

July 30, 1980

NOTE FOR: Messrs. Gibson
Veilleux
Gwyn
→Goldenberg

May I please have your comments?

Spence
for: David R. Cameron

Attachment

I thought you might find it useful if we gave you our thoughts on the recommendations that might be placed before the Committee meeting this afternoon and the Cabinet meeting on Thursday.

The recommendations are distilled from the Discussion Paper and from my 28 July 1980 covering memorandum to the Prime Minister.

Recommendation 1. That authority be given to develop new positions in the five areas of resources, offshore resources, communications, fisheries and the Senate, on the understanding that these positions will be placed before Ministers for approval before the CCMC reconvenes on August 26.

Recommendation 2. That officials, acting under my direction, be given authority to enter into bilateral discussions with some provinces (e.g., Newfoundland and Nova Scotia on offshore resources, Saskatchewan on resources) prior to the August 21-22 Premiers' meeting, and that they be authorized to advance new positions provided that these positions have the support of myself, Mr. Roberts and the Minister of the appropriate line department. It would be understood that these would be subject to ultimate Cabinet approval.

Recommendation 3. In the event that unilateral action becomes necessary, that guidance be given on the most likely package that will be selected by the Government, so that contingency plans can be developed now; further, that:

- i) Ministers indicate whether they are prepared to act unilaterally in areas of shared or purely provincial jurisdiction without provincial agreement, even if this action involves a transfer of power from the federal government to the provinces.
- ii) Ministers discuss what, other than unanimity, constitutes federal-provincial agreement.
- iii) Ministers indicate, assuming agreement cannot be reached, whether they would wish to hold a national referendum on their desired package before proceeding to amend the Constitution.
- iv) Ministers consider how soon after the September First Ministers' Conference (assuming no agreement) a Joint Address on the Constitution might be introduced in Parliament, and how timing on that issue would be related to the scheduling of the budget.

In addition to these broad areas in which we have suggested the above recommendations for your consideration, there are certain specific items upon which it is important to receive guidance. We list below three which we think require attention now, recognizing that others will need to be dealt with later in the month.

Resource Ownership

The federal government told the provinces that the Best Efforts Draft is no longer acceptable with respect to interprovincial and international trade and with respect to the declaratory power. However, we told the provinces that progress on powers over the economy could mean progress on resources and offshore resources.

We now need guidance on possible fall-back positions.

1. To meet the problems of the CIGOL case, we have indicated a willingness to consider concurrent jurisdiction with unrestricted federal paramountcy in international and interprovincial trade in resources.
2. It would be possible to modify (a) above by offering concurrent jurisdiction with federal paramountcy in cases of "compelling national interest" where "compelling national interest" is whatever the House of Commons declares it to be.
3. We have basically offered not to use the declaratory power with respect to resources except where such use has been ratified by a new Upper House.

Do we have the authority to use any or all of the three approaches?

Offshore Resources

Offshore resources is one of the items on which there has to be a federal move if agreement on a package is to be achieved.

The provinces expect us to come forward with a detailed proposal on administrative arrangements, which would be more favourable to them than the 1977 Memorandum of Understanding, in terms of decision-making and revenue-sharing.

All provinces agree with the principle that offshore resources should be treated in a manner consistent with constitutional provisions for resources onshore.

Given the above, federal opening and fall-back positions could range all the way from moderately improved administrative arrangements (which would still be unacceptable to most, if not all, provinces), to delegating complete legislative authority to the provinces without actual ownership. The latter possibility would probably satisfy the provinces. The question is how far away from that we should open.

We need to develop various positions. Can we do so, under your direction, and in consultation with the Minister of Energy, Mines and Resources, and the Prime Minister?

Powers Over the Economy

With respect to powers over the economy, some provinces have expressed their opposition to the role of the courts in deciding on derogations from Section 121. It has been suggested that derogations be approved by a political rather than a judicial mechanism. May we explore whether an intergovernmental institution or a reformed Upper House could meet our objective while resolving difficulties perceived by the provinces?

Michael J.L. Kirby

DR Cameron:fg