

MEETING OF THE CONTINUING COMMITTEE
OF MINISTERS ON THE CONSTITUTION

Report of the
Committee on Natural Resources,
Interprovincial Trade and
Powers over the Economy

Toronto, Ontario
August 13, 1980

The Committee on Natural Resources, Interprovincial Trade and Powers over the Economy met in Toronto on Wednesday, August 13, 1980. All governments except New Brunswick were represented. The meeting had been convened as a direct result of the mandate given to it by the Ministers at their July meeting in Vancouver.

NATURAL RESOURCES

The committee devoted most of its time to a review and discussion of the "best efforts" draft on natural resources which had been prepared for the 1979 First Ministers' Conference. The federal government outlined its position on the draft as follows:

- 1) The draft should confirm provincial ownership of resources.
- 2) The draft should incorporate a clause with respect to indirect taxation which would overcome the effects of the CIGOL decision.
- 3) The federal government is willing to consider a concurrent power with respect to trade and commerce as it affects export to other provinces of non-renewable natural resources, with federal paramountcy.
- 4) The federal government is willing to consider limitations to the exercise of the declaratory power, for example, through a reformed Senate.

International Trade

The committee noted that the proposed concurrent legislative authority with respect to trade and commerce did not include international trade. The 1979 "best efforts" draft had provided for a provincial role in international trade but with federal paramountcy. The federal government advanced the view that to

give provinces legislative authority in international trade could lead to confusion on the part of Canada's trading partners, particularly if provinces endeavoured to conclude international agreements. Some provinces felt that federal paramountcy should and would overcome this concern. For example, Canada's acceptance of the GATT would take precedence over any trading arrangements proposed by a province. Other provinces indicated that they had no wish to conclude international trade agreements in resources, nor any desire to have the power to do so.

It was also pointed out that the proposed extension of provincial legislative responsibilities in the area of trade and commerce was limited to non-renewable natural resources, forestry and electricity. Attention was drawn to the export market on electricity and the various transborder transactions which already exist between provincial hydro companies and utility companies in the United States. Concern was expressed that the courts might be unable or unwilling to draw the line between electricity destined for export and that consumed domestically.

Saskatchewan expressed its concern with respect to the federal government compelling a province to export resources. The federal government expressed the view that they could not do it under the existing Constitution. Despite assurances from the federal government, some provinces thought it would be useful to include in the draft on resources a clause which would ensure that resources could not be exported without the consent of the province(s) affected. Saskatchewan agreed to draft an amendment to Section (2) which would attempt to incorporate its concerns with respect to compelling exports.

Saskatchewan, using the potash industry as an example, indicated that its principal concern was the regulation of the production of that particular resource. By exercising the provincial legislative power there could be incidental effects on international trade. That province wished to be assured that it could regulate the industry without having its laws declared ultra vires because they affected international trade, even though the federal government had not legislated in that area. The parallel with the Central Canadian Potash case was noted and hence the argument for concurrent jurisdiction in the area of international trade.

After the discussion the federal government indicated that it was prepared to reflect further on the international trade provisions.

Interprovincial Trade

With respect to interprovincial trade and commerce the committee discussed whether this legislative power should be contained in the proposed sections on natural resources or incorporated within Section 95 (Agriculture and Immigration) of the B.N.A. Act. It was agreed that this item should be located in the section on natural resources. The federal government agreed to redraft Sections (3) and (4) which would give provinces concurrent jurisdiction in the area of export to other provinces of non-renewable natural resources, forest products and electricity, with federal paramountcy. In drafting the paramountcy provisions it was recommended that the federal government consider the approach taken in an earlier draft proposal in the area of provincial jurisdiction in communications. Alberta expressed its view that concurrency with federal paramountcy did not meet their concerns.

