Office of The Prime Minister / Cabinet du Premier Ministre

Apr. 6/79

CONFIDENTIAL

May 22, 1979

MEMORANDUM FOR R.G. ROBERTSON

From: Mary E. Macdonald

Re: Your memorandum for the Prime Minister
April 6, 1979

"The Program to Achieve Constitutional Reform"

The Prime Minister has commented as follows:

re: page 4, point (a) The Supreme Court, "The question of the Court would in no way be settled necessarily for all time"

"I agree".

re: page 8, point (2) The fourth stage, "we rejected the possibility of limiting the referendum just to the province in question"

"I agree".

re: page 8, point (2) The fourth stage, "we finally concluded that a full national referendum in all cases was probably best"

"But would create expense, sound and fury in a province (or region) which had agreed ... On balance, you are probably right though, for the 4th stage; we could try the regional referendum plan in Stage 3 (ii)."

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re: page 11, Fourth Stage point (i), "unanimity would be required respecting resources (as in the Toronto consensus)"

"Should we drop this? It singles out one aspect of provincial jurisdiction that is more sacrosanct than all else e.g. education, property and civil rights, etcetera.

It would be left to the provinces to bring it in as part of stage three."

re: page 12, Fourth Stage point (iii), "for all other amendments, the approval of Quebec and Ontario, plus two eastern and two western provinces would be required"

"I agree with it, save for my remarks on previous page."

re: page 13, point (3) the concept of "expatriation", "we thought of what might have happened if there had been a similar device to repeal the new flag, and concluded that fast surgery is better."

"I agree, but the rhetoric might be useful as kind of reduction of absurdo."

re: page 13, point 3 Legislation for a referendum, "That could only be achieved if such referenda were to be provided for in changes to the BNA Act made in Westminster"

"I agree".

re: Draft letter, page one

"A paragraph should be added, insisting on our interests in this package (e.g. Rights, Patriation) and making it clear that our offers will remain conditional on their answers to our requests. Thus we could withdraw our offer or resources if a province refuses our request on language, etcetera. Otherwise, we might end up in five years getting a patriated constitution with no pressure on provinces to move on languages."

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re: Draft letter, page 2

"Please discuss whole strategy of timing with Pitfield, both for sending letters, for holding First Ministers Meeting, and for Speech from the Throne."

re: Draft letter, page 4, insert to paragraph two

"among which is the Charter of Rights and Freedoms with its provisions for language rights including minority rights in education."

M. E. M.

c.c. Hon. Marc Lalonde
Hon. John Reid
Mr. Pitfield
Mr. Robertson
Mr. Tellier
Mr. Rabinovitch
Mr. Carter
Mr. Gwyn
Mr. MacKinnon
Mr. Hayes
Mr. Taylor
Mr. Tassé
Mr. Strayer
FPRO File

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CONFIDENTIAL

April 6, 1979

MEMORANDUM FOR THE PRIME MINISTER

The Program to Achieve Constitutional Reform

On March 23 we discussed at some length the memorandum I had sent to you on March 5 which dealt, amont other things, with the above question. With that memorandum I had included an annex which set out a work program and sequence of events for the next three and a half years. The purpose of this memorandum today is to respond to several points you raised on March 23 and to propose for your consideration a draft of a letter you might wish to send the Premiers concerning an early Constitutional Conference.

1. The letter to the Premiers

Any letter sent now that the election is under way will be regarded by the press, and to a fair extent by the Premiers, as a political document. Reactions to the letter will be tempered by this attitude. We have tried, therefore, to write the simplest possible letter containing no more than the essential message. In this connection, you will wish to take into consideration the reservations which Paul Tellier, Frank Carter and Nick Gwyn share concerning the advisability of sending such a letter at this time, particularly in the light of the charged atmosphere which has developed on the federal-provincial front over the past week or so. The alternative is, of course, to convey the message of the letter by means of one of your speeches in the campaign.

