



The Patriation and Amendment of the Constitution of Canada

*Brief Presented to the Special Joint Committee
on the Constitution by
Honourable Allan Blakeney, Premier*

December 19, 1980

Saskatchewan

Contents

	Page
Canada: A Federal State	1
Constitutional Amendment in Canada	3
The Need for Constitutional Reform	4
Federal-Provincial Negotiations: Towards Consensus	5
The Saskatchewan Approach	6
Federal Resolution on the Constitution: The Process	7
Federal Resolution on the Constitution: The Content	8
Saskatchewan's Proposed Changes	8
Resources	9
Part IV	11
Amending Formula	11
Equalization	13
Charter of Rights	14
Indian and Native Rights	17
Conclusion	18

Appendices

	Page
A. History and Analysis of Amendments to the B.N.A. Act	20
B. Conventions Governing Constitutional Amendment	27
C. Conventions Governing Constitutional Amendment: Quotations	28
D. 1979 Best Efforts Draft: Resource Ownership and Interprovincial Trade	30
E. 1979 Best Efforts Draft: Declaratory Power	34
F. Resources: Saskatchewan Draft	35
G. Amending Formula, Section 41: Saskatchewan Draft	37
H. Referendum Procedure, Section 42: Saskatchewan Draft	38
I. Referendum Rules Committee, Section 46: Saskatchewan Draft	40
J. Equalization, Section 31: Saskatchewan Draft	41
K. Indian and Native Rights, Section 24: Saskatchewan Draft	42

Co-chairmen, members of the committee.

I am here today to place before Parliament the position of the Government of Saskatchewan on the resolution you are considering. I do so with mixed feelings. It is clear that the constitution is an important subject. But it is not clear that it should be dealt with in this way. We are here, after all, because the government of Canada believes that federal-provincial negotiation, the traditional process of constitutional discussion, has failed, and must continue to fail. I do not share that belief.

In my presentation today, I want to review briefly some of the fundamental characteristics of our federal system, because I believe that such a review is essential to an understanding of the issues before us. In that connection, I will discuss the conventions which have governed constitutional amendment in Canada for the last half century. Also, I will talk briefly about the need for constitutional renewal, and the progress made in federal-provincial negotiations over the last few years. Finally, I would like to indicate ways in which, in my view, the resolution on the constitution should be changed, to make it more broadly acceptable.

Canada: A Federal State

It is not often in the history of a nation that the fundamental rules of its organization and government are brought into question. And that is as it should be. In the normal course of events, as we go about our everyday lives, we must be able to have faith in the essential elements of our national existence: our basic political institutions, the fundamental framework of our legal system, the shared values which bind us together.

It is only on rare occasions that basic questions demand examination and debate. I believe that Canada is now at such a juncture.

As we face the present challenge, as we build together for tomorrow, it is important that we remember our past. Nations, like individuals, must build upon what has gone before, must understand their past if they are to shape their future with any success.

In 1867, Canada was created as a federal state.

As you all know, a federal state has two orders of government: a national government to pursue goals common to all; and provincial or state governments to reflect and preserve the distinctive characteristics of the constituent units, of the regions.

In 1867, it was recognized that, in a country like Canada, only a federal form of government could work. Some may have desired a unitary state, but they knew it was not possible. Only a federal system could achieve union, while accommodating the great distances, the fierce regional loyalties, the linguistic and cultural differences, and the distinctive economies of the four uniting colonies. Only a federal system could achieve unity without imposing a totally unacceptable uniformity.

Lord Watson put it well, in an 1892 judgment of the Judicial Committee of the Privy Council:

The object of the (British North America) Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy . . . in so far as regards those matters which, by section 92, are specially reserved for provincial legislation, the legislation of each province *continues to be free from the control of the Dominion, and as supreme as it was before the forming of the Act.*

Our federal system has been tested many times. There have been periodic shifts in the balance between the two orders of government. But we have resisted the excessive centralization which has afflicted many states, just as we have resisted the decentralization which has crippled others. The Fathers of Confederation built, and their successors have preserved, a federation which is uniquely adapted to Canadian realities.

The wisdom of those early builders is perhaps even more apparent today than it was in 1867. The distances separating us have increased dramatically as Canada has grown from four provinces to ten. The linguistic duality evident in 1867 is still very much with us. Our cultural and ethnic diversity has grown enormously with the arrival of new Canadians from all over the world.

Now, more than ever, we need to preserve and strengthen our federal system. We need a strong central government to define and pursue national goals, to manage the national economy, to redistribute wealth among regions and individuals, and to promote Canada's interests abroad. We also need strong provincial governments, to respond to the distinctive needs, to meet the distinctive challenges, and to seize the distinctive opportunities of each province.

The rules which govern our federation are in need of adjustment, of updating, of renewal. But the purpose of renewal should not be to weaken either the federal government or the provinces. It should not be to establish the dominance of either over the other. It should be, rather, to strike a new balance more useful to contemporary Canadian society, a balance more able to preserve and build the unity of this country.

Constitutional Amendment in Canada

The essential feature of a federal state is the division of powers between the central government, on the one hand, and the states or provinces, on the other. And, to cite the words of the great English constitutional lawyer, A. V. Dicey, "It is not intended that the central government should have the opportunity of encroaching upon the rights retained by the states. . . ." The procedures for effecting changes in Canada's constitution have respected Dicey's interdiction against the central government encroaching on provincial rights.

We have prepared, in Appendix A, a brief history and analysis of amendments to the B.N.A. Act. Certainly, some of these amendments have not involved provincial consultation or provincial consent. But those have dealt almost exclusively with matters of concern only to the federal government, matters which since 1949 have been amendable by the federal government alone under section 91.1.

From the earliest days of Confederation, amendments which affected the rights and powers of provincial legislatures have been subject to provincial consent. There may be one exception to this rule: the amendment of 1871 which dealt with the creation of new provinces and the procedure for changing provincial boundaries. But this was the first amendment to the B.N.A. Act, and it took place before any firm conventions had had time to develop. All later amendments affecting federal-provincial relationships have been made subject to provincial consent.

If historical precedents tell us anything, it is that unilateral action has in the past been used to effect amendments of concern to the federal government alone. And amendments affecting both federal and provincial governments have, as an almost invariable rule, been subject to provincial consultation and provincial consent.

By 1931, the convention of provincial consent had become so firmly established that failure to reach agreement on an explicit amending formula prevented patriation of the B.N.A. Act. Under the terms of the Statute of Westminster, which was designed to terminate the colonial relationship of the Dominions, the power to amend the B.N.A. Act was left with the Parliament of the United Kingdom. To transfer the power of amendment to Canada in the absence of an agreed formula would have placed it in the hands of the central government. And that was acknowledged by all parties to be a violation of Canadian constitutional principles.

Great concern was shown at the time the Statute of Westminster was drafted to ensure that it did not upset Canada's federal arrangements. The Statute's provisions were extended to provincial jurisdiction only with the consent of the provinces. Provincial consent was secured to the wording of section 7 of the Statute, a section which is at the core of the patriation exercise, and which the federal government now proposes to repeal without the consent of the provinces.

The clear understanding about the immunity of provincial rights from unilateral federal initiatives has been confirmed by all amendments since 1931.

It has also been formally acknowledged in a paper on constitutional amendment published by the federal government in 1965. (See Appendix B.) That paper, published under the authority of the Honourable Guy Favreau, then Minister of Justice, identified four general principles or conventions governing constitutional amendment. These conventions, while “not constitutionally binding in any strict sense”, had nevertheless “come to be recognized and accepted as part of the amendment process”. The fourth and most important principle was:

the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces.

The strength of this convention, the illegitimacy of unilateral amendment by the federal government, has been recognized by Canada’s political leaders for decades. Appendix C contains relevant quotations from Louis St. Laurent, Mackenzie King, Arthur Meighen, and others.

Yet now the federal government proposes to act unilaterally, in breach of the firmly established constitutional convention. What it proposes may be legally possible. It is constitutionally wrong. It is not federalism. It is not Canadian.

