

OFFICE OF ATTORNEY GENERAL

REGINA, Saskatchewan, June 12, 1961.

The Hon. E.D. Fulton, Q.C., P.C., M.P.  
Minister of Justice,  
Department of Justice,  
Ottawa, Ontario.

Dear Mr. Fulton:

Re: Constitutional Amendment

I am pleased to enclose herewith three copies of a memorandum which sets out Saskatchewan's position with respect to the draft Constitutional Amendment Act and related matters. I am sending a copy of this memorandum to each of the other Attorneys General for their information.

With reference to your letter of June 8, the dates of September 11-12 which you propose for a further meeting in Ottawa would be suitable to me, subject to the comments in part C of the enclosed memorandum.

Yours sincerely,

"R.A. Walker"  
Attorney General

June 6, 1961

GOVERNMENT OF SASKATCHEWAN

Memorandum on Constitutional Amendment

A. Comments on draft Constitutional Amendment Act

The views of this government on the draft Act, as forwarded with Mr. Driedger's letter of February 4, will be set out with reference to each section of the said draft.

Section 1 - This section is acceptable.

Section 2 - The Government of Saskatchewan cannot concur in paragraph (a) of section 2, which entrenches all powers of the Legislatures to make laws. This government is opposed to the total entrenchment of provincial powers, and it is felt that under no circumstances could this government accept the entrenchment of section 92, head 13 of the British North America Act, 1867. The rest of section 2 is acceptable.

Section 3 - This section is acceptable.

Section 4 - This section is acceptable.

Section 5 - This section is acceptable, with the above noted reservation with respect to section 2. It is the view of this government that many of the provisions of the Constitution of Canada, which, by the terms of the draft, would be amendable under section 2, should instead be amendable under section 5.

Section 6 - This section is acceptable. It is assumed that this preserves Parliament's power under section 91, head 1 of the British North America Act, 1867, as amended.

Section 7 - This section is acceptable. It is assumed that Section 7(1) of the Statute of Westminster, 1931, would be repealed as well, either by the Parliament of the United Kingdom or by the Parliament of Canada pursuant to this Act.

Section 8 - This section is acceptable

Section 9 - With respect to the proposed new section 94 of the B.N.A. Act, 1867, the Government of Saskatchewan concurs in subsections (1) and (3). However, subsection (2) is completely unacceptable because of the requirement that four provinces must consent before there can be delegation either by a Legislature to Parliament or by Parliament to a Legislature. In the view of this government such a restriction on the power of delegation is completely unnecessary and would in effect destroy the measure of flexibility which could be achieved by such a power.

The extent to which this draft goes in making delegation impossible may be seen particularly in the last six lines of section 94(2), where it is provided that a legislature can not exercise a delegated power by statute unless the statute "has been enacted" by at least four provinces. Apart from the legal questions as to whether four provinces can "enact" a statute (as opposed to each enacting identical statutes), the practical difficulties in achieving agreement among four

provinces on identical legislation are overwhelming. This is particularly true where the legislation would, as is expected, be concerned with pressing social or economic problems which might involve different concepts and approaches in different provinces. It is assumed that delegation from Dominion to province would occur where a problem could better be dealt with on a provincial rather than on a national basis. The draft Act, however, precludes individual provincial exercise of such delegated powers.

The same objection would apply where there is proposed delegation with respect to a matter which is of concern to one or two provinces only. For example, delegation of powers either way with respect to grain marketing, or development of an interprovincial river flowing through two or three provinces, would be of concern to fewer than four provinces. The other provinces would have no interest either in granting or withholding consent for delegation from province to Dominion. Whether consent was or was not given could depend on various factors having nothing to do with the merits of the proposed delegation. Similarly, a strange situation would obtain in certain instances of delegation from Dominion to province. Suppose that delegation of certain federal powers over navigation to the province of Saskatchewan were deemed desirable in connection with the

South Saskatchewan River Development.

Saskatchewan would enact a statute to exercise this delegated power in relation to that project, but such statute would be of no effect unless it was "enacted" by at least three other provinces. Would the legislatures of e.g. Quebec or Prince Edward Island be asked solemnly to enact legislation governing navigation within Saskatchewan on the South Saskatchewan River?

Because of the various restrictions attached to the exercise of delegated powers by the draft, it is our view that no government which seriously advocates delegation can accept this proposal.

General Comments

This government finds the draft to be inadequate because there is no provision for initiation of amendments. Presumably under the present draft only the federal government could initiate amendments by introduction in Parliament. In our view there should be provision for:

- (a) initiation by one or a specified number of provinces, involving expression of consent to a specific amendment. The federal government would then be obliged to introduce the amendment in Parliament within a specified time - e.g. one year, and the other provinces would then be obliged to express their consent or dissent within a specified period, assuming Parliament adopted the amendment; and

(b) in all cases where Parliament has enacted an amendment whether on federal or provincial initiative, the provinces should be required to consent or dissent within a certain period, e.g. one or two years. This could be enforced by a requirement that failure to dissent within the period fixed would be deemed to constitute consent.

B. Comments on section 91, head 1 of the British North America Act, 1867

The Government of Saskatchewan advocates that section 91, head 1 as amended remain in its present form.

C. Comments on future constitutional conferences

This government has consistently opposed the excessive entrenchment of provincial powers. However, we have maintained throughout that the amendment procedure itself must be entrenched. If this is not entrenched, there is no real guarantee for those parts of the constitution which are made subject to change only by unanimous consent. We understand that there is general agreement that any amending formula adopted will be entrenched, and this is provided for in section 2 of the draft Act.

It must logically follow from this that no new amending procedure should be adopted without the unanimous agreement of the provinces and the federal government. This government therefore

views with surprise and concern the suggestion made at the January conference that a recommendation could be submitted by the conference on the basis of a majority-rather than a unanimous-agreement among the provinces. We are participating in further discussions on the assumption that no amending formula will be adopted without the unanimous consent of the provinces and the federal government. If this assumption is not shared by the federal government we would be pleased to be advised at once.

This government also wishes to re-assert its views that before any final recommendation is made, members of the public should be allowed to express their opinions on this matter. By the terms of the resolution passed unanimously by the legislature of Saskatchewan on March 28, 1961 (copies of which have been sent to the Minister of Justice and to all of the other Attorneys General) we are bound to insist that this be done.