You will wish to consider two aspects of the letter particularly. One of these is the question of the declaratory power which we suggest you tackle head on. It seems to me

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to be better to do it now, than to do it at the next Conference when you might be accused of bad faith in retreating from your February Conference position at the last minute. I have reflected further on our conversation about the possibility of your saying that you would make this move on the declaratory power "unless provinces came in on the Charter" or, perhaps, unless they accepted federal proposals on the second list dealing with economic union. I think it would be awkward to try to make such a linkage as your condition for not pulling back. It seems easier and more straightforward to pull back for what are reasons of substance. Then, at the next Conference, you could always move once again to the February position, if you should at that time wish to make such a move in exchange for provincial agreement on something else of importance.

The other aspect of the letter is the timing of the next Conference. You will see that we have suggested two alternatives. They involve precise dates, because the practical purpose of the letter is to make sure that the Premiers set aside the necessary time, and base their preparatory work on the timing chosen.

A late June timing would seem to be about as early as could be contemplated, given the possibility of minority government and the need to meet the House. There is, however, the Fête of St-Jean-Baptiste to take into consideration and the Tokyo summit on June 28-29, which make the last part of June pretty impossible. We then considered later dates. One alternative suggested in the draft takes into account the proposed meeting of Ministers and builds on it to suggest a mid-July timing. The other alternative would "upgrade" the July 4-6 meeting of Ministers to a First Ministers Conference. For either of these alternatives, the meeting of federal and provincial officials, tentatively scheduled for June 7 and 8 at Ottawa, would be appropriate.

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In so far as provincial reaction is concerned, the Premiers will probably find either alternative upsetting, and their feeling that they are being pushed into "indecent haste" will likely give rise to sour comments about federal "grandstanding". In terms of giving them more warning, and observing the protocol of not ignoring the CCMC, the first alternative is the best. However, given their likely desire to take some holidays in mid-July, the margin between the two alternatives is probably slight.

As soon as I have your thoughts on these points we can prepare the final version of the letter. To save time, a translation is already being prepared.

2. The contents of a possible Joint Address

The way we left matters in our conversation, the Joint Address would include:

- the Bill of Rights (covering among other things language rights, including minority language rights in education, and an opting-in procedure);
- the Supreme Court (based on the most recent formulation, which was acceptable to a great majority of the Premiers);
- all changes in the distribution of powers which would have been agreed upon unanimously;
- a request for "patriation" of the Constitution with provision for an amending formula which would work itself out in stages.

You asked that further thought be given to a number of these:

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(a) The Supreme Court

On the question of the Supreme Court, all of us agree that the entrenching of the provisions for the Court would do a great deal to add to its moral authority, which is particularly desirable with the coming into existence of a new Bill of Rights. However, Roger Tassé, who is very much in agreement with the general approach now proposed for the Joint Address, is concerned about including the Supreme Court at this time, given the opposition from the governments of British Columbia, Quebec and Alberta, and the likely opposition of Claude Ryan. I think you could discount the governmental opposition, but you will wish to think carefully about Mr. Ryan's position. If the Court were to be included in the Joint Address, it would certainly be essential to underline that, apart from providing for greater consultation with the provinces, no essential change was being made, except to take the Court out from under Parliament's jurisdiction. The question of the Court would in no way be settled necessarily for all time and there would be neither more nor less prospect of Mr. Ryan's proposals being accepted in future constitutional discussions. On balance, I would be inclined to go ahead, but Roger's concern is real cause for hesitation.

(b) The Distribution of Powers

The outstanding point on the distribution of powers was the question of whether we had gone too far in the offer on resources, and whether some pull-back should be contemplated, particularly in connection with the declaratory power. This point is dealt with briefly above, in connection with the letter, and it might be useful to make a few additional comments on the substance of the issue.

In giving the producing provinces any greater control over their resources, there are many federal concerns which are touched upon. In the foreseeable future, however, there would

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seem to be two which are fundamental. One of these is to ensure that Canadian resources are indeed developed and made available to Canadians. The other is to ensure that, while residents of a producing province will derive a particular benefit from the disposition of their province's resources, other Canadians will also benefit from the disposition of those resources.

