

The Premier
Nova Scotia

Halifax, January 19, 1951

Hon. Stuart Garson,
Minister of Justice and Attorney General,
Ottawa, Canada.

Dear Mr. Garson:

I thank you for your letter of January 2, and in reply thereto, I beg to enclose comments on the proposed amendments, which for convenience are divided into comments on proposal No. 1, and comments on proposal No. 2. I assume that when you have heard from other provinces, and got an amendment in some more advanced form, we will again be furnished with a copy, so that we may have a chance of looking at it before it is introduced or passed.

Yours sincerely,
A. L. Macdonald

Comments Re Proposed Amendments To
B.N.A. Act

Re Proposal 1:

1. Add a new subsection to section 95 in the following terms:

"(2) Notwithstanding anything in this act, the parliament of Canada may make laws in relation to old age pensions."

This amendment is treated differently from that relating to unemployment insurance, for the apparent reason that it is not intended or desired that the legislative power of the dominion parliament should be exclusive in relation to old age pensions. Therefore the amendment is not incorporated into section 91 because of the effect of the opening clause of that section, particularly the word "exclusive", and the effect of the closing clause of section 91.

It is doubted, however, that the proposed wording of the new subsection, even as a subsection of section 95, would avoid the effect of making the dominion's powers exclusive, or would result in concurrent powers being possessed by the provincial legislatures. While it may be desirable from the standpoint of the province that the dominion's power should be exclusive, that result would not appear to have been intended from discussions at the conference.

The phraseology of the amendment as proposed is quite similar to that of section 101, and attention is drawn to the interpretation placed on that section by the judicial committee in the privy council appeals reference (1947 A.C. 127). It will be recalled that the argument was advanced that section 101 could not give the dominion parliament power to create a final court of appeal, at least in respect of matters coming within the legislative powers of the provinces under section 92. This is dealt with by Lord Jowitt, who delivered the opinion of the judicial committee, at pages 151 to 153 of the report cited, and attention is drawn particularly to the following remarks found on pages 152 and 153 of the report:

"But in the opinion of Their Lordships the same considerations lead to the conclusion that the court so established must have not only 'final' or 'ultimate' but also exclusive appellate jurisdiction. They would emphasize that section 101 confers a legislative power on the dominion parliament which by its terms overrides any power conferred by section 92 on the provinces or preserved by section 129. 'Notwithstanding anything in this act' are words in section 101 which cannot be ignored. They vest in the dominion a plenary authority to legislate in regard to

appellate jurisdiction, which is qualified only by that which lies outside the act, namely, the sovereign power of the imperial parliament."

It is suggested that if the intention is to grant concurrent legislative powers to the legislatures in the provinces, that might be accomplished by adding a subsection to section 95 paralleling the wording of the present section 95 somewhat as follows:

"(2) In each province the legislature may make laws in relation to old age pensions in the province; and it is hereby declared that the parliament of Canada may from time to time make laws in relation to old age pensions in any or all of the provinces."

Re Proposal 2:

2. Re-enact head 2 of section 92 to read as follows:

"2. The raising of revenue for provincial purposes by

(a) direct taxation within the province,
and

(b) indirect taxation within the province in respect of the sale of goods (except goods sold for shipment outside the province) to a buyer for purposes of consumption or use and not for resale, at a rate not exceeding three per centum of the sale price, but not so as to discriminate between sales of goods grown, produced or manufactured within the province and sales of goods grown, produced or manufactured outside the province."

It is suggested that there is no good reason for changing the form of the existing head (2) of section 92 in any way. That head has been the subject of consideration in a great many cases and a considerable amount of jurisprudence has been built up on the basis of the wording exactly as it stands. At least some of the effect of the decisions would be lost even by a rearrangement in form or by such an apparently minor change as the omission of the indefinite article before the word "revenue". For instance, there is at least the question raised by Lord Phillimore in *Caron v The King*, but not decided, as to whether the dominion has a power of indirect taxation for provincial purposes, and the argument developed by Professors Kennedy and Wells in their work on the "Law of Taxation in Canada" to the effect that there may be a provincial power of indirect taxation for provincial purposes. Without suggesting that questions such as these are substantial or indeed have particular merit, none the less the existence of a considerable volume of case law and comment would seem to be a sufficient reason for retaining the head in its present form unless there is very good reason for a change, and no such reason seems to exist. The proposed provision with respect to indirect taxation might be included in section 92 as a new enumerated head (2A).

The amendment granting the power of indirect taxation will have to be very carefully drawn, as from it alone will the province derive its whole indirect taxation power and by it will that power be limited. Before suggesting any alternative, some comments in respect of the form suggested may be in order. With respect to the exception (in parentheses): in those provinces which now have a tax in the nature of a sales tax, an exception is made of goods sold for delivery outside the province. There are two apparent reasons for such an exception: first, as the tax is in theory and in form a direct tax on the purchaser, it would be ultra vires of the province to attempt to impose that tax on a purchaser outside the boundaries of the province; second, it is apparently considered desirable to avoid placing a vendor within the province in an unfavourable position as compared with his competitors outside the province. As it is proposed to