

c.c.: Hon. Mr. Lalonde  
Hon. Mr. Lang  
Hon. Mr. Reid  
Mr. Pitfield  
Mr. Coutts  
Mr. Massé  
Mr. Tellier  
Mr. Gwyn  
Mr. de M. Marchand  
Mr. Tassé  
Mr. Strayer  
Miss Macdonald

S e c r e t

February 19th, 1979.

MEMORANDUM FOR THE PRIME MINISTER

A "four year plan" for completion of  
the constitutional program

A possible process and timetable -

The attached "Annex" sets out a process and a timetable along the lines of the plan you described in our discussion on Friday last. It differs in some details because of problems or considerations that emerged as I thought about the proposal. It would start with a Third Constitutional Conference at a very early point after the election because that would be the best means of showing the provinces the continuing seriousness of your intention about trying to get agreement with them and about achieving changes in the distribution of powers. It would, for the same reasons, contemplate that the action taken by a Joint Address to achieve "patriation" would also include any changes in the distribution of powers that had, up to that point, achieved full agreement - and possibly also those that had secured the agreement of 7 provinces with 85% of the population. (This latter might not be wise: it would depend on the seriousness of the objection of any non-agreeing province(s) and on their size. It could probably be only cases where the objection of those not agreeing was not very serious.)

The "patriation" legislation by the British Parliament as suggested here would contemplate four procedures for amendment: unanimous consent at the outset; any other plan agreed to with the unanimous consent of the provinces during 2 years; any other plan approved in a national referendum after 2 years; and, finally, if no new procedure emerged in either of these ways, the "Toronto consensus" formula. An alternative would, of course, be to provide for the Victoria formula as the "last resort" formula. It, however, is anathema to Alberta and,

with 4 regions only, is objectionable to B.C. The "Toronto consensus" does not have quite as much opposition: Alberta does not like it, but its dislike is less vehement than for the Victoria formula. Only New Brunswick and, without a very strong preference, the federal government, would probably take the Victoria formula (with 4 regions) ahead of the "Toronto consensus". In the choice of a "last resort formula", there is probably something to be said for putting provincial preferences ahead of our own. For these reasons, I think the "Toronto consensus" would be best - unless further discussion at the Third Conference produces something better still.

As contemplated, the process would take 3 1/2 years from election date to referendum. If that did not bring a decision, there would be another six months - 4 years in total - to achieve a final amending formula. This final stage could be avoided if the referendum were to require only an absolute majority on a national basis. However, I think this would be a mistake. Such a plan would be open to the attack that it would permit Quebec to be swamped by the English-speaking majority. It would be open to similar, if less serious, objection in the Atlantic provinces and the West about being swamped by a central Canadian majority. Altogether, it seems wisest to recognize these problems in advance and to require regional majorities as well as a national majority. This raises the possibility of an indecisive referendum but that is not as grave as the problem there would be of knowing what to do about, say, a national majority with a Quebec minority if the regional basis were not established in advance. In short, I think it is very important that the rules of the game should be known at the outset and that they should accept the regional reality for a vote on a matter so fundamental to the future of the federation.

The question of a resolution -

It seems to me that there would be some advantage in having a resolution in the House of Commons before dissolution. It should not go into any of the detail of the total plan that is set out in the Annex. It could, however, focus attention on the issue of constitutional change. This has not been done at all during this session of Parliament. It could also put forward squarely the assertion of the importance and urgency of a new constitution, something on which Parliament has not declared itself. Finally, the basis could be laid for a "report" after the Third Constitutional Conference as to what should be done to change the constitution and to "patriate" it.

The attached draft of a possible resolution is the same as the one I sent with my memorandum of February 12th except for paragraph 2 on the second page.

