasons indicated above, I cannot agree or disagree with your exact words.

Non-Discrimination

Your assessment of our discussions, as outlined in your letter of October 21st, are accurate. I will inform the Prime Minister that Premier Blakeney will be writing to him on this subject.

Equalization

I agree with the essence of your summary of our position on this issue in that the federal government is not unalterably wedded to the present wording of the equalization clause in the constitutional resolution. It is prepared to support a new equalization clause if it is requested to do so by several committee witnesses, particularly representatives of provincial governments which receive equalization payments.

I do not think, however, that I would describe any of the alternatives outlined in Appendix A to your letter as "strengthened" versions of the existing section 31 of the Resolution. Rather, they are alternative ways of describing the government's commitment to the principle of equalization.

In summary, I have no difficulty with the essence of your proposal although, as I have indicated above, the exact wording of a new equalization clause would have to be worked out by the committee. Therefore, I urge you to present your alternatives to the committee, or alternatively, to have a member of the committee present them for you.

Final Amending Formula: Alternative to the Victoria Formula

I indicated to you during our meetings last week that the government would seriously consider reverting to the original Victoria formula. Indeed, a Liberal member from P.E.I. has already announced that he will be introducing such an amendment in committee.

Your amalgamated formula, outlined in the fourth paragraph of page 2 of your letter, has some appeal. In one aspect of it is, of course, more rigid than the Victoria formula since it requires the agreement of 7 instead of 6 provinces for an amendment. On the other hand, it is less rigid since it does not require the agreement of all provinces who have ever attained more than 25 per cent of the population. Thus, it would require very careful consideration before a decision was made by the federal government to support it.

Moreover, I think the federal government would be reluctant to introduce such a major change in the Resolution at this time unless it knew that it had the support of a considerable number of provincial governments. It would be most useful if you could determine whether there is general provincial support for such a change. Alternately, it may be that this formula is one for which support could be sought during the two-year interim period before the final formula comes into force, and it could be adopted pursuant to the replacement provisions of Part IV.

Section 42: A Deadlock-Breaking Mechanism

We are examining ways which would make it clear that section 42 is a genuine deadlock-breaking mechanism. Your draft will help us considerably in this regard. However, once again, it is not appropriate for us to reach agreement with you at this time on the exact nature of the clause we will introduce in committee. Moreover, in this particular case, wording of the deadlock-breaking mechanism clause has not yet been considered by any Minister or the Cabinet as a whole.

I have indicated that I too feel there should be some provision so that a referendum has to be called within a limited period of time (three to five years) after the initial approval of an amendment. I also said, however, that despite your insistence, the federal government would not support

complete reciprocity between federal and provincial governments in the calling of a national referendum. I realize that the draft contained in Appendix C of your letter is not complete reciprocity, but rather includes an element of reciprocity only. This matter will be examined by the federal government as it considers alternate ways of linking sections 41 and 42. But again, your specific proposal has not yet been considered by Ministers.

Referendum Rules Committee

I will have to get back to you sometime next week or early the following week with a reaction to the proposal contained in Appendix D. I share your concern that it is essential that the rules for a national referendum be fair, and be seen to be fair. For this reason your proposal that the rules for the referendum be established by a federal-provincial body has some appeal. We are currently considering alternate ways of doing this and will discuss them with you.

Part IV

Of the four points proposed at the top of page 4 of your letter, the federal government has no strong objection to the first point. However, I indicated to you categorically that your second point was unacceptable to the federal government and that we would consider points three and four, although I doubted that we would find them acceptable.

Resources

Your argument in connection with subsection 2 is a legal one which is being considered by the Department of Justice. I would add, however, that it has always been the opinion of our legal advisers that a clause of the kind you propose goes much further than your letter indicates. They are of the view that the clause could unintentionally accord to the provinces jurisdiction over interprovincial and international trade and commerce, and exclude federal jurisdiction from that same area.