Taxation

Another area of discussion was Section (5) of the "best efforts" draft which gives the provinces the right to levy indirect taxes in the area of natural resources. While it was recognized that the effects of the CIGOL decision should be overcome, Ontario thought that the proposed amendment went further than necessary. It tabled an alternative draft which it thought would give the provinces the necessary legislative authority to tax natural resources. Concern was expressed by some provinces that the Ontario draft did not go far enough in protecting royalty regimes which could be classified by the courts as indirect taxes and in permitting the use of indirect taxes. This problem was noted and Ontario agreed to review their draft in light of this concern. The federal government noted the need to preserve an effective anti-discrimination clause in this regard, either in this section or in a revised section 121.

Production

Saskatchewan proposed two amendments to Section (6) of the report. They wished to include heavy oil and refined liquids and gas from coal in the definition of "primary production". They also would like to include uranium and thorium under non-renewable natural resources. Some governments thought that the existing draft already included uranium. Those governments concerned (the federal government, Ontario and Saskatchewan) agreed to reflect further on this question. Concern over the specificity of Section (6) was expressed and it was agreed that this section should be included as a schedule to the Constitution.

Ontario suggested that using the phrase "primary production and initial processing" might be a sufficient way of conveying the extent of provincial jurisdiction over resources. If such a phrase were acceptable it would eliminate the need for a more detailed explanation as found in Section (6). While there was no consensus that such a phrase would be an adequate substitute for the more detailed definition in section 6, it was agreed that the definition could be put in a schedule to the Constitution. A few other points were raised by governments, one of which was the importance placed by the federal government on an effective anti-discrimination provision in a revised Section 121 relative to the proposed provincial legislative power over resources in the area of inter-provincial trade and commerce. In this respect, Ontario noted that it wanted to ensure that discriminatory arrangements in supply of resources should be covered either in section 121 or in the resources draft. Another concern expressed was with respect to the reference to "primary production from electricity" as contained in Section (2)(c). The federal government agreed to review the drafting.

British Columbia continued to express its concern over the definition of natural resources.

DECLATORY POWER

The federal government indicated that it was prepared to consider limitations to the exercise of the power possibly through a reformed and reconstituted Senate. Until such time as the proposals on the Senate are finalized the precise

limitation could not be identified. It was also noted that the 1979 "best efforts" draft had another technique for limiting the use of the declaratory power, namely, referring it to First Ministers' Conferences for discussion. It was also indicated that the 1979 draft on the declaratory power required consent of the province affected for the use of the federal government's power only in the area of natural resources. Since the most frequent use of the declaratory power had been in the area of transportation, the special limitation for resources was not seen as being too great by some provinces. Alberta pointed out that the draft proposals on natural resources could be rendered meaningless by the exercise of the declaratory power, a fact which had been accepted by the federal government in earlier discussions. The federal government observed that a requirement of consent of the province concerned for use of the declaratory power seemed pointless: if there were agreement between Ottawa and the province concerned it would normally not be necessary to use the declaratory power anyway, particularly if there were a delegation power in the Constitution. Quebec noted that the declaratory power could still be used as a means of amending the division of powers with or without the consent of the provinces. The policy difference was recognized and officials referred the matter of limitations to the declaratory power to the Ministers for their consideration. This would include both the technique of how and when the federal government could exercise the declaratory power and any limits to the exercise of the power.

It was also suggested that existing declarations should be subjected to a review by the federal government in consultation with the provinces affected.

POWERS OVER THE ECONOMY

There was a brief review of Section 121. While all governments subscribe to the principles of an economic union, the question of enforceability is still unresolved. Three positions remain: one reflected in the Saskatchewan proposal which is patterned after the draft on equalization; the second reflected by the federal and Ontario and Nova Scotia proposals which call for a strengthening of Section 121 and its enforcement by the courts; and the third envisages some compromise between the three whereby any proposed action could be reviewed by another institution (e.g., a reconstituted second chamber or a conference First Ministers) for discussion or formal ratification either before or after resorting to the Courts.

The Government of Ontario tabled a new proposal on section 121 which it asked committee members to consider (copy attached). This proposal, which used a "pith and substance" test, was seen by some delegates as a method of avoiding a long list of derogations.

