

ADDENDUM TO

MEMORANDUM TO MINISTERS FROM MINISTER OF JUSTICE

RE: POSSIBLE AMENDMENTS TO PROPOSED
RESOLUTION ON CONSTITUTION OF CANADA

I PURPOSE

This Addendum to the Memorandum to Ministers dated December 15, 1980 is to bring forward for consideration several issues that were contained in the earlier Memoranda to Ministers dated November 25 and December 8, 1980.

II ISSUES FOR DETERMINATION

A. EQUALIZATION AND REGIONAL DISPARITIES

1. Section 31 - Equalization and Regional Disparities

A number of representations have been made respecting the wording of section 31(2) which now reads as follows:

"Parliament and the government of Canada are committed to taking such measures as are appropriate to ensure that provinces are able to provide the essential public services referred to in paragraph 1(c) without imposing an undue burden of provincial taxation."

This wording reflects the British Columbia proposal that was put forward during the CCMC negotiations.

Premier Hatfield, in his appearance before the Joint Committee, proposed that this text be modified to read:

"Parliament and the government of Canada are committed to the principle of making equalization payments to provincial governments that are unable to provide essential public services of reasonable quality without imposing an undue burden of taxation."

This wording is based on that proposed by Québec during the CCMC negotiations.

This latter wording was put forward for consideration by Ministers in the November 25 Memorandum. It is a wording that the Department of Finance would find acceptable.

Ministers decided at Cabinet on December 11 that they would prefer to remain with the present wording in the Proposed Resolution, and that Premier Hatfield's reaction to this position should be ascertained. The Premier's reaction is now being sought.

Ministers also considered the possibility of using the Manitoba/Saskatchewan joint wording proposed during the CCMC negotiations. It reads as follows:

"Parliament and the government of Canada are further committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

Recommendation: That Ministers reconsider the various alternate wordings for section 31(2) with a view to determining which is the best for inclusion in the Resolution (See Annex 1 for text of Premier Hatfield's draft.)

B. PROCEDURE FOR AMENDING CONSTITUTION

2. Limitation on Use of General Amending Formula

Premier Peckford has contended that there should be a provision in the Constitution making it impossible to amend, without unanimous consent, amendment procedures of the Constitution (i.e. section 43 and of section 3 of the B.N.A. Act, 1871 respecting provincial boundaries) that require the approval of a province to an amendment that applies particularly to that province.

While this concern would not seem justified, given the requirements for amendments under sections 41 and 42, it is nevertheless strongly felt by Newfoundland that other provinces and Parliament could "gang up" on one province to change an amending procedure under which the consent of that province is now required.

Newfoundland has now raised this question in its reference to its Court of Appeal, asking if under section 41 and 42 an amendment could be made to the Newfoundland Terms of Union without the agreement of that province.

As the Resolution now provides, this question must be answered in the affirmative, and such a pronouncement by the Court could strengthen the concern in Britain about proceeding with the Bill in face of a judgment of this nature.

In light of the foregoing, Ministers may wish to reconsider the possibility of placing in the Resolution a provision that would amend section 47 to require that amendments to amending procedures, relating to any provision in the Constitution applying to one or more but not all provinces, be done under the unanimity rule.

(See Annex 2 for draft amendment)

C. PROVINCIAL RESOURCES JURISDICTION

3. Sections 52 & 53 - Provincial Jurisdiction over Resources

The support of the government of Saskatchewan and that of the N.D.P. is conditional upon the inclusion in the Resolution of an amendment relating to natural resources. An amendment has been worked out with the N.D.P. based, in part, on the "best efforts draft" considered at the First Ministers' Conference in February 1979. The amendment would be inserted as an amendment (section 92A and the Sixth Schedule) to the Constitution Act, 1867 (the B.N.A. Act, 1867).

The amendment would

- (a) give the provinces express and exclusive authority to make laws relating to various aspects of non-renewable natural resources, forestry resources and electrical energy; i.e. the exploration for, and the development, conservation and management, as applicable, of those resources;
- (b) give the provinces a concurrent power to make laws respecting the export of the primary production of such resources from the province to another part of Canada, subject to a prohibition against discrimination in respect of prices for or supplies of production exported to other provinces;
- (c) retain for Parliament unqualified paramount legislative authority in respect of inter-provincial (and international) trade in those resources; and
- (d) permit provincial direct or indirect taxation of those resources, subject to a requirement that no differentiation in taxes be made between production retained in the province and production exported to other provinces.

The resources provision also defines "primary production" in a Schedule and preserves pre-existing provincial powers.

This provision would transfer less powers to the provinces than the February, 1979 draft which was supported by most provinces. It would hence be less satisfactory to most provinces, particularly Alberta. However, it has been agreed to by the N.D.P.