... 5

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Administrative Arrangements for International Trade

As I told you last week, we will start to work on the exact nature of an administrative or legislative solution to the problem of international trade in resources. However, I also told you, as confirmed in your letter, that this would inevitably take time because we have a limited amount of human resources and we will be under great pressure in the coming weeks in view of the fact that the parliamentary committee will be reporting back to Parliament on December 9th. Since we have agreed that the solution to your international trade in resources problem will be of an administrative rather than a constitutional nature, while we will do what we can on it, I am sure you can appreciate the fact that we must give priority between now and December 9th to matters associated with the parliamentary committee.

Conclusion

I appreciate receiving your views and the draft proposals annexed to your letter. Indeed, both I and the other officials who were with me in our meetings, found the discussions very useful. As you know, in several areas you had very good ideas which we are examining in detail and in others we found you draft wording appealing. If you have any further thoughts on these matters, please let me know. In the meantime, please be assured that as soon as we clarify our views on some of the specific points raised in your letter and to which I have not responded definitely (e.g., the establishment of a joint federal-provincial referenda rules committee) I will get back in touch with you.

Best wishes,

Mike

Michael J.L. Kirby.

(I will not be available in the office on Monday, but if you wish to discuss this with me over the weekend you can reach me at home - 902-425-5399.)

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OCTOBER 27/80

THE RIGHT HONOURABLE PIERRE ELLIOT TRUDEAU
PRIME MINISTER OF CANADA
HOUSE OF COMMONS
OTTAWA

OCT 28 [illegible]

MY DEAR PRIME MINISTER:

IT IS NOW SOME TWO AND A HALF WEEKS SINCE THE FEDERAL GOVERNMENT MADE PUBLIC ITS PROPOSED RESOLUTION RESPECTING THE CONSTITUTION OF CANADA. I AND MY MINISTERS, ON BEHALF OF THE GOVERNMENT OF ONTARIO, HAVE CLEARLY AND FIRMLY INDICATED OUR SUPPORT IN PRINCIPLE FOR BOTH THE SUBSTANCE AND THE PROCESS FORPATRIATION SET OUT IN THE RESOLUTION AND ITS SCHEDULES. WE SHALL CONTINUE TO DO SO.

DURING THIS PERIOD, WE HAVE CAREFJULL//XXX CAREFULLY REVIEWED THE DETAILED PROVISIONS OF THE CONSTITUTION ACT 1980, AND HAVE FOLLOWED CLOSELY THE DEBATE IN PARLIAMENT AND ELSEWHERE ON YOUR PROPOSAL. IN LIGHT OF THIS DEBATE AND OUR CONCERN OVER CONSIDERABLE DISAFFECTION IN SOME AREAS, I WOULD LIKE TO TAKE THIS OPPORTUNITY TO SUGGEST TO YOU A NUMBER OF CONSTRUCTIVE CHANGES TO THE ACT WHICH WHILE NOT SPECIFICALLY IN ONTARIO'S INTEREST, WILL MEET SOME OF THE CRITICISMS WHICH HAVE BEEN DIRECTED AT IT BY OTHERS WHILE MAINTAINING ITS OVERALL INTEGRITY.

Q1. NATIONAL REFERENDUM AS A DEADLOCK-BREAKING DEVICE

TO ENSURE THAT A NATIONAL REFERENDUM IS USED AS A MEANS OF BREAKING AN INTERGOVERNMENTAL DEADLOCK ON A PARTICULAR AMENDMENT, IT SHOULD BE MADE CLEAR THAT THIS PROCEDURE CAN BE AUTHORIZED ONLY AFTER THE PROCEDURES SET OUT IN SECTION 41 HAVE BEEN GIVEN A FAIR TEST. IN OTHER WORDS THE REFERENDUM PROCEDURE CANNOT BE USED FOR ONE YEAR FOXXX FROM THE TIME THE FIRST FORMAL STEP IN THE AMENDMENT PROCESS HAS BEEN SUCCESSFULLY COMPLETED.' WE CONTNXXX CONTINUE TO HOLD THE VIEW THAT THE VOTERS OF CANADA MUST RETAIN THE RIGHT TO BREAK ANY DEADLOCK WHICH APPEARS PERPETUAL IN NATURE

