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Discussion Paper

Progress Report on the Three Weeks of Constitutional Negotiation In Montreal, Toronto and Vancouver

Note: This paper has been prepared by officials involved in the constitutional negotiations, under the direction of FPRO and the Department of Justice.

Introduction

This memorandum is designed to provide Ministers with a review and assessment of the first phase of intensive constitutional discussion which was completed last week in Vancouver. While it is primarily an informational document, it does request some broad policy direction from Cabinet (see Part III, pp. 30-40).

The memorandum is divided into three main sections:

- An overview and general assessment of the constitutional talks to date
- A status report on each of the twelve items of negotiation
- A concluding section on strategic issues which indicates further work to be completed in August in preparation for the August 26-29 CCMC meeting and the September 8-12 First Ministers Conference, and which seeks some general policy guidance.

A summary timetable of relevant events appears below:

May 20	Quebec referendum
May 21-24	Minister of Justice's meetings in provincial capitals (except Quebec City).
June 9	First Ministers Conference, 24 Sussex Drive.
June 17	Meeting of the Continuing Committee of Ministers Responsible for the Constitution (CCMC) in Ottawa.
July 8-11	Week 1 - Constitutional negotiations begin in Montreal.

July 15-18	Week 2 - Constitutional talks continue in Toronto.
July 22-24	Week 3 - First phase of intensive constitutional discussion concludes in Vancouver.
July 24-25	Prime Minister Trudeau meets Premier Lougheed in Ottawa about oil pricing. Talks break down.
July 28 - August 25	Interim period prior to final CCMC meeting during which committees of officials will continue to meet.
August 14-15	Quebec National Assembly discussion of constitutional reform.
August 21-22	Annual Premiers' Conference to be held in Winnipeg.
August 26-29	Final CCMC meeting in this round of talks. To be held in Ottawa. Possible extention into week of September 2.
September 8-12	First Ministers Conference to be held in Ottawa.

At the June 9 First Ministers meeting twelve items were identified for the intensive constitutional discussion, and it was agreed that the federal and provincial Ministers responsible for the Constitution would report back to the September First Ministers Conference on progress made during the summer on each of the twelve items. The items are:

1. Charter of Rights
2. Patriation and Amending Formula
3. Principles/Preamble to the New Constitution
4. Equalization
5. Supreme Court
6. Family Law
7. Fisheries
8. Resources
9. Offshore Resources
10. Powers over the Economy
11. Communications
12. Senate/Second Chamber

I Overview and General Assessment of Constitutional Discussions to Date

A. Mood of the Talks and General Progress So Far

In summarizing progress to date, it is probably fair to say that we are at the key point in the negotiating process. We have spend the bulk of the first three weeks in the first phase of negotiations in which the various participants established their positions, attempted to communicate the justice of their cause, and tested the strength of their adversaries. There were some indications in the third week of a readiness to move to a second stage in which the participants would begin to search actively for common ground, and to indicate a willingness to move some distance towards one another and a desire to establish the terms of a settlement which all participants can subscribe to and defend politically to their own constituents. Needless to say, this is a perception of the process from the inside and is little recognized as yet by the press and public, a fact which is hardly surprising, since the talks are taking place behind closed doors.

In this first phase of negotiations, the federal government has fared well, staking out a tough position and defending it successfully, both in private and public (e.g. at press conferences). As we will see in a moment, the strategy which Cabinet established prior to the start of constitutional talks has been implemented and is operating effectively.

Initial provincial suspicion of federal government intentions has been gradually supplanted over the three-week period by the realization that the country's circumstances have changed since the last constitutional round, as have the fortunes of the federal government, and that Ottawa means what it says in the positions it is advancing and the tough approach it is taking in these talks. There is little apparent recognition among most provinces of the fundamental importance of the Quebec referendum; indeed as far as the CCMC is concerned, it is very much business as usual.