Recommendation: That approval be given to the amendment described above.

(See Annex 3 for draft amendment).

D. TECHNICAL AMENDMENTS

CANADA ACT

1. Section 2 - Non-Application of United Kingdom Laws to Canada

Translater
In the French version of this section, reference is made to "droit positif du Canada", whereas the English version simply refers to "law" of Canada.

Recommendation: That the French version should have the word "positif" dropped in the event that this section is opened for amendment in Committee.

CONSTITUTION ACT, 1980

2. Section 3 - Democratic Rights

Translater
The French version, in using the singular "ce droit ne peut", leaves the implication that only one right is involved rather than two: the right to vote and the right to be a candidate for elective office.

Recommendation: That an amendment be made to change "ce droit ne peut" to read "ces droits ne peuvent".

3. Section 4 - Democratic Rights

Translator

The French version of subsection 4(1) speaks only of the "date of report of the writs" while the English version speaks of the "date fixed for the return of the writs". This is an important difference since under the French version there is no fixed date and in practice the writs are returned on dates different to the fixed date.

Recommendation: That the French version of subsection 4(1) be amended to refer to "la date fixée pour le retour des brefs".

4. Section 11 - Proceedings in Criminal and Penal Matters

The use of "he or she" in paragraphs 11(f) and (g) (protection against double jeopardy and benefit of lesser penalty), while grammatically proper, would exclude corporate entities from the benefit of these rights. Since this is not the intention, the "he or she" should be replaced by the expression "that person" which includes a corporation.

Recommendation: That an amendment be put forward to replace "he or she" with "that person" in paragraphs 11(f) and (g).

5. Section 38 - Referendum on Amending Procedure

The English text of subsection 38(2) refers to a provincial alternative amending procedure being "deposited" with the Chief Electoral Officer of Canada. Subsection 38(3), which refers back to subsection 38(2), uses the word "filed". The same word should be used in both subsections.

Recommendation: That the word "deposited" be substituted for the word "filed" in subsection 38(3).

6. Section 41 - General Procedure for Amending Constitution

(1) It is suggested that the words "à la fois" be added in the opening words of subsection 41(1) of the French version after the word "autorisée". This amendment is not necessary but has been suggested to put beyond doubt that the requirements of both paragraphs 41(1)(a) and (b) must be met before an amendment to the Constitution may be made.

(2) It has been suggested that in the opening words of paragraph 41(1)(b) of the French version, the words "cette majorité doit comprendre" be changed to the more usual structure "cette majorité comprend".

Recommendation: That no amendment be drafted but that these changes be incorporated if an amendment is put forward for any other reason.

7. Section 50 - Office of the Queen, etc.

In the French version of paragraph 50(a), the expression "fonctions" is used as the equivalent of the English word "office". It is not a satisfactory equivalent and it is suggested that the word "charge" would express the idea more accurately.

Recommendation: That a technical amendment to paragraph 50(a) to correct the French version as indicated above be approved.

8. Section 59 - Short Title

In the French version, the word "abrégé" was inadvertently omitted after the word "titre".

Recommendation: That a technical amendment be made to modify the word "titre" in French by the word "abrégé" and to add the expression "short title" in the English marginal note.

9. Schedule 1 to Constitutional Amendment Act, 1980

In the Schedule to the Act, the titles of a number of Acts are modernized as in the changes from British North America Acts to Constitutional Amendment Acts. In item 9 of the French version of the Schedule, the name of the Canada (Ontario Boundary) Act, 1889 is changed from Acte du Canada (limites d'Ontario) 1889 to Loi de 1889 sur le Canada (frontières de l'Ontario). The word "frontières" is not appropriate for inter-provincial boundaries.

Recommendation: That the word "limites" be substituted for the word "frontières" in the French version of Item 9 of Schedule I.

Also attached for easy reference by Ministers is a copy of the Premiers 1978 Montreal Agreement on Minority Language Education Rights.

Minister of Justice

November 21, 1980

Moved that

The Proposed Resolution respecting the Constitution of Canada be amended by deleting subsection 31(2) of the proposed Constitution Act, 1980 and by substituting therefor the following:

"(2) Parliament and the government of Canada are committed to the principle of making equalization payments to provincial governments that are unable to provide essential public services of reasonable quality without imposing an undue burden of taxation."

ANNEXE I
Le 21 novembre 1980

Il est proposé que le Projet de résolution concernant la Constitution du Canada soit modifié par substitution, au paragraphe 31(2) du projet de Loi constitutionnelle de 1980, du paragraphe suivant :

"(2) Le Parlement et le gouvernement du Canada prennent l'engagement de principe d'assurer des paiements de péréquation aux gouvernements provinciaux non en mesure de fournir les services publics essentiels à un niveau de qualité acceptable sans avoir à imposer un fardeau fiscal excessif."