2. AUTHORIZATION OF THE REFERENDUM

AT PRESENT, PARLIAMENT ALONE WOULD HAVE THE RIGHT TO DETERMINE THAT THE REFERENDUM PROCEDURES SHOULD BE USED. IN MY VIEW, IT WOULD BE A SIGNIFICANT IMPROVEMENT TO ENSURE THAT PROVINCES ARE PART OF THE PROCESS OF AUTHORIZING A REFERENDUM.
TO THAT EFFECT, THE FOLLOWING APPROACH IS SUGGEST: XXX
SUGGESTED: ALLOW THE USE OF THE REFERENDUM TO BEAUTHORIZED BY THE RESOLUTION OF PARLIAMENT AND THE LEGISLATIVE ASSEMBLIES OF AT LEAST FOUR PROVINCES: BY REQUIRING BOTH PARLIAMENT AND A MINIMUM NUMBER OF PROVINCES TO BE IN AGREEMENT, THE NOTIONS OF CONSENSUS AND DEADLOCK BREAKING ARE BROUGHT INTO BETTER BALANCE.

LTERNATIVE REFERENDUM QUESTIONS

RE THERE ARE SEVERAL ALTERNATIVE AMENDMENT PROPOSALS ON
SINGLE ISSUE UNDER CONSIDERATION (AS OPPOSED TO A SITUATION
HERE THE CHOICE IS BETWEEN A SINGLE PROPOSAL AND THE STATUS
QUO) ENSURE THAT AT LEAST TWO OF THE ALTERNATIVES BE PUT TO
THE PEOPLE IN THE REFERENDUM.

ONE WAY TO ACHIEVE THIS OBJECTIVE WOULD BE TO PERMIT PARLIAMENT
TO DETERMINE ONE ALTERNATIVE AND ANY GROUPING OF FIVE PROVINCES
TO DETERMINE THE OTHER.

I BELIEVE THAT ADJUSTMENTS TO YOUR PROPOSAL ALONG THE LINES
SUGGESTED ABOVE WOULD GO FAR TO MITIGATE SOME OF THE MORE
EXPLICIT CONCERNS WHICH HAVE BEEN RAISED WITH REGARD TO IT,
AND WOULD CONTRIBUTE FURTHER BROADENING AND DEEPENING TO THE
BASE OF SUPPORT FOR IT. I LOOK FORWARD TO YOUR RESPONSE TO
THESE SUGGESTIONS ONCE YOU HAVE HAD THE TIME TO CONSIDER THEM.

AS I HAVE INDICATEDAN ONTARIO CAN LIVE WITH THE EXISTING
PACKAGE. WE SUPPORT RECENT PROPOSED GUARANTEES ON RESOURCE
OWNERSHIP.

THE DEEPLY HELD CONCERNS ABOUT THE VICTORIA FORMULA, WHILE
NOT SHARED BY US, DO SUGGEST THE NEED FOR CONCILIATION AND
RESPONSE.

THE NATIONAL INTEREST IS SERVED BY THE CONSTITUTIONAL
PROPOSALS BEFORE PARLIAMENT: IT WOULD BE ADVANCED EVEN
FURTHER THROUGH A CONCILIATORY AND CREATIVE APPROACH TO
STRUCTURAL ISSUES WITHIN THOSE PROPOSALS.

BROADENING THE PROCESS BY WHICH THE QUESTIONS ON A REFERENDUM
ARE DETERMINED, AND MAKING MORE SEQUENTIAL AND PARTICIPATORY
THE MEANS BY WHICH A REFERENDUM IS CALLED WOULD GO A LONG WAY
TO RESPONDING TO THOSE FEARS CONCERNING EXPLOITATIVE USE BY
ONE SIDE OR THE OTHER OF THE REFERENDUM PROCEDURE.