I am reminded of the words of the French political theorist, Denis de Rougemont:

It is easier to enact measures in one clean sweep, to simplify realities by a stroke of the pen, to draw plans with a ruler in an office and then to enforce their execution by crushing whatever resists . . . A federalist policy careful to moulding itself to an always complex reality requires infinitely more pains, more technical ingenuity and more understanding of the people it governs. It demands much more real political sense. (Some) methods are anti-political by definition, they consist simply in suppressing diversities through incapacity to fashion them into a living, organic whole.

The Need for Constitutional Reform

We in Saskatchewan are anxious to complete the work of building a constitution for Canada.

Canada is a mature and independent federal state. Yet our constitution does not fully reflect this fact. It contains no provision for amendment of essential features. It contains no provision for a supreme judicial authority for its final interpretation. It contains provisions for regional representation in central parliamentary institutions which, by general consent, have been ineffective for that purpose.

No federation in the world operates with these constitutional defects. Clearly, the task of constitution-making in Canada must address this unfinished business, must put in place these basic building-blocks of a constitution for a federal state.

But it must do more than that. Constitutional renewal in 1980 must also respond to accumulated pressures for change.

To the long-standing and deeply-held aspirations of French Quebecers. To the aspirations and needs of the new West, a West that is increasingly confident and assertive, and anxious to become a full and equal partner in Confederation. To the needs of the Atlantic provinces and the northern Territories. To the special concerns of Canada's Indian and native peoples.

Canada's eleven governments have tried hard to reach agreement on a package of constitutional changes that would address both needs: the need to complete unfinished business and the need to renew and revise our constitution in response to pressures for change.

Federal-Provincial Negotiations: Towards Consensus

Admittedly, the federal-provincial negotiations have been tough. But let me remind you of the words of Henry Wise Wood, a distinguished Western Canadian and President of the United Farmers of Alberta. In 1919, he wrote that:

True progress can come only as the result of thoughtful, continuous, co-operative effort. This progress will necessarily be slow, but it must be continuous. Nothing can hinder it more than the mistakes of thoughtless impatience.

Our attempts to reach agreement on new constitutional arrangements have not yet succeeded. But we have made good progress.

As you know, in the past decade or so, there have been two major attempts at re-writing Canada's constitution.

The first, which culminated in the Victoria Conference in 1971, was very nearly successful. In the end, agreement was not reached because, for Quebec at least, the proposed package of constitutional measures was too limited in scope.

We learned from the Victoria experience. We learned that constitutional negotiations, to be successful, must produce a broad package of reforms which would address the concerns and hopes of every region and province.

Our second attempt began in earnest in 1976. We all knew the task would be difficult and complex, as indeed it was. And yet we made good progress, despite the interruptions caused by two federal elections, several provincial elections, and the Quebec referendum.

I do not intend to review in detail the history of constitutional discussions over the last four or five years. I want to emphasize, though, that by September of 1980, after intensive negotiations, Canada's eleven governments had reached a significant measure of consensus on even the most contentious constitutional issues.

It would be pointless to speculate, here, on the reasons why governments failed to reach final agreement at last September's First Ministers' Conference. The point I want to make is that a negotiated agreement was within our grasp, and could have been achieved — with more time, with flexibility, and with goodwill on all sides. In deciding to proceed unilaterally, the federal government has brought an end to the process of federal-provincial negotiation. And it has done so not at a time when those negotiations were hopelessly bogged down, but at a time when progress had been made and might have been continued.

The Saskatchewan Approach

I am convinced that constitutional renewal is necessary. **Real** constitutional renewal, however, can be achieved only by consensus among governments. To reach consensus will require flexibility and patience. It will require, on all sides, a willingness to compromise. It will require a determined effort to devise a package which accommodates, as far as possible, the legitimate aspirations of each province and region, while maintaining an appropriate balance between the two orders of government.

Canada can work neither as a centralized state, nor as ten principalities. One defies our diversity, the other our common goals. Canada can work only as a balanced federation. United but not uniform. Respectful of regional diversity, linguistic duality, cultural pluralism. With a workable and efficient division of powers. Sharing fundamental values.

I hope that governments will return soon to the negotiating table, to complete the work that has been interrupted, the work of building the new Canada. In the meantime, however, we have before us the federal government's resolution which seeks, unilaterally, to patriate and amend the constitution.

Federal Resolution on the Constitution: The Process

Turning to that resolution, I must ask whether proceeding with it will contribute to the building of the new Canada. I must ask whether the process itself will help or hinder the attainment of that goal. I fear it will do the latter. The divisions created by unilateral action can only delay the real process of constitutional renewal.

Unilateral action strikes at the very heart of Canadian federalism. It defies the partnership upon which Canada is based — the partnership between orders of government, the bargain among cultures and regions.

Unilateral action also defies the constitutional conventions which have, for at least fifty years, governed the procedures for amending the B.N.A. Act. These conventions developed for a good reason. They responded to the essential requirements of a federal state. They respected the federal-provincial partnership. They ensured that constitutional changes affecting the rights of the provinces would have provincial consent.

Perhaps these conventions were too inflexible; perhaps we should develop better rules. But surely, in a federal state, that is not the prerogative of the central government alone.

I want to make perfectly clear my strenuous objection to the kind of unilateral action which the federal government is undertaking by means of this resolution. It is an action that seeks not only to patriate the constitution, but to amend it. To amend it in ways that go beyond federal jurisdiction, in ways that affect the rights and powers of the provinces, in ways that affect the balance so critical in a federal system.

What can be the justification for unilateral action? Many are offered. Most rely upon the failure of governments to reach agreement respecting patriation after repeated attempts since 1927.

But I remind you that the idea of entrenching a Charter of Rights was not discussed in 1927; it did not emerge until 40 years later. Some of the provisions of the particular Charter contained in the resolution appeared only last summer; others were revealed for the first time only two months ago. Clearly, many of these provisions have not been subjected to any substantial period of public scrutiny. Similarly, the proposal for an amending formula involving a referendum has not been under discussion for 50 years. Indeed, it has not been under discussion for 50 weeks, or even 50 days.

So the 50-year deadlock alone provides no justification for proceeding with this particular package, the implications of which are not yet fully appreciated.

In our federal state, unilateral action of the kind proposed must be condemned. The federal action may or may not be legal — the courts will make that determination. But it is clearly corrosive of the basic principles of federalism.

Federal Resolution on the Constitution: The Content

Given what I have said, it is obvious that our first preference would be to have this committee recommend against unilateral action, to urge that the resolution not be proceeded with, and to call for the early resumption of federal-provincial negotiations. As a realistic man, however, I am not hopeful that you would agree to adopt that course.

In light of this assessment, the Government of Saskatchewan is faced with three options.

One option would be simply to support the package in its present form. That option we reject out of hand because of major flaws in the resolution.

Our second option is to oppose the action outright and to try to stop it, using whatever legal and political instruments are available to us. We are reluctant to take this path, notwithstanding our objection to unilateral action. We are reluctant because we believe that a prolonged constitutional crisis at this juncture in our history could be damaging to the fabric of our national life and, accordingly, that every opportunity to avoid such a head-on confrontation should be pursued and exhausted before a policy of total opposition is embarked upon.

The third option — and the one we have been pursuing — is to try, by negotiation and persuasion, to have the contents of the resolution changed — to remove its most glaring inequities and to make it more broadly acceptable to all Canadians. If the contents of the resolution are substantially improved, we will be in a position to consider acquiescing in the process in the interests of lessening the level of controversy. If the contents are not substantially improved, we will have no option but to oppose both the process and the contents.

Saskatchewan's Proposed Changes

Since the beginning of October, I have spoken out on the specific improvements which Saskatchewan is proposing. They are based on three general principles:

1) the substance of the unilaterally-enacted changes must leave intact the essential features of Canadian federalism; 2) the changes must be accomplished in such a way that unilateral action can never be repeated; 3) the changes must address **some** of the real concerns of all regions.

Let me, then, review the specific changes we propose.

