

D R A F T

CONFIDENTIAL
August 8, 1980.

TO: M. Mike Kirby
cc: Fred Blackburn

FR: Gérard Veilleux

SUBJECT: Negotiating Position on the Five Items
included in the Economic Package

You will find attached separate notes on the five items included in the economic package, namely, equalization, powers over the economy, resource ownership, offshore resources and fisheries. Each note outlines a position which Mr. Chrétien might wish to put forward at the August 26 CCMC meeting and further outlines a "fall back" position which Mr. Trudeau might ^{put forward} outline at the September 8 FMC meeting.

I would like to make the following comments with respect to these notes:

Equalization

This question has not really progressed in the last three years, essentially because of B.C.'s stance. We have ourselves demonstrated flexibility recently by accepting the changes Quebec put forward. I therefore recommend that at both the CCMC and the FMC we adopt a "listening stance" leaving it to B.C. to make its move. It would not necessarily be a bad thing if B.C. remained inflexible in the event we wanted to move unilaterally ~~without~~ ^{on ~~power~~ ^{items}} where there is *no unanimity*

Powers over the Economy

You will see, in the attached note, that I am recommending that Mr. Chrétien should remain firmly committed to the "operative principle" of an economic union, involving a judicial review. He should be prepared to show flexibility

in the wording of 121 and be prepared to ^{table} ~~add~~ a clause stating that "nothing in this confers additional powers to the federal government". ^{The} ~~that~~ would blunt the criticisms that this is a federal "power grasp"^b. In addition Mr. Chrétien should remain committed to 91(2) and 91 (2.1) but again be flexible ^d in the wording.

This is the position I propose to adopt at the Toronto meeting of officials next week. Do you agree?

As for the Prime Minister, we suggest that, if necessary, he be prepared to accept a political mechanism for review of derogations and ~~be~~ further ^{agree to postpone consideration of} prepared to jettison 91 (2.1) ^{to a later round of negotiations}.

Resource Ownership

I believe, that in the interest of the current negotiations, we now have to make a move on this item. This move should be designed with a view to finding out Saskatchewan's minimum position. Mr. Chrétien could therefore formally offer concurrency on interprovincial and international trade and commerce over resources but with unlimited federal paramountcy. All other items would also remain, ^d confirmation of ownership and indirect taxation. As for declaratory power, we should continue to indicate our willingness to have it ratified by a new upper-House. This is what I propose to discuss at the Toronto meeting of officials next week. Do you agree? (You should be aware that at my request, Bob Bryce has developed a most ingenious and promising alternative which the Prime Minister might use ^{at} for the FMC. We will brief you separately on this).

As for the FMC, I suggest that the Prime Minister consider defining "federal paramountcy" in a political manner,

i.e. as determined by Parliament. He might also consider the Bob Bryce suggestion relating to declaratory power.

You will note, in the attached, other more "far reaching" suggestions on trade and commerce. We could envisage a "double concurrency/double paramountcy" regime where provinces obtain concurrency over interprovincial and international trade in return for us obtaining some jurisdiction over intra provincial trade. I realize that this is a new idea; ^{AND that there are dangers in tabling new ideas at this time} it is given as "food for thought" for the time being.

Offshore Resources

We had a very productive meeting with Gadsby ^{and Harrison} on this question. We have developed a suggested position for Mr. Chrétien for his meeting with Premier Pickford. We may have to amend this for the August 26 CCMC meeting.

As for the FMC, a regime of concurrency with federal paramountcy could be envisaged. But we will have to discuss this with Mickey Cohen next week.

Fisheries

The position proposed for Mr. Chrétien for the August 26 CCMC is essentially a consolidation of the various elements that, one way or the other, are on the table now and with which Mr. Leblanc could agree.

As for the position for the Prime Minister, some ideas on further division of powers on fisheries are put forward in the attached note. These have not been discussed with the Department of Fisheries. We will await word from you as to whether and when you think we should do that ^{and will need your advice as to Nova Scotia's reaction to such proposals}

NOTE:

We will be meeting with Mickey Cohen on Monday August 11, at 10:00 a.m. to discuss resource ownership and offshore. We may have to amend our positions after that meeting or we may require political arbitration.

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FISHERIES

Of the various possibilities which exist, there would seem to be one "compromise" position which best reflects what the federal government could "live with" as a settlement of this item at the First Ministers Conference of September 8-12. Given that final position, it is possible to devise a reasonable "interim" position for use at the CCMC meeting of August 26-29. These positions assume adequate progress on other items of interest to the federal government:

(a) Interim Position for use at the CCMC (August 26-29)

- (i) Any change would have to be without prejudice to any rights of the native peoples, and to the power of Parliament to deal with diseases in fish and with environmental problems in interprovincial or international waters;
- (ii) Accept provincial jurisdiction over inland fisheries and specified sedentary species (e.g., oysters) and marine plants;
- (iii) Respecting seacoast and diadromous species (e.g., salmon) propose an administrative arrangement, including a joint body for consultation and policy making, whose existence and basic purpose would be specified in the new Constitution.

(b) Position for Final Settlement at the First Ministers Conference (September 8-12)

Note: While the "Interim Position" above has already largely been placed on the table by federal representatives from the Ministry of Fisheries and Oceans during the July meetings of the CCMC, what follows

below has not been discussed with the
Ministry and would be strongly opposed:

- (i) As in (i) of the "Interim Position";
- (ii) As in (ii) of the "Interim Position";
- (iii) Respecting seacoast and diadromous species
propose:

1. a joint body for consultation and policy making whose existence and basic purpose would be specified in the new Constitution (as in the Interim Position);
2. while retaining exclusive federal jurisdiction over international arrangements, conservation of the stocks, determination of the allowable catch for each species in each area and the allocation internationally and to each province, accept concurrent jurisdiction with the provinces on all other aspects of these fisheries with full federal paramountcy.

