

August 5, 1980

ONSHORE RESOURCES

A. Elements essential to any "package" involving onshore resources

- (federal concession) (1) Provincial Jurisdiction to be set out in the new Constitution, covering the development and management of non-renewable resources, forestry and electrical generation, and primary production from these resources. (This was provided for in the Best Efforts Draft (BED) of February 1979, and left "on the table" by the federal delegation during the July 1980 meetings of the CCMC.)
- (federal concession) (2) Provincial Jurisdiction to be extended to permit indirect taxation of the resources in (1) above, provided no discrimination in taxation falling inside and outside the province. (This was in the BED of February 1979, and left "on the table" during the July 1980 meetings of the CCMC.)
- (provincial concession) (3) A New Section 121 acceptable to the federal government and providing protection for the Canadian Economic Union against discrimination, on the basis of province, in governmental measures dealing with the movement of goods, services and capital. (This was proposed by the federal delegation during the July 1980 meetings of the CCMC and would provide particularly, so far as resources are concerned, protection from discrimination in supply and in price.)
- (provincial concession) (4) An expanded Section 91(2) making clear that Parliament's trade and commerce power covers not only goods but services and capital as well.
- (federal concession) (5) The Declaratory Power to be usable to acquire jurisdiction over resources against a province's wishes only with ratification by a renewed Upper House, or with a 2/3 majority vote in the House of Commons in those cases where Upper House ratification was not forthcoming.

B. Possible Packages

First Package - include A(1), (2), (3), (4) and (5) above, plus these features:

- (a) for International Trade and Commerce in resources, retain exclusive federal jurisdiction (the BED of February 1979 proposed concurrent jurisdiction with full federal paramountcy);

(federal  
concession)

- (b) for Interprovincial Trade and Commerce in resources, provide for concurrent federal and provincial jurisdiction with full federal paramountcy (this is a smaller concession than the BED of February 1979 in which federal paramountcy was limited to situations of "compelling national interest").

Second Package - include A(1), (2), (3), (4) and (5) above, plus these features:

(further  
federal  
concession)

- (a) for International Trade and Commerce in resources, provide for concurrent federal and provincial jurisdiction with full federal paramountcy (as in the BED of February 1979);
- (b) for Interprovincial Trade and Commerce in resources, same as for international in (a) above (and as in (b) of First Package).

Third Package - include A(1), (2), (3) (4) and (5) above, plus these features:

(further  
federal  
concession)

- (a) for International and Interprovincial Trade and Commerce generally, provide for concurrent federal and provincial jurisdiction with full federal paramountcy (this would cover all resources and not just those in A(1) above, and all other trade besides. It would also extend concurrency to S91(2) as newly expanded by A(4) above);

(further  
federal  
concession)

- (b) Provincial Jurisdiction over resource development and management (as in A(1) above) to be expanded to cover all resources except agriculture and fisheries which are covered elsewhere and differently in the Constitution;

(provincial  
concession)

- (c) for Intraprovincial Trade and Commerce generally, provide for concurrent federal and provincial jurisdiction with full provincial paramountcy (subject only to the federal "unilateral" powers).

Fourth Package - include A(1), (2), (3), (4) and (5) above, plus these features:

(further  
federal  
concession)

- (a) Provincial jurisdiction expanded from the coverage in A(1) to the wider coverage proposed in (b) of the Third Package;
- (b) the limitation on the Declaratory Power expanded to cover not only the provision in A(5) for Upper House ratification or a 2/3 vote in the House of Commons, but also to provide that any such use of the power would lapse automatically after two or three years (subject, of course, to further action by Parliament);
- (c) Intraprovincial Trade and Commerce generally, to be concurrent with full provincial paramountcy (as in (c) of the Third Package);
- (d) International and Interprovincial Trade and Commerce generally, to be concurrent with full federal paramountcy (as in (a) of the Third Package);

(further federal concessions)

(e) any use of federal power in (d) to set prices on resources against a province's wishes would require specific approval of Parliament; or

(f) any use of the federal power in (d) would be limited to circumstances of "compelling national interest" as determined by Parliament (the BED of February 1979 would have left the determination to the courts); or

(g) the setting of prices in (e) could be subject to Upper House ratification or a 2/3 vote in the House of Commons; or

(h) "compelling national interest" in (f) could be subject to Upper House ratification or to a 2/3 vote in the House of Commons.

