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July 19, 1980

MEMORANDUM TO GERARD VEILLEUX

FROM: EDDIE GOLDENBERG

I have prepared four pieces of paper which may help in putting our case on Powers Over the Economy:

- 1) A layman's explanation of what we seek to achieve.
- 2) A point by point answer to Mr. Romanow's statement;
- 3) A preliminary legal analysis and commentary of the new Section 121;
- 4) An argument on the role of the Courts.

I shall try to come to Vancouver on the Jet Star (if there is room) on Monday afternoon so that we may meet at dinner.

Eddie Goldenberg

A. The Federal Position on Powers Over the Economy

Last week at the request of the provinces, I promised to set out in as clear and simple terms as possible exactly what the Federal Government is seeking to achieve in its proposals to secure constitutionally the Canadian economic union.

Perhaps the best way to phrase what we are proposing is to use the expression "harmony in diversity". We want to harmonize the flow of people, capital, goods and services in Canada; yet, we want to maintain all the advantages of diversity which is the very essence of a federal system of government.

We believe very strongly that there are certain basic rights inherent in Canadian citizenship. These rights must include the ability of any Canadian to move anywhere he wants in Canada, to hold a job wherever he wants in Canada, to invest his money wherever he wants in Canada, and to purchase and sell goods and services wherever he wants in Canada.

For Canadians to be able to exercise these rights freely requires, in our view, constitutional provisions to prohibit governments -- both Federal and provincial -- from erecting discriminatory barriers to the free flow of

people, services, goods and capital. It is essential to prohibit discrimination based on province of residence of persons, or the province of origin or destination of goods, services and capital.

In very recent years, we have seen more and more evidence of new barriers being created in Canada. Some examples include the blocking by provincial governments of the sale of provincial companies to out of province companies; discriminatory purchasing policies where, for example, an Ontario municipality refused to buy buses manufactured in Quebec; preferential provincial hiring laws which give rise to retaliation by other provinces.

This trend has very dangerous implications not only in terms of economic efficiency, but more important in terms of bringing into question the whole concept of Canadian citizenship as being something which, by its very nature, must transcend provincial boundaries. If Canada is to be more than a loose association of quasi sovereign states, it is essential that a renewed constitution enshrine the very principle of a single Canadian citizenship. This can best be done by consecrating in our fundamental law the essential operating principles for an economic union.

The Government of Canada recognizes that economic mobility is not the sole aim of the Canadian Federation. The

to ensure that discriminatory laws and practices which  
essence of federation requires political, cultural, and  
social differences throughout the country. A modern  
economy requires intervention by all levels of government.  
It would be unthinkable to enshrine an absolutely free  
market in a constitution and we are not proposing to do so.

We recognize that one of the objectives of the Canadian  
federation is the reduction of regional economic disparities  
including the reduction of disparities within provinces. Our  
proposals will in no way hinder this very important objec-  
tive. We will not put an end either to federal or to pro-  
vincial economic development programs.

We recognize that a very important social objective  
of our society is to promote the advancement of minority  
groups. Nothing in our proposals is intended in anyway to  
hinder affirmative action programs.

We recognize that in a federal system, different  
governments are elected on different social and economic  
platforms. Nothing in our proposals will enshrine any par-  
ticular social or economic system in the constitution.  
Public or private ownership will not be encouraged or dis-  
couraged by the proposals of the Government of Canada.

The major objective of the Federal proposals is

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to ensure that discriminatory laws and practices which by their very nature can give rise to retaliatory action will be prohibited in the new Canadian constitution.

I have said that the Government of Canada is not bound to the particular legislative drafts which have been put forward. This is not the place to argue exactly how the draft will be interpreted by the courts. What I shall do here is to take each of Mr. Romagosa's assertions and compare them with the intent of the Federal proposals. This will enable us to know where we have a disagreement in principle and where we agree in principle but require better drafting or better legal advice.

Assertion One

The Federal Government would prescribe that any interference with free market forces be left solely to the Federal Government.

Response

This is completely false. Nothing is proposed in Section 121 which would prevent provincial interference with free market forces within the province. The only restriction -- which applies with equal force to the Federal Government -- is with respect to discriminatory practices which would impede the Canadian economic union, i.e., provincial policies which could give rise to retaliation by other provinces. Mr. Romagosa probably misinterpreted section 121(1). This would not give the power to the Federal Government. It would merely ensure

B. An Answer to Mr. Romanow's Statement

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Assertion One

The Federal Government would prescribe that any interference with free market forces be left solely to the Federal Government.

Response

This is completely false. Nothing in proposed Section 121 would prevent provincial interference with free market forces within the province. The only restriction -- which applies with equal force to the Federal Government -- is with respect to discriminatory practices which unduly impede the Canadian economic union, i.e., provincial policies which could give rise to retaliation by other provinces. Mr. Romanow probably misinterprets section 121(3). This would not give new power to the Federal Government. It would merely ensure

that programs within existing Federal power, such as DREE, the regionally differentiated investment tax credit, the Borden Line, etc., would not be considered invalid.

Assertion Two

Certain problems are not serious enough to threaten the functioning of our common market.

Response

It is of course a matter of judgment as to when a problem is so serious as to require constitutional reform. It seems to us that there is a constitutional void which is giving rise to more and more problems. We have an opportunity of curing them now before the disease becomes an epidemic.

Assertion Three

Saskatchewan is dealing with problems created by the activities of multi-national corporations.

Response,

Surely it is not beyond the ingenuity of the Government of Saskatchewan to regulate the activities of both Saskatchewan companies and non-Saskatchewan companies in the same way and still accomplish the objective of restricting absentee ownership of farm land.

Assertion Four

The Federal Government is seeking the exclusive power to regulate competition in Canada, not interprovincial competition, but all competition.

