

28/11

Eddie,

Enclosed is a briefing, copy of which went to Irwin (who replaces Mr. Christian in the House for quarter period), Muro + the Prime Minister. Joyce Fairbairn asked for it by 10:45 this morning, at the request of the Prime Minister.

The covering memo has been cleared by Telles; the rest is a Justice assessment of an amendment to section 24 and back ground material.

Please accept my apologies for my outburst yesterday in Fred's office. I was not aware that Kirby had requested that everything be cleared by Telles and this threw me off balance. Being a very impulsive person... I hope there will be no ill feeling on your part and that our personal + working relationship will remain unchanged.

Sam

the item on the priority basis, once the Constitution is patriated, while expressing the hope that native peoples will participate in discussions with officials and, eventually ministers, in order to prepare for the next phase of the constitutional renewal process.

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October 28, 1980

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November 28, 1980

MEMORANDUM FOR THE PRIME MINISTER

Native Peoples and the Constitution

Proposed position in the House

In reply to questions you may wish to indicate that:

- you are aware that proposed amendments to Section 24 have been developed by native associations;
- you hope that the Joint Committee will carefully review the representations of native associations;
- subject to the conclusions of the Joint Committee which might submit some form of amendment which is acceptable to all parties in the House, and hopefully to some provinces, you still are of the view (which you expressed to Mr. Manly in the House on November 7) that "the simple claim of aboriginal rights, without anyone knowing exactly what it means, is not a matter which one can convincingly argue should be put in the constitution at this time";
- reiterate your commitment to seek to place the item on the constitutional agenda on a priority basis, once the Constitution is patriated, while expressing the hope that native peoples will participate in discussions with officials and, eventually ministers, in order to prepare for the next phase of the constitutional renewal process.

Background

Mr. Munro mentioned in Cabinet yesterday that copy of a proposed amendment to Section 24, representing the common position of the NIB, the NCC and ICNI on aboriginal rights, had been transmitted to him. You asked that the amendment be reviewed by Mr. Chrétien and Mr. Munro.

The proposed amendment has been reviewed by representatives of FPRO, PCO, Justice and DIAND this Wednesday and as the assessment of Justice indicates (Appendix "A"), it is not acceptable to the government. It would have the effect of entrenching aboriginal and treaty rights, including the right to self government, provide that such rights could not be changed without the consent of native peoples, that native peoples would participate in constitutional discussions affecting their rights (virtually any item does) and so on. At the moment of writing, the proposed amendment had not been formally transmitted either to you or Mr. Munro.

A previous amendment (Appendix "B"), dated October 31, was also reviewed by Justice and rejected, despite the fact it was a refinement of the current "notwithstanding" clause, because it opens the door to judicial interpretation of undefined concepts, raises the question of distinct identities and provides the broad parameters of a definition of aboriginal rights the implications of which may be far reaching and unclear.

However, the associations have jointly replied to your October 30 letter. In their letter, (dated November 17 and received by FPRO on the 25th) they ask for the entrenchment of the "collective rights of the aboriginal peoples of Canada, including our right to self determination and consent to amendments to the constitution affecting our rights"; they further ask that you meet with them directly to discuss these proposals. We have asked Mr. Kirby whether we should recommend acceptance of such a meeting and he replied in the negative because of the precedent it would set for other groups and provinces. Furthermore, such a meeting would likely be unproductive from the native perspective, unless you would entertain amending Section 24. However, should you nevertheless agree to meet them, if only to further explain the government's position, we would appreciate being informed at your earliest convenience so that we may in turn advise the presidents of the three associations.

We also attach, as per your request to Joyce Fairbairn, a summary of events from the September 1980 FMC (Appendix C) and, relevant excerpts of your April Speech to Elders (Appendix D).

This note and attachments has been transmitted to Mr. Chrétien and Mr. Munro.

Aboriginal Rights and Freedoms

For the purposes of this Act, the "Aboriginal peoples of Canada" mean those Indians, status and non-status Indians and Métis peoples resident in Canada.

The aboriginal rights and treaties of the aboriginal peoples of Canada are hereby confirmed and recognized.

Without limiting the rights of the aboriginal peoples of Canada all rights confirmed or recognized by the Royal Proclamation of October 1, 1869 shall continue in force and the said Proclamation shall be deemed to be part of the Constitution of Canada so far as it touches on the rights of the aboriginal peoples of Canada.