Second Package

The added concession here is to restore the February 1979 offer of concurrency in international trade although with full federal paramountcy. While this concession could be viewed as a welcome improvement by Saskatchewan and other provinces, the package as a whole is most unlikely to be accepted. It might, however, be a much better starting point for constructive discussions than the First Package.

Third Package

The concession here, compared to the second package, is to open up the whole field of international and interprovincial trade and commerce to the provinces, subject to federal paramountcy. The novelty of this concession is to extend this to cover resources generally, thereby meeting strong views expressed by both British Columbia and Quebec. The concessions go beyond resources, however, and would interest all provinces, including Ontario. The "price" for these concessions is the proposal that the federal government receive concurrent jurisdiction over interprovincial trade. This would be a most useful power, even though subject to provincial paramountcy. Even the possibility of its use by Parliament would have an influence in future on the conduct of the legislatures.

The offering of this package - after discussions reach a dead-end on Package I or II - would provide food for considerable debate - and public evidence of real federal flexibility. It could become the basis from which "final" concessions might be made at the First Ministers Conference in September.

Fourth Package

It is in this package that an arrangement acceptable to most governments is likely to be found. It should be noted that the concession under (e), while important, is a good deal narrower in respect of resources than what was offered by the "compelling national interest" provision of the BED of February 1979. For that reason,

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Commentary (on Onshore Resources Packages)

First Package

In provincial eyes, the federal concessions under A(1), (2) and (5) and First Package (b) are the same or less than what the federal side proposed in February 1979. When these elements are combined with the federal demands under A(3) and (4), the presentation of the Package by the federal side will be more likely to generate anger than lead constructively towards agreement.

Second Package

The added concession here is to restore the February 1979 offer of concurrency on international trade although with full federal paramountcy. While this concession would be viewed as a welcome improvement by Saskatchewan and other provinces, the package as a whole is most unlikely to be accepted. It would, however, be a much better starting point for constructive discussions than the First Package.

Third Package

The concession here, compared to the second package, is to open up the whole field of international and interprovincial trade and commerce to the provinces, subject to federal paramountcy. The corollary of this concession is to extend A(1) to cover resources generally, thereby meeting strong views expressed by both British Columbia and Quebec. The concessions go beyond resources, however, and could interest all provinces, including Ontario. The "price" for these concessions is the proposal that the federal government receive concurrent jurisdiction over intraprovincial trade. This could be a most useful power, even though subject to provincial paramountcy. Even the possibility of its use by Parliament would have an influence in future on the conduct of the legislatures.

The offering of this package - after discussions reach a dead-end on Package I or II - would provide food for considerable debate - and public evidence of real federal flexibility. It could become the basis from which "final" concessions might be made at the First Ministers Conference in September.

Fourth Package

It is in this package that an arrangement acceptable to most governments is likely to be found. It should be noted that the concession under (e), while important, is a good deal narrower in respect of resources than what was offered by the "compelling national interest" provision of the BED of February 1979. For that reason,

if something more than (e) was thought necessary, the proposal under (g) might be a better concession to make than the one under (f).

Note--The attitude of the provinces towards the "packages" above will be strongly conditioned by federal proposals under the items "offshore resources" and "fisheries".

Offshore Resources

- (1) The federal system of exploration permits would take offshore resource revenues received by provinces into account in the same way as provincial resource revenues are taken into account.
- (2) Any payments made by Canada to the international community in connection with mineral resource development on the continental shelf would be a first charge against such development, making provisions for any revenues that might flow to adjacent coastal provinces to the Government of Canada.
- (3) The basic principles governing the disposition of federal funds on offshore resources, designed to ensure a fair share of the benefits to all Canadians, would apply equally to offshore resources.
- (4) All the federal "powers" of jurisdiction (i.e., the trade and commerce power, defence, etc.) apply to the offshore, as they apply to onshore.