Response

Mr. Romanow has misinterpreted the intent of the Federal proposal. The Federal trade and commerce power has been interpreted by the Courts as applying to interprovincial and international trade. The Federal proposal is intended merely to make clear that Parliament can legislate to regulate competition otherwise than through the

exercise of its jurisdiction over commercial law and also where necessary within a province to ensure the operation of the Canadian economic union.

The Federal Government is not seeking jurisdiction over self-regulating professions within the provinces. The new section 121 would prohibit discrimination by the professions based on province of origin but would not prohibit entry based on requirements of knowledge and competence <sup>in</sup> ~~of~~, for example, provincial laws.

Assertion Five

The courts may say that the flow of capital is unduly impeded by Saskatchewan's Crown mining corporation's entitlement to take an ownership position of up to fifty per cent in any new mining venture.

Response

There is no intention whatsoever to prohibit such a practice. The practice does not discriminate by province of origin of capital as it applies equally to Saskatchewan private capital.

Assertion Six

The Federal Government would have power to change Ontario Hydro's position as the sole producer and marketer of electric power in Ontario.

Response

There is absolutely no such intention in the proposal which would clarify the Federal trade and commerce power to include the regulation of competition.

Assertion Seven

The Saskatchewan Government Insurance Plan might be beyond provincial power.

Response

Assertion

The Federal proposals would not affect the Saskatchewan Government Insurance Plan. The Saskatchewan would not be allowed to dedicate the Plan requires all Saskatchewan residents to purchase their auto insurance from one government owned company. It does not discriminate against private non-Saskatchewan insurers as opposed to private Saskatchewan insurers. Perhaps a drafting change will be required to protect state monopolies in this case and in the Ontario Hydro example.

Assertion Eight

Alberta may be prevented by the Federal Government from dedicating a portion of its petroleum reserves to the establishment of a petro-chemical plant in Alberta.

Response

There is absolutely nothing in the Federal proposal which will prevent Alberta from using some of its petroleum reserves for such a purpose. However, the principle of free movement of goods would not allow a province or provincial agency from engaging in deliberately discriminatory supply practices such as refusing to supply PetroSAR for the reason that it is located in Ontario.

C. Preliminary Legal Examination and Commentary on  
Assertion Nine

Section Saskatchewan would not be allowed to dedicate its limited natural gas reserves to distribution solely within its own border.

Response

Nothing in the Federal proposal would prohibit legitimate conservation policies as long as they are not discriminatory policies masquerading behind the guise of ~~protectionism~~ conservation

This section does not apply to the movement of goods, services and capital within a province and among provinces. Therefore, provincial governments will be able to maintain all of their policies and programs which create differential treatment between residents and non-residents. These programs are not discriminatory against non-residents.

Furthermore, the word "protectionism" is used in the proposal precisely to ensure that discriminatory action is affirmative action and not discriminatory practices. The word "protectionism" is used to look at the intent of the government and not the effect.

C. Preliminary Legal Examination and Commentary on Proposed Section 121

Section 121(1)

The general purpose of the new Section 121(1) is to prevent federal and provincial governments from creating barriers to interprovincial trade either by law or through discriminatory practices. Discrimination would be prevented not only with respect to the movement of persons, but also with respect to the movement of goods, services and capital across Canada.

It is extremely important to understand that this section does not apply to the movement of persons, goods, services and capital within a province but merely between provinces. Therefore, provincial governments will be able to maintain all of their programs and policies which create differentiation within the province as long as these programs and policies do not discriminate against non-residents more than they discriminate against residents.

Furthermore, the word unduly has been put into the section precisely to ensure that programs and policies such as affirmative action are not caught in the net of discriminatory practices. "Unduly" will allow the courts to look at the intent of legislation and interpret

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it in a flexible way. This should be considered a protection for the provinces.

In other words, for a law or practice to be struck down, it must both discriminate on the basis of province of residence or province of origin or destination of goods, services and capital and must do so in a way that unduly impedes the operation of the Canadian economic union.

Section 121(2)

This is not considered to be a section of major importance. It follows the wording of the proposed Charter of Human Rights and is designed to ensure that public authorities will not have their hands tied by section 121 in the case of emergencies relating to disease or public disorder. If this section creates difficulties with the provinces, we are very willing to modify it as there is nothing of fundamental principle in it.

Section 121(3)

This section does not give new economic power to Parliament. It recognizes that Parliament, because of its national obligations, must pass laws which differentiate between provinces. There are countless examples of such laws, e.g., equalization, DREE, various farm programs, the Borden Line. This derogation to the

principle of non-discrimination takes into account the need for economic intervention across the country by the Government of Canada just as section 121(1) does not prohibit provincial governments from pursuing different policies in different regions within a province. In fact, Parliament will have to declare its differentiated policies to be in the national interest other than in the case of equalization while provinces will not have to declare their differentiated policies to be in the provincial interest.

Section 121(4)

This section extends the present section 121 to services and capital as well as to goods. It prevents the establishment of tariff barriers but does not deal with non-tariff barriers. In itself, it is not a sufficient extension of the present section 121 to create the proper foundations for the Canadian economic union.

D. The Role of the Courts

There seems to be considerable apprehension about the role of the Courts in the Federal proposal. It should be made very clear that all laws are subject to the interpretation of the Courts just as are all constitutions.

A new constitutional provision does not guarantee that every law will be tested in Court. It will be up to citizens who feel aggrieved to test laws which are, in their view, wrongly applied. The role of the Courts will be no different tomorrow than today.

It is a red herring to suggest that the proposed changes to Section 121 are dangerous because they will be applied by the Courts. The same argument could apply with equal validity to family law, communications, resource ownership, offshore resources, fisheries, and every other item on the list of twelve.