



Department of Justice

Ministère de la Justice

MEMORANDUM/NOTE DE SERVICE

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CONFIDENTIAL
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Date
November 23, 1981

TO/A: MINISTER

FROM/DE: Deputy Minister

SUBJECT/OBJET: Aboriginal Rights in Constitutional Resolution

Comments/Remarques

Further to our telephone conversation on Saturday, I enclose for your information copies of the telexes that the Prime Minister received on Friday from Premiers Bennett and Lougheed on restoring aboriginal rights in the constitutional resolution, along with copies of the Prime Minister's press release of yesterday and the telex that was sent over your name to provincial Ministers including Premier Hatfield and Premier-elect Pawley.

As you will note, the Prime Minister removed from his release any reference to the federal government not being prepared to incorporate in the resolution any aboriginal rights provision that was not acceptable to the provinces or to the national native associations. Accordingly, in your telex it is indicated that the federal government would find acceptable either the wording that was in the April federal resolution or that proposed by Alberta, subject to a qualification on future rights.

The aboriginal rights provision in the federal resolution read as follows:

34(1) The ^{existing} aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis people of Canada.

The Alberta provision reads as follows:

34(1) The aboriginal and treaty rights of the aboriginal peoples of Canada, as those rights exist

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prior to the coming into force of this Part, are affirmed.

(2) The rights affirmed under subsection (1) include rights subsequently included in the Constitution of Canada pursuant to section 36.

(3) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Section 34(2) of the Alberta draft can be dismissed out of hand since it is redundant. Obviously, any rights that are identified at the First Ministers Conference under section 36 will be included in those under section 34 if Parliament and the requisite two-thirds of the provinces agree to amend the Constitution to include them.

Section 34(1) of the Alberta draft is the significant one. Obviously, it is Alberta's intention, by including reference to rights existing on proclamation of the Constitution Act, to seek to ensure that aboriginal rights which have previously been extinguished are not revived. We feel that this is basically a cosmetic change in legal terms, since it is our view that the federal draft implies essentially the same thing. The rights which are being recognized and affirmed are obviously those which now exist; the clause is not restoring original rights which have been effectively extinguished or abrogated or creating any new rights.

We suspect that the Alberta wording is believed by them to do more than this, namely to avoid any question being raised respecting whether past laws, orders or governmental actions have effectively extinguished aboriginal rights. If this be their intention, their proposed wording does not accomplish it; nor should it. The whole intention of the aboriginal rights provision is to recognize and affirm those rights as they now exist, leaving it to the aboriginal peoples to establish -- whether by negotiations at the constitutional conference, by future treaty negotiations or by court action, if necessary -- what the content of existing aboriginal rights is. In other words, the nature and extent of existing aboriginal rights in any area of Canada will be for future determination, either on a global basis or a case-by-case basis.

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The Alberta section 34(1) also drops reference to recognition, confining the rights to constitutional affirmation. We do not believe that this limitation changes the legal sense of what is intended. Whether the aboriginal rights are recognized and affirmed or simply affirmed does not change the legal fact that the Constitution is saying that whatever the rights are, they are henceforth constitutionalized.

On the political side, however, the native peoples are likely to be very suspicious of both changes proposed by Alberta section 34(1), believing that they are designed to cut down on what was contained in the federal draft. It will therefore be necessary to assure them, if we proceed with the Alberta draft (and it is by no means clear that the Atlantic provinces will be on-side even with this draft), that its legal substance is in no way different from the federal draft. In addition, the native peoples representatives will have to be told that the choice may be either going with the Alberta draft or having no provision in the resolution at all which is binding on both levels of government.

On another point, the telex from British Columbia agrees to entrenchment of aboriginal rights, but Premier Bennett asserts that as a matter of law, that province bears no financial responsibility for any native claims settlements that may arise in that province. While this assertion may be somewhat dubious in light of the B.C. Terms of Union, which provide for that province to transfer to Canada in trust tracts of land for Indian reserves, we have felt it best to defer this issue for discussion at the First Ministers Conference rather than upsetting any agreement on a section 34 wording now.

Thus, in responding to any questions on this point, we suggest that you simply indicate, as noted in the Prime Minister's press release, that Premier Bennett's legal position is one which requires further consideration in the context of the First Ministers Conference.

Finally, there is the question of the leak in the Globe and Mail last week of Roy McMurtry's letter to you of last May in which he raised a number of serious consequences that he foresaw flowing from the entrenchment of aboriginal rights. Attached hereto is a separate memorandum which deals with the main concerns raised by Mr. McMurtry and the suggested responses thereto, in the event that you receive questions on his letter.

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In summary, there is a great deal of suspicion, both on the part of the provinces and the native peoples, as to the intent of the federal government in entrenching aboriginal and treaty rights. The course to be followed during the next few days in order to allay these suspicions will require at the same time assuring the provinces that the proposed entrenchment does not mean "giving the land back to the native peoples", and assuring the native peoples that entrenchment of their rights is not mere window-dressing, but a substantive move which will enable them to protect their existing rights.

Original Signed by
Original signé par
R. TASSÉ

Roger Tassé

Encls.

c.c. Michael Kirby
John Tait