Within the Canadian federation, the aboriginal peoples of Canada shall have the right to their self-determination, and in this regard Parliament and the legislative assemblies, together with the government of Canada and the provincial governments, so the extent of their respective jurisdiction, are committed to negotiate with the aboriginal peoples of Canada to settle their land claims and their self-government and other matters in the following areas:

Fred Gibson
Fred Gibson

Revised Draft
November 18, 1980

Proposed Amendments to the
"Proposed Resolution for a Joint Address
to Her Majesty the Queen
respecting the Constitution of Canada."

Aboriginal Rights and Freedoms

Section 23A

- (1) For the purposes of this Act, the "Aboriginal peoples of Canada" means those Indians, status and non-status, Inuit and Metis peoples resident in Canada.
- (2) The aboriginal rights and treaty rights of the Aboriginal peoples of Canada are hereby confirmed and recognized.
- (3) Without limiting the rights of the aboriginal peoples of Canada all rights confirmed or recognized by the Royal Proclamation of October 7, 1763 shall continue in force and the said Proclamation shall be deemed to be part of the Constitution of Canada so far as it touches on the rights of the aboriginal peoples of Canada.
- (4) Within the Canadian federation, the Aboriginal Peoples of Canada shall have the right to their self-determination, and in this regard Parliament and the legislative assemblies, together with the government of Canada and the provincial governments, to the extent of their respective jurisdictions, are committed to negotiate with the Aboriginal peoples of Canada mutually satisfactory constitutional rights and protections in the following areas:
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- a) aboriginal rights;
- b) rights and protections pertaining to the Aboriginal peoples of Canada in relation to Section 91(24) and Section 109 of the Constitution Act, 1867;
- d) rights pertaining to the aboriginal peoples and their descendants of Canada in relation to the Manitoba Act, 1870; and the Dominion Lands Acts;
- e) rights or benefits provided in present and future settlements of aboriginal claims;
- f) rights of self-government of the Aboriginal peoples of Canada;
- g) representation of the Aboriginal peoples of Canada in Parliament and, where applicable in the legislative assemblies;
- h) responsibilities of the Aboriginal peoples of Canada and the provincial governments for the provision of services in regard to the Aboriginal peoples of Canada;

so as to ensure the distinct cultural, economic and linguistic identities of the Aboriginal peoples of Canada.

- (5) a) Every treaty and agreement validly entered into between Her Majesty and any of the Aboriginal peoples of Canada and every treaty and agreement with the Aboriginal peoples validly authorized by Her Majesty shall continue in force after the coming into force of this Act, and all such treaties and agreement shall be deemed to be part of the constitution of Canada.

- b) No treaty or agreement with any of the Aboriginal peoples of Canada, or any provision or term thereof, shall be diminished or abrogated by either Parliament or any legislative assembly, nor shall any Act of the Parliament of Canada or of any legislative assembly be construed or applied so as to diminish or abrogate any provision or term of any treaty or agreement with any of the Aboriginal peoples of Canada without the consent of those Aboriginal peoples party to the treaty or agreement.
- (6) No aboriginal right shall be subject to extinguishment by Parliament of Canada or by any legislative assembly.
- (7) No lands, waters or resources of the Aboriginal peoples of Canada shall be subject to expropriation under any law of the Parliament of Canada or any legislative assembly without the express consent of those Aboriginal peoples holding such lands, waters or resources.
- (8) The free movement of persons with their personal goods and possessions guaranteed by the Treaty of Amity, Commerce and Navigation, 1794, and known as Jay's Treaty, between Her Majesty the Queen and the United States of America, shall apply mutatis mutandis to all the Aboriginal peoples of Canada and the United States, and no Act of Parliament or any legislative assembly shall be construed so as to diminish this right.

Section 24

- (1) The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate, abridge or derogate from any undeclared rights or freedoms that exist in Canada.

Section 15

- (1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.
- (2) This section does not preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged persons or groups or the recognition of the aboriginal and treaty rights of the Aboriginal peoples of Canada.

Section 32

- (1) Such constitutional conferences shall include the direct participation of three representatives of the Aboriginal people of Canada consisting of one representative of each of the Indian, Inuit and Metis peoples of Canada for matters on the agenda which affect the Aboriginal peoples of Canada.

Section 51A

- (1) Nothing in Parts IV and V shall be construed as permitting any amendment to any constitutional provision that makes reference to any of the Aboriginal peoples of Canada without the consent of those Aboriginal peoples of Canada so affected.

