

FEDERAL-PROVINCIAL CONFERENCE  
OF  
FIRST MINISTERS

Letter from Premier Blakeney to  
Prime Minister Trudeau on  
Natural Resources  
October 10, 1978

Saskatchewan

Ottawa  
October 30-November 1, 1978



Premier  
of Saskatchewan

OGDILGULISTYDIA

Legislative Building  
Regina, Canada  
S4S 0B3

October 10, 1978.

The Right Honourable Pierre Elliott  
Trudeau, P.C., Q.C., M.P.,  
Prime Minister of Canada,  
House of Commons,  
Ottawa, Ontario.  
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Dear Prime Minister:

This letter is prompted by the decision of the Supreme Court of Canada, handed down on October 3rd, in the case of Central Canada Potash Co. Limited and the Attorney General of Canada v. the Government of Saskatchewan et al. That judgment raises grave concerns with regard to provincial powers over natural resources, and will significantly influence the present discussions on constitutional reform.

First, I want to outline briefly the background and issues in the Central Canada case, although I do not intend to go into the facts and legal arguments in any great detail.

In the late 1960's and early 1970's, because of world market conditions and other factors, potash produced in Saskatchewan was being sold at very low prices -- in some instances below the cost of production -- and the potash industry in Saskatchewan was in a precarious financial position. The government of the day, under the late Premier Ross Thatcher, took steps to allocate production of potash according to the available market, and to establish a minimum floor price. Although the measures taken had very little impact upon the provincial government's revenues, they were crucial for the economy of the province and the continued viability of the potash industry. The present government inherited the prorationing scheme and continued the program, with production controls being effective until 1973.

All but one of the potash companies supported prorationing, the exception being Central Canada Potash,

which, because of its unique captive market in the United States, was in a position different from the rest of the industry. In 1972 that company attempted unsuccessfully to force the Minister of Mineral Resources, through court action, to grant it additional production licences; when that action failed, it commenced another action, claiming that the prorating measures infringed the federal trade and commerce power. The latter action was commenced in December 1972. The Attorney General of Canada applied to be joined as a plaintiff in the action, and obtained an order of the Court of Queen's Bench in November 1973 allowing the Canadian government to be a plaintiff along with Central Canada. The action was tried in 1974 and judgment given for the plaintiffs in May 1975. The province appealed, and the Court of Appeal for Saskatchewan, in a unanimous judgment, allowed the appeal in January 1977. Leave to appeal to the Supreme Court of Canada was granted, and the case was heard last December. In its judgment last week, the Supreme Court found the prorating scheme to be beyond provincial powers.

The Central Canada Potash decision is only the latest in a series of unsettling judgments concerning resource jurisdiction. You will recall, in particular, the decision of the Supreme Court of Canada in the case of Canadian Industrial Gas and Oil Ltd. v. the Government of Saskatchewan in November 1977, which found Saskatchewan's oil income tax and royalty surcharge invalid and ordered repayment thereof.

Two points are worthy of special note.

The Supreme Court of Canada, in both the Central Canada and the CIGOL judgments, overturned the unanimous decision of the Saskatchewan Court of Appeal (and, in the latter case, the verdict of the original trial judge as well).

It is noteworthy, too, that the Attorney General of Canada was a co-plaintiff in the Central Canada case. This I found particularly disturbing. It will be recalled that there were extensive discussions during the genesis of prorating, in late 1969 and early 1970, involving senior legal officials of our two governments, involving indeed the then federal Minister of Justice, John Turner. Those discussions related to the constitutional validity of the prorating scheme and resulted in certain amendments to the regulations to satisfy federal concerns. The government of the day of this province co-operated fully with the federal

authorities to attempt to avoid or resolve potential constitutional difficulties. The record clearly shows that the governments of both Saskatchewan and Canada believed the prorating scheme to be constitutionally valid. The only change in the prorating regulations made by our government since 1971 was one which could only serve to strengthen their constitutional validity. You will understand, therefore, why many, including myself, perceived the subsequent action of the Attorney General of Canada in joining the action as a plaintiff against the province as a complete about-face and betrayal on the part of the federal government.

In addition to its interventions in court cases, the federal government has taken other steps to lessen provincial powers to manage and tax resources. These affect all the Western provinces. Examples that come readily to mind include the unilateral changes to the Income Tax Act that disallowed the deduction from corporate income of provincial taxes and royalties for federal tax purposes; the Petroleum Administration Act, under which the federal government assumed the power to set oil prices; the export tax on oil; certain provisions of the proposed Nuclear Control and Administration Act (Bill C-14); and, most recently, the declared intention of the federal government to abrogate the oil pricing agreement with the producing provinces.