3. Possible Packages

First Package - includes A(1), (2), (3) and (4) above plus these features:

(Federal concession)

- (a) An administrative arrangement: any coastal province or group of provinces could enter into an agreement with the federal government for an administrative arrangement along the lines tentatively worked out in 1977 with the three Maritime Provinces. This would entail day-to-day administration by a federal agent acting under policy direction from a joint federal-provincial board, with equal numbers of members from the federal side and the provincial, and a rotating chairmanship.
- (b) As an improvement over the 1977 arrangement, decisions within the board would not be subject only to the Federal Minister, they would be appealable initially to the federal and provincial ministers concerned, and then to the First Ministers concerned. If agreement could not be reached, a final Federal Minister would be appointed in the case where there should still be a Federal Minister. If agreement could not be reached, a final Federal Minister would only be appointed to the Board of Canada.

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OFFSHORE RESOURCES

A. Elements essential to any "package" involving offshore resources

- (1) The federal system of equalization payments would take offshore resource revenues received by provinces into account in the same way as provincial onshore resource revenues are taken into account.
- (2) Any payments owing by Canada to the international community in connection with mineral resource development on the continental shelf would be a first charge against such development, taking precedence over any revenues that might flow to adjacent coastal provinces or to the Government of Canada.
- (3) The basic principles governing the imposition of federal taxes to onshore resources, designed to ensure a fair share of the benefits to all Canadians would apply equally to offshore resources.
- (4) All the federal "heads" of jurisdiction (e.g., the trade and commerce power, defence, etc.) apply to the offshore, as they apply to onshore.

B. Possible Packages

First Package - include A(1), (2), (3) and (4) above, plus these features:

- (a) An Administrative Arrangement: any coastal province or groups of provinces could enter into an agreement with the federal government for an administrative arrangement along the lines tentatively worked out in 1977 with the three Maritime Provinces. This would include day-to-day administration by a federal agency acting under policy direction from a joint federal-provincial board, with equal numbers of members from the federal side and the provincial, and a rotating chairmanship;
- (b) As an improvement over the 1977 arrangement, disagreements within the Board would not be settled only by the federal Minister, they would be appealable initially to the federal and provincial Ministers concerned, and then to the First Ministers concerned. If agreement could not be reached, a final federal decision could be appealed to the new Upper House whose ruling could only be overturned by the House of Commons;

(federal  
concession)

(federal  
concession)

(c) As an improvement over the 1977 arrangement, which would have been covered by federal legislation rescindable at any time, provision for the existence of the joint boards in (a) above could be made in the Constitution itself, and a statement of their purpose could be included as an annex to the Constitution;

(federal  
concession)

(d) As an improvement over the 1977 arrangement, rather than having 75% of the revenues "normally accruing to the owners" flowing to the adjacent province, this figure could be raised to 100% (with or without provision for part of the revenue to flow elsewhere once a province, or its people, reached a certain level of wealth);

(federal  
concession)

(e) As an improvement over the 1977 arrangement, and as a protection for the adjacent provinces, the federal government could subscribe to the principle that the general levels of those kinds of revenues "normally accruing to the owners" in respect of the offshore should be comparable to those collected by provinces producing comparable resources onshore, taking into consideration, however, different levels of production costs;

(f) As in the 1977 arrangement, a limited range of appropriate provincial legislation would be made to apply in the offshore;

(g) As in the 1977 arrangement, the question of ownership would be set aside, subject of course to the possibility that private parties could raise the issue before the courts. If administrative arrangements along the above lines were working, however, there would be little incentive for this to happen.

