CONFIDENTIAL

August 15, 1980

1. RESOURCE OWNERSHIP AND INTERPROVINCIAL TRADE

A. Status Report

(a) The federal position as it now stands

(i) On provincial ownership and management of resources, it supports the principles of Section 109 of the BNA Act and accepts the description of provincial jurisdiction over resources set out in Section 2 of the Best Efforts Draft (BED) of February 1979;

(ii) On concurrent powers for the provinces in trade and commerce, it accepts concurrency in interprovincial trade coupled with full federal paramountcy. It rejects concurrency in international trade. It rejects any limitation on federal paramountcy such as "compelling national interest". Thus, it accepts one and rejects two of the major provisions contained in Sections 3 and 4 of the BED of February 1979. (All three provisions were rejected throughout the three weeks of CCMC discussions in July. The provinces have now been told that, at the CCMC meeting of August 26-29, the federal government will accept the first provision respecting interprovincial trade.);

(iii) On taxation powers, it accepts provincial indirect taxes on resources as set out in Section 5 of the BED;

(iv) On production of resources, it accepts Section 6 of the BED which defines the limits of provincial jurisdiction over primary production;

(v) On the Declaratory Power, it rejects the requirement contained in Section 4 of the BED of February 1979 on this power, that the producing province concerned would have to agree before the power could be applied to its resources. It has suggested however, without commitment, that ways be explored for placing some limit on the use of the power, for example, by requiring ratification in a new Upper House.

(b) Provincial positions as they now stand

With the notable exception of Ontario, and perhaps PEI, the provinces were all taken aback by the federal rejection, at the July discussions of the CCMC, of a number of major proposals it had previously

"Best Efforts Draft" February 1979

Draft Proposal Discussed by First Ministers

RESOURCE OWNERSHIP AND INTERPROVINCIAL TRADE

(1) (present Section 92)

(1) Carries forward existing Section 92

Resources

(2) In each province, the legislature may exclusively make laws in relation to

a) exploration for non-renewable natural resources in the province;

b) development, exploitation, extraction, conservation and management of non-renewable natural resources in the province, including laws in relation to the rate of primary production therefrom; and

c) development, exploitation, conservation and management of forestry resources in the province and of sites and facilities in the province for the generation of electrical energy, including laws in relation to the rate of primary production therefrom.

(2) The draft outlines exclusive provincial legislative jurisdiction over certain natural resources and electric energy within the province. These resources have been defined as non-renewable (e.g. crude oil, copper, iron and nickel), forests and electric energy. This section pertains to legislative jurisdiction and in no way impairs established proprietary rights of provinces over resources whether these resources are renewable or non-renewable.

Export from the province of resource

(3) In each province, the legislature may make laws in relation to the export from the province of the primary production from non-renewable natural resources and forestry

(3) Provincial governments are given concurrent legislative authority to pass laws governing the export of the resources referred to above from the province. This legislative capacity is in

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 prices for production sold for export to another part of Canada that are different from prices authorized or provided for production not sold for export from the province.

the sphere of both inter-provincial and international trade and commerce. Provincial governments are prohibited from price discrimination between resources consumed in the province and those destined for consumption in other provinces. This new provincial legislative capacity applies to these resources in their raw state and to them in their processed state but does not apply to materials manufactured from them.

Relationship to certain laws of Parliament

(4) Any law enacted by the legislature of a province pursuant to the authority conferred by subsection (3) prevails over a law enacted by Parliament in relation to the regulation of trade and commerce except to the extent that the law so enacted by Parliament,

a) in the case of a law in relation to the regulation of trade and commerce within Canada, is necessary to serve a compelling national interest that is not merely an aggregate of local interests; or

b) is a law in relation to the regulation of international trade and commerce.

(4) The effect of this new provincial legislative responsibility over trade and commerce diminishes the scope but does not eliminate the federal government's exclusive authority over trade and commerce. The exercise of the provincial power is subject to two limitations. First, the federal government may legislate for interprovincial trade if there is "compelling national interest". This trigger mechanism may apply to circumstances other than an emergency as established under the peace, order and good government power. Second, federal laws governing international trade prevail over provincial laws in international trade, in effect establishing a concurrent power similar to that for agriculture.