7. S.24, as amended, would amount to the Federal Government saying: "To the extent that treaty and aboriginal rights exist, nothing in the Charter of Rights shall derogate from them." Without, at a minimum, this recognition of the concept of treaty and aboriginal rights, in the Canada Act, native people stand a weak chance of ever seeing their rights protected and recognized in the constitution. The Federal Government, alone at this time and possibly forever, is in the position of securing this recognition for the native people.

The following draft section has been developed at a meeting of the Joint Working Group at which the ICN and SCC were represented.

PART I
SECTION 24

The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights and freedoms that exist in Canada, including the aboriginal rights and freedoms that pertain to the Inuit, Indian, and Metis peoples of Canada and which ensure their distinct cultural, economic, and linguistic identities.

Note: accepted by a representative of the ICN at the October 31 meeting with Mr. Kirby

APPENDIX "C"
October 31, 1980

August 11, 1980
ICNI-NCC JOINT WORKING GROUP

Draft Proposal

Amendment to the "Proposed Resolution for a Joint Address
to Her Majesty the Queen respecting the Constitution of Canada"

The following draft option has been developed at a meeting of
the Joint Working Group at which the ICNI and NCC were represented.

PART I

SECTION 24

The guarantee in this Charter of certain rights and freedoms
shall not be construed as denying the existence of any other
rights and freedoms that exist in Canada, including the
aboriginal rights and freedoms that pertain to the Inuit, Indian,
and Métis peoples of Canada and which ensure their distinct
cultural, economic, and linguistic identities.

Nota: accepted by a representative of the NIB at the
October 31 meeting with Mr. Kirby

APPENDIX "C"

August 11, 1980

- A letter from the Prime Minister to each national Native organization affirmed that Native leaders would again have observer status at the upcoming First Minister's Conference and advised the Native leaders of the CCMC's decision to meet with them prior to the First Minister's Conference on the Constitution scheduled for September 8 - 12.

August 26, 1980

- The CCMC sub-committee met with the leadership of the NIB, NCC, and ICNI. As a measure of the importance of this meeting to all the governments involved, it is worth noting that the sub-committee meeting was attended by all but two of the CCMC ministers. The leaders of the Native organizations presented briefs to the ministers which gave their views on all 12 of the items which the First Ministers would be addressing. The Natives' submissions to the sub-committee were subsequently presented in whole and in summary form to the full CCMC and to First Ministers.

September 8 - 12, 1980

- The First Ministers' Conference on the Constitution (FMC) saw attention being drawn to Native rights by a number of Premiers and by the Prime Minister. A "best efforts" draft for a possible preamble was offered to the conference by the federal government which made the protection of "collective rights, including those of the Native peoples" a fundamental purpose of the Constitution. The acceptability of that passage was declared by the federal government to be conditional upon the agreement of the Native leaders, whose representatives had in fact had a chance to consider it prior to the FMC.

Notes For Remarks By The Prime Minister
At A National Conference of Indian Chiefs and Elders

Ottawa, April 29, 1980

...Finally, we set a valuable and historic precedent by involving native peoples directly, with the federal and provincial governments, in the process of the reform of the constitution.

Over the course of the past ten years, the Indian, Métis and Inuit people have become immeasurably better organized. Your organizations have become more effective in negotiating with governments, more effective in canvassing your opinions and representing your views. I take some pride in the knowledge that a new federal policy of assisting native organizations helped to make possible the progress you have achieved...

...In the paper entitled "Time For Action", published in 1978, my colleagues and I gave a high priority to the involvement of Indian, Inuit and Métis representatives in the process of constitutional reform.

At the First Ministers Conference on the Constitution in February of last year, I succeeded in having placed on the agenda a discussion item entitled "Natives and the Constitution". It was agreed that Native representatives would meet with the First Ministers on that subject.

I was happy to see that the Conservative government carried forward that initiative by inviting your representatives to a meeting last December of the steering committee of the Continuing Committee of Ministers on the Constitution.

I want to reaffirm tonight that you will continue to be involved in the discussion of constitutional changes which directly affect you.

You have already indicated what your highest priorities are, and I feel sure that all other parties to the constitutional discussions will agree to discuss with you such matters as aboriginal rights and treaty rights, internal native self-government, native representation in political institutions such as Parliament, and the responsibilities of the federal and provincial governments for the provision of services to native peoples...