WHILE ONTARIO RESPECTS THE PARTNERSHIP BETWEEN PROVINCES AND
THE NATIONAL GOVERNMENT IN MANY AREAS, WE REITERATE OUR VIEW
THAT CANADIANS AS A WHOLE, AS INDIVIDUAL VOTERS MUST HAVE THE
OPPORTUNITY TO BREAK A SEEMING ENDLESS DEADLOCK THROUGH SOME
APPROPRIATE MEANS.

SIMILARLY, WHILE WE APPRECIATE THE DESIRE OF THE GOVERNMENT
OF CANADA TO MOVE AHEAD WITH A FAIR MINDED TIMETABLE ON
CONSTITUTIONAL MATTERS, WE BELIEVE THAT ASSURANCES RELATIVE
TO THE OPORTUNITY FOR ADEQUATE PARLIAMENTARY DEBATE UPON THE
REPORT BACK BY THE JOINT COMMITTEE OF THE HOUSE AND SENATE ON
DECEMBER 9TH, ARE OF CRITICAL IMPORTANCE TO THE INTEGRITY OF
THE PROCESS ITSELF.

ONTARIO BELIEVES THAT THE TIME TO ACT ON PATRIATION, HUMAN
RIGHTS AND OTHER RELATED ISSUES IS NOW. WE BELIEVE THAT THE
ABOVE SUGGESTIONS WILL FACILITATE PROGRESS AND CONCENSUS IN
THIS DIRECTION.

WILLIAM G. DAVIS
PREMIER OF ONTARIO

PMO PCO OTT

P M OF ONT TOR
FC

: Barbara Reed

CONFIDENTIAL

October 17, 1980.

MEMORANDUM FOR THE PRIME MINISTER

Re discussions with Saskatchewan officials on Patriation Resolution

After meeting with you this morning we met with Saskatchewan officials. A summary of those discussions follows.

Non-discrimination Clause

I indicated that we were sympathetic to considering any changes Saskatchewan might make to the wording of the clause to improve it which was acceptable to the joint committee. While Saskatchewan would obviously prefer to see the section dropped they realize this is as far as we will go and this issue seems settled.

Equalization

I indicated again that we are not wedded to the present draft and it was agreed that Saskatchewan officials would work with federal Justice and Finance officials to work out an alternative draft on the basis of either the Quebec or the Manitoba-Saskatchewan drafts which were before the CCMC. We have some concerns about the use of the phrase "reasonably comparable levels of taxation" in the Manitoba-Saskatchewan draft (as does Alberta) but would be prepared to accept the Quebec draft which was supported by everybody except B.C. at the CCMC. I will report back to you after the officials meet sometime next week or the week after.

National Referendum - Deadlock Breaking Mechanism

I indicated that we were attracted to their suggestion that a referendum be called on the failure of

provincial Legislatures to pass the appropriate resolutions for constitutional amendment. I indicated that we did not like a process which requires that Parliament deal with the same issue twice, once to approve an amendment and a subsequent time a year later to launch a referendum on the amendment. We would see the mechanism working so that Parliament's resolution approving a proposed amendment also authorized, but did not compel, the holding of a referendum. Saskatchewan officials are to discuss this with Premier Blakeney.

Concern was expressed that once Parliament passed a resolution for amendment the power to call a referendum on that issue should not last for an indefinite period of time in the future. Accordingly, Premier Blakeney suggests a three year time limit. He also suggests that allowing the provinces only one year to pass resolutions concurring in a proposed amendment is too short, and that they should be given 18 months. Thus under this scheme, Parliament would pass a resolution; the provinces would then have 18 months to pass concurring resolutions; and the federal government would have a further 18 months within which to call a referendum, if it wished. I agreed to seek your views on this proposal.

