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November 23, 1981

MEMORANDUM FOR THE PRIME MINISTER

Globe and Mail Editorial on
the Amending Formula and
the Future of the Territories

On Saturday, the Globe and Mail published an editorial in which it argued that s. 4(1)(e) and (f) of the new resolution, which requires the agreement of Parliament and of at least seven legislatures with 50% of the population for the extension of a province into the territories or the establishment of new provinces, "was obviously a federal sop to the provinces, several of which have shown a desire to expand into the territories. ... Under the new deal any province anxious to plunder the resources of one of the territories could initiate the amendment for such annexation, bargain or persuade six of its fellows and the federal Government into going along, and take over. The people taken over would have no say in the matter." (A copy of the editorial is attached.)

If you are questioned on this matter in the Commons, you may wish to reply along the following lines:

1. Under the current constitutional arrangements (B.N.A. Act, 1871), the borders of a province could be extended into the territories with the consent only of the province concerned and of Parliament. It was under these arrangements that the boundaries of Quebec, Ontario and Manitoba were extended northwards. Under the new arrangements, it will be more difficult, not easier, for provincial boundaries to be extended into the territories: any such proposal would require decision by Parliament and the provinces collectively, and not merely the province or provinces concerned. Parliament, of course, will retain a veto.

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2. Under the current constitutional arrangements, Parliament could unilaterally create new provinces in the territories without provincial consent and this could have major consequences for the operation of the amending formula, which requires the consent of Parliament and two-thirds of the provinces representing 50% of the population for future changes. For example, Parliament could, if its unilateral power to create new provinces were not restrained, create 20 thinly populated provinces in the territories. With the support of these new provinces and of Ontario and Quebec, or of Ontario, British Columbia and Alberta, but without the support of any of the other current provinces, Parliament could seek the secure changes in the Senate or in the principle of proportionate representation of the provinces in the House of Commons. Under the provisions of s.41(1)(f), this will not be possible. The creation of new provinces will be subject to the consent of the provinces collectively. In assessing the impact of the creation of new provinces on the amending formula, the current provinces will have the opportunity of re-examining the amending formula itself before proceeding to sanction the entry of new provinces in Confederation. Thus, s.41(1)(f) is designed to protect the role of the provinces in the amending process and this protection seems appropriate if we are to maintain a federal system of government in Canada.
3. The amending formula only provides a formal role for legislative bodies that exercise authority under the terms of the distribution of powers in the Constitution of Canada: i.e., Parliament and the provincial legislatures. However, if there is no formal role for the territories in the amending formula, s.36(3) obliges the Prime Minister to invite elected

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representatives of the government of the Yukon and the Northwest Territories to participate in the discussions on any items affecting them on the agenda of the Constitutional Conference to be held within one year after patriation. The principle of consulting the territories on constitutional change is thus entrenched in the Constitution.

RS.

Roger Tassé

Attachment
J.R. Hurley/djs