On the first concern, there are two aspects: first, there is the capacity of the federal government to control allocations and inter-provincial prices when the chips are really down - i.e., in cases of compelling national interest. This aspect is well protected in the current federal offer. Second, there is the capacity of the federal government to force a province to develop or deliver a resource against its will. (A case in point would be the refusal of an already wealthy Alberta to permit further oil sands development on environmental grounds which Canadians in other provinces could not accept as justifiable in the light of their having to do without, or otherwise suffering grave economic loss.)

On the second aspect, the federal offer as it now stands protects Canadians largely by the potential use of the POGG power. In offering to give up the use of the declaratory power in respect of resources, this had been recognized, and it had been the intention to ensure that any future rewrite of POGG would define emergencies in such a way as to permit federal action in, for example, the case just cited. As leverage to ensure that this will happen, it may well be best to pull-back now on the declaratory power offer, as you have suggested, and the letter to the Premiers does this.

On the second concern, "fair shares of the benefits for all Canadians", there is nothing in the current federal offer, as far as we can see, that in any way inhibits the federal government from continuing to take a share of

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the tax revenues from resources, as it does now - or to keep prices lower than international levels, as it does now, if it believes there is a compelling national interest to justify such an action. None of this, however, faces up to the other part of the problem: that a province, by accumulating what seems a reasonable share of resource benefits, may become rich to the point that its taxpayers at provincial and municipal level may bear a far lower tax burden than all other Canadians. This is a philosophical problem of considerable proportions for any federation.

In accumulating its Heritage Fund, Alberta can argue that it is being perfectly reasonable, as the funds are needed for investments which will develop the province's economy against the day when its resources have gone. This is not unreasonable as a goal and such investments would create industries which would pay taxes to all levels of government, and give employment to persons who would similarly pay taxes to all levels. Albertans might become, on the average, more wealthy than residents of other provinces, but the normal tax system would tend to spread the wealth across Canada.

When, however, the revenues Alberta receives from resources are used to reduce provincial or municipal tax loads, or are accumulated and the interest therefrom used for such tax reductions, there is no way short of applying different rates of tax in different provinces that the federal government can obtain a share for all Canadians. This has led Mr. Lang, for example, to suggest that the interest earned by the Heritage Fund should in some way be taxable by the federal government, or otherwise shared with non-Albertans. The difficulty in this, of course, is that Albertans might well have a lower level of per capita income than, say, the residents of Ontario, and, in such a case, why should Albertans be specially penalized because some of their wealth happens to be in government hands?

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It is in the light of these considerations that we have tried to keep alive, in the constitutional discussions with the provinces, the idea of a study being made of some kind of equalization fund into which provinces would pay some portion of their revenues (or of excess revenues beyond some standard base), with such a fund to be governed by ground-rules set out in the Constitution. The idea is on the table, though it was not picked up and discussed at the February 5-6 Conference. It could readily be raised again at the next Conference. We have asked Finance to examine what the ground-rules for such a fund might be.

One point is clear in all of this: provinces have become and could in future become disproportionately wealthy - without that wealth being based on resources. To try to achieve reasonable interprovincial equity by attacking the resource problem alone, could leave untouched inequities arising from other causes in future, and would give Albertans real reason to complain that they were being given the gears by central Canada. Some more wide-reaching and sophisticated system of wealth or revenue sharing between provinces is needed if the problem is to be overcome.

(c) The Basis for Patriation

You were in general agreement with the line proposed in the Annex to my March 5 memorandum for handling the question of amending the Constitution. I had suggested that the Joint Address request that the British legislation provide for a "four stage" process. You did however ask us to consider several points in this connection, and my comments on them, which take into consideration the discussions we have had with Justice, are set out below:

(1) The initial period of "unanimous consent" (the first stage) should provide, you suggested, for amendments to the Bill of Rights to be made by the unanimous agreement of the federal government and those

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provinces which had, at that moment, opted-in. We see no reason why a provision along these lines should not be made, and it will be provided for in the draft Joint Address which Justice is preparing;

(2) The fourth state (the "last resort") was based on the premise that lack of support by the federal government or by more than one province would mean rejection of any proposal. It contemplated a national referendum if either the federal government or a single province rejected a proposal. You raised the possibility that a national referendum might be held only when the federal government said no, and only a regional referendum would be held if one province said no. We have since debated this among ourselves at some length, including even the possibility of limiting the referendum just to the province in question. We rejected that idea because of its greater rigidity, but had difficulty deciding on the regional referendum question.