Saskatchewan officials reiterated their position that provincial governments should have the right to call deadlock breaking referenda. They proposed as a fall back position that in the case where the required provincial resolutions for an amendment had been passed and the federal government did not agree to the proposal, (i.e. all the conditions of the Victoria formula had been met, except for the federal government approving the amendment) Parliament be required to decide whether it would approve the proposed amendment and, if not, whether a national referendum should be held. I indicated that I would raise this with you.

This proposal has some advantages in that it would allow Parliament to overrule an obstructionist federal government. On the other hand, it would force a debate in Parliament on an amendment (e.g. on offshore resources) which could prove politically embarrassing to the government. Nevertheless, if you want some small element of reciprocity in the amending formula, without giving the provinces the right to call a referendum, then this modification in our existing proposal has a lot to recommend it. Moreover, in the case of a majority federal government it would result

in the same outcome (i.e. non passage of the amendment) as if this clause were not in the constitution and the process stayed as now proposed.

Final Amending Formula - Alternative to Victoria

Premier Blakeney prefers as the final amending formula one that would require the consent of 7 provinces having 80% of the population which must include at least 2 Atlantic and 2 ~~Maritime~~ provinces. He is concerned about any formula which gives a perpetual veto to Quebec and the reaction to such a formula in Western Canada. I indicated that such a formula was not unattractive as far as we are concerned but that we would not be prepared to introduce an amendment of this nature in committee. At the same time I indicated that it was a proposal that could be adopted as a replacement for Victoria by using the procedure in place during the two year interim period.

Rules for Referenda

I indicated that we found their proposal of an independent rule making commission for national referenda both attractive and acceptable if appropriate details could be developed. It was agreed that federal Justice officials could work with Saskatchewan officials to develop a draft.

Provincial Alternative to Victoria Formula

Officials reiterated the view that the provisions for a replacement formula should allow for a provincial alternative which might exclude the possibility of a national referendum, and that the two year time period given to Parliament for the holding of a referendum was too long. I explained again our position. These would not appear to be major outstanding issues. Saskatchewan will accept our view although Blakeney may raise this issue with you when you next speak to him.

Resources

Saskatchewan prefers the anti-discrimination clause presently in the ~~CCMC~~ draft and sees political advantages to staying with it, rather than adopting our alternative suggestion. Accordingly this issue is settled since we had previously agreed with the N.D.P. to accept that version. I have so informed Mr. Broadbent's office.

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Accordingly he will be contacting you on Tuesday to decide when and how the public will be made aware of your agreement with him. Apparently he still prefers an exchange of letters which would then be made public.

Could you get this draft + work on a reply?

Officials pressed for details of the "administrative or legislative" arrangements that might be put in place. It is clear they expect an exchange of letters between yourself and Premier Blakeney within the next few weeks setting out the principles of such arrangement. Officials are proposing federal legislation which would provide for a delegation of administrative authority to a Board or Commission (presumably provincially controlled) which would regulate the export of resources from the province. They envisage that the authority of this Board would be circumscribed by a number of conditions, for example, that it could not exercise its powers so as to interfere with Canada's international obligations. Officials clearly think you intend to move towards implementation of some type of administrative or legislative scheme in the near future and do not see it as an item for the next round of constitutional negotiations. Officials are of the view that without a fairly precise agreement on the details of an administrative arrangement Saskatchewan's consent will not be forhtcoming.

Both!

Saskatchewan is still holding out for additional changes on the resources draft particularly the inclusion in subsection (2) of additional wording to indicate that the exclusive legislative authority given to provincial Legislatures by that section "shall not be invalid merely because part or all of the product may enter interprovincial or international trade". (see attached CCMC draft of the section.) These words were put in the CCMC draft at the behest of Saskatchewan; we never agreed to them. Accordingly they were underlined in that draft as something not agreed to and they were not incorporated by Marc Eliesen in the N.D.P. draft.

