SECRET

ABORIGINAL AND TREATY RIGHTS

AND THE CONSTITUTION

OBJECTIVES

The purpose of this paper is to put forward proposals to:

1. broaden public support for the Constitutional Resolution;
2. shorten the debate in the House by removing a key issue from the opposition parties;
3. minimize the possibility of embarrassment and delay in London; and
4. establish a foundation for improved relations between the government and aboriginal peoples.

BACKGROUND

Native leaders have been informed of the government's position that the Constitutional Resolution cannot be changed without the agreement of the 9 provinces supporting the measure. Their present position is one of strong opposition to the package as it now stands. The concern of the Inuit people in the North has been demonstrated by school boycotts and the lowering of Canadian flags. Inuit leaders in particular, however, are looking at ways short of amendments to the Resolution that would constitutionally recognize aboriginal and treaty rights for the purposes of federal jurisdiction, and are apparently encouraging their people to await the outcome of government consideration of their concerns before engaging in political demonstration.

The opposition parties are likely to use the deletion of the native rights provision to lengthen the debate in the House on the Resolution. In addition, while the NDP seems to be exploring possible positions of compromise on the issue, it seems likely that they (or indeed the Progressive Conservatives) will move a motion of some kind to provide protection for aboriginal and treaty rights.

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Indian groups are significantly stepping up their efforts in London to embarrass the government and stop patriation. To date, the Inuit and to a lesser extent, the Métis and non-status Indian groups have concentrated their efforts in Canada but they too are poised to press their case in London.

The NWT Assembly unanimously supports a constitutional provision recognizing aboriginal and treaty rights in the territories.

OPTIONS

Substance

Assuming that the government's condition of obtaining the consent of 9 Premiers to amend the resolution cannot be met, the substantive options are to:

1. Pass federal legislation under S. 91.24 of the BNA Act affirming and recognizing aboriginal and treaty rights for the purposes of federal jurisdiction generally.

2. Pass similar legislation to apply only to North of 60°.

3. Make no commitment to federal legislation until the First Ministers' Conference required by the Resolution has been held.

These are options that the Prime Minister discussed with Inuit leaders last week, without committing the government. None is inconsistent with the accord with the provinces.

Option 1. would be a full use of the government's power under S. 91.24 It would be more satisfactory to native leaders and might well lead to renewed support by the Inuit for the Resolution, though it would not satisfy status Indians and likely not satisfy the Métis and non-status Indians. It would benefit all native peoples and could not be seen as discriminatory and thus would set a firmer foundation for the future. The indirect effects on the provinces might be of concern to them.

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Option 2. would be a use of the power under S. 91.24 in areas where the government has full jurisdiction and where the impact on the provinces would be small. It would be satisfactory to the NWT Assembly and perhaps some Northern Inuit leaders, but would be less likely to please Quebec and Labrador Inuit. It would have significantly less impact on status Indians and Métis and non-status Indians, who would accuse the government of dividing the native peoples and of granting special treatment to the Inuit. This would have a negative impact. It would, however, signify the federal government's position of principle on the issue.

Option 3. would be to keep the government's options open until the First Ministers' Conference at which the rights of the aboriginal peoples would be discussed, with a view to maintaining maximum leverage on the provinces to themselves accept the recognition of aboriginal and treaty rights within their own jurisdiction. This would also allow native leaders time to develop their thinking on the precise protection they want. While this option might well increase the chances of eventually including a strong protection for aboriginal and treaty rights in all jurisdictions, it is not an option that native leaders, including the Inuit, will accept. Thus, its adoption would have little impact on the constitutional debate here or in London.

Options on timing and process

To have maximum impact, the government's position should be made public as soon after the Resolution has been introduced in the House as possible. This would shorten House debate, pre-empt possible opposition motions to amend and quickly increase public support.

The options for proceeding are as follows:

1. the Prime Minister and/or the Minister of Indian Affairs and Northern Development could clearly commit the government to action, possibly in the debate on the constitution;

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2. the government could support a motion under S.O. 43 stating the position it has decided upon (this would commit the House of Commons as a whole); or

3. the government could introduce a draft Bill, possibly seeking unanimous consent for its passage without debate.

Native leaders have made it clear that they seek as firm a commitment as possible. Discussion with the opposition could indicate which option is most feasible. If no opposition cooperation is possible, the first option should be followed as soon as possible.

RECOMMENDATIONS

It is recommended that Cabinet agree that legislation to recognize, in relation to Federal jurisdiction only, the aboriginal and treaty rights of aboriginal peoples as defined in the former clause 34 of the Resolution should be drafted and that the Prime Minister, the Minister of Justice, the Minister of Indian Affairs and Northern Development and the Minister of State decide on the timing and process to be followed in announcing, introducing and passing the legislation.

SOME HAVE SUGGESTED THE IMMEDIATE APPLICATION OF SECTION 34 TO THE FEDERAL GOVERNMENT AND MATTERS UNDER FEDERAL JURISDICTION. THE BOVERNMENT IS PREPARED TO ACT IMMEDIATELY ON THIS SUGGESTION IF THE LEADERS OF THE NATIONAL INDIAN BROTHERHOOD, THE NATIVE COUNCIL OF CANADA, AND THE INUIT COMMITTEE ON NATIONAL ISSUES, INDICATE THEIR SUPPORT FOR IT BY WEDNESDAY, NOVEMBER 25TH. IF SUCH SUPPORT IS NOT FORTHCOMING BY THE DEADLINE, THE GOVERNMENT IS COMMITTED TO LEAVING THE SAME PROPOSAL ON THE TABLE FOR THE PURPOSES OF ALL NEGOTIATIONS ON THE IDENTIFICATION OF THE RIGHTS OF THE ABORIGINAL PEOPLES. TO BE CRYSTAL CLEAR, I WILL QUOTE THE LANGUAGE WE HAVE IN MIND:

THE GOVERNMENT WOULD PREFER THAT THE RECOGNITION AND AFFIRMATION OF ABORIGINAL AND TREATY RIGHTS BE FULLY REINSTATED IN THE RESOLUTION BUT CANNOT ACT TO DO SO WITHOUT THE CONSENT OF THE NINE PROVINCES WHO ARE PARTIES TO THE ACCORD. I KNOW THAT NATIVE LEADERS HAVE ATTEMPTED TO OBTAIN THIS CONSENT, SO FAR WITHOUT SUCCESS.

I KNOW THAT THE HONOURABLE MEMBER FOR NUNATSIAQ TODAY MUST RIGHTLY BE DISAPPOINTED THAT THE RESOLUTION AS INTRODUCED DOES NOT ENSHRINE ABORIGINAL RIGHTS. I HOPE HE UNDERSTANDT THAT WHETHER WE SUCCEED IN ENSHRINING ABORIGINAL AND TREATY RIGHTS IN RELATION TO FEDERAL MATTERS OR WHETHER WE HAVE TO WAIT A YEAR TO REACH A CONSENSUS WITH THE PROVINCES FOR ALL OF CANADA IS LESS IMPORTANT THAN THE FACT THAT WE WILL DO IT.