Note: This proposal should only be contemplated if its use could also bring about a settlement on other important items, particularly offshore resources.

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RESOURCE OWNERSHIP AND INTERPROVINCIAL TRADE

Of the various possibilities which exist, there would seem to be one "compromise" position which best reflects what the federal government could "live with" as a settlement of this item at the First Ministers Conference of September 8-12. Given that final position, it is possible to devise a reasonable "interim" position for use at the CCMC meeting of August 26-29. These positions assume adequate progress on other items of interest to the federal government:

(a) Interim Position for use at the CCMC (August 26-29)

- (i) Accept those parts of the February 1979 Best Efforts Draft (BED) dealing with provincial jurisdiction over particular resources and with indirect taxation respecting those resources (these have already been accepted by Mr. Chrétien during the July 1980 CCMC meetings);
- (ii) Accept provincial concurrency in international and interprovincial trade and commerce, subject to full federal paramountcy (this would be the same as the BED of February 1979 for the international aspect, and more stringent on the interprovincial aspect, as it places no limitation on federal paramountcy respecting "compelling national interest");
- (iii) On the use of the declaratory power on resources, continue to explore, with no commitment, possible "limitations" on federal freedom to act (Mr. Chrétien opened this process at the Vancouver meeting of the CCMC, raising the possible use of a new Upper House in this connection).

(b) Position for Final Settlement at the First Ministers Conference (September 8-12)

- (i) As in (i) of the Interim Position;
- (ii) As in (ii) of the Interim Position, but, for interprovincial trade and commerce accept a limitation on federal paramountcy to situations declared by Parliament in an enactment to be of "overriding national national interest" (this would leave the power with Parliament to define such situations; the BED of February 1979 would have left the discretion largely with the courts);
- (iii) On the use of the declaratory power on resources, accept in principle that ratification of a declaration by the House of Commons should be required, and that this should be expressed by a favourable vote from the representatives in a revised Upper Chamber of a majority of provinces containing a majority of the Canadian population.

Note: This could be given a definitive value in a September "settlement" even if no final arrangements to revise the Senate are agreed upon. The newly adopted Constitution could provide that the Senate would be revised within five years and would have this role respecting the declaratory power. It would also be provided, however, that in the meanwhile, provincial governments themselves would cast the "votes" in the ratification process.

There is also the possibility of providing for a House of Commons override on a two-

thirds vote as either a starting position or as a final position to be sought.

There are other possibilities which might be borne in mind:

- (a) extend concurrency on trade and commerce to cover all circumstances, and not just some resources. Federal paramountcy would apply on the international and interprovincial aspects, and provincial paramountcy would apply intraprovincially. The added federal influence within provinces would have to be weighed against greater provincial influence, particularly on the international front;
- (b) the position "for Final Settlement" above would still permit Parliament to declare oil and gas to be of overriding national interest on a continuing basis and allow prices to go on being set by federal Order-in-Council. Price setting can, in effect, take billions of dollars from one group and give them to another. It might be reassuring to the provinces and respectful of Parliament's traditional role in taxation and revenue to offer to accept a requirement that a parliamentary enactment be sought each time a price was set on a resource against the wishes of the producing province.

SECRET

A. Draft Economic Package

1) Resources

- 1) There are two compromise positions on resources. The first can be put on the table by Mr. Chrétien. Essentially it would be a revised Best Efforts Draft which (a) re-confirms the provincial ownership of resources; (b) allows the provinces to impose indirect - but non-discriminatory - taxes; (c) grants concurrent jurisdiction with unrestricted federal paramountcy in inter-provincial and international trade; (d) extends the ambit of the non-discrimination clause to include both pricing and supply; (e) drops any reference to the declaratory power.

What is required in the presentation is a clear explanation of how sub-section (c) would resolve the potash problem as well as other potential legitimate uses of this power by the provinces. There must also be a strong defence of why the Federal government cannot give up anymore jurisdiction over resources. And there must be a linkage between our concessions on resources and the rationale i.e. non-discrimination, for a strong Section 121 and revised 91(2).

The second compromise position which should be reserved for the Prime Minister would be to restrict federal paramountcy in inter- provincial trade to cases of over-riding national interest as declared by Parliament (as presently constituted) or by the House of Commons in the case of a reformed Upper House. There must be an explanation of the rationale for this concession, i.e. the need for an express political statement of why paramountcy is involved and the possibility of a

debate on the issue in Parliament (which is comprised of the elected representatives of all Canadians).

2) Economic Powers

In terms of powers over the economy, there is room for considerable apparent compromise without damaging our fundamental objective. Most of this should be offered by the Prime Minister for Mr. Chrétien must maintain a hard line on what is a popular issue.

Mr. Chrétien should table a revised Section 121 which takes into account the Ontario draft on regional development within a province and also should add a clause stating that no new powers are conferred on Parliament. As far as Section 91(2.1) is concerned, he should accept the Nova Scotia draft as a compromise regarding product standards.

The Prime Minister might consider first dropping Section 91(2.1) entirely as it may not be necessary at this time. With respect to Section 121, the Prime Minister could propose an institutional mechanism to deal with provincial derogations.

A derogation would have to be specified in the legislation; if not specified, a law [or practice] would be subject to the interpretation of the courts; if specified, the law could not take effect unless within a specified time frame i.e. 6 months, approval was obtained from a majority of legislatures including Parliament. Finally, such a law would be subject to sunset clause.

3) Equalization

There can be no compromise from the revised best efforts draft.

4) Fisheries

We must ask whether a much softer line on fisheries will counterbalance a tough position on the offshore.

5) Offshore

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