We finally concluded, however, that a full national referendum in all cases was probably best as it would appear less like the provoking of a direct confrontation between a dissenting government and its residents, or between the residents of assenting provinces (in a multi-province region) and the residents of the dissenting province. This is because in a national referendum, there would always be the chance that residents of an assenting province anywhere in Canada might say no, and any proposal apparently supported only by a minority would have more of a "sporting chance".

Our debate on these points, however, led us to reopen the whole question. Even with the referendum added, the fourth stage as proposed is a very rigid arrangement. Given the unlikelihood of provinces agreeing on anything in the second stage,

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and the high probability that any federal proposal in the third stage would be rejected by the people in one or more regions, the chances of being stuck with the fourth stage as a permanent amending formula are pretty high - perhaps even nine chances out of ten. On the other hand, to go for a more flexible formula in the fourth stage would lead to provincial accusations (which would be difficult to counter) that the federal government would never co-operate with provinces in the second stage, and would sit back and wait for the fourth stage to arrive automatically.

There is, then, a defensible logic to the four-stage "package" as it is now constituted, which rests upon the fourth stage being something well short of the federal government's ideal. If we wished to have a more acceptable fourth stage, some provision would have to be made so that the federal government could not simply sit back saying "no" until that stage arrived. This we attempt to do in the new "package" of four stages set out below for your consideration as a possible alternative. As you will see, the last two stages are quite different to those in my March 5 memorandum. This new package has the disadvantage of including a certain element of "confederalism" but has the advantage of a potentially happier ending.

First Stage - With the passage of the British legislation, amendments to the Constitution would require the unanimous consent of the federal government and the provinces (with special provision for amendments to the Bill of Rights) for a period of three years, or until the Second part or Third part was completed successfully, whichever came first.

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Second Stage - During the first two years of the three-year period provided for in the First Stage, the federal government and the provinces would seek unanimous agreement on a new amending formula. If such agreement was reached, the new formula would come into effect right away.

Third Stage - If no agreement had been reached between the federal government and the provinces during the two-year period of the Second Stage, there would then begin a period of one year in which a new formula could be adopted only through the holding of a binding national referendum in which any formula, in order to be adopted, would have to receive majority support in all four regions of Canada. There would be two key conditions governing such referenda:

(i) the federal government would be obligated to put to the people, in the course of the year, any formula on which all ten provinces had agreed upon during the Second Stage (but which the federal government had opposed);

(ii) the federal government would be free, as part of the referendum in (i) above, to put its own proposal to the people as an alternative, or if there had been no provincial agreement on a formula, would be free to put its own proposal (if a better or more acceptable formula than the one in the Fourth Stage below had emerged) or to hold no referendum and await the automatic coming into force of the Fourth Stage at the end of the third year of the process.

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Fourth Stage - After three years from the passage of the British legislation, a new amending formula would automatically come into force (unless a different proposal had already been approved by the eleven governments under the Second Stage or by the people under the Third). This formula would be similar to that of Victoria, but would involve referenda in some cases. The main points would be these:

(i) unanimity would be required respecting resources (as in the Toronto consensus);

(ii) as in all formulae, there would be provision for amendments affecting only one or a few provinces to be approved by Parliament and the legislature or legislatures concerned;

(iii) for all other amendments, the approval of Quebec and Ontario, plus two eastern and two western provinces would be required. If support was lacking for any proposal (regardless of which government had suggested it) from the federal government and from one or more regions, or simply from two or more regions, the proposal would be dead. If support was lacking only from the federal government, or only from one region, a national referendum would be held, requiring majority support in all four regions to carry. (This would permit proposals to be put to a referendum fairly readily, as even six provinces could be against a proposal, but would be a good deal more stringent in the requirement for an approval.)