Subsection 31(2) of the proposed Constitution Act, 1980 at present reads as follows:

Texte actuel du paragraphe 31(2) :

Commitment respecting essential public services

"(2) Parliament and the government of Canada are committed to taking such measures as are appropriate to ensure that provinces are able to provide the essential public services referred to in paragraph (1)(c) without imposing an undue burden of provincial taxation."

Engagement relatif aux services publics essentiels

"(2) Le Parlement et le gouvernement du Canada s'engagent à prendre les dispositions propres à mettre les provinces en mesure d'assurer les services publics essentiels visés à l'alinéa (1)c) sans qu'elles aient à imposer un fardeau fiscal excessif."

November 24, 1980

Moved that

The Proposed Resolution respecting the Constitution of Canada be amended by deleting section 47 of the proposed Constitution Act, 1980 and by substituting therefor the following:

Limitation on use of general amending procedure "47. (1) The procedures prescribed by section 41, 42 or 43 do not apply to an amendment to the Constitution of Canada where there is another provision in the Constitution for making the amendment, but the procedures prescribed by section 41 or 42 shall nevertheless, subject to subsection (3), be used to amend any provision for amending the Constitution.

Limitation on use of general amending procedure (2) The procedures prescribed by section 41 or 42 do not apply in respect of an amendment referred to in section 43.

Amendment of amending procedures (3) An amendment to section 43, this section or section 3 of the Constitution Act, 1871 may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and the legislative assembly of each province."

ANNEXE II
Le 24 novembre 1980

Il est proposé que le Projet de résolution concernant la Constitution du Canada soit modifié par substitution, à l'article 47 de la Loi constitutionnelle de 1980, de l'article suivant :

Restriction du recours à la procédure normale 47. (1) Les articles 41, 42 ou 43 ne s'appliquent pas aux cas de modification constitutionnelle pour lesquels une procédure différente est prévue par une autre disposition de la Constitution du Canada. La procédure visée aux articles 41 ou 42 s'impose toutefois, sous réserve du paragraphe (3), pour modifier les dispositions relatives à la modification de la Constitution.

Restriction du recours à la procédure normale (2) Les procédures prévues aux articles 41 et 42 ne s'appliquent pas à la modification visée à l'article 43.

Modification des procédures de modification (3) L'article 43, le présent article et l'article 3 de la Loi constitutionnelle de 1871 ne peuvent être modifiés par proclamation du gouverneur général sous le grand sceau du Canada que si cette proclamation est autorisée par des résolutions du Sénat, de la Chambre des communes et de l'assemblée législative de toutes les provinces.

Section 47 of the proposed Constitution Act, 1980 at present reads as follows:

Texte actuel de l'article 47:

Limitation on use of general amending formula "47. The procedures prescribed by section 41, 42 or 43 do not apply to an amendment to the Constitution of Canada where there is another provision in the Constitution for making the amendment, but the procedures prescribed by section 41 or 42 shall nevertheless be used to amend any provision for amending the Constitution, including this section, and section 41 may be used in making a general consolidation or revision of the Constitution."

<< 47. Les articles 41, 42 ou 43 ne s'appliquent pas aux cas de modification constitutionnelle pour lesquels une procédure différente est prévue par une autre disposition de la Constitution du Canada. La procédure visée aux articles 41 ou 42 s'impose toutefois pour modifier les dispositions relatives à la modification de la Constitution, y compris le présent article; la procédure visée à l'article 41 peut également servir à toute codification ou révision générales de la Constitution >>

Restriction du recours à la procédure normale

November 21, 1980

Moved that

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 named the British North America Act, 1867) is amended by adding thereto, immediately after section 92 thereof, the following heading and section:

"Non-Renewable Natural Resources, Forestry
Resources and Electrical Energy

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

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.

Export from
provinces
of resources

(2) 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

(3) Nothing in subsection (2) 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, the law of Parliament prevails to the extent of the conflict.

Taxation of
resources

(4) 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"

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

Existing powers or rights

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section."

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 section 92A 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

(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.

Il est proposé que le projet de résolution concernant la Constitution du Canada soit modifié :

a) par l'insertion, après l'article 51 de la Loi constitutionnelle de 1980 qui y est proposée, des rubriques et des articles suivants :

« PARTIE VI

MODIFICATION DE LA
LOI CONSTITUTIONNELLE DE 1867

Modification
de la Loi
constitution-
nelle de 1867

52. (1) La Loi constitutionnelle de 1867 (antérieurement désignée sous le titre : Acte de l'Amérique du Nord britannique, 1867) est modifiée par l'insertion après l'article 92 de la rubrique et de l'article suivants :

Pouvoirs en
droits
existants

« Ressources naturelles non renouvelables,
ressources forestières et énergie électrique

Compétence
provinciale

92A. (1) La législature de chaque province a compétence exclusive pour légiférer dans les domaines suivants :

a) prospection des ressources naturelles non renouvelables de la province;

b) exploitation, conservation et gestion des ressources naturelles non renouvelables et des ressources forestières de la province, y compris leur rythme de production primaire;

c) aménagement, conservation et gestion des emplacements et des installations de la province destinés à la production d'énergie électrique.