The adjustment of the provinces to this new situation and to an unfamiliar bargaining environment in which the federal government is asking for powers, not just giving them away and is clearly determined to achieve constitutional change this fall, has taken some time. However, there have been some indications towards the end of the third week (principally Saskatchewan's statement accepting the principle of the economic union) of a provincial willingness to concede <u>some</u> ground on areas of contention in the hope of breaking the stalemate, and some provinces have indicated in private, a willingness to make a deal. On the other hand, the change in the Saskatchewan position may only be a negotiating tactic rather than a change of heart (in which case it will probably turn out to be a major tactical error). It may just be an attempt by Mr. Romanow to get himself out of the corner he had painted himself into in Toronto when he appeared to be completely unreasonable in his emotional reaction against the concept of the economic union.

The item dealing with powers over the economy dominated the three weeks of constitutional discussions, without a consensus emerging at this stage. But a good deal of work was done on the other items as well, and this is detailed in Part II of this paper.

In the first week the Senate surfaced as an item of lively interest on the part of the provinces, and it continues to attract a good deal of attention. The Supreme Court proposal, which is widely supported by the provinces, provides for an 11-member court with 6 common law and 5 civil law judges, an arrangement which would result in a remarkably open and frank expression of the principle of duality, which is the more striking when one considers that it is Manitoba that advanced this particular idea. The discussions of the various items in no sense saw the provinces lining up together against the federal government, although Ontario has been the most steadfast supporter of the federal position. Indeed, offshore resources is virtually unique in being the only item in which there is universal provincial opposition to the approach taken by Ottawa (although the same 10-1 split exists in some parts of the communications item); even then, however, on offshore resources, the provinces are not in agreement among themselves on how to implement their agreement in principle.

In summary, it is useful to recall that, prior to the start of these discussions, and even until the end of the second week, there was some question in people's minds about whether the talks might break down, in view of the hard federal stance. In reviewing the three weeks, it is fair to conclude that the federal government pressed the provinces to the limit, but not beyond, and that we begin August with the process intact and the stage set for rapid progress, should that be the collective desire of the participants when the CCMC reconvenes in three weeks' time. The outcome of the intervening Premiers' Conference may be critical to progress.

B. Government of Canada's Objectives and Strategy

The federal government's constitutional strategy, as approved by Priorities and Planning Committee and Cabinet at the beginning of July, was composed of five elements:

1. To insist on the distinction between the people's package and the package for governments;

2. To make it clear to the provincial governments and the public that the federal government is committed to a deadline on the people's package;

3. To make it clear that the federal government would not bargain elements of the first package against elements of the second;

4. To insist that the federal government was prepared to bargain on the second package, so long as it involves give-and-take on both sides;

5. To establish the central linkage between resources and powers over the economy.

Our conclusion at the end of the third week of negotiations is that the strategy is working well. The federal government has clearly established the ground on which the negotiations will occur and has been able to ensure that its basic conditions with respect to the process have been met. The people's package has been separated for purposes of negotiation from the other items on the agenda, and little overt effort on the part of the provinces is now devoted to the attempt to trade off agreement on "rights" for agreement on "powers". However, our impression is that several provinces will wish to hold off on submitting their final position on the Charter of Rights until they see what the total package might contain.

The existence of a deadline and the threat of unilateral federal action in the absence of full agreement are perceived as real; indeed, the provincial concern now is, first, that the federal government may be looking for an excuse to move unilaterally, the excuse being that the provinces are uncooperative, narrow in their outlook and interested in their own rather than the nation's interests. And second, that, if unilateral action does occur, it may proceed on a wider front than simply the people's package.

The linkage between resources and powers over the economy has been clearly established, as is evidenced by the fact that a single committee of officials is addressing both issues.

What remains to be done, so far as our statement of strategy is concerned, relates to Item 4; that is to say, "good faith" bargaining on the second package, involving give-and-take on both sides, awaits our entry into the second phase of the negotiating process. So far, it has been the federal government's policy to assert the bargaining principle in general, but to insist that the first sign of movement and of a willingness to make a deal needs to come from the provinces. These signs began towards the end of the third week in Vancouver, and reciprocal action on the part of the federal government will be required in August. (We return to this subject in Part III of this memorandum.)

