

Hon. Mr. Lalonde
Hon. Mr. Lang
Hon. Mr. Reid
Mr. Tassé
Mr. Strayer
Mr. Pitfield
Mr. Coutts
Mr. de M. Marchand
Mr. Carter
Mr. Tellier
Miss Macdonald

Secret

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MEMORANDUM FOR THE PRIME MINISTER

Constitutional change: possible courses
after the Conference

There will be two general lines of action possible following the Conference:

- I An "early action" course; and
- II A "full and protracted negotiation" course.

The preferred option ought to be decided upon before the Conference as it will determine, in part, the way the Conference should end and the way in which the next stage will be described and proposed at the Conference.

Within the first option, there are several lines of action that could be adopted.

I "Early action" course

Assuming that there is a fair measure of agreement on some version of solution for a good many of the 14 items under negotiation, it would be possible for the government to decide that it wanted to act on these at an early point, while still carrying on with the remainder of the constitution for further negotiation to complete the entire process. A consideration in relation to all of these is that the government of Quebec has made clear its position that there should be no action on some parts (and especially not on the amending procedure and "patriation") until the complete distribution of powers "has been worked out to its satisfaction". It is not clear that other provinces would have objection and some might welcome action if there were a sufficiently high degree of consensus on the steps taken. The Pepin-Robarts report may increase the tendency to feel that there should not be "fragmentary" action, but rather the establishment of a total framework before moving on any part.

Possible courses to bring about "early action" would include:

(A) Action by Parliament at this Session -

(1) A statute plus joint address on powers -

A successor Bill to Bill C-60 could be introduced plus a joint address to the Queen for action by the British Parliament on most or all of the nine "powers" areas under discussion. The address could either include or omit an amending formula and a request for "patriation".

Advantages -

- if passed, the quickest basis of action
- would make clear the seriousness of the government's commitment to a "renewed federation"
- would make clear the intention to revise the distribution of powers
- would demonstrate that the government and the federation are not paralyzed by disagreement: federalism can be made to work
- if agreement could be achieved (or near agreement) on the Senate and the Supreme Court, the Bill could be quite complete and impressive.

Disadvantages -

- the measures would provoke long debate and the government might have to choose between closure (which would be most undesirable on a constitutional measure), abandoning the measures, or having discussion drag on and compromise an early election
- the government would have to decide whether to include or to omit some of the Pepin-Robarts proposals - e.g.: a new "list" of 60

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additional members for the House of Commons. Very quick decision would be a problem. Decision against Pepin-Robarts might be exploited in Quebec

- it would be charged that the government, at the end of its term, had no mandate to act, and especially not to act "unilaterally" on the constitution
- it would be alleged to be "arrogance"
- the new constitution would be compromised at the outset by probable bitterness of protest and allegations of partisan action
- the Parti Québécois might precipitate an election in Quebec to get a specific mandate to fight "unilateral change" in the constitution.

(2) A statute plus "patriation" -

Action could be taken as above but omitting the changes in "powers".

Advantages -

- if passed, there would be a degree of action: the chance of passing would be greater than in (1)
- the commitment to "renewal" would be demonstrated, but less convincingly than in (1)
- it might not be as open to allegations of "arrogance" and "no mandate" as (1)

Disadvantages -

- virtually all the disadvantages of (1)
- it would be attacked as "unilateral action"

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- it would revive all the provincial distrust, which has been dissipated by the last three months of negotiation. Provinces would view the action as a betrayal and as indication that the federal government is not serious about changes in the distribution of powers
- if the Bill did not include the Senate, the only significant change would be the Charter and the Supreme Court. The extent of change and "renewal" would thus appear minimal, especially after Pepin-Robarts
- there would be some risk of a PQ election, although possibly less than in (1).

On the whole, the disadvantages of action by Parliament at the present session are so clear, and the risk of frustration and failure so great, that these courses should probably be ruled out.

(B) A mandate for action secured in a general election -

The mandate would be to act on a "successor Bill" + the nine powers items + "patriation" with an amending procedure and to carry on discussions with the provinces leading to a complete new constitution for Canada. Several variants are possible in seeking such a mandate:

(1) Introduction of the "successor Bill" + the addresses (as in (A)(1)) but not for passage, followed by an appeal for a mandate to pass them with no further discussion if returned to power.

Advantages -

- there would be prompt demonstration of determination to act, plus the rest of the advantages in (A)(1)
- the basis of the mandate being sought would be set out in the clearest possible way, which would minimize allegations of "arrogance" and of "unilateralism" in acting after the election
- there would be a demonstration of respect for Parliament and a discharge of the commitment in the S.F.T. to "introduce a Bill"

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at this session, but without the risks of delay, closure, etc.

- it could be made clear that the government is not running on Bill C-60: the differences would be substantial
- while the Bill and the address would differ from Pepin-Robarts recommendations, they could constitute an equally convincing demonstration of seriousness about "renewal". The "vision" of a new federation could be preserved without appearing to accept some of the aspects of Pepin-Robarts that would be destructive for the preservation of a strong and effective central government.