Exportation
hors des
provinces

(2) La législature de chaque province a compétence pour légiférer en ce qui concerne l'exportation, hors de la province à destination d'une autre partie du Canada, de la production primaire tirée des ressources naturelles non renouvelables et des ressources forestières de la province, ainsi que de la production d'énergie électrique de la province, sous réserve de ne pas adopter de lois autorisant ou prévoyant des disparités de prix ou des disparités dans les exportations destinées à une autre partie du Canada.

Pouvoir du
Parlement

(3) Le paragraphe (2) ne porte pas atteinte au pouvoir du Parlement de légiférer dans les domaines visés à ce paragraphe, les dispositions d'une loi du Parlement adoptée dans ces domaines l'emportant sur les dispositions incompatibles d'une loi provinciale.

Taxation des
ressources

(4) La législature de chaque province a compétence pour prélever des sommes d'argent par tout mode ou système de taxation :

a) des ressources naturelles non renouvelables et des ressources forestières de la province, ainsi que de la production primaire qui en est tirée,

b) des emplacements et des installations de la province destinés à la production d'énergie électrique, ainsi que cette production même.

Cette compétence peut s'exercer indépendamment du fait que la production en cause soit ou non, en totalité ou en partie, exportée hors de la province, mais les lois adoptées dans ces domaines ne peuvent autoriser ou prévoir une taxation qui établisse une distinction entre la production exportée à destination d'une autre partie du Canada et la production non exportée hors de la province.

«Production primaire»

(5) L'expression «production primaire» a le sens qui lui est donné dans la sixième annexe.

Pouvoirs ou droits existants

(6) Les paragraphes (1) à (5) ne portent pas atteinte aux pouvoirs ou droits détenus par la législature ou le gouvernement d'une province lors de l'entrée en vigueur du présent article.

Idem

53. La présente loi est en outre modifiée par l'adjonction de l'annexe suivante :

SIXIÈME ANNEXE

PRODUCTION PRIMAIRE TIRÉE DES RESSOURCES NATURELLES NON RENOUVELABLES ET DES RESSOURCES FORESTIÈRES

Pour l'application de l'article 92A :

a) on entend par production primaire tirée d'une ressource naturelle non renouvelable :

(i) soit le produit qui se présente sous la même forme que lors de son extraction du milieu naturel;

(ii) soit le produit non manufacturé de la transformation, du raffinage ou de l'affinage d'une ressource, à l'exception du produit du raffinage du pétrole brut, du raffinage du pétrole brut lourd amélioré, du raffinage des gaz ou des liquides dérivés du charbon ou du raffinage d'un équivalent synthétique du pétrole brut;

b) on entend par production primaire tirée d'une ressource forestière la production constituée de billots, de poteaux, de bois d'oeuvre, de copeaux, de sciure ou d'autre produit primaire du bois, ou de pâte de bois, à l'exception d'un produit manufacturé en bois.»

b) par la substitution de «Partie VII» à «Partie VI» de la Loi constitutionnelle de 1980, des numéros d'article 54 à 61 aux numéros d'article 52 à 59 et par les autres changements de numéro qui en découlent.

PREMIERS' CONFERENCE, MONTREAL, FEBRUARY 1978

Recognizing their concern for the maintenance and development of minority language education rights throughout Canada as expressed in St. Andrews and recognizing that education is the foundation on which language and culture rest;

The Premiers took note of the significant progress accomplished during the last years, as highlighted in the Ministers' of Education's report and further recognize the need for continued progress.

The Premiers reaffirm their intention to make their best efforts to provide education to their English or French speaking minorities, and in order to ensure appropriate levels of services, they also agree that the following principles should govern the availability of, as well as the accessibility to, such services;

- (i) Each child of the French-speaking or English-speaking minority is entitled to an education in his or her language in the primary or the secondary schools in each province wherever numbers warrant
- (ii) It is understood, due to exclusive jurisdiction of provincial governments in the field of education, and due also to wide cultural and demographic differences, that the implementation of the foregoing principle would be as defined by each province.

The Premiers requested the Council of Ministers of Education to assume the responsibility to suggest ways and means of achieving further progress in minority language education and second language instruction consistent with the progress thus far made.