

CONFIDENTIAL

August 18, 1980

Memorandum to: Mr. Gérard Veilleux

c.c. - Mr. F. Gibson
Mr. F. Carter
Mrs. B. Reed
Mr. E. Golderberg
Mr. C. Lemelin
Mr. V. Traversy

Resources and Economic Powers
Redrafting for CCMC, August 26-29, 1980

We undertook in Toronto to examine various drafting changes and to come forward with some new drafts on each of these subjects. Following are some suggestions for consideration at our meeting planned for 10 a.m. Tuesday, August 19. A copy of the best efforts draft is attached for convenience as Annex A.

1. Resources and Interprovincial Trade

- (a) Saskatchewan suggested adding at the end of s.-s.(2) of the b.e.d., the following:

"whether or not such production is exported in whole or in part from the province."

The purpose would be, apparently, to achieve much of what was lost by our withdrawal of the offer of provincial concurrency over export to other provinces or outside Canada. The main advantage would be to enable them to exercise the powers in s.-s.(2) in such a way as to manipulate the export market in respect of supply and possibly also of price. Such laws would be subject to the paramountcy of federal laws concerning trade and commerce.

I would recommend against this amendment for the following reasons:

- (i) legally it would be seen to create, not a concurrent power but an exclusive power, and the rules for paramountcy of a federal law enacted under another exclusive power (i.e. trade and commerce) would probably be more restrictive of federal ability to override the provincial law;
- (ii) if we are going to concede concurrent power over exports eventually this will adequately serve the same purpose: in the meantime we can argue that they are trying to achieve a result to which we have not agreed, at least vis à vis exports from Canada.
- (b) Nova Scotia argued, with some support, that the references to "primary production" from electrical generating facilities in para. (2)(c) and para. 5(b) are inappropriate since there is no definition of "primary production" of electricity in s.-s. (6) nor need there be one. It was also noted that s.-s. (3) avoids this problem by referring only to "production" from such facilities. That was thought to be adequate.

We agreed to look at this and I would suggest that paras. (2)(c) and 5(b) be recast accordingly. I think it would be best simply to speak of "production" of electricity rather than trying to define "primary production" of it.

- (c) Ontario wants to have the anti-discrimination provision at the end of s.-s. (3) broadened to cover supply as well as price. We can probably maintain our position that with a proper s. 121 this will not be necessary.
- (d) We need to draft, for purposes of the CCMC meeting, an appropriate revision of s.-ss. (3) and (4) to express our current offer of concurrency over export to other provinces, with "full federal paramountcy". (It will be easier to draft our final position, if it involves a qualified federal paramountcy, as the b.e.d. would then suffice with minor alterations.)

I would suggest a draft along the following lines:

s.-s. (3) - add after the words "from the province" in the fourth line the following: "to another part of Canada"

s.-s. (4) - "A law enacted by Parliament in relation to the regulation of trade and commerce prevails over a law enacted by the legislature of a province pursuant to its concurrent authority conferred by subsection (3)."

While this seems straightforward the matter is not without difficulty. In one sense, even without any s.-s. (4) a federal law made under an exclusive power in s. 91 (i.e. "regulation of trade and commerce") would be paramount over a provincial law made under an exclusive s. 92 head (i.e. the new 92(3) resources power). However, in my view paramountcy will not be as readily applied in the case of a conflict between two laws made under separate exclusive powers as it will as between two laws, one federal and one provincial, which are made under the same concurrent power. A special rule for paramountcy stated in s.-s. 92(4) may be required to indicate that this is a concurrency situation.

At the same time, by expressly providing for the paramountcy of one kind of federal law - i.e. a law in relation to trade and commerce - there could be a danger of implying that no other kind of federal law - e.g. a law concerning pipelines under para. 92[10](a) - would be paramount over a provincial law made under the new s.-s. 92(3) concerning export of resource products. However, this may not be a very serious danger.

In any event, it is assumed that this redraft of s.-s. 92(4) will be temporary only.

- (e) Saskatchewan is still pressing for some limitation on the federal trade and commerce power to ensure it does not enable Parliament to compel production. This appears to be an unnecessary concern since there is no serious reason to think that even the

existing power enables Parliament to compel production. Indeed it could be argued that, by expressly so limiting the federal trade and commerce power with respect to resource production, we would be implying that elsewhere this power does enable Parliament to compel production - e.g. of wheat, automobiles, etc.

I think we should resist this change as being unnecessary. Ontario at least will support us in this, although apparently Québec would support Saskatchewan.

- (f) Ontario has prepared a revision of s.-s. (5) (Annex B) seemingly to narrow the scope of the new indirect taxation power to confine it to authorizing taxes in the nature of a royalty. This seems to be unnecessarily complex and restrictive and I see no reason for us to support it. Saskatchewan and Alberta are strongly opposed to it. Ontario was to reconsider its draft and perhaps we could await a new one.

- (g) Saskatchewan wants to amend sub-para. (6)(a)(ii) by adding, after the words "refining crude oil" the words:

"refining upgraded heavy oil, refining gases or liquids derived from coal"

We should probably seek advice from E.M. & R. on this. I see no objection to it although it is not entirely apparent why they want further elaboration as to what "primary production" does not include. Does it imply that everything involved e.g. in upgrading heavy oil is "primary production"? Is that the advantage to them?