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This, then, constitutes the alternative "four-stage package" which you may wish to consider as a substitute for the package we discussed earlier. Because its end result is closer to what the federal government has tended to advocate all along, the unilateralism involved in its adoption would probably be attacked more vigorously than would the earlier proposal. But that kind of attack will have to be faced in any event, and the added degree of vigour would seem likely to be marginal in the whole scheme of things. The federal government could argue, with justice, that the opportunity for the provinces to take "their" scheme to the people would ensure that the federal government would genuinely try, throughout the first two years, to reach agreement with the provinces on the most acceptable formula, rather than just await the arrival of the last stage. I might add that I do not think my comments on "Expatriation" set out below depend in any way on which of the "packages" is adopted.

(3) The concept of "expatriation" was an idea we discussed briefly and which you asked me to look at more carefully. The idea would involve an arrangement under which the Constitution could be "expatriated" back to Westminster if, within five years from the proclamation, a majority of the provinces representing a majority of the population, were to request that this happen, perhaps subject to a national referendum. The principal advantage in such an arrangement would be that it would offer a kind of defence against charges that will be levied against the federal government for the unilateral action it would be taking by way of the Joint Address.

In our discussions with Justice, we have concluded that we should recommend against the idea. There are several reasons for this. Firstly, the provinces most likely

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to protest the unilateral action - Quebec, Alberta and perhaps two others - would see little chance of persuading other provinces to join with them in making the new "device" work, and would attack the device as nothing more than "hypocrisy"; their protests could well be stronger, simply because the device was there. Secondly, it would be a complicated proposal to explain publicly and it is doubtful that many would understand its mechanics - or even less, why it should exist at all. Lastly, but most important, it would spread an air of uncertainty and indecision over the life of the country for five long years and, in so doing, would provide fuel for controversy. We thought of what might have happened if there had been a similar device to repeal the new flag, and concluded that fast surgery is better.

3. Legislation for a Referendum

In the context of the above, we discussed briefly the possible use of the federal Referenda Bill which was, at the time, still before the House. I have since confirmed that the Bill would, in general, provide all the necessary "mechanics" for the holding of referenda. It makes no provision, however, for specific judging of results on the basis of regions, although that could be provided for in the Resolution required in advance of the holding of any particular referendum. More important, no provision is made in the Bill for the results to be binding, although this could be achieved either by amending the Bill or by the passage of a special Bill along with the required Resolution. Such an action could provide for a referendum as contemplated under the "expatriation" scheme above, as Parliament would only be binding itself, but would not cover situations where results would need to be binding on all governments. That could only be achieved if such referenda were to be provided for in changes to the BNA Act made in Westminster, or provided for by federal and provincial action taken in Canada under some amending formula of the future.

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4. Concluding Points

-- (a) The draft letter to the Premiers on the subject of the next Conference is attached for your consideration. I await your reaction to the question of sending the letter and to the draft suggested, as well as your reaction to the other matters reviewed above, particularly the idea of an alternative ending to the "four-stage" amendment plan;

-- (b) I am returning herewith, as you requested, the original of my memorandum to you of March 5, with its attachments;

-- (c) As agreed, I am attaching separate typed sheets containing:

(i) points on "self-determination" drawn from pages 4-5 of the March 5 memorandum;

(ii) points on "sovereignty-association" drawn from pages 9-10 of the March 5 memorandum.

R. G. R.

Carter/Hurley/JV

DRAFT

My dear Premier:

At the close of the Constitutional Conference on February 6, I expressed publicly my feeling that we had made a good deal of progress in our work together. At the same time, I said that I would like to think over carefully what should next be done. I foresaw another Conference taking place soon to continue discussions on those items of mutual interest on which unanimous agreement had not been reached, and to begin discussions on many other items, including those important questions affecting the Canadian economic union and common market.