The federal government indicated that it was working on a new draft of Section 121. Its original intention had been to permit derogations from the principles of the economic union by the proposed wording of Section 121. In their view

if the draft as written did not overcome provincial concerns they were prepared to reconsider the wording. It was indicated that this draft would be available for review during the week of August 25.

The federal government also indicated that it was redrafting Section 91(2) and 91(2.1) to take into account concerns expressed earlier by the provinces. This draft would also be available during the week of August 25.

Ontario noted that the subject of mobility rights had not been addressed by the committee. It was agreed that this subject would have to be discussed by this committee if the committee responsible for the Charter of Rights did not address this question. It was indicated that any reference to mobility rights in a revised Section 121 would have to be compatible with any reference to mobility rights in the Charter.

The meeting adjourned at 4:30 p.m.

J. Peter Meekison
CHAIRMAN
COMMITTEE ON NATURAL RESOURCES,
INTERPROVINCIAL TRADE AND
POWERS OVER THE ECONOMY

August 13, 1980

DRAFT

s. 121(1) It is hereby declared that Canada is an economic union and

(a) every citizen of Canada and every person lawfully admitted to Canada for permanent residence has the right,

(i) to move to and reside in any province or territory,

(ii) to pursue the gaining of a livelihood in any province or territory without discrimination based on residence or former residence, and

(b) all goods, services and capital may move freely and without discrimination within Canada based on the province or territory of origin or destination.

(2) Neither Parliament nor a legislature may enact a law that in its pith and substance is inconsistent with subsection 1.

Working Draft

RESOURCE OWNERSHIP AND INTERPROVINCIAL TRADE

(1) (present 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, whether or not such resources are exported in whole or in part from the province; and

c) development, exploitation, conservation and management of forestry resources in the province, including laws in relation to the rate of primary production therefrom, and of sites and facilities in the province for the generation of electrical energy, including laws in relation to the rate of production whether or not such resources are exported in whole or in part from the province.

If, as suggested, the words "initial processing" should be added, the draft would be amended in various places.

Designed to overcome Saskatchewan's concern on compelling exports.

This change addresses the concern of primary production from electricity. It might be preferable to make electricity (d).

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 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.

Not acceptable to the Government of Canada and is being redrafted. The redraft, when available, should be read in conjunction with Section 121; if not, Ontario would like to see a reference to supply as well as price.

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,

Not acceptable to the Government of Canada and is being redrafted and will probably be incorporated with (3) as a new concurrent power over interprovincial trade and commerce with federal paramountcy. The international trade provisions would be deleted by the federal government.

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.

AND/OR

- b) is a law in relation to the regulation of international trade and commerce that is necessary to serve a compelling national interest that is not merely an aggregate of local interests or is for the purpose of limiting or imposing restrictions on exports for one or more of the following purposes, namely, ensuring priority of supply of a product or electrical energy for users in Canada, promoting economic activity and development in Canada, and conducting trade or foreign relations with other countries in the interests of Canadians generally.

This draft was not discussed but was proposed by Saskatchewan at the ministerial meeting in Halifax in 1979.

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

- b) sites and facilities in the province for the generation of electrical energy and the primary production therefrom,

May be changed depending on the change to subsection (2)(c).

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.

OR

- (5) In each province the legislature may make laws in relation to taxation by any mode or system of taxation in respect of,

Draft proposed by Ontario at the meeting of officials in Toronto on August 13, 1980. This draft is being revised by Ontario.

- a) primary production from natural resources consisting of petroleum or mineral deposits or forests, in the province, or
- b) the gross proceeds or income realized from such production,

where the ownership of the natural resource or the right to exploit it has been alienated or conferred without retention by or on behalf of the province of a right to a royalty or similar charge in respect of such production and the taxation is reasonably equivalent to such a royalty or charge.

Production from Resources

(6) For purposes of this section,

This part would go into the schedule.

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 oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and

This change includes upgraded heavy oil and coal liquids and gases in primary production.

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.

c) "non-renewable natural resources" includes uranium and thorium.

This adds uranium and thorium to non-renewable resources. Apart from the declaratory power, there are, according to court decisions, other bases for federal power over their development and use.

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.