Taxation of resources

(5) 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

(5) Provincial powers of taxation are increased to include indirect taxes over the resources outlined in this section - whether these resources are destined in part for export outside the province. These taxes are to apply with equal force both in the province and across the rest of the country.

b) sites and facilities in the province for the generation of electrical energy and the primary 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.

Production from resources

(6) For purposes of this section,

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 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.

(6) In determining the scope of provincial legislative powers over resources exported from the province, it became necessary to define the degree to which the resource was processed. It is not intended to extend provincial authority to manufacturing but it is intended to extend it to something beyond its extraction from its natural state. Given the varying resources covered by this section, the wording of this subsection is thought to place the appropriate limitations on provincial powers.

Existing Powers

(7) Nothing in subsections (2) to (6) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of those subsections.

(7) This clause ensures that any existing provincial legislative powers found in s.92 are not impaired by the new section.

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LIST OF ALTERNATIVES COVERING THE DISPOSITIONS OF SECTION 109

Option 1	Maintain the status quo, do not carry forward Section 109.
Option 2 (a)	
Property in lands, mines, etc.	*"123.1 All lands, mines, minerals and royalties belonging to any province immediately before this section comes into effect, and all sums then due or payable in respect of any such lands, mines, minerals and royalties, belong immediately after this section comes into effect to the province or are then due and payable, subject to any trusts existing in respect thereof and to any interest other than that of the province therein."
Option 2 (b)	
Ownership of property	*"123.1 All property belonging to any province immediately before this section comes into effect, belongs immediately after this section comes into effect to the province, subject to any trusts existing in respect thereof and to any interest other than that of the province therein."
Option 3	
Ownership of property	"127.1 Nothing in this Act changes the ownership in any property owned by Canada or a province immediately before the coming into force of this Act."

*Note: Numbering is tied in to numbering found in Bill C-60.

"Best Efforts Draft" February 1979

Draft Proposal Discussed by First Ministers

DECLARATORY POWER

1. Amend head 92. 10(c) to read as follows:

"(c) Such works as, although wholly situate within the province, are before or after their execution declared by Parliament to be for the general advantage of Canada, or for the advantage of two or more provinces, for purposes indicated in the declaration."

2. Add new subsections to section 92 which for the purposes of this draft are numbered as follows:

Requirement to consult with respect to use of declaratory power of Parliament

"92. (2) Before Parliament declares any work to be for the general advantage of Canada or for the advantage of two or more provinces

(a) the government of Canada shall consult with the government of the province or the governments of each of the provinces in which the work is situate; and

(b) if the consultation under paragraph (a) does not result in an agreement that the work be so declared, the Prime Minister of Canada shall consult the first ministers of the provinces about the proposed declaration at a first ministers' conference.

Declaration on failure on consultation

(3) Where, after the consultation required by subsection (2), an agreement has not been reached that a work be declared to be for the general advantage of Canada or for the advantage of two or more provinces, a declaration under paragraph 92(1)10(c) shall have effect only for such period not exceeding five years from the effective date of the declaration as is stated in the declaration but nothing in this subsection prohibits Parliament from making a further declaration in respect of the work after the requirements of subsection (2) have again been fulfilled.

Limitation on Declaratory Power with respect to resources

(4) No declaration under paragraph 92(1)10(c) shall be made by Parliament without the prior consent of the government of the province in which the work to be so declared is situate if it is a work for

(a) the primary production or initial processing of any non renewable or forestry resource; or

(b) the generation of electrical energy.

Revocation or limitation of declaration

(5) Parliament may revoke any declaration of a work to be a work for the general advantage of Canada or for the advantage of two or more provinces made before or after the coming into force of this section and may limit or, subject to subsections (2) to (4), extend the purposes for which any such declaration had been made.

APPENDIX V

July 23, 1980

ALBERTA DRAFT
FOR DISCUSSION PURPOSES ONLY

THE TRADE AND COMMERCE POWER

91. 2. The regulation of trade and commerce, but not including natural resources and the primary production therefrom.