Our reason for not agreeing to this wording is that it might bring in by the back door extended provincial jurisdiction over international trade and commerce, which is what we have been continually rejecting in another form. In addition, the authority given to provincial Legislatures in clause (2) is an exclusive power so that any addition to provincial authority thereby could be interpreted as a subtraction from federal authority. In particular it should

be noted that "management" and "rate of primary production" in clause (2) could be interpreted very broadly and we would not be able to override provincial regulation affecting exports by paramount provincial legislation.

Saskatchewan argues that clause (5) which gives provinces authority over indirect taxation includes a similar provision and that one should be consistent and add such a provision to clause (2). Clause (5), however, does not give provincial Legislatures exclusive jurisdiction; it is a concurrent power. Officials indicated that without such a clause or one that reads

"whether or not such production is exported in whole or in part from the province"

Saskatchewan is not prepared to support the resources amendment and the resolution as a whole. I indicated that this was an issue that could only be settled between you and Premier Blakeney.

This is the main outstanding difference between ourselves and Saskatchewan. However, it does not affect our agreement with the N.D.P.

Premier Blakeney will likely also raise again his concern to have Parliament's paramount trade and commerce jurisdiction restricted to cases where Parliament declares the exercise of that jurisdiction to be in the compelling national interest.

Timing

Saskatchewan officials indicated that they preferred that you not call Premier Blakeney to try to settle the outstanding issues until some further work had been done on the details of the changes on which we have agreed. I indicated that it was essential to have an amendment ready for committee almost as soon as it starts to meet since the committee should be given as much time as possible to consider the amendment. Accordingly I would suggest you phone Premier Blakeney early next week to try to settle with him the outstanding issue on resources.

Premier Blakeney is playing a bargaining game. I have found out that his Caucus and Cabinet have given him a blank cheque to make a deal - they will support any deal he makes. His officials say he is in no rush to make a deal. He thinks Broadbent is foolish to agree so quickly and he will probably try to discourage Broadbent from agreeing with us next week. We must get Broadbent tied down right away before Blakeney persuades him to abandon his support for the resolution. To expedite this, I will meet with Broadbent's officials at 9 am Monday to go over their draft of a letter

from Broadbent to you.

What Blakeney is doing to stall for time is insisting that every detail of every amendment be worked out before he comes on board publicly. Frankly, this worries me. I suspect his real plan may be to keep stalling and then find a pretext for backing off at the last minute. This is why I think you should telephone him soon rather than later to see where he stands on the key questions of the wording of section 2 of the resources draft and the timing of federal legislation on international trade in resources. These are the two issues which his officials claim he must have if he is to come on board. Note, however, that even if these agreements are reached, he may still insist on seeing precise wording of the amendment linking sections 41 and 42 and a possible equalization amendment, etc.

B.R. for

Michael J.L. Kirby

"C.C.M.C. DRAFT"

RESOURCE OWNERSHIP AND INTERPROVINCIAL TRADE

) (present Section 92)	(1) Carries forward existing Section 92.
sources	
) In each province the legislature may exclusively make laws in relation to a) exploration for non-renewable natural resources in the province; b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy. and such legislation shall not be invalid merely because part or all of the product may enter interprovincial or international trade.	(2) The draft outlines exclusive provincial legislative jurisdiction over certain natural resources and electric energy within the province. These resources have been defined as non-renewable (e.g.: crude oil, copper, iron and nickel), forests and electric energy. This section pertains to legislative jurisdiction and in no way impairs established proprietary rights of provinces over resources whether these resources are renewable or non-renewable. British Columbia has concerns over the definition of resources and would prefer to see the term "natural resources". This inclusion is designed to safeguard otherwise valid provincial laws from being declared ultra vires for affecting trade and commerce and would prevent compulsion of export of resources from provinces. The Government of Canada (i) does not find such a provision acceptable and (ii) does not think a section to prevent federal legislation compelling exports from the province to be necessary.
E p o	
Au Pa	
Tax res	