The advantage and disadvantages of the plan -

The plan outlined in the Annex has a good many advantages and a number of disadvantages. As I see them:

Advantages -

- the resolution would provide a good focus of attention and a good basis for presentation of the full plan in the course of the election campaign - whether the resolution was voted on in the House of Commons or not. The resolution would leave complete freedom for development of the plan as the election debate proceeds.
- the resolution would firmly commit the government to a Third Conference and to carrying the process of renewal to completion, which could help to meet some of the worries of the provinces. It would also be important for the federalist option in Quebec.
- the plan would accomplish "patriation" at an early point and that should have the full support of Premier Davis and those who supported his initiative at the Conference.
- it would be clear that "unanimous consent" will not be the permanent condition for amendment of the constitution. Full scope would be given for the provinces to agree on something else to their liking. It would be difficult for them, except Quebec and possibly Alberta, to object strongly to "patriation" on this basis.
- resort to a referendum would be only after the provinces have had 2 years to agree on something: it would be very hard for them to attack consultation of the people at that stage. A referendum to settle this problem, on which agreement seems to be impossible, would probably be well received by the public.
- introducing a referendum in this way does not have the disadvantages associated with a referendum during the election, or one soon after the election, designed to give a mandate on the whole process of constitutional change. It would be for one specific purpose (to approve an amending procedure); it would not get in the way of federal-provincial discussions (indeed the provision for it would provide a stimulus

to them); and its timing would be determined so far in advance that the legislative and other requirements could be handled without difficulty.

- it would be difficult to level a charge of "unaliteralism" against the plan. It does provide for over-riding the provinces by referendum or with a "last-resort" formula, but only at the end of a long process, if they do not agree to something.
- it would provide certainty that the process of constitutional renewal is, in fact, going to come to fruition. This should do a good deal to meet the charge that change of our federal system is impossible and that no conclusion will ever emerge. It would also do something to provide a general sense of confidence that there is some way out of our seemingly endless difficulties over the constitution.
- neither the resolution nor the plan would require any position that would conflict with the Pepin-Robarts report or with positions so far taken by Claude Ryan. There would be full freedom to adopt substantive positions on institutions or on powers as seems desirable. The concept of the referendum as proposed in the Annex accords with the Pepin-Robarts proposal for an amending formula in calling for a majority in each of four regions.
- Disadvantages -
  - the plan will accentuate "patriation" and the amending procedure. This will excite suspicions that the federal government may not really try for changes in the distribution of powers or for general constitutional renewal (the Blakeney argument). It will be important to offset this by acting on changes that are agreed to during discussions with the provinces and by making clear that the government is determined to carry through to complete renewal. This is one argument in favour of the resolution.

- the government of Quebec will object violently to a plan that calls for action on "patriation" and the amending procedure before there is full agreement on the distribution of powers. Whether they would carry that objection to the point of calling an election might depend on how the "plan" is handled during the federal election campaign and how much credibility is given to the commitment to total renewal.
- there will be objection from many provinces to a plan that would call for "patriation" without their agreement.
- there will be objection by some provinces (Alberta, B.C., New Brunswick and probably Quebec) to a plan that would create the possibility that the "Toronto consensus" formula (or, indeed, any formula) might come into force without their agreement.
- it will be alleged that the plan is "unconstitutional" - both because it would involve "patriation" without provincial agreement and because it would contemplate a permanent amending formula that might not have the unanimous agreement of the provinces. Because of such allegations, there might be a demand for reference of the plan to the Supreme Court of Canada and this might make the passage of any Joint Address or the legislation on the referendum difficult, especially if the government is in a minority in the House of Commons.
- the plan calls for a long time to complete: 3 1/2 years to 4 years. This presents a good many possibilities for unforeseen difficulties; for governmental changes and for developments in Quebec that could alter the picture as the process moves ahead.

Conclusion -

I think the plan is basically a good one. The most serious problem about it is likely to be the allegation that "patriation", without unanimous consent, is unconstitutional. The best means of meeting this will probably be by ensuring that the proposal is clearly set out in the appeal for a mandate during the election. If the government is returned on the clear basis that it is going to "patriate", after the Third Constitutional Conference, on the basis proposed if no unanimous consent then emerges, I would think it will be possible to resist argument that the

action has to be referred to the Supreme Court of Canada before the necessary Joint Address can be passed in Parliament. Unless the plan is made quite clear, so that the popular mandate is beyond doubt, "unconstitutionality" could be a fatal argument, especially if the House of Commons has no government majority.