Second Package - include A(1), (2), (3) and (4) above, plus these features:

(further  
federal  
concession)

(a) An improved administrative arrangement as in the First Package (but see (b) and (c) below);

(b) Any coastal province which wished to undertake the day-to-day administration of federal and provincial legislation, would have the right to do so, with a federal agency to do the work for provinces which did not wish to take this on;

(further  
federal  
concession)

(c) Parallel federal and provincial legislation to govern the offshore would be prepared, with provincial legislation, to have its legal application offshore through a delegation of federal legislative authority provided for in the Constitution. This delegation would be non-rescindable without the province's agreement, but in the case of conflict, the federal legislation would apply (or would apply in limited circumstances to be worked out). Differences of view encountered in the preparation of initial legislation and subsequent changes would be handled by the joint boards, with appeal mechanisms as in (b) of the First Package.

Third Package - include A(1), (2), (3) and (4) above, plus these features:

- (a) All the features of the Second Package except:
- (b) In place of the delegated legislative arrangement in (c) of the Second Package, accept the concept of concurrent federal and provincial jurisdiction with federal paramountcy, coupled with an appeal mechanism as in (b) of the First Package.

(further federal concession)

(further federal concession)

Fourth Package - the Third Package, plus a constitutional specification that the offshore resources are owned jointly by the adjacent province and Canada. (Note: ownership beyond the 12-mile limit is a concept limited by international law. Any change in ownership would also have to be subject to whatever rights the native peoples may have in the offshore resources.)

(further federal concession)

Fifth Package - the Third Package, plus a transfer of ownership to the adjacent provinces, with Parliament retaining, however, certain overriding powers on the timing and pace of development and production (the note in the Fourth Package applies here as well).

Second Package

This package is very close to the proposal Newfoundland made in 1979, a proposal which was rejected by the federal government at the time. Its major advantage over the First Package, in provincial eyes, lies in the possibility of provincial administration and in a legislative arrangement which would be close to concurrency. It is likely to be attacked, however, by Newfoundland and Nova Scotia particularly, on the same grounds as the First Package - i.e., it solves the ownership question and does not give any real jurisdiction to the provinces.

Third Package

This would go a long way to meet provincial demands, and would likely be likely more difficult to live with than the Second Package.

Fourth Package

This might be a compromise attractive to many provinces and to the public. It would not appear to concede in practice any more authority or jurisdiction than the Third Package.

Fifth Package

While this would concede to the provinces 100% on the ownership question, it could be done in such a way as to leave the federal government with jurisdictional powers in areas not yet defined, concerning development and production.

Notes-The attitude of the provinces towards the "packages" above will be conditioned to some degree by federal proposals under the items "Resource Ownership and Interprovincial Trade" and "Fisheries".

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Commentary (on Offshore Packages)

First Package

In provincial eyes, any "administrative arrangement" without change in jurisdiction represents a federal withdrawal from its February 1979 offer to explore concurrent jurisdiction. While the provisions of the First Package go a long way to meet certain concerns of the coastal provinces, they do not deal with the question of jurisdiction, and they continue to set aside the question of ownership. The First Package does not meet the proposition, agreed to by all provinces in the July discussions, that "offshore resources be treated in a manner consistent with constitutional provisions for resources onshore".

The federal government has promised to table a new proposal for administrative arrangements (perhaps along the lines of the First Package) when the CCMC reconvenes on August 26. It is most unlikely, however, that any kind of agreement can be reached with the coastal provinces on this basis.

Second Package

This package is very close to the proposal Newfoundland made in 1973, a proposal which was rejected by the federal government at the time. Its major advantages over the First Package, in provincial eyes, lie in the possibility of provincial administration and in a legislative arrangement which would be close to concurrency. It is likely to be attacked, however, by Newfoundland and Nova Scotia particularly, on the same grounds as the First Package: i.e., it dodges the ownership question and does not give any real jurisdiction to the provinces.

Third Package

This would go a long way to meet provincial demands, and would likely be little more difficult to live with than the Second Package.

Fourth Package

This might be a compromise attractive to many provinces and to the public. It would not appear to concede in practice any more authority or jurisdiction than the Third Package.