Moved that (1)

The Proposed Resolution respecting the Constitution of Canada be amended

(a) by adding thereto, immediately after section 51 of the proposed Constitution Act, 1980, the following headings and sections:

"PART VI
AMENDMENT TO
THE CONSTITUTION ACT, 1867

Amendment to Constitution Act, 1867

52. (1) The Constitution Act, 1867 (formerly known as the British North America Act, 1867) is amended by renumbering section 92 as subsection 92(1) and by adding to that section the following subsections:

"Non-Renewable Natural Resources, Forestry Resources and Electrical Energy (2)

Laws respecting non-renewable natural resources, forestry resources and electrical energy

(2) In each province the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy. (3)

Export from provinces of resources

(3) In each province the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Authority of Parliament

(4) Nothing in subsection (3) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict (are inconsistent), the law of Parliament prevails to the extent of the conflict (inconsistency). (4)

Taxation of resources

(5) In each province the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

"Primary production"

(6) The expression "primary production" has the meaning assigned by the Sixth Schedule.

Existing powers or rights

(7) Nothing in subsections (2) to (6) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of those subsections (this section)." (1)

Idem

53. The said Act is further amended by adding thereto the following Schedule:

"THE SIXTH SCHEDULE

PRIMARY PRODUCTION FROM NON-RENEWABLE RESOURCES AND FORESTRY RESOURCES

1. For the purposes of subsections 92(2) to (5) of this Act,

(a) production from a non-renewable resource is primary production therefrom if

(i) it is in the form in which it exists upon its recovery or severance from its natural state, or

(ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and (2)

(b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood."" ; and

(b) by renumbering Part VI of the Constitution Act, 1980 as Part VII, by renumbering sections 52 to 59 thereof as sections 54 to 61, respectively, and by making such other changes in numbering as are consequential thereto.

(2)

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

OFFICE OF THE LEADER
NEW DEMOCRATIC PARTY

BUREAU DU CHEF
NOUVEAU PARTI DEMOCRATIQUE

O T T A W A
October 20, 1980.

The Rt. Hon. Pierre Trudeau,
Prime Minister of Canada,
House of Commons,
O T T A W A.

Dear Prime Minister:

I am writing subsequent to the introduction in the House of Commons of the "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada" and to the meeting I had with you at your request on the day that you also met with the Leader of the Opposition.

You will recall that at the meeting on October 1st, I indicated to you that the New Democratic Party, as a matter of policy, strongly supports inclusion in a Canadian Constitution of the entrenchment of certain fundamental rights, the principle of equalization and a recognition of the central duality of Canadian history by enabling minorities of the two Official Languages in any province to have access to education in their language where numbers make this feasible. In addition, I expressed my view that as undesirable as it is from some perspectives, it is important at this period in our history, to break the deadlock which has occurred for many years in the constitutional change process and I therefore agreed that action of the right kind by Parliament was acceptable. In asserting this, I made the point that it was very desirable, indeed essential, to ensure that action by Parliament be of the kind that would obtain the support of as many parties in the House of Commons and as many provincial governments as is possible. In addition, the approach to constitutional change initiated by Parliamentary action should be of the kind that would obtain the maximum support among all peoples and regions in Canada.

For the above reasons, I stressed the necessity of including in any proposal to Parliament, in addition to the above desirable elements, the confirmation of the provinces' right to manage and control their resources and more specifically of their right to levy indirect taxes in this sector and to share a concurrent power with federal paramountcy with respect to interprovincial trade in resources. I did so because I believe it is profoundly important that a package of proposals presented for constitutional change be such as to obtain the personal support of as many people in Canada as is possible.

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Many Canadians in recent years have expressed apprehension about their provincial governments' lack of control of their provincial resources. It is certainly true in Atlantic Canada, in Québec and in Western Canada. It is for this reason that I strongly believe that the constitutional recognition of the provinces' right to control their resources must be established at this time to obtain the kind of regional support among Canadians that is necessary for Parliamentary action to be seen as desirable at this time.