The federal government has successfully taken the offensive with an approach that so far has proven to be generally attractive and "explainable" in public. The provinces as a consequence have been on the defensive. The situation, however, is unstable, and the Government of Canada will need to consider carefully how best it can maintain the momentum that has been established. If the federal government

adheres too long to a hard-nosed negotiating position, and is not able to move quickly to take advantage of negotiating openings and offers for compromise when they present themselves, its toughness may come to be seen as intransigence and as an aggressive and unbending defence of its own powers. Thus a good public case could be fumbled and the initiative could move to those who oppose the approach of the Government of Canada. However, we must also guard against moving too quickly -- for there is no doubt that one of the reasons for the limited success there has been in the negotiations to date has been the tough, uncompromising stand of the government on positions which the provinces presume to be politically popular. For example, Romanow said on radio on Sunday, that the federal position would be highly popular with the people of Saskatchewan if the federal government decided to hold a referendum on it.

The key questions which we must face therefore are: what issues we should alter our position on, and when and how we should make these new positions open to the provinces. These questions are also addressed in Part III of this paper.

C. The Provinces

Collectively, as we have indicated elsewhere in this memorandum, the provinces have been caught somewhat off guard by the federal government's strategy, and in particular by the fact that it has developed precise proposals in the economic area that constitute a challenge to provincial freedom of action.

The following provinces might be singled out for specific comment:

1. Newfoundland

Newfoundland has in effect made a leap of faith. It has now decided to give total support to the federal government's position on the people's package and on much of our powers over the economy proposal, in the expectation that it will receive satisfaction on at least offshore resources and possibly on the fisheries as well. By doing so, it has acknowledged the distinction the Government of Canada wishes to draw between the people's package and the rest, and has placed itself in an exposed position, should the federal government refuse to move sufficiently on matters of particular concern to it, especially on offshore resources.

2. Quebec

The Government of Quebec's approach to date has not in any way undermined the process or compromised the integrity of the talks and the federalist framework within which they are being carried on.

Quebec has been forthcoming in discussions of the Supreme Court, principles/preamble, Senate and family law, while also indicating that powers items come first, although Mr. Morin has stressed that a reformed Senate is no substitute for changes in the distribution of powers. For the first time they have been active participants in discussions on the topic of patriation and amendment. Their position on the distribution of powers and powers over the economy has been entirely predictable; they are opposed to any steps which might weaken Quebec's provincial powers. They have also asked for major transfers in resources, communications and fisheries. While they are prepared to discuss the question of the entrenchment of certain fundamental rights, they are steadfastly opposed to any constitutional entrenchment of language rights.

Their long-term strategy remains unclear, although it appears that the outcome they would most like to see from the negotiations is agreement on some items (e.g. Supreme Court) which would undercut Ryan by showing that the PQ can negotiate successfully with the provinces and the federal government, and disagreement on all the powers items, thus showing that they are staunch defenders of provincial rights against an excessively centralist federal government. Thus, Quebec's preferred outcome to the negotiations appears to be partial success because of Quebec's skillful negotiating ability, and overall failure because of Ottawa's demands for new powers and refusal to concede to Quebec's traditional demands.

3. Ontario

Ontario has been the strongest supporter of the Government of Canada's overall position in these talks, especially in the area of the division of powers and economic matters. They offered a revised draft of a new section 121 which would secure all the positions which the Government of Canada deems to be important. At times the warmth of their support in the economic areas endangered their credibility, and it would not be surprising if they decided, for tactical reasons, to put some distance between themselves and the federal government for a time. They agree in principle with the other provinces on the subject of offshore resources, and they are opposed to many of the federal proposals for the Charter of Rights, other than language-education rights.

4. Saskatchewan

Saskatchewan has been without question the most obstreperous and recalcitrant province in the course of these talks; the reasons for this are obscure. To some extent, they

may be functioning as a stalking horse for Alberta, although the extent to which that is a result of circumstance or design is not clear. Also, to a certain extent, Mr. Romanow may be attempting to maintain the credibility of his government which is publicly vulnerable to attack if it is seen to be too close to what is perceived as the 'central' Canadian government. He may also have been trying to establish his credibility as provincial co-chairman in the eyes of the other provincial Ministers (although if so, this is backfiring to some extent).