Resources

Throughout the federal-provincial constitutional talks, resources have been the number one issue for Saskatchewan and for Western Canada generally. And for good reason. In Saskatchewan, for example, resources provide more than one quarter of provincial government revenues, revenues that are used to finance a broad range of social and economic benefits for Saskatchewan residents. Resources represent our best hope of providing long-term economic stability and diversity, of ironing out the booms and busts of our economy. Resources are the key to Saskatchewan's continued growth and prosperity:

Our concern has been to clarify and confirm provincial powers to manage and tax resources. Powers which we thought we had, but which have been called into question by two recent judgments of the Supreme Court of Canada.

In neither case was the basic contest between the provincial government and the federal government, but rather between the provincial government and resource corporations. The issues surrounded two questions:

1. whether certain taxes on resource production were indirect taxes and therefore beyond the power of a provincial government;
2. whether arrangements to regulate resource production, where the resource produced was largely exported from the province, were beyond the power of a provincial government because they encroached on federal powers to regulate interprovincial and international trade.

In the constitutional talks which took place from October 1978 to February 1979, governments made real progress toward a resolution of this very complex issue. The First Ministers' Conference in February 1979 produced near agreement — not unanimity on every point to be sure, but near agreement — on a so-called 'best efforts' draft on resources (attached as Appendix D).

Let me outline what the 'best efforts' draft included. It included, first, an express and exclusive grant of jurisdiction to provinces to manage and develop resources. Second, a provision which would permit provinces to levy both direct and indirect taxes on resource production, if they did so in a way which did not discriminate between provincial residents and other Canadians. Third, a provision which would permit provinces to legislate with respect to the export of resources from the province. Finally, a limitation on the federal trade and commerce power to provide that it could override provincial law only in circumstances of "compelling national interest". The 'best efforts' draft was a product of many months of hard work and many months of tough bargaining. It perhaps wasn't perfect on every point, but I think it made a fair stab at reconciling divergent interests in a way that was generally acceptable to all governments.

There was also a consensus in February 1979 to limit the federal declaratory power, with respect to resources and other works, by subjecting its use to provincial consultation and consent. (See 'best efforts' draft on declaratory power, Appendix E.)

Then we came to last summer's constitutional discussions. When the ministers' committee began its work in July, the provinces were informed by the federal government that it no longer supported key sections of the 'best efforts' draft on resources, and that it would no longer agree to limit the use of the declaratory power. By the conclusion of the First Ministers' Conference the federal government was still offering less on resources than had been agreed to a year and one-half earlier. That federal position certainly did not assist the chances of success of the constitutional talks.

The resolution proposed by the federal government ignores resources entirely, and thus has nothing, other than patriation itself, which addresses the particular needs and aspirations of Western Canadians. It contains a labour mobility clause, something Ontario wants. It contains an equalization clause, something of interest to Atlantic Canada. It contains provisions on language rights, described by the federal government as important to Quebecers. But there is nothing that relates specifically to our region, Western Canada.

The federal government has indicated that it is now prepared to redress that imbalance, and to incorporate a resources section in the resolution. As we understand it, that section will confirm provincial jurisdiction over resource management; admit provinces to the field of indirect taxation of resources; and permit provinces to legislate in relation to interprovincial trade in resources, subject to unqualified federal paramountcy in the event of conflicting federal and provincial laws.

What it will not do is permit provinces to pass laws affecting international trade. For Saskatchewan, that is crucial. Almost all our resources are sold on world markets. We don't want to take over the federal government's responsibility for Canada's international trade policy. But we need to ensure that the steps we take to regulate the production of a resource in Saskatchewan will not be struck down by the courts merely because they are seen to affect international trade, a field that is reserved exclusively to the federal government.

We have produced a draft of a resources section (Appendix F) that we would recommend to the committee. It is patterned closely on the 'best efforts' draft of 1979, but with the "compelling national interest" test replaced by unqualified federal paramountcy, with respect to both interprovincial and international trade laws. In our view, this is a reasonable and responsible proposal.

Saskatchewan, at the same time as it urges reasonable flexibility on Ottawa's part, recognizes that there can be instances when federal laws must prevail, must be paramount, for the good of Canada as a whole. Saskatchewan also recognizes its obligation, and the obligation of all Canadians, to share the wealth derived from resources and other industries. Saskatchewan has shared its wealth from oil and other resources. We will continue to share in the future, and will share willingly on the basis of rules which are fair to all.

Part IV

I will not comment on the many problems with Part IV of the proposed Act. It is clearly a make-weight provision, not intended to be used.

Amending Formula

The proposed amending formula is the most unacceptable part of the federal resolution, the part which does most serious violence to the basic principles of federalism. Saskatchewan cannot endorse the resolution unless major changes are made in the amending formula.

In a federal state, the procedure for amending the constitution is the most important part of the fundamental law. And the amending formula proposed in the resolution is so weighted in favour of the central government, so biased against the interests of the provinces, that it threatens to destroy the balance that is crucial to the maintenance of Canada as we now know it.

As you know, the resolution offers two methods for amending the constitution of Canada. The first, the legislative alternative, requires, as well as the consent of Parliament, the consent of Quebec and Ontario; the consent of two of the four Atlantic provinces with 50% of the region's population; and the consent of two of the four western provinces with 50% of that region's population.

As has already been pointed out by others who have appeared before your committee, the population requirement for the Atlantic region appears to be unfair to Prince Edward Island, since it makes the support or opposition of that province totally irrelevant to the approval of any amendment. Saskatchewan would support a change in this provision.

But the formula, even with that change, is not ideal. For one thing, it gives, in legal terms, a perpetual veto to two provinces, Ontario and Quebec, irrespective of future shifts of population. By doing so, it lends support to those who attack the process, not only as unilateral but also as clearly aimed at curtailing the influence of the West regardless of its future growth. This allegation can be refuted by a simple change.

Saskatchewan prefers and proposes a variation of this formula, so that the formula would require, for provincial approval, the consent of a majority of the provinces representing 80% of the population of Canada, which majority must include two or more of the four Atlantic provinces and two or more of the four western provinces representing 50% of the population of the West. (See Appendix G.) The result would be the same for the foreseeable future, except that the constitution, in its terms, would not grant a continuing veto based on past rather than current circumstances.

We put this forward not as an ideal formula, but rather as an improvement over the formula proposed in the resolution, an improvement designed to meet one of the well-founded objections levelled against it.

The second proposed method for amending the constitution does not involve the consent of provincial legislatures at all. It employs, instead, the technique of the referendum.

Much has been made of our 50 years of trying to get an amending formula. I search this 50 years without finding any proposal for a referendum. It is a new proposal which Canadians have had no real opportunity to consider. It is a proposal for which no case has been made.

Our first preference would be for the referendum procedure to be dropped altogether, as a means of amending the constitution.

If that is not possible, Saskatchewan must insist, as a minimum, on substantial changes to the referendum alternative currently proposed in the resolution.

As now drafted, a referendum could be used to by-pass provincial legislatures entirely. There is no requirement that the provincial legislatures be consulted, or in any way involved, in future constitutional changes before a referendum is called. Thus, there could be a situation of extensive and well-publicized debate in the federal Parliament, little or no debate in the provincial legislatures, and then a referendum. What I call an "instant referendum". This clearly undermines the position of democratically-elected provincial legislatures.

This instant referendum has all the charm of instant mashed potatoes.

It must be changed.

If we are to adopt this extra-parliamentary device for amending our constitution, some important conditions must be met:

1. There must be opportunity for adequate public debate, in Parliament and in provincial legislatures, on the precise terms of a proposed constitutional change before the public is asked to vote.