When the proposed resolution on the constitution was publicly released on October 2nd, I indicated that, in principle, the elements contained within it reflected New Democratic Party policy and indeed, beyond that, were such as could be regarded as civilized by any Canadian whatever his or her political party affiliation may be. However, I noted with great concern, the absence of any reference to provincial control over resources.

Subsequently, in the debate in the House of Commons on the proposed resolution, I indicated that upon further reading of the proposed resolution, my colleagues and I had a number of other concerns but that the absence of any reference to provincial control over resources was fundamental.

Following a thorough discussion with my caucus colleagues, I am writing to you today to stress our support of the major elements in the proposed resolution and indicate that we intend to suggest amendments when the proposed resolution reaches the Committee stage on a number of important matters, including the amending formula, women's rights and native rights, in the anticipation that your public statements indicate the government will respond constructively to positive suggestions. However, I want to stress that we have decided at this historic moment, because of the good aspects of the proposed resolution, that we will give it our support on the condition that the government will accept an amendment moved by myself or one of my colleagues confirming the provinces' right to manage and control their natural resources, specifying their right to levy indirect taxes in a non-discriminatory manner in relation to those resources and providing to them a concurrent power with respect to inter-provincial trade in those resources to be exercised in a non-discriminatory manner and subject to federal paramountcy. Since you have made public reference to the fact that you will consider responding in an affirmative manner to my proposal, I hope that your response will be favourable.

I look forward to an early reply.

Yours sincerely,

Edward Broadbent

PRIME MINISTER PREMIER MINISTRE

Ottawa K1A 0A2
October 21, 1980

Dear Mr. Broadbent:

I have received your letter of October 20 in which you express your intention and that of the New Democratic Party to support in the House of Commons the "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada".

I am very pleased that you recognize the need at this time for action by Parliament to patriate the Constitution, to entrench certain fundamental rights, to entrench the principle of equalization, and to enshrine minority language education rights. I agree with you that it is desirable that the constitutional package have the broadest possible support in Parliament and in the country.

You stress in your letter the importance you attach to the confirmation of the right of provinces to manage and control their resources, the right of the provinces to levy indirect taxation on resources, and to share a concurrent power with federal paramountcy with

Mr. Edward Broadbent, M.P.,
Leader of the
New Democratic Party,
House of Commons,
O t t a w a.

respect to interprovincial trade in resources. I agree with you that some change for the proposed Resolution with respect to resources will increase the support for the package both in Parliament and in the country. I am, therefore, prepared to deal with this particular issue at this time.

In fact, the points you raise with respect to resources were among those put forward by the Minister of Justice in his opening statement last July at the first meeting of the Continuing Committee of Ministers on the Constitution. I repeated them in September at the First Ministers' Conference.

Of course, during the course of the constitutional negotiations over the summer, we put forward a number of suggested changes. Those relating to resources were expressly acceptable to us only on the condition that agreement be reached to entrench in the Constitution certain basic principles of the economic union.

Accordingly, the type of amendment which I would be prepared to accept would be one which makes specific provision that the increased provincial power could only be exercised in a way that does not allow a province to discriminate against other parts of Canada. Therefore, I would be prepared to accept an amendment which you or one of your Colleagues may propose in Committee which would:

1) confirm the jurisdiction of the provinces with respect to exploration, development, conservation, and management

of non-renewable natural resources and forestry resources in the province including the making of laws in relation to the primary production from such resources;

2) give the provinces concurrent jurisdiction in interprovincial trade in non-renewable resources subject to full federal paramountcy and subject to a clause which would prohibit discrimination in prices or in supplies of resources exported from the province to another part of Canada;

3) give the provinces the right to levy indirect taxation in non-renewable resources as long as such taxation does not discriminate between the province and other parts of Canada.

Yours sincerely,