Mr. Romanow is clearly under a good deal of pressure and has made a few tactical blunders, including a major one by first bitterly attacking, and then supporting in principle, the federal position on the economic union. This has isolated him from his provincial colleagues at times. Some provinces have taken exception to what they believe to be his tendency to use his CCMC co-chairmanship as a soap-box from which to publicize his province's views.

While Saskatchewan has been the most aggressive province in these talks, it would be wrong to conclude that they have strengthened their position as a result. If anything, it is the reverse. However, the fact that they feel boxed in and in danger of being isolated may make them difficult . In addition, it is not inconceivable that they may find sudden and strong support in Alberta, particularly now that the energy talks have broken down.

5. Alberta

Alberta has been playing a minimal role in these talks and has been virtually silent on several issues. Their official, as Chairman of the committee dealing with powers over the economy and resources, went to considerable length to keep resources off the table, despite the efforts of Saskatchewan to address the matter. It is obvious that their role in these talks has been shaped by the energy negotiations, just as the degree and quality of their participation in the future CCMC and First Ministers meeting is now in serious doubt as a result of the impasse in the energy talks.

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II Status Report: Progress Made on the 12 Items

This section of the paper is divided into three parts:

The People's Package

- Patriation and Amending Formula
- Charter of Rights
- Preamble/Principles

Economic Items

- Resources and Interprovincial Trade
- Offshore Resources
- Fisheries
- Powers Over the Economy
- Equalization

Institutions and other items

- Senate/Second Chamber
- Supreme Court
- Family Law
- Communications

A. The People's Package

1. Patriation and Amending Formula

There have been useful discussions on this item, especially in the last week. In accordance with the federal government's strategy for the meetings, the federal delegation has not declared a preference for any particular amending formula, but has encouraged development of potentially acceptable proposals by the Conference as a whole.

The federal government indicated that something in the general area of the following existing formulas would be acceptable:

The Victoria formula, requiring a "national consensus" for amendment of matters of fundamental concern; such a national consensus being the consent of Parliament and of six or more provincial legislatures, distributed among four regions, representing 80% of the population.

The Toronto consensus, requiring unanimity on changes in amendment provisions and in provisions affecting provincial ownership of natural resources. Changes in other entrenched matters would require the consent of at least seven legislatures representing 85% of the population.

A simple formula, requiring the consent of Parliament plus six or more provincial legislatures representing 80-85% of the population.

Discussion in the Committee of Officials centered upon the Alberta formula, which would provide for amendments with the consent of Parliament and two-thirds of the provinces representing a simple majority of the population, but if adopted the amendment would not apply to a province which had expressed its disagreement.

The federal government indicated that it would support any general formula that provided an effective combination of stability and flexibility, that was broadly acceptable to the provinces, and that resulted in a generally uniform constitutional régime for all the provinces.

A number of provinces appear to support the Alberta approach generally.

Most of the key issues have been raised and differences narrowed to some degree, including the possibility of a veto for one or more provinces and special protection for a short list of key items, such as provincial jurisdiction over and ownership of natural resources and certain elements of the amending procedure. All provinces have participated actively. Quebec has declared its desire for a veto and no province has explicitly rejected the notion. One or two have said they would want the same, but Ontario has not yet made a point of laying claim to a veto.

The federal government will have to decide whether it should declare support for any of the more familiar formulas or whether it should make a new proposal. It may be necessary to take a position at the August meeting of the CCMC, but in all likelihood we can avoid taking a firm position on the amending formula until the First Ministers Conference.

2. Charter of Rights

When entrenchment of the Charter was first discussed privately by Ministers on July 16, there was only limited provincial support for the principle of entrenchment. Only New Brunswick gave unqualified support. Newfoundland's support was contingent on concessions respecting offshore resources and fisheries, with Nova Scotia and P.E.I. proposing deferral of rights discussions until offshore issues were settled. Ontario's support was limited to fundamental freedoms, democratic and a few legal rights as was Quebec's but

in the latter case, Quebec felt entrenchment of rights should proceed only after settlement of the distribution of powers. Other provinces continued their outright or strong opposition to virtually any entrenchment.