I believe more than ever that the renewal of our Constitution is an essential base for the future social and economic progress of all Canadians, wherever they may live. With the holding of the referendum in Quebec coming closer each day, it is more urgent than it has ever been to show that governments in Canada can work together to effect changes of importance to the citizen - that the Canadian Constitution can indeed be renewed.

It is in these circumstances that I am now writing to you about the planning for our next Conference and to suggest possible dates. The constitutional question is, I believe, of vital importance and the fact that the election campaign is under way should not deter any of us from planning its renewal. I would like to propose, therefore, that we now set aside time for our next Conference. Certainly if I form the next government, I will be ready to meet with you shortly after the election is over.

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First alternative

/It seems to me that we should not wait much beyond mid-July to meet. The Continuing Committee of Ministers on the Constitution is, I gather, tentatively scheduled to meet on July 4-5-6. We could plan to meet a week or ten days later, say July 16-17-18, perhaps keeping July 19 clear in case of need. Or, we might contemplate shifting both meetings one week forward, so that we could meet on July 9-10-11./

Second alternative

/It seems to me that a timing in early July would be appropriate. I would suggest that Wednesday, Thursday and Friday, July 4-5-6, be set aside for a meeting here in Ottawa. I recognize that these dates have already been suggested for a meeting of the Continuing Committee of Ministers on the Constitution. I believe the First Ministers have a good deal of work that can be done with no further preparation at ministerial level. In any event, the fact that the Ministers will have been setting these dates aside may well make it easier for all of us to assemble our delegations./

The agenda for our meeting will not, I imagine, create much difficulty for us. As several have already commented, it would seem appropriate to give first priority to finding solutions to those questions on the "first list" which we were not able to deal with completely in February. We have agreed that no change

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should be made respecting the Monarchy, and have reached basic agreement on Family Law. There is perhaps no point now in further pursuing the question of indirect taxation, although the federal government is quite open on this. On all the other subjects, however, we might indeed make progress if we have these added days in which to deal with them. We are already close to consensus on some; on others we could surely benefit by further discussions, even on matters which are still strongly controversial among us, such as the settlement of the resources question, the important matter of whether unanimity is the only basis for action, and the question of patriation and the amending formula.

In addition to considering the first list, we could also devote time to a preliminary discussion of items proposed for the "second list", and seeking agreement on a complete version of that list. We could also put in train the necessary studies and other preparatory work leading to a further Conference in the fall.

Since we last met, I have also had the opportunity to review the considerable list of proposals which the federal government put forward at the February Conference or at the meetings leading up to it. We were seeking, in all the ideas we put forward, a constitutional balance for the future which would serve Canadians well. We had in mind things the federal government wished to achieve, and the aspirations of the provinces. When we come together again, I would like to give you my assurance that, with one exception I shall mention, all of the federal proposals will remain on the board, and we can continue our discussions from that point.

The one exception is the applicability of the declaratory power to resources. We had proposed that, in the future Constitution, the power would no longer be capable of being used by Parliament to take legislative jurisdiction over the development and disposition of all those kinds of natural resources which we were defining together. The federal government was planning to rely solely on the emergency power as the means of controlling these matters in the unlikely case where a province should act (or refuse to act) in a way that would cause great harm to other provinces or to Canadians generally.

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World events of recent months have caused us to take another and most careful look at this question, and we have become more concerned. While we all hope that circumstances would never necessitate action by a federal government, we are, in renewing the Constitution, planning for the decades ahead. I would propose therefore that the declaratory power over resources remain in place but be capable of use only in circumstances of compelling national interest. We would, of course, be prepared to review this in the light of whatever agreements are reached among us in future concerning a renewed definition of the federal emergency power.

I will be interested in having your comments on the proposed timing and agenda for an early Constitutional Conference. I remain firm in my belief that the renewal of our Constitution is essential to our unity and at the same time, essential to our future economic progress and well-being.

Sincerely,