Taken together, these actions seem to indicate a deliberate strategy to expand federal jurisdiction at the expense of provincial powers to manage and tax natural resources. In my view, the federal determination to further centralize power at the expense of the provinces is imposing very serious strains on our federal system.

I have made these same arguments over and over again. You will perhaps recall my statement at the First Ministers' Conference in December 1976, when I urged the federal government "to drop its aggressive anti-provincial stance in the taxation and control of natural resources". And you may remember my letter to you of November 29, 1977, in which I referred to "a grave risk to our federal system itself". I could cite example after example.

In the two reports of the Western Premiers' Task Force on Constitutional Trends, the four western Premiers have identified a number of federal intrusions into provincial jurisdiction over resources.

The ten provincial Premiers, in 1976 and again in Regina in August of this year, reached agreement on the

need to strengthen provincial powers over resources. Premier Lougheed's letter to you of October 14, 1976, reported our unanimous agreement on a specific text dealing with "a strengthening of jurisdiction of provincial governments" in the field of resource taxation. In Regina last August, the Premiers "agreed to advance, again, the 1976 consensus, which has not received an adequate response from the federal government".

My views on national unity are well known by now. I am sympathetic to the special problems of the Province of Quebec. But I must tell you frankly that the time has come for you and your government to begin to respond to the legitimate demands of the Western provinces. If you continue to ignore the West, you will imperil the very fabric of our nation.

In terms of the constitutional changes that are required with respect to provincial jurisdiction over resources, it is perhaps not appropriate in this letter to consider specific wording. Generally, though, Saskatchewan will propose:

1. that provinces be allowed to levy indirect, as well as direct, taxes on resource production, notwithstanding the fact that the production is exported or that the incidence of the tax may be thought to fall outside the province. In particular, we will propose that each province be authorized to make laws to raise money by any system of taxation in respect of forests, mines and minerals, or the production therefrom in the province. This is along the lines of the agreement reached by the ten Premiers in 1976.
2. that the federal trade and commerce power be clarified so that it can no longer be used to frustrate a province's legitimate efforts to influence the production and marketing of its natural resources. In particular, we will propose a provision along the lines of that proposed by the Canadian Bar Association's Committee on the Constitution.
3. that changes be made to the Supreme Court of Canada, so that it will not only be, but be seen to be, an impartial arbiter of federal-provincial disputes.

In respect of the first of these proposals, you will know that provincial power of taxation flows from section 92(2) of The British North America Act which states:

"92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, --

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes."

The courts have developed a complicated jurisprudence based on distinctions between indirect and direct taxation. The tests developed for "directness" of a tax are based on outmoded economic theories and bear little relevance to modern conditions. The courts, however, have continued to use these tests, and to expand on them to the point where it is now very difficult to predict the outcome of any case involving a novel form of taxation. It is my strongly held view that the time has come to abandon this outmoded distinction between direct and indirect taxation. With respect to its own resources, a province must not be arbitrarily excluded from any appropriate system of taxation.

On the second point above, namely the need to clarify the federal trade and commerce power, it is clear to me that the courts have in recent years greatly expanded this power as a means of restricting a province's control over the production, marketing and pricing of its resources. The Central Canada Potash case is the most recent manifestation of that expansion. The implications for proper management and regulation of provincial resources are grave and are incompatible with the effective control of resource development. It is time for action to limit the meaning of this power, substantially to the meaning given it by the courts during most of Canada's history. I shall be pressing for changes to achieve this result.

Regarding the third proposal, the time has come to make such changes as are necessary to ensure that the Supreme Court of Canada is seen to be independent and not unduly reflective of federal views in constitutional disputes. I am not questioning the integrity of those who serve on the present Court, nor am I questioning their ability. But I do question the wisdom of having the members of our Supreme Court, the final arbiter of constitutional disputes, appointed by the executive branch of one level of

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government, and largely representative of one or two regions of the country -- without intervention or voice by the executive branch of provincial governments, by provincial legislatures, or by Parliament. It is clear that a provincial role in the appointment process would be desirable. Consideration might also be given to formal regional representation on the Court.

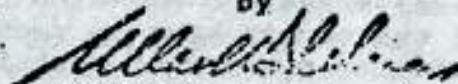
I will be raising these concerns at the First Ministers' Conference on the Constitution at the end of this month.

Let me emphasize once again our serious concern that the constitutional rights of provinces to manage their resources are being systematically eroded by a succession of federal actions and judicial rulings. That is a situation which I believe will not long be tolerated by the people of Saskatchewan and Western Canada.

I trust we can make early progress toward securing the necessary constitutional changes.

Yours truly,  
Original signed

by



Allan Blakeney,  
Premier