Despite general provincial reluctance to entrenchment of rights (especially as comprehensive as those proposed by the federal government), a committee of officials was struck to:

- examine the provisions of the federal draft with a view to assessing their likely impact on existing laws and practices and on provincial legislative powers;
- consider changes that would clarify and improve the language of the draft;
- consider the possibility of initially entrenching the Charter only for the federal level;
- re-examine the practicality of including in the Charter an "override" clause, permitting the enactment of laws expressly derogating from specified rights; and,
- consider the viability of elevating the Canadian Bill of Rights as a "super-statute", the provisions of which would prevail over other statutes without entrenchment.

Following a study and report by officials on these matters, some considerable progress has been made. Whether this advance will hold is another question since some provinces' positions are unstable.

In general, the following assessment may be made:

- with the exception of Manitoba (and probably British Columbia) which remains totally opposed to entrenchment of any rights, all provinces are likely to accept entrenchment of fundamental freedoms and democratic rights.
- with the exception of Manitoba and possibly Alberta, it may be possible to get agreement to entrench some legal rights;
- it may be possible to sell a limited version of mobility rights to a fair number of provinces, but without including any right to acquire and hold property;
- as anticipated, non-discrimination and property rights will be virtually impossible to sell;
- general language rights at the federal level will be acceptable, but there are difficulties at the provincial level. In particular Ontario will not accept the same obligations as Quebec, Manitoba and New Brunswick. Most other provinces will likely accede to the minimal obligations proposed for them;
- a fair number of provinces may be brought around to accepting the proposal for entrenchment of minority language education rights;

- it is problematic whether there will be any consensus to entrench the Canadian Bill of Rights;

- there may well be added support for entrenchment if an acceptable general override (notwithstanding) clause could be devised.

Despite the foregoing, there are a number of difficult problems to be resolved. Many of these entail drafting changes which may or may not ultimately gain provincial acceptance. Others involve larger policy issues on which Cabinet guidance will be sought before the August CCMC meeting.

3. Preamble/Principles

Ministerial discussions on this item went unexpectedly well. All the main federal aims were achieved. The principal objective is to obtain as clear as possible a statement of the subjects the various participants think should appear in a Preamble.

The item will be considered again at the next CCMC meeting, when drafts from several participating governments are likely to be presented.

All provinces attended the Ministerial session in Vancouver, although Alberta and Saskatchewan took no part in the proceedings. Quebec, which had prompted the discussion, was especially active. Mr. Morin stressed the importance of the preamble and suggested that it refer, among other things, to the distinctness of Quebec society and to Quebec as the mainstay of French Canada, to Quebec's commitment to federalism combined with its free adherence to the federal system. At the officials meeting, Quebec did not ask that provincial self-determination be referred to explicitly in a preamble. However, at the Ministers private sessions, Quebec (supported by Premier Hatfield of New Brunswick) asked for a self-determination clause but also said that they would be prepared to agree to having self-determination expressed positively (e.g. by saying that Canadians originally came together voluntarily and hence, Quebec claims they could leave the union voluntarily. Considerable agreement with this suggestion was voiced and there was no expressed opposition.

Several delegations expressed a preference for a preamble which was chiefly, if not exclusively, inspirational in character. Concern was expressed by some delegations about the possibility that a preamble to the Constitution might be used by the courts to interpret other parts of the Constitution. It was also noted that the preamble might not be used by the courts to interpret other parts of the Constitution unless the meaning of those parts was unclear. It was decided that this matter be reviewed at the next meeting of the CCMC at the end of August.

There was also wide support for an appropriate expression of Canadian linguistic equality but not cultural duality. New Brunswick was the leading voice in favour of Quebec's proposals and Ontario also lent support. B.C. and Nova Scotia would not allow themselves to be carried along by these statements of Canadian reality and said, for example, that it did not accord with the facts to say that French and English are Canada's languages, as opposed to "official languages."