Fifth Package

While this would concede to the provinces 100% on the ownership question, it could be done in such a way as to leave the federal government with jurisdictional powers it does not have onshore, concerning development and production.

Note--The attitude of the provinces towards the "packages" above will be conditioned to some degree by federal proposals under the items "Resource Ownership and Interprovincial Trade" and "Fisheries".

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FISHERIES

A. Elements essential to any "package" involving Fisheries

- (1) Any change in jurisdiction would have to be without prejudice to any rights of the native peoples.
- (2) Any change in jurisdiction over the fisheries, which had the effect of reducing Parliament's power to deal with environmental problems in interprovincial or international waters, would require a simultaneous compensating change at some appropriate place in the Constitution to ensure the continuance of that power.
- (3) Any change in jurisdiction should leave Parliament with adequate power to deal with diseases in fish.

B. Possible Packages

First Package - include A(1), (2) and (3), plus these features:

- |                      |  |
|----------------------|--|
| (federal concession) | (a) transfer jurisdiction over the <u>inland fisheries</u> to the provinces;   |
| (federal concession) | (b) transfer jurisdiction over <u>specified sedentary species and marine plants</u> to the provinces;  |
| (federal concession) | (c) retain federal jurisdiction over <u>diadromous species</u> (salmon) and over the <u>sea coast fisheries</u> ;  |
| (federal concession) | (d) respecting the sea coast fisheries and the <u>diadromous species</u> , there would be an <u>administrative arrangement</u> for joint consultation and policy making, the details to be worked out for presentation to the CCMC on August 26; |
| (federal concession) | (e) respecting the <u>administrative arrangement</u> , there would be recognition of the consultation mechanism in the Constitution, and a statement of its purpose could be included as an annex to the Constitution.                           |

Second Package - include A(1), (2) and (3) plus these features:

- |                      |   |
|----------------------|---|
| (federal concession) | (a) all of the features of the First Package;   |
| (federal concession) | (b) in respect of the administrative arrangement, acceptance of the <u>joint board concept</u> (as in offshore resources) with an appeal procedure to deal with disagreements. (While there |

would be consultation on the total catch for any species, and the quota of that catch to be assigned as a total to the fishermen of each province, the federal decision on these matters would not be subject to the appeal procedure mentioned.)

Third Package - include A(1), (2) and (3) plus:

(further federal concession)

- (a) all the features of the Second Package;
- (b) retention of exclusive federal jurisdiction respecting the protection, total catch and allocation by province, of the sea coast and diadromous species;
- (c) concurrent jurisdiction with the provinces on all aspects of sea coast and diadromous fisheries not excluded by (b) above, with full federal paramountcy in all circumstances.

The work of the committee would be to study the proposals and to report to the committee on the proposals and to recommend to the committee the proposals which it would recommend to the government.

Final Report

This report should be accepted by all provinces. How it should be accepted is a matter for the committee to study.

The work of the committee would be to study the proposals and to report to the committee on the proposals and to recommend to the committee the proposals which it would recommend to the government.

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Commentary (on Fisheries)

First Package

The various items in this package have been explored as possibilities by the federal representatives during the CCMC discussions of July 1980. They have not been formally offered. The federal side is committed to presenting more details of an "administrative proposal" when the CCMC meets again on August 26. Newfoundland, British Columbia and Quebec will reject this package as insufficient, and they will have sympathy from some others, probably including Ontario. It is not a sufficient basis for agreement.

Second Package

The more elaborate administrative proposal would still be opposed by the same provinces as with the First Package. The opposition would be less strong, however, and would evoke less sympathy among the others. It is at least a possible basis for an agreement, perhaps with all but Newfoundland and Quebec.

Third Package

This would likely be accepted by all provinces. How seriously it would upset the federal operation is a matter for study.

Note--The attitude of the provinces towards the "packages" above will be conditioned to a considerable degree by federal proposals under "Offshore Resources" and to some degree by federal proposals under "Resource Ownership and Interprovincial Trade".