The problem arises with respect to any plan that tries to escape from the dead end of unanimous consent. There has to be some means of escaping from it or we will not get unanimous consent. I think, therefore, that the risk and the problem have to be faced.

The plan need not cause any great difficulty in Quebec, except with the PQ. Subject to the way the substance of constitutional positions is treated during the election, it leaves both time and flexibility. It should be possible to avoid a direct clash with the views of Claude Ryan or those expressed in the Pepin-Robarts report.

I would be surprised if the plan would provide the basis for the PQ to call an election in Quebec. With the promise of a Third Constitutional Conference later this year, they would appear to be evading their responsibilities if they assumed, in advance, that no agreement was possible. They would also seem to be trying to find some excuse to avoid their referendum, which could open them to attack.

While a resolution before the dissolution of Parliament is by no means essential, I think there would be many advantages and no disadvantages. If you agree, you might want to have it considered and possibly discussed in the Cabinet at a very early point.

R.G.R.

P.S.: Since writing this memorandum, I have seen today's press report quoting Premier Lévesque as saying that his government will not attend any further constitutional conferences. I doubt if that should alter the federal government's strategy at this stage. Clearly we should not allow a sudden change of position by Mr. Lévesque to alter a process that has been put in train and to which he raised no objection at the February 5th-6th Conference. "Future work" was an item on the agenda; a federal "second list" was

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tabled and there was some reference to Quebec suggestions of subjects for future work. Mr. Lévesque will certainly harm his relations with the other Premiers if we and they proceed on a normal basis for a third conference and he has to justify a refusal to participate that he has announced unilaterally less than two weeks after the conference and which he did not raise or discuss in any way at the Conference itself.

If Mr. Lévesque adheres to this new position, it will, of course, increase greatly the importance of putting your plan forth clearly during the election campaign. You might be seeking a mandate from the voters of Quebec to proceed to a third conference that Quebec would not attend and to act after it; even though Quebec had not been there.

2. Submission of a "successor bill"

- To include a Charter of Rights - including language rights
- Also to include proposals on the Senate if the Supreme Court decision is favourable - plus must R.G.R. 7-88 as revised

3. Submission of a Joint Address

- To include all changes in the distribution of powers agreed on (or with a committee of seven provinces with 51% of the population) at the third conference
- Also to include a request for "protection" of the constitution.

4. The issue of "restriction"

The federal legislation would provide the necessary legal basis for:

- (a) Amendment of the constitution with
- approval of all the provinces

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Possible process and sequence on the constitution

A. The elements of the process

1. A third conference with the provinces

- To try to get agreement on the "first list" items
- Start of work on "second list"
- To seek a substantial consensus on "patriation" forthwith

2. Submission of a "successor Bill"

- To include a Charter of Rights - including language rights
- Also to include proposals re the Senate if the Supreme Court decision is favourable - plus most of Bill C-60 as revised

3. Submission of a Joint Address

- To include all changes in the distribution of powers agreed on (or with a consensus of seven provinces with 85% of the population?) at the third conference
- Also to include a request for "patriation" of the constitution.

4. The basis of "patriation"

The British legislation would provide the necessary legal basis for:

- (a) Amendment of the constitution with unanimous consent of the provinces

(b) Amendment by any other process that may be agreed upon with unanimous consent during two years from the proclamation of "patriation"

(c) Amendment by any other process that may be approved by the majority of the people of Canada and a majority of the people in each of four regions of Canada in a referendum to be held by the government of Canada under legislation to be introduced not less than two years from the proclamation of "patriation"

(d) Failing approval of any new procedure for amendment under (b) or (c) within three years from the proclamation of "patriation", amendment of the constitution on the basis of the "Toronto consensus" (i.e. - limited unanimity; two-thirds of the provinces with 85% of the population of Canada)