B. Economic Items

1. Resource Ownership and Interprovincial Trade

By the close of the first round of discussions at Montreal, the provinces had been told, in line with the July 2 Priorities and Planning discussion, that the federal government was not prepared to support those important sections of the 1979 Best Efforts Draft which provided for (1) provincial concurrency in international and interprovincial trade and commerce in resources and (2) federal paramountcy to be limited to those situations involving a compelling national interest. The provinces had also been told that there was no federal support for the 1979 draft on the declaratory power which would have exempted resources from its application, unless the province concerned was in agreement.

The full import of these moves by the federal government took time to "sink in", and was probably appreciated fully only when it was made clear, during the Toronto discussions, that no easing of the federal position was to be expected until provinces moved on matters of federal interest, particularly on powers over the economy. The federal stand on resources ownership and interprovincial trade was not directly discussed by Ministers at Toronto, but was attacked strongly in discussions on other subjects, particularly in talks about the economy. An officials committee covering both resource ownership and powers over the economy was established at Toronto, but did not discuss the resource issue because the Alberta committee chairman insisted on it being postponed despite pressure from other provinces for it to be discussed.

At Vancouver, Ministers spent some time in private sessions on the resources issue. Mr. Chrétien indicated his willingness to consider concurrency with unrestricted federal paramountcy. He also expressed sympathy concerning problems raised by Saskatchewan which had arisen from the CIGOL case and the Canada Potash case. The provinces were encouraged to continue exploring the whole subject with the federal representatives, but with no promise that a solution would be found, or that a change in the federal stand might take place.

On the application of the federal declaratory power to provincial resources, Mr. Chrétien indicated a willingness to explore the possibility of a constitutional provision requiring ratification by a renewed Upper House before the power could be used against the wishes of the provincial government concerned.

The Committee of Officials spent most of its time in Vancouver on powers over the economy and only a short and inconclusive period on resources. Despite the fact that the 1979 Best Efforts Draft was unacceptable to most provinces for widely different and sometimes conflicting reasons, most provinces stated their disappointment that the federal government had largely withdrawn from the earlier joint effort and seemed to be making no new effort to resolve differences.

2. Offshore Resources

In line with the July 2 Priorities and Planning discussion, Mr. Chrétien indicated in his opening statement at the outset of the Conference, that the federal government no longer believes concurrent jurisdiction, as earlier proposed, to be a workable solution with respect to offshore resources. He proposed instead that administrative arrangements be considered and suggested that there could be an improved version of the arrangements worked out with the Maritime provinces in 1977, including an improved revenue-sharing formula.

All the provinces argue that offshore resources should be treated in a manner consistent with constitutional provisions for resources onshore. This means that on this item there is a 10-1 split against the federal position. However when it comes to implementing the above principle, seven provinces favour constitutional recognition of provincial ownership, New Brunswick supports the administrative arrangements approach and Ontario and Manitoba do not seem to hold strong views.

Despite the above alignment of provinces, Mr. Chrétien maintained his initial position. At the end of the second week, he was therefore pressed by the provinces to table a precise proposal concerning administrative arrangements, even though most provinces consider such an approach to be an unacceptable solution. It proved impossible to develop a proposal by the third week, but federal officials did explore various possibilities with their provincial counterparts. In the absence of a specific proposal, the provinces were rather reluctant to discuss administrative arrangements and they now fully expect a federal proposal to be put forward prior to the August 26-29 meeting of the CCMC.

Federal officials are now developing proposals for administrative arrangements for consideration by Ministers. The possibilities explored with provincial officials, without prejudice to an eventual firm federal proposal, and using the 1977 Federal-Maritimes Memorandum of Understanding as a starting point, can be summarized as follows:

- the possibility for the federal minister to override provincial views might be made more difficult than in the Memorandum of Understanding;

- the existence and the roles of the Board set-up under the Memorandum might be confirmed in the Constitution;

- the 75% share of revenues the provinces would receive under the Memorandum might be increased, perhaps to 100%; and,

- to assure the provinces that the revenue flow would be significant, governments might adopt a principle whereby the economic rent provinces receive from offshore resources would be comparable to the rent from onshore resources.