2. There must be some measure of reciprocity as between Parliament and the provincial legislatures in their power to initiate a referendum. The proposed process permits a referendum where provinces fail to agree to a federal proposal for constitutional change. It does not provide for a referendum in the reverse case, where the federal government opposes an amendment endorsed by the provinces. In other words, it is a way to temper provincial intransigence, but not federal intransigence. In our view, appropriate provisions for reciprocal treatment are required to make the referendum a fairer and more balanced instrument.
3. The referendum vote must take place within a reasonable and specified time of the amendment's endorsement by the legislative body commencing the process.
4. Provision must be made for impartial referendum rules developed and supervised by an appropriate referendum committee. In the federal proposal, all the rules respecting referenda are to be solely within federal control, with none of the safeguards which have been established over the years to ensure, for example, fair federal elections. This clearly requires some revision. What we propose is a federal-provincial body to establish rules for a referendum.

Attached (as Appendices H and I) are draft amendments, proposed by Saskatchewan, dealing with section 42 and section 46. The section 42 draft would establish the referendum procedure as a deadlock-breaking mechanism; it would also permit a referendum to be held in cases where an amendment is endorsed by provincial legislatures but opposed by the federal government, as well as in the reverse situation. The section 46 draft would create a federal-provincial referendum rules committee.

I am well aware that federal spokesmen have recently suggested that they are prepared to improve the referendum procedure in ways which we, and others, have proposed. But as yet, we have no detailed indications of the kinds of changes which will be acceptable. I urge the committee to recommend specific amendments.

Equalization

We want to see a strengthening of the commitment to the equalization principle. The present section 31 of the resolution is inadequate.

Equalization is not now of major financial concern to Saskatchewan, although we still receive equalization payments.

However, the principle of equalization is important to us. The Canadian system of equalization payments has been one of the crowning achievements of post-war co-operative federalism and the subject of world-wide admiration. Canadians have found a way to provide essential services of reasonable quality to all Canadians without imposing a crippling burden of taxation on those who happen to live in less-wealthy provinces. And we have found a way to share the cost of major social services without centralizing the administration of those services.

Last summer, all but one of Canada's eleven governments, including the federal government, agreed on wording for a constitutional provision which would have enshrined not only the principle of sharing but of equalization payments themselves. The equalization provision proposed in the federal resolution is the weakest and, for most governments, the least acceptable of several versions examined during the constitutional negotiations.

I believe that it should be strengthened. Appended to this submission (Appendix J) is a draft which we believe would be appropriate.

Charter of Rights

Many of you will know that I have opposed, in principle, the constitutional entrenchment of a Charter of Rights.

I do not oppose human rights.

I do not oppose charters of rights. On the contrary, I am proud of Saskatchewan's record as the first jurisdiction in Canada with a legislated Bill of Rights.

What I oppose is the constitutional entrenchment of a Charter of Rights. And the reason can be simply stated. With entrenchment many of the most important and sensitive public policy decisions are delegated irretrievably to the courts. Courts, of course, are partially responsible now for administering federal and provincial human rights codes, but their decisions are not beyond popular review through legislative action.

What is being proposed by the constitutional entrenchment of rights is a shift in power more radical than anything yet experienced in Canada. By entrenchment we are essentially putting beyond the reach of elected representatives the disposition of such matters as abortion, capital punishment, sectarian education, key issues in the administration of criminal justice, conscription for military service outside Canada, Sunday observance, restraints on racist associations or religious cults, benefits for certain citizens based on age, and many, many others.

I believe that policies in all these areas should be made in light of the sorts of rights spelled out in the proposed Charter. But I do not believe that the final accommodation of competing values — and that, after all, is what is involved here — should be removed from you and your federal colleagues, or from me and my provincial colleagues, and given to a group of persons who, although honourable and thoughtful, have no special abilities in relation to these most difficult of political choices and who are not politically accountable to the people for their decisions.

I do not object to the constitutional entrenchment of French and English language rights. The right to use French or English, or the right to receive some government services in either of those languages, is not, after all, a right which we claim as humans. It is an essential fact of Canada, an essential element of the Confederation bargain, and, as such, is an obvious candidate for inclusion in the constitution.

In endorsing the recognition of French and English as Canada's two official languages, however, I want to emphasize the importance we attach to Canada's cultural diversity. Saskatchewan is the only province in which those of British and French origin, combined, form less than half the population. That makes us particularly conscious of our multicultural heritage. And it gives us a strong commitment to policies and programs that will ensure the continued vitality of languages and cultures other than French and English.

We ought to be examining some constitutional recognition of multiculturalism, perhaps in a preamble as discussed last summer, or in some other section. But, in any case, it should be the subject of early discussion in the next round of negotiations.

Having stated our general position on the Charter, I would like to make some specific comments on the assumption that the resolution, when passed, will contain a Charter which will be entrenched.

Several groups that have appeared before you have pointed out perceived defects in the federal proposal. In my view, some of their comments ignore the real limitations on the extent to which a constitution can cure society's problems. It is in light of this sense of the limitation of constitutional therapy that I offer the comments which follow.

I would like to concentrate on only three sections: sections 1, 7 and 15.

Section 1

It has been argued that section 1 renders the Charter meaningless.

I do not share that view. I believe it is important to give some guidance to the Courts to assist in their interpretation of enumerated rights.

Failure to do so would lead to one of two possible results. Courts would either construe the Charter with reasonable limitations implied, or they would give the enumerated rights a strictly literal interpretation. The former would create disillusionment and cynicism, and expose judges to unwarranted criticism. The second would almost certainly produce the most bizarre and unacceptable results.

Section 7

All the provinces during the summer felt that the worst feature that any entrenched Charter could have would be the inclusion of a clause giving rise to a “substantive due process” right.

As I am sure you are aware, substantive due process was used by American courts to strike down state and federal legislation which attempted to limit the harms posed by rampant late nineteenth century capitalism. It is a concept which allowed courts to review legislation to determine whether its substance accorded with the court’s view of appropriate policy.

This would not be a tolerable element in the Canadian constitution. On this I believe everyone is agreed. Substantive due process is a mischief to be avoided at almost all costs.

The question is, which words best preclude its possibility. In our view, the words “except in accordance with the principles of fundamental justice” are a bad choice. The idea of fundamental justice has very strong substantive connotations.

We believe that section 7 should use language that makes it clear that it is concerned with procedural fairness only. We would prefer the words “except in accordance with fair procedures” or some like phrase.

Section 15

This committee has received a great deal of comment on section 15, almost all of it critical.

To our mind, if there is to be an entrenched Charter, it is appropriate that the right not to be unreasonably discriminated against by governmental action be included.

I suspect that is the only point on which there could now be said to be general agreement with respect to section 15. And I suspect, further, that the controversy surrounding this section does not reflect disagreement over objectives. Rather it reflects confusion and uncertainty over the implications of particular formulations of words. In my view, it is clear that this section needs further consideration.

It was in recognition of its uncertain implications that the federal government itself proposed a three-year delay in the application of section 15. I propose that we go one step further. I propose that we not proceed with section 15 at this time; that we resolve to take our time to draft a better clause, taking account of the various views that have been advanced.

It does not make sense to go forward with a plan, the expectations for which are so high, while the outcome is so unknown.

Some complain that section 15 is too weak, and offer proposals to toughen it up. But to my mind section 15 is not ambiguous. It states “everyone has the right to equality before the law . . . without discrimination because of race, etc.”. Those words seem to preclude the legislative use of the enumerated classifications in any circumstance. This would be an unfortunate result, and could force governments to abandon desired policy objectives.

The problems are perhaps most acute with respect to age. I hope I am not misunderstood in saying that there are strong arguments for deleting “age” from the enumerated classes. I recognize that our society may be unreasonably agist and that we need to make reforms in this area. However, to place age at the same level of protected status as race, and sex, is to mislead Canadians about the extent to which it is reasonable and desirable to forbid age-based distinctions in imposing restrictions or conferring benefits.

I am concerned, too, about the possible impact of section 15 on the system of separate schools which exists in Saskatchewan and in most other provinces. On the face of it, the use of public funds to support denominational schools is a clear violation of section 15, which prohibits discrimination on the basis of religion. Are separate schools saved by other sections of the Charter or by other constitutional provisions? Perhaps so, but perhaps not. And what about the discriminatory hiring and staffing practices and enrolment criteria which are part and parcel of a religious school system? Will they be jeopardized by the language of section 15? I urge the committee, if section 15 goes ahead, to resolve these doubts, to incorporate a provision which will give clear protection to the continued existence and effective functioning of separate schools.