Disadvantages -

- the successor Bill + the addresses might be denounced as pallid, inadequate, fragmentary, etc. in comparison with the "bold and courageous action" demanded by Pepin-Robarts. This would be especially so if the Bill did not include the Senate
- while the total would be under attack for inadequacy, the details would be attacked where they differed from Pepin-Robarts
- it might be a repetition of the "army on the plain" in Bill C-60, but at a time of greater vulnerability with an election looming
- the degree of precision required for the measures would involve a number of decisions to be taken in a very short space of time
- some of the provinces would attack the proposal as "unilateralism" and the Parti Québécois might seize on the issue for an early election, which could be an attractive escape from their commitment to an early referendum.

(2) Action as in (1), but the mandate would be to meet with the provinces once more, after the election, followed immediately by action on the "successor Bill", 9 areas of powers plus "patriation".

Advantages -

- all the advantages in (1)
- avoidance of the allegation of "unilateralism"
- would be very difficult for the PQ to justify an early election. If they went for one, they could be accused of "playing politics" and seeking to avoid the referendum.

Disadvantages -

- the first four disadvantages of (1)
- there would be greater delay in action and the risk of being sucked into a new series of federal-provincial discussions in which, in spite of the mandate, it might be difficult to act without being accused of "unilateralism"

(3) No measures introduced at this session of Parliament: an appeal for a mandate to implement the 14 areas that have been under discussion with the provinces from October 30th to February 6th, with no further federal-provincial meeting.

Advantages -

- demonstration of determination to act
- avoidance of the first four disadvantages of (1),
- would permit maximum flexibility during an election campaign to adjust position as the debate develops

Disadvantages -

- the basis of the mandate being sought would not be clear. The obscurity of the mandate might largely invalidate it after the election

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- the government might be attacked as running on Bill C-60, including the "attack on the Crown" and all the other defects of which C-60 has been accused
- would be difficult to demonstrate that the government was asking for a mandate precisely on things the provinces would largely have agreed to. The uncertainty might stimulate provincial worries and opposition
- the uncertainty might increase the charge of "unilateralism" and the risk of a PQ election.

(4) No measures introduced, as in (3), but the appeal for a mandate would include one more meeting with the provinces, followed by action as in (2)

Advantages -

- all the advantages of (3)
- less risk of being accused of "unilateralism"
- it would be difficult for the PQ to justify an early election

Disadvantages -

- the first two disadvantages of (3)
- the risk of being sucked into a new series of federal provincial meetings in which it would be difficult to act would be greater than in (2) because the nature and validity of the mandate would be much less certain.

(C) A mandate for action secured in a general election plus a referendum

A referendum could either coincide with the election or follow it. In either case, it would have the same advantages as (B)(1) and (2) in presenting clearly the items that would be implemented. The description in a referendum question would probably be less precise than in the "successor Bill" and addresses in (B)(1) and (2), which would have advantage of avoiding some of the details that can become the focus for

argument and attack. However, the questions would have to be approved by Parliament, which would involve debate either before the election or in a session called after the election. There would also be the risk of getting different answers in the referendum from Quebec, and possibly from Alberta, than from the other provinces. This could present an extremely difficult situation for the government and could be the source of more difficulty and strain in the country.

(1) A referendum to coincide with the election -

The measure setting forth the questions for the referendum would have to be passed at the present session of Parliament. The electoral machinery would have to be adjusted to absorb the referendum material; returning officers would have to be instructed; complex ballots would have to be prepared in both languages.

Advantages -

- if the measure passed and the machinery could be set up in time, there would be prompt demonstration of determination to act
- the mandate would be clear and beyond doubt
- would be very difficult to level any charge of "unilateralism"

Disadvantages -

- the measure for the referendum would precipitate intense debate and might involve either closure or failure to get the measure passed: either could be disastrous
- the government would be charged with an abuse of the electoral process: of using a "phoney" referendum to confuse the election, to falsify the issues, etc., etc.
- the actual result might be to deprive the government of the advantage of the "national unity" issue. Other parties could say that they too would comply with the referendum result if returned to office and the electorate could vote to defeat the government while still voting for prompt action on the constitution.

- the electoral confusion would almost certainly be injurious to the government which would be seen to have caused it.

(2) A referendum after the election

The measure for the referendum would have to be presented to the first session of Parliament after the election. There would be a lot of other priority items for the session. In the result, the referendum would have to be in the winter of 1980 at earliest or in the spring of 1980. In the meantime, the government would have to decide whether to proceed with the next stage of discussions with the provinces or to postpone it until after the referendum. A decision to proceed with discussions would inevitably get the government back into argument over the 14 items and it would be difficult to break off to put them to a referendum. A decision to postpone meeting the provinces would mean that the next stage of discussions would not start until mid-1980. Somewhere in the midst of all this the Quebec referendum might occur, or a Quebec election for a mandate to fight the federal referendum.