- (h) Saskatchewan wants a new para. (6)(c) to read:

"'non-renewable natural resources' includes uranium and thorium".

This seems quite unnecessary and a potential source of difficulty in Ottawa. It will give provinces nothing they don't otherwise get in the draft as it is. While uranium and thorium are presumably non-renewable, uranium at least will remain subject to a different constitutional regime because of the federal declaratory power which has been used in respect of it in the *Atomic Energy Control Act*.

2. Economic Powers - We undertook to submit drafts on each of the following:

- (a) S. 121 - We should examine Fred Gibson's draft of August 7 (Annex C). Ontario tabled a new draft (Annex D) dated August 13 that has several deficiencies.

A principal question to be considered is whether the "pith and substance" or characterization of laws approach, as exemplified in the Ontario draft, is acceptable or must we press for a more absolute prohibition as in s.-s. 101A.(2) of Fred's draft. We should also start considering a political mechanism to validate derogations, although this is not needed for the CCMC meeting.

- (b) S. 91[1] - Attached as Annex E is a draft dated August 15, prepared by Fred Gibson. I am not sure about the words "extends to". Is what follows an exhaustive definition of the power?
- (c) S. 91[2.1] - I suggest some revision along the following lines.

"91[2.1] Competition

91[2.2] The establishment of reasonable product standards throughout Canada.

91[2.3] The jurisdiction conferred on Parliament by heads 91[2.1] and 91[2.2] does not render invalid a law enacted by a legislature that is not in conflict with a law of Parliament enacted under either of those heads."

This would better and more clearly state a federal jurisdiction over competition (the term "regulation" as used previously could have been confining in terms of regulatory technique). The proposed products standards power would be reduced somewhat by making it a "minimum" standards power, but this would go some distance to solve the problem left by the Labatts case.

The troublesome previous requirement in both matters that regulation be "reasonably necessary for the operation of the Canadian economic union" has been dropped as it was thought by many to be too vague and unpredictable in its effect. To the extent that it would have preserved a reasonable provincial jurisdiction over such matters, this would be achieved by head 91[2.3].

BLS
B.L. Strayer

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

(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 province over resources whether these resources are renewable or non-renewable.

- 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.

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.

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 an existing provincial legislative powers found in s.92 are not impaired by the new section.

August 13, 1980

DRAFT

In each province the Legislature may make laws in relation to taxation by any mode or system of taxation in respect of,

(i) primary production from natural resources consisting of petroleum or mineral deposits or forests, in the province, or

(ii) 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 by the province 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.

(3) Neither Canada nor a province shall by law or practice discriminate in a manner that contravenes the principle expressed in subsection (1).

(4) Subsection (2) does not render invalid a law of Parliament or a legislature enacted in the interests of public safety, order, health or morals.

(5) Subsection (2) does not render invalid a law of Parliament enacted

(a) in accordance with the principles of equalization and regional development recognized in section 36 of the Constitution Act, 1982,

and in relation to a matter that is declared by Parliament to be of national importance.

(6) Subsection (2) does not render invalid a law of a legislature enacted in relation to the production of goods or services wholly within the province.

(5) Subsection (2) does not render a law of a legislature that, before it comes into force, is

August 7, 1980

VIIA - THE ECONOMIC UNION

Canadian
economic
union

101.A(1) Canada is constituted an economic union within which all persons may move without discrimination based on province or territory of residence or former residence and within which all goods, services and capital may move without discrimination based on province or territory of origin or entry into Canada or of destination or export from Canada.

Non-
discrimination

(2) Neither Canada nor a province shall by law or practice discriminate in a manner that contravenes the principle expressed in subsection (1).

Derogation

(3) Subsection (2) does not render invalid a law of Parliament or a legislature enacted in the interests of public safety, order, health or morals.

Idem

(4) Subsection (2) does not render invalid a law of Parliament enacted

(a) in accordance with the principles of equalization and regional development recognized in section ---; or

(b) in relation to a matter that is declared by Parliament in the enactment to be of an overriding national interest.

Idem

(5) Subsection (2) does not render invalid a law of a legislature enacted in relation to the reduction of substantial economic disparities between regions wholly within the province.

ALTERNATIVE

(5) Subsection (2) does not render invalid a law of a legislature that, before it comes into force, is approved by the governments of six other provinces or by the governments of five other provinces and the Government of Canada.

Customs
union
continued

(6) Nothing in subsection (3), (4) or (5) renders valid a law of Parliament or a legislature that impedes the admission free into any province of goods, services or capital originating in or imported into any other province or territory.

Legislative
authority
not extended

(7) Nothing in this section confers any legislative authority on Parliament or a legislature.

- Section 121 is repealed.

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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.

ONTARIO

August 13, 1980

DRAFT

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 discrimi-
nation based on residence or
former residence, and

(b) all goods, services and capital may
move freely and without discrimina-
tion 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 incon-
sistent with subsection 1.

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TRADE AND COMMERCE POWER

Add to section 91 a subsection as follows:

() The authority of Parliament to make laws in relation to the regulation of trade and commerce extends to the making of laws in relation to the regulation of trade and commerce in goods, services and capital.