Finally, I am concerned about the relationship between decisions of provincial human rights commissions, operating under provincial legislation, and decisions of the courts applying section 15 of the Charter. Commissions often make decisions which attempt to ameliorate a discriminatory condition but, for sound social reasons, do not forbid it altogether. For example, the Saskatchewan Human Rights Commission, after extensive hearings, has decided to allow male only employment in some job classifications in penal institutions. That decision could presumably be challenged in the courts, under section 15, and struck down.

The provincial experiment in social equality has been a success. It would be a pity if this development were to be undercut by a judiciary which did not possess the same capacity to respond to social contexts.

Indian and Native Rights

One other section of the proposed Charter requires our attention.

In February 1979, First Ministers made a decision and a commitment. A decision to place on the agenda of constitutional discussions an item entitled "Canada's Native Peoples and the Constitution." And a commitment to give Indian and native people direct involvement in the process of constitutional review.

Governments have begun to examine this subject. We have had some preliminary meetings. But we have not yet fully honoured our commitment.

I recognize the difficulty and complexity of this subject. And I know, as Indians and natives know themselves, that final resolution of all the issues involved — the issues surrounding treaty rights, aboriginal rights, Indian political structures, Indian self-government — will not come easily or quickly. Certainly, the problems can not be fully resolved in the context of the resolution now before this committee.

But we must acknowledge their legitimate concerns. And we must commit ourselves, now, to address these concerns in a serious way as soon as possible after patriation. On behalf of the Saskatchewan government, I make that commitment. And I urge the federal government to do likewise before proceeding with the present resolution.

Furthermore, I believe that, at a minimum, we should ensure that what we are doing now — if it does not advance the cause of Indian and native rights — is not detrimental to the position of Canada's aboriginal peoples.

Indian and native people are concerned that section 24, as presently drafted, does not give adequate protection to their existing rights. Saskatchewan proposes an amendment to section 24 which would recognize and safeguard, in a more explicit way, the rights of Canada's Indian and native peoples — the rights enjoyed by Indians by virtue of treaties with the Crown, and historic rights of Indians, Inuit, Metis, or other native peoples. (See Appendix K.)

Conclusion

I have spoken at length today because I feel strongly about this process, and about the future of our country. I feel strongly about the fact that 50 years of tradition is flouted by this process. I feel strongly about the fact that the Canadian partnership is being changed unilaterally. But most importantly, I feel strongly about the potential for division caused by this action.

Canada is strong but it is not infinitely strong. We cannot engage in relentless and nearly constant controversy without endangering the very fabric of this nation.

It is our view that there is still time to seek a broader consensus.

This may mean not proceeding with patriation at this time.

It may mean proceeding only with patriation and an amending formula.

And, if a resolution containing something more than patriation and a bare-bones amending formula goes forward, it certainly means that the resolution must have a broader base of support among Canadians than does the one referred to your committee.

As members of the committee you have the opportunity to recommend the appropriate course of action. If you decide to recommend that the resolution be proceeded with, then you have the opportunity to change the resolution from something that is flawed and clearly divisive to something with broader support, something more unifying for Canada.

Those of us in positions of responsibility have an obligation to seek, with diligence and patience, the accommodations so clearly needed to foster a spirit of co-operation and harmony.

It is often easier to pick a side and maintain one's position. This course promises a clear victory or a glorious defeat rather than the seeming indignities of a craven compromise. But this country was built on compromise among those who represent its regions, and that same spirit is needed again.

First and foremost, we need it if we are to prevent regional conflict from escalating still further. And that is a danger not to be taken lightly.

Secondly, we need it as a basis for the next step in constitutional renewal. We all recognize that patriation, whether or not accompanied by the other items in the resolution, is only a first step in the renewal of the Canadian federation to which we are all committed.

Time is running out. The Prime Minister and the Government of Canada must indicate very soon their willingness to compromise and accommodate, to respect the balance so crucial to Canadian unity. If they do, and I sincerely hope that they will, perhaps we can emerge from this crisis stronger than ever, building upon our common commitment to Canada to create a federal system which will encompass and reflect the cultural and regional diversity that is the essence of Canada.

Appendix A

History and Analysis of Amendments to the B.N.A. Act.

I. Amendments made by the U.K. Parliament

1. British North America Act, 1871

Provided for the establishment of new provinces, the administration of the territories, and the ratification of the Manitoba Act, 1870, as well as establishing a procedure for making changes to provincial boundaries.

Provinces were not consulted and provincial consent was not secured. Initially, the federal government proceeded without securing the consent of Parliament, but this provoked a strong protest from the Opposition, with the result that it was decided to proceed with the amendment by way of a Joint Address of the Senate and House of Commons.

2. Parliament of Canada Act, 1875

Amended section 18 of the B.N.A. Act, 1867, which set forth the privileges, immunities, and powers of each of the Houses of Parliament.

Provinces were not consulted and provincial consent was not secured. The Act was passed by the British Parliament merely at the request of the Government of Canada. Parliament's consent was not secured.

3. British North America Act, 1886

Authorized the Parliament of Canada to provide for the representation of the Territories in the Senate and House of Commons.

Provinces were not consulted and provincial consent was not secured. The Act was passed by the British Parliament following a Joint Address of the Senate and House of Commons.

4. The Canada (Ontario Boundary) Act, 1889

Extended the boundaries of the province of Ontario.

Enacted with the consent of the province of Ontario. The Act was passed by the British Parliament following a Joint Address of the Senate and the House of Commons.

5. The Statute Law Revisions Act, 1893

Repealed certain obsolete sections of the B.N.A. Act, 1867.

The Statute Law Revisions Act was a periodic enactment of the British Parliament whose object was to clear up English statute law. It was enacted without the formal consent of Canada.

6. The Canadian Speaker (Appointment of Deputy) Act, 1895

This was British legislation validating an Act passed by the Parliament of Canada entitled “An Act respecting the Speaker of the Senate”, which provided for the appointment of a deputy during the illness or absence of Speaker of the Senate.

Provinces were not consulted and provincial consent was not secured. The Act was passed by the British Parliament merely at the request of the Government of Canada; the request did not originate from the Parliament of Canada.

7. British North America Act, 1907

Established a new scale of financial subsidies to the provinces in lieu of those set forth in section 118 of the B.N.A. Act, 1867.

All nine provinces were consulted (Dominion-Provincial Conference of 1906 dealt with this subject), and the amendment was made with the consent of all provinces but British Columbia. The Act was passed by the British Parliament following a Joint Address of the Senate and House of Commons. However, the words “final and unalterable settlement” included in the original draft submitted by the federal government to the British government were rejected by London on the grounds that they were inappropriate in a United Kingdom statute, and this met British Columbia’s principal concern.

8. British North America Act, 1915

Redefined Senate divisions to take account of the four Western provinces, and added section 51A to the B.N.A. Act.

Some provinces were consulted but provincial consent was not formally secured. The Act was passed by the British Parliament following a Joint Address of the Senate and House of Commons. Marks the first time that an amendment was put forward in the form of a Canadian draft bill, which was enacted without modification by the British Parliament.

9. The British North America Act, 1916

Extended the life of the current Parliament of Canada by one year.

Provinces were not consulted and provincial consent was not secured. The Act was passed by the British Parliament following a Joint Address of the Senate and House of Commons.

10. The Statute Law Revisions Act, 1927

Repealed the B.N.A. Act, 1916, and section 1 (2) of the B.N.A. Act, 1915.

The Statute Law Revisions Act was a periodic enactment of the British Parliament whose object was to clear up English statute law. It was enacted without the formal consent of Canada.

11. The British North America Act, 1930

Confirmed the Natural Resources Transfer Agreements with the four Western provinces.

The four provinces directly affected Manitoba, Saskatchewan, Alberta, and British Columbia, were consulted and consented to this amendment. The Act was passed by the British Parliament following a Joint Address of the Senate and House of Commons.