3. Fisheries

The draft Memorandum to Cabinet of June 27, 1980 proposed that concurrent fisheries jurisdiction should be opposed and that improved arrangements for consultation would be the best way of satisfying provincial aspirations. At the same time it was suggested that, as a fall-back position, full provincial jurisdiction over freshwater fisheries and certain coastal species of lesser importance could be proposed at an appropriate point towards the end of the negotiations. During the July CCMC negotiations, all aspects of fisheries jurisdiction -- both freshwater and marine -- were explored in considerable detail.

The Committee of Officials produced a "best efforts" draft of constitutional provisions conferring exclusive jurisdiction on the provinces with respect to the inland fisheries, with the federal government, however, expressing strong reservations as to the workability of the regime.

There was general agreement that salmon and other "diadromous" (freshwater - salt water) species should be subject to a special regime, but differing views were expressed on the nature of the regime that should be adopted. The federal position was that Parliament should retain exclusive jurisdiction over these fisheries, both at sea and in rivers. Most provinces argued for a form of concurrent jurisdiction, leaving the federal order of government with jurisdiction only with respect to the total allowable catch and the division of the catch between provinces. The federal government considered this approach to be unacceptable.

The federal government also proposed that if inland fisheries jurisdiction were to be transferred, some federal authority should be retained over environmental protection in inland waters (which at present is based largely on the fisheries power), native fisheries, and the prevention of fish disease. With respect to the environmental question, it was indicated that the federal concern is primarily centered on salmon streams as well as trans-boundary rivers and lakes where effective action would be beyond the powers of any single province. These questions remain open for further negotiation.

A "best efforts" draft was also developed with respect to aquaculture and certain specified fisheries conducted in tidal waters -- the so-called "sedentary species" such as clams and oysters (which unlike the free swimming species are essentially stationary) and marine plants. Again, however, there were strong federal reservations on the practicality of this option. This aspect was also covered in the "best efforts" draft, although the key questions of the exact species to be covered and the area involved have not yet been discussed.

The most important issue remains the coastal fisheries, and here there are still significant differences. The federal position is that exclusive federal jurisdiction should be maintained, but that "legal mechanisms" -- not necessarily of a constitutional nature -- could be developed to ensure more meaningful consultative procedures. Nova Scotia still appears to support this approach, but most other provinces appear to favour some form of concurrency with federal paramountcy over the areas that have an interprovincial or international dimension, and provincial paramountcy over areas of primarily local impact. There were, however, differences among the provinces on the form that concurrent jurisdiction might take. There was some discussion of the form that improved consultative mechanisms might take, and this question is to be pursued further in August.

4. Powers Over the Economy

The federal position on powers over the economy dominated the three weeks of discussion. Briefly, this position is to secure in the Constitution the Canadian economic union by making provision for the free flow of persons, capital, services and goods across the country. Discrimination on the basis of province of residence or origin would be prohibited.

The provinces were first put off balance because they did not expect the federal proposals to be as direct: They were then shocked when they realized that the federal government was serious about its proposals and had no intention of backing away.

Saskatchewan and Alberta were particularly troubled by the linkage made between powers over the economy and resources, and it was not until the end of the third week that Saskatchewan decided that it had to make some concessions in order to have a serious discussion on resources.

It may well be that a basic difference of principle exists between the federal government and the provinces as to whether the national economy transcends, or is simply an aggregation of the regional economies. Certainly, there are some clear signs that the cleavage in outlook runs as deep as this. In particular, some Western provinces may want to be able to regulate the external world

which impacts on their major resource areas (e.g., potash in Saskatchewan and oil and gas in Alberta. In effect, they appear to believe that the national economy consists of a series of regional economies and that the provinces themselves should control these regional economies. This is a fundamentally different view of Canada from that held by the federal government and Ontario and may well be the underlying cause of the concern and resentment which the provinces have towards the federal economic proposals. In turn, such differences on the nature of an economic union can explain the significantly different views that emerged on suitable derogations to be allowed in respect of a constitutional acknowledgement of a Canadian economic union. These differences can also explain the differing views on whether politicians or the courts should make the decisions in cases of conflict.