5. Further constitutional conferences 1979 to 1982

- To proceed, along with work by the Continuing Committee of Ministers, to try to get agreement on

- the "second list" of items
- other items of change
- on amending formula to replace "unanimous consent" within two years from the proclamation of "patriation"

6. Referendum on the amending formula, 1982

- If no agreement on a formula has been achieved during the constitutional conferences

7. 1982-1983 - further discussions with the provinces

B. A sequence and possible timetable

Starting from the date of the election (E) a possible, although tight, sequence and timetable might be:

E + 3 months - Third constitutional conference

This would allow time for any problems relating to the establishment of the government; Cabinet decisions about positions on the items for discussion; etc.

E + 5 months - Report to House of Commons; introduction of "successor Bill" and Joint Address

E + 7 months - Passage of "successor Bill" and Joint Address

E + 10 months - Passage of "patriation" legislation by the British Parliament,

E + 12 months - Proclamation in Canada of the "patriation" of the constitution and of any amendments to the distribution of powers included in it

E + 36 months - Expiry of the two year period for agreement with the provinces on an amending formula. If no agreement, introduction in the House of Commons of legislation for a referendum on a formula

E + 39 months - Passage of referendum legislation

E + 42 months - Holding of the referendum

This assumes that more time will be required than for a general election, which may or may not be a valid assumption.

If the referendum brings the required majority for an amending procedure, the process will be completed three and a half years after the election. The constitution could then be amended, using the new procedure, to bring into effect any changes that had achieved the

necessary degree of consensus in the meetings of the constitutional conference - except for any that might have been implemented in the interim on the basis of "unanimous consent".

If the referendum did not bring the required majorities, there would be another six months for further discussions with the provinces to try to achieve unanimous consent on an amending procedure. Failing that -

E + 48 months - The "Toronto consensus" formula would come into effect.

The proposal would thus set an outer limit of four years from the date of the election to achieve a formula other than unanimous consent for amendment of the constitution. The timetable could possibly be squeezed by a few months if a few weeks could be cut off the various stages set out above.

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Possible motion for introduction in the  
House of Commons on the constitution

Moved by the Prime Minister, seconded by  
that this House:

Note the progress made in the recent constitutional conferences with Premiers of the provinces and in meetings of the Continuing Committee of Ministers on the Constitution in the achievement of a high degree of consensus on matters stated by the provinces to be of priority for them with respect to the distribution of powers and in other matters of concern to both the federal and the provincial governments in Canada;

Record its view that it is of great importance in the national interest that steps be taken at the earliest date to provide a new constitution for Canada as the basis for a renewal of our federation to meet urgent problems of national unity, regional alienation and economic disparity between different parts of Canada and for the better protection of the basic rights of Canadians, including language rights;

Note that, after repeated efforts since 1927, it has not been possible to achieve unanimity among the federal and provincial governments on a procedure for the amendment of those parts of our constitution that cannot now be amended in Canada and that, as a consequence, action has not yet been taken to transfer the complete control of the constitution to Canada under appropriate arrangements to permit all changes in our constitution to be made in Canada;

and that this House, therefore, agree:

2.       S e c r e t

1. That the Prime Minister of Canada hold a third Conference on the Constitution with the Premiers of the provinces to achieve as complete a consensus as is possible on the matters that have been under discussion since October, 1978, including a fair and reasonable formula for the amendment of the constitution of Canada;

2. That, following that conference, the government report to this House on the measures it thinks it desirable to recommend for change in those parts of our constitution that can now be amended under the powers accorded to Parliament by Section 91(1) of the British North America Act and also with respect to other matters that have been under discussion with the provinces and that will be further discussed at the third Constitutional Conference, including the transfer of complete control of the constitution of Canada to this country; and

3. That action be taken through the Continuing Committee of Ministers on the Constitution to prepare for discussion, at the third Conference on the Constitution and at further Conferences, of other areas of constitutional change until a complete renewal of the Constitution of Canada has been achieved.