12. British North America Act, 1940

Transferred unemployment insurance from provincial to federal jurisdiction.

All nine provinces were consulted, and all provinces consented to this amendment. The Act was passed by the British Parliament following a Joint Address of the Senate and House of Commons.

13. British North America Act, 1943

Provided for the postponement of the statutory requirement to implement a redistribution of the seats of the House of Commons after each decennial census, until after the termination of hostilities.

Provinces were not consulted and provincial consent was not secured. The Act was passed by the British Parliament following a Joint Address of the Senate and House of Commons.

14. British North America Act, 1946

Amended section 51 of the B.N.A. Act, 1867, and altered the provisions for readjustment of representation in the House of Commons.

Provinces were not consulted and provincial consent was not secured. The Act was passed by the British Parliament following a Joint Address of the Senate and House of Commons.

15. British North America (No. 1) Act, 1949

Confirmed and gave effect to the terms of union between Canada and Newfoundland.

Enactment was consented to by Newfoundland. The Act was passed by the British Parliament following a Joint Address of the Senate and House of Commons.

16. British North America (No. 2) Act, 1949

Altered section 91 of the B.N.A. Act, 1867, to enable the federal government to amend the “Constitution of Canada” except for certain specified matters.

Provinces were not consulted and provincial consent was not secured. The Act was passed by the British Parliament following a Joint Address of the Senate and House of Commons.

17. The Statute Law Revisions Act, 1950

Repealed section 118 of the B.N.A. Act which had been rendered obsolete by the B.N.A. Act, 1907.

The Statute Law Revisions Act was a periodic enactment of the British Parliament whose object was to clear up English statute law. It was enacted without the formal consent of Canada.

18. British North America Act, 1951

Provided for concurrent jurisdiction in respect of old age pensions with provincial paramountcy (section 94 A).

Provinces were consulted, and all provinces consented to this amendment. The Act was passed by the British Parliament following a Joint Address of the Senate and House of Commons.

19. **British North America Act, 1960**

Amended section 99 of the B.N.A. Act, 1867, to require judges to retire at age 75.

Provinces were consulted and all provinces consented to this amendment. The Act was passed by the British Parliament following a Joint Address of the Senate and House of Commons.

20. **British North America Act, 1964**

Amended section 94 A to include benefits supplementary to old age pensions.

Provinces were consulted and all provinces consented to this amendment. The Act was passed by the British Parliament following a Joint Address of the Senate and House of Commons.

II. **Amendments made by the Federal Government pursuant to Section 91(1)**

1. The British North America Act, 1952, effected a readjustment of representation in the House of Commons. The principle of representation by population was not affected by this legislation.
2. The British North America Act, 1965, provided for the compulsory retirement of senators, henceforth appointed, at age seventy-five.
3. The British North America Act, 1974, repealed the provisions of the Act of 1952 and substituted a new readjustment of representation in the House of Commons. The principle of representation by population was maintained.
4. The British North America Act, 1975, increased the representation of the Northwest Territories in the House of Commons from one to two members.
5. The British North America Act (No. 2), 1975, increased the total number of senators from 102 to 104, and provided for representation in the Senate for the Yukon Territory and the Northwest Territories by one member each.

III. Comments

1. Of the 20 amendments made by the British Parliament to the B.N.A. Act, nine resulted from federal requests made without provincial consent, eight resulted from federal requests made with some measure of provincial consent, and three involved the repeal of obsolete sections of the B.N.A. Act by the British **Statute Law Revisions Act**.
2. Of the nine amendments made without provincial consent, seven clearly dealt with matters of concern to the federal government alone and did not, according to the established conventions, require provincial consent. These were amendments to the B.N.A. Act's provisions regarding the House of Commons and representation in the Senate, matters generally regarded as being of concern to the federal government alone. They have, since 1949, been amendable by the Parliament of Canada pursuant to section 91(1).
3. Of the nine amendments implemented through unilateral action, the B.N.A. Act 1871 is the only one which appears to deal with a matter clearly affecting the federal government and all the provinces. This amendment gave the federal Parliament the power to create new provinces in the "territories" and put into place a procedure for making changes to provincial boundaries. But it should be noted that the power to create provinces was conditioned by the requirement that these new provinces should enjoy the same status as existing provinces, while the power to change provincial boundaries was conditioned by the requirement that consent of the provinces affected had to be obtained. In this sense, therefore, no change in federal-provincial relationships was effected. This was, moreover, the first amendment made to the B.N.A. Act at Canada's request and it took place before constitutional conventions had had time to develop. Evidence indicates that there was considerable controversy regarding Parliament's role in this amendment, and this shows that there was some ambiguity about the amending procedure at that time. Doubt must therefore be cast on whether this amendment creates any precedent for unilateral action on matters affecting both the federal government and the provinces. That a precedent was not created can be discerned from the fact that the procedure used in this instance was never used again to effect any subsequent amendments involving matters of concern to both federal and provincial governments.
4. **The B.N.A. (No. 2) Act, 1949** is the last amendment made through unilateral action and it is one of the most controversial. This was an amendment to section 91 and it provided the federal government with the power to amend the Constitution of Canada subject to certain specific exceptions. The amendment can therefore be considered to have altered the division of powers, certainly a matter affecting federal-provincial relationships, and this was the view of most provincial governments at the time. The federal government, however, denied that this was the case and claimed that the intention was simply to give to the federal government the same powers to amend its constitution as provinces enjoy under section 92(1) to amend their constitutions. It seemed to feel that an amendment which had this as its intention was one which was of concern to the federal government alone and not subject to provincial consent.

5. The Supreme Court gave the following interpretation of the 1949 amendment in the **Senate Reference**:

The apparent intention of the 1949 amendment to the Act which enacted s. 91(1) was to obviate the necessity for the enactment of a statute of the British Parliament to effect amendments to the Act which theretofore had been obtained through joint resolution of both Houses of Parliament and without provincial consent.

This suggests that the amendment dealt with a specific category of amendments, namely those which had theretofore been obtained through Joint Resolution and without provincial consent, and was designed to remove the need to go to Westminster for amendments that affected the federal government alone and for which provincial consent was not required.

6. With the possible exception of the B.N.A. Act, 1871, amendments made to matters affecting the federal government and the provinces have always been made with *provincial consent*. Amendments affecting the federal government and all the provinces have been made with the consent of the federal government and all the provinces. This is true of the amendments of 1940, 1951, 1960 and 1964, most of which dealt with the division of powers. It is also true of the amendment of 1907 which dealt with federal-provincial financial relationships, if consideration is taken of the fact that the B.N.A. Act, 1907 was amended in London in a manner which met the concerns of the only dissenting province, British Columbia. Amendments affecting the federal government and one or more but not all provinces have taken place with the consent of the province or provinces concerned. This is true of the amendments of 1889 (Ontario), 1930 (Natural Resources Transfer Agreements) and 1949 (Newfoundland).

Appendix B

Conventions Governing Constitutional Amendment

Excerpt from **The Amendment of the Constitution of Canada**, Honourable Guy Favreau, Minister of Justice, February 1965 (p. 15)

The first general principle that emerges in the foregoing resume is that although an enactment of the United Kingdom is necessary to amend the British North America Act, such action is taken only upon formal request from Canada. No Act of the United Kingdom Parliament affecting Canada is therefore passed unless it is requested and consented to by Canada. Conversely, every amendment requested by Canada in the past has been enacted.

The second general principle is that the sanction of Parliament is required for a request to the British Parliament for an amendment to the British North America Act. This principle was established early in the history of Canada's constitutional amendments, and has not been violated since 1895. The procedure invariably is to seek amendments by a Joint Address of the Canadian House of Commons and Senate to the Crown.

The third general principle is that no amendment to Canada's Constitution will be made by the British Parliament merely upon the request of a Canadian province. A number of attempts to secure such amendments have been made, but none has been successful. The first such attempt was made as early as 1868, by a province which was at the time dissatisfied with the terms of Confederation. This was followed by other attempts in 1869, 1874 and 1887. The British Government refused in all cases to act on provincial government representations on the grounds that it should not intervene in the affairs of Canada except at the request of the federal government representing all of Canada.