Advantages -

- the election could be fought on the general issue of national unity without the precision involved in a "mandate" appeal
- the referendum process would show a high respect for democracy and the right of the people to decide
- the mandate would be clear
- there could be little basis to argue "unilateralism".

Disadvantages -

- the process would be slow: the better part of a year would be lost as compared with a mandate from the election
- would be extremely difficult to maintain credibility if no new discussions with the provinces were started before 1980. They would claim that agreement could be achieved and a refusal to talk would arouse great suspicion and ill-will

- if discussions were started, the government would find it difficult to break off for a referendum
- the referendum might fail in Quebec where both the PQ and the Quebec Liberal Party might argue against action until complete constitutional change had been worked out
- the PQ might use the issue to precipitate an election.

II A "full and protracted negotiation" course -

The conclusion of the Conference could be either to resume discussion of the 14 items in further meetings of the Continuing Committee, or to put those items "on the shelf" while going on, in the Continuing Committee, to the "second list". The plan could be to plod ahead, list by list, until the entire constitution and distribution of powers had been discussed and, if possible, agreed to. Only when everything had been discussed and agreed to would there be action - subject to the possibility of the federal government going ahead with a "successor Bill" either at the present session of Parliament or at a future one. That Bill could be with no Senate; with a Senate if agreed upon; or with a Senate without agreement if the Supreme Court rules in favour of the government on the reference.

Advantages -

- there could be no argument of unilateralism unless the government included a Senate and a Supreme Court in the "successor Bill" that had little provincial support
- would avoid strain with the provinces
- would show the government in a posture of maximum cooperation and maximum acceptance of the proposition that "governments are equal"
- the PQ and probably the Liberal Party of Quebec would support the course
- would be most in accord with the Pepin-Robarts thesis that the constitution is an integrated whole and that "modifications... in one section are related to those... in another".

Disadvantages -

- it has taken three months of intensive work to discuss 14 subjects, with no complete agreement on any of them. The intensity of the work cannot be maintained. Discussion of the whole constitution will probably require at least 3 to 4 years. It will be extremely difficult to provide any credibility in Quebec that "renewal of the federation" is going to happen at all. (This is undoubtedly why the PQ argues for no change until all is agreed.)
- if no change occurs for 3 or 4 years there will be continued difficulties with Alberta and Saskatchewan on resources, with Newfoundland and Nova Scotia on fisheries and offshore
- there will never be complete agreement on all or on most of the constitution. Frustration will set in (as in 1968-71) and the effort to achieve agreement may be lost in recrimination and in allegation that the federal government was ensuring that agreement would not occur so no change could emerge
- the resulting immobility, uncertainty and frustration would play into the hands of the PQ. Their option would appear to be the only credible one since federalism clearly would not be "working" and renewal would not be emerging.

Assessment and Conclusions -

If the above assessment is substantially correct, Course II (full and protracted negotiation with no action - except possibly a "successor Bill") is not a desirable course. The situation is too critical to permit 3 or 4 years to pass with no confidence that any significant change in the constitution is going to emerge - even at the end of that time. The "successor Bill" might be enough action before an election, or in the first session after an election, but indefinite postponement of any action on powers would erode credibility.

Among the possibilities in Course I ("early action"), those under (A) (Action by Parliament at this session) would have very high risk of non-passage. Unless the action were limited to the "successor Bill" alone the other disadvantages are very great. A "successor Bill" alone would probably not be impressive unless it included either a Senate or reform of the electoral system or both. Inclusion of these would make the Bill very difficult to pass at this session. It would appear, therefore, that options (A)(1) and (2) are not desirable and a "successor Bill" alone is dubious if passage is intended.

The options under (C) (a mandate for action secured in a general election plus a referendum) have very great risks without adequate compensating advantages over some of the options in (B). It would appear that courses involving a referendum as the basis for a mandate should not be adopted at this time.

Of the options under (B) (a mandate for action secured in a general election), options (1) and (3), which would call for action on return to power without any further meeting with the provinces, would both be open to charges of "unilateralism". Each might provide the basis for the PQ to precipitate an election in order to get a "counter-mandate" to fight unilateral action by the federal government.

It would appear that options (B)(2) and (4) present the best possibility of securing a mandate for early action without too great exposure to the risk of the charge of "unilateralism". As between (2) and (4), the choice would appear to turn on a judgment whether the certainty of the mandate being sought in the case of (2) would more than compensate for the added exposure involved in putting details into a "successor Bill" and joint addresses. Option (4) would provide fewer hostages to fortune in the way of details for attack but, after the election was over, the nature of the mandate might be obscure and debatable. If a firm base is wanted for prompt action after the election + one more conference, the advantage of option (B)(2) seems substantial.

R.G.R.