The fourth general principle is that the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces. This principle did not emerge as early as the others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance. The nature and degree of provincial participation in the amending process, however, have not lent themselves to easy definition.

Appendix C

Conventions Governing Constitutional Amendment Quotations from Canadian Political Leaders

Hon. Louis St-Laurent, Minister of Justice, 1943

When it comes to making amendments to our constitution I would like to suggest to hon. members that there appears to be a fundamental distinction to be observed. Confederation was not really a pact between provinces. As a matter of fact, there was only one province of the United Canadas, Upper and Lower, at the time confederation came into existence. But it was nevertheless the system worked out by responsible prominent leaders of the population of the areas which then constituted, on the one hand, the united province of Upper and Lower Canada, and on the other hand the maritime provinces, and it was provided that under this system provincial legislatures and provincial governments would be established to deal with certain matters over which they were allocated exclusive jurisdiction. The courts have held that the provinces in the exercise of jurisdiction in the field allocated to them are sovereign states ...

I would readily concede to hon. members that if there were to be any suggested amendment to change the allocation of legislative or administrative jurisdiction as between the provinces, on the one hand, and the federal parliament, on the other, it could not properly be done without the consent of the organism that was set up by the constitution to have powers that would assumedly be taken from that organism ...

The example that was given by the hon. member (the British North America Act, 1940) is a case where it was eminently proper that the consent of the legislatures be obtained because it meant transferring to this parliament jurisdiction which in 1867 had been quite improper to take away from the provinces without their consent anything that they had by the constitution.

Hon. Ernest Lapointe, Minister of Justice, 1925

The British North America Act itself is not only the charter of the Dominion of Canada; it is just as much the charter of the provinces of Canada ... Would it then be fair for us to arrogate to ourselves the right to change the act which is just as much the constitution of the provinces as it is our own? ...

Within their sphere the provinces enjoy the powers of self-government just as much as the Dominion parliament does, and if so, surely the Dominion parliament cannot take upon itself the right to change a statute which gives to those provinces the powers which they enjoy ...

Rt. Hon. W. L. Mackenzie King, Prime Minister, 1925

That method (of amendment proposed in the resolution) ignores altogether the relationship of the provinces to the Dominion in the creation of the constitution itself. All of that particular phase of the question was so fully and conclusively argued by the Minister of Justice yesterday that this House, I believe, is practically unanimously of the view that if an amendment of the kind is to be sought, due regard should be had to the view that a compact was made at the time of Confederation, and that an amendment of the importance that such an amendment certainly would have, ought only to be proposed after there had been a conference and agreement between the Dominion and the provinces.

Undoubtedly, the pact of confederation is a contract and there are rights involved therein not represented by the Parliament of Canada. We could not put ourselves in the position of asking that rights so secured should be disturbed on our motion alone. The speech of the Minister of Justice determines, I think, without power of dispute, that there should never be suggestion of amendment affecting other parties to the contract save after conference and consent of those other parties . . .

Rt. Hon. Arthur Meighen, Leader of the Opposition, 1925

Not only is there a contract between the provinces and the Dominion as a whole, between the minorities as represented by the provinces and the majority as represented by the Dominion, a contract which is sacred and which we must all preserve; but, as well, I think, it can be affirmed that another party to the contract for the protection of the minority rights is the British Parliament itself. And I believe it is a fact to a degree minorities in Canada — minorities racial and minorities religious — not only upon the merits of the contract as between the various parties in the Dominion, but as well on the contract between the Dominion and the British Parliament . . .

Hon. Hugh Guthrie, Minister of Justice, 1931

. . . My contention has always been that in all matters appertaining to the legislative jurisdiction of the parliament of Canada the parliament of Canada has the right, and should have the right expressed, to make such amendments to the constitution as it shall see fit. But, on the other hand, the rights of the provinces of the country are just as plenary, just as high as the rights of this parliament. Can this parliament, therefore, by amendment or alteration of any kind, interfere with the rights which are specially set apart as matters of provincial jurisdiction and provincial concern, without the consent of the various provinces of Canada? . . . I submit that we cannot. In respect of any matters arising under section 92 or section 93 of the British North America Act, this parliament cannot, without the consent of the various provincial legislatures, amend the British North America Act in any respect . . .

Hon. Hugh Guthrie, Minister of Justice, 1935

I think that we would have to have agreement. I do not think the parliament at Westminster would disregard the views of the provinces merely at the request of the parliament of Canada. If the provinces refused to agree upon any fundamental question which concerned their rights I doubt very much if the parliament of the United Kingdom would grant such amendment.

Appendix D

1979 Best Efforts Draft

Resource Ownership and Interprovincial Trade

(1) (present Section 92)

(1) Carries forward existing Section 92

Resources

- (2) In each province, the legislature may exclusively make laws in relation to
- a) exploration for non-renewable natural resources in the province;
 - b) development, exploitation, extraction, conservation and management of non-renewable natural resources in the province, including laws in relation to the rate of primary production therefrom; and
 - c) development, exploitation, *conservation and* management of forestry resources in the province and of sites and facilities in the province for the generation of electrical energy, including laws in relation to the rate of primary production therefrom.

- (2) The draft outlines exclusive provincial legislative jurisdiction over certain natural resources and electric energy within the province. These resources have been defined as non-renewable (e.g. crude oil, copper, iron and nickel), forests and electric energy. This section pertains to **legislative** jurisdiction and in no way impairs established **proprietary** rights of provinces over resources whether these resources are renewable or non-renewable.

Export from the province of resource

- (3) In each province, the legislature may make laws in relation to the export from the province of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for prices for production sold for export to another part of Canada that are different from prices authorized or provided for production not sold for export from the province.
- (3) Provincial governments are given concurrent legislative authority to pass laws governing the export of the resources referred to above from the province. This legislative capacity is in the sphere of both interprovincial and international trade and commerce. Provincial governments are prohibited from price discrimination between resources consumed in the province and those destined for consumption in other provinces. This new provincial legislative capacity applies to these resources in their raw state and to them in their processed state but does not apply to materials manufactured from them.

Relationship to certain laws of Parliament

- (4) Any law enacted by the legislature of a province pursuant to the authority conferred by subsection (3) prevails over a law enacted by Parliament in relation to the regulation of trade and commerce except to the extent that the law so enacted by Parliament,
 - a) in the case of a law in relation to the regulation of trade and commerce within Canada, is necessary to serve a compelling national interest that is not merely an aggregate of local interests; or
 - b) is a law in relation to the regulation of international trade and commerce.
- (4) The effect of this new provincial legislative responsibility over trade and commerce diminishes the scope but does not eliminate the federal government's exclusive authority over trade and commerce. The exercise of the provincial power is subject to two limitations. First, the federal government may legislate for interprovincial trade if there is "compelling national interest". This trigger mechanism may apply to circumstances other than an emergency as established under the peace, order and good government power. Second, federal laws governing international trade prevail over provincial laws in international trade, in effect establishing a concurrent power similar to that for agriculture.

Taxation of resources

(5) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

- a) non-renewable natural resources and forestry resources in the province and the primary production therefrom; and
- b) sites and facilities in the province for the generation of electrical energy and the primary production therefrom,

whether or not such production is exported in whole or in part from the province but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

(5) Provincial powers of taxation are increased to include indirect taxes over the resources outlined in this section — whether or not these resources are destined in part for export outside the province. These taxes are to apply with equal force both in the province and across the rest of the country.

Production from resources

(6) For purposes of this section,

- a) production from a non-renewable resource is primary production therefrom if
 - i) it is in the form in which it exists upon its recovery or severance from its natural state, or
 - ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil or refining a synthetic equivalent of crude oil; and
- b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.

(6) In determining the scope of provincial legislative powers over resources exported from the province, it became necessary to define the degree to which the resource was processed. It is not intended to extend provincial authority to manufacturing but it is intended to extend it to something beyond its extraction from its natural state. Given the varying resources covered by this section, the wording of this subsection is thought to place the appropriate limitations on provincial powers.

Existing Powers

(7) Nothing in subsections (2) to (6) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of those subsections.

(7) This clause ensures that any existing provincial legislative powers found in s.92 are not impaired by the new section.

Ottawa
February 5-6, 1979

Appendix E

1979 Best Efforts Draft

Declaratory Power

1. Amend head 92.10(c) to read as follows:

- (c) Such works as, although wholly situate within the province, are before or after their execution declared by Parliament to be for the general advantage of Canada, or for the advantage of two or more provinces, for purposes indicated in the declaration.

2. Add new subsections to section 92 which for the purposes of this draft are numbered as follows:

Require-
ment to
consult
with
respect to
use of
declaratory
power of
Parliament

92. (2) Before Parliament declares any work to be for the general advantage of Canada or for the advantage of two or more provinces

- (a) the government of Canada shall consult with the government of the province or the governments of each of the provinces in which the work is situate; and
 - (b) if the consultation under paragraph (a) does not result in an agreement that the work be so declared, the Prime Minister of Canada shall consult the first ministers of the provinces about the proposed declaration at a first ministers' conference.

Declaration
on failure
of
consultation

- (3) Where, after the consultation required by subsection (2), an agreement has not been reached that a work be declared to be for the general advantage of Canada or for the advantage of two or more provinces, a declaration under paragraph 92(1)10(c) shall have effect only for such period not exceeding five years from the effective date of the declaration as is stated in the declaration but nothing in this subsection prohibits Parliament from making a further declaration in respect of the work after the requirements of subsection (2) have again been fulfilled.

Limitation
on
Declaratory
Power with
respect to
resources

- (4) No declaration under paragraph 92(1)10(c) shall be made by Parliament without the prior consent of the government of the province in which the work to be so declared is situate if it is a work for
 - (a) the primary production or initial processing of any non-renewable or forestry resource; or
 - (b) the generation of electrical energy.

Revocation
or
limitation
of
declaration

- (5) Parliament may revoke any declaration of a work to be a work for the general advantage of Canada or for the advantage of two or more provinces made before or after the coming into force of this section and may limit or, subject to subsections (2) to (4), extend the purposes for which any such declaration had been made.

Appendix F

Resources

Saskatchewan Draft

Section 92A

- (1) In each province the legislature may exclusively make laws in relation to:
- (a) exploration for non-renewable natural resources in the province,
 - (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom, and
 - (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy,

whether or not such production is exported in whole or in part from the province.

- (2) In each province the legislature may make laws in relation to the export from the province of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.
- (3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.
- (4) In each province the legislature make make laws in relation to the raising of money by any mode or system of taxation in respect of
- (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
 - (b) sites and facilities in the province for the generation of electrical energy and the production therefrom

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

- (5) The expression “primary production” has the meaning assigned by the Sixth Schedule.
- (6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

The Sixth Schedule

Primary Production from Non-renewable Resources and Forestry Resources

- 1. For the purposes of subsections 92A of this Act,
 - (a) production from a non-renewable resource is primary production therefrom if
 - (i) it is in the form in which it exists upon its recovery or severance from its natural state, or
 - (ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and
 - (b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.

Appendix G

Amending Formula, Section 41 Saskatchewan Draft

41. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by
- (a) resolutions of the Senate and House of Commons; and
 - (b) resolutions of the legislative assemblies of at least a majority of the provinces that have, according to the then latest general census, combined populations of at least eighty per cent of the population of all the provinces, and that include
 - (i) two or more of the Atlantic provinces,
 - (ii) two or more of the Western provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Western provinces.
- (2) In this section,
- “Atlantic provinces” means the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland;
- “Western provinces” means the provinces of Manitoba, British Columbia, Saskatchewan and Alberta.

Appendix H

Referendum Procedure, Section 42 Saskatchewan Draft

42. (1) (Same as proposed federal resolution 42(1).)

(2) A referendum referred to in subsection (1) shall be held only where directed by proclamation issued by the Governor General under the Great Seal of Canada, and such proclamation shall be issued and referendum held in the following cases and in no others:

(a) where

- (i) the requirements respecting resolutions in paragraph 41 (1)(a) have been satisfied for at least one year with respect to a proposal for amendment,
- (ii) the requirements of paragraph 41 (1)(b) have not been satisfied with respect to the proposal for amendment at the expiration of the year mentioned in subparagraph (i),
- (iii) the issue of the proclamation is authorized by resolutions of the Senate and House of Commons after the expiration of the year mentioned in subparagraph (i),
- (iv) the issue of the proclamation is authorized by resolutions of the legislative assemblies of at least four provinces after the expiration of the year mentioned in subparagraph (i), and
- (v) polling day at the referendum is not more than two years after the expiration of the year mentioned in subparagraph (i);

or

(b) where

- (i) the requirements of paragraph 41 (1)(b) have been satisfied for at least one year with respect to a proposal for amendment,
- (ii) the requirements respecting resolutions in paragraph 41 (1)(a) have not been satisfied with respect to the proposal for amendment at the expiration of the year mentioned in subparagraph (i),

- (iii) after the expiration of the year mentioned in subparagraph (i), but within one year after the expiration of that year, the issue of the proclamation is authorized by resolutions of the legislative assemblies of the provinces that would be sufficient to satisfy the requirements of paragraph 41(1)(b), and
 - (iv) polling date at the referendum is not more than two years after the expiration of the year mentioned in subparagraph (i).
- (3) Where subparagraphs (2)(b)(i) and (ii) obtain, motions to resolve, under subparagraph (2)(b)(iii), to authorize the issue of a proclamation shall be proposed as soon as practicable in the legislative assembly of each province, and, within one year after the expiration of the year mentioned in subparagraph (2)(b)(i), every question necessary to dispose of the motions shall have been put.

Appendix I

Referendum Rules Committee, Section 46 Saskatchewan Draft

46. (1) Subject to subsection (2), the Governor General may, by Proclamation issued under the Great Seal of Canada, on the recommendation of a Referendum Rules Committee established under this section, make rules applicable to the holding of a referendum under sections 38 and 42.
- (2) (same as federal draft)
- (3) As soon as practicable after the authorization for the holding of a referendum under this Act, a Referendum Rules Committee shall be established to recommend the rules applicable to the holding of that referendum and the Referendum Rules Committee shall make its recommendation by majority, within sixty days of its establishment.
- (4) The Referendum Rules Committee referred to in subsection (3) shall consist of:
- (a) The Chief Electoral Officer of Canada, appointed by resolution of the House of Commons, who shall be chairman of the Committee;
 - (b) a person appointed by the Governor in Council;
 - (c) a person appointed by the Governor in Council:
 - (i) on the recommendation of the governments of a majority of provinces;
or
 - (ii) if the governments of a majority of provinces do not recommend a person within sixty days after the Chief Electoral Officer requests such a recommendation, on the recommendation of the Chief Justice of Canada from among persons recommended by the governments of the provinces within thirty days after the expiration of that sixty day period, or, if none is so recommended, from among persons knowledgeable in the holding of elections.
- (5) Rules made under this section:
- (a) may include penalties for the contravention thereof;
 - (b) have the force of law; and
 - (c) prevail over other laws, except the **Canadian Charter of Rights and Freedoms**, to the extent of any inconsistency.

Appendix J

Equalization, Section 31 Saskatchewan Draft

31. (2) Parliament and the Government of Canada are further committed to the principle of making equalization payments to ensure that provincial governments are able to provide essential public services of reasonable quality without imposing an undue burden of taxation.

Appendix K

Indian and Native Rights, Section 24 Saskatchewan Draft

Marginal note changed from:

Undeclared rights and freedoms

to:

Other rights and freedoms

24. (1) The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.
- (2) *Nothing in this Charter abrogates or derogates from, or shall be construed or applied so as to abrogate or derogate from, any rights enjoyed by Indians by virtue of treaties made between Indians and the Crown or any historic rights which pertain to Indians, Inuit, Metis, or other native peoples of Canada.*