The basic provincial reactions to our position can be summarized as follows: There is widespread acceptance of the principle of economic union although there is no consensus on the best means of making it operative. Some provinces are concerned that the courts will have too great a role in the economic field; they want disagreements over the implementation of the principle of an economic union to be settled by politicians not judges.

The four Atlantic provinces will probably end up in agreement with our position if we can assure them that regional development will not be adversely affected. Quebec will be opposed because it sees our position as weakening provincial powers; however, it will be embarrassed to have to contradict its own White Paper which strongly supports a Canadian common market. Ontario is strongly in favour. Manitoba has indicated a certain degree of approval. Saskatchewan has approved enshrining the principle of an economic union and, in the end, will be hard pressed to refuse to make it operative. Alberta has been silent, but has indicated disapproval. British Columbia seems to be leaning towards approval.

However, most of the support indicated above for the principle of an economic union, will disappear if the issues of resources and offshore resources are not resolved to the satisfaction of the provinces.

Nevertheless, what is significant is that in a period of three weeks, we have achieved widespread recognition that the principle of economic union and the free flow of people, goods, services, and capital across Canada should be incorporated in the Constitution. How to achieve it, rather than whether or not it is a valid goal for the federation, is now the matter being negotiated.

The other significant aspect is that this is the first time in many years that the federal government has come to constitutional negotiations with a direct attack on provincial laws and practices and a request for new or clarified powers of its own. The result has been that the provinces were consistently on the defensive on an issue that has very widespread public support.

Finally, it appears evident that a signal has now been given by Saskatchewan -- the most recalcitrant province -- that it is willing to move if we compromise on

our hard-line position on resouces. If we do bargain on resources in good faith, it is very possible that we will get agreement on incorporating a new Section 121 into the Constitution which has some measure of enforceability.

5. Equalization

The initial federal objective to secure constitutional entrenchment of the principle of equalization through a system of federal payments to provinces, has been largely achieved. Nine provinces and the federal government are in agreement on the substance of an approach for doing this which is along the lines of the earlier best efforts draft as modified by Quebec. However, British Columbia still questions the need to entrench equalization in the Constitution. Their objection, however, is not to the principle of equalization but to the fact that they interpret the word equalization to mean the existing equalization formula and they are opposed to entrenching a formula in the Constitution.

C. Institutions and Other Items

1. Senate/Second Chamber

The federal position adopted on July 7 was to not present a particular proposal for a revised second chamber but to direct discussions with the provinces on this subject towards an identification of the roles a revised second chamber might perform.

During the first week of the discussions a striking development was the extent to which (in contrast to previous periods of constitutional discussions) the provinces gave to this issue a high priority and approached the subject from a common frame of reference. By the beginning of the second week, the Ministers in private discussion had arrived at the following points of consensus:

a) on the need for a new second chamber,

b) that the new second chamber not be an elected body,

c) that it be composed of provincial representatives, but that consideration be given to the possibility of federal representatives at the same time that the role and powers of the second chamber are discussed,

d) that on representation:

- a majority of the provinces wanted equal representation on a province by province basis,

- some wanted a weighted representation based on an undetermined number per region, using four regions as a basis,

- one province (B.C.) wanted equal representation from five regions,
- two reserved their position,

e) that the new upper chamber could possibly, but not necessarily, be a substitute for some of the existing federal-provincial consultation mechanisms,

f) that the new chamber have the power to ratify (probably by a simple majority vote) federal actions in such areas as:

- declaratory power,
- federal spending power in areas of provincial jurisdiction,
- amendments to the constitution,
- other powers as contained in the B.C. proposal, and

g) that there was a willingness to discuss further the establishment of another category of suspensive powers.

This ministerial document was referred to a committee of officials who identified four possible approaches to second chamber revision each compatible with the broad points of federal-provincial ministerial consensus. The four models were:

- Model I, a "traditional" House of review composed largely of provincial appointees voting as free agents,
- Model II, a basically intergovernmental institution that would be restricted to ratifying federal action on a limited list of specified matters of concern to provincial governments and which would be composed largely of instructed delegates of provincial governments,
- Model III, a hybrid house (e.g., B.C.'s proposal) that would supplement the ratifying function in Model II with the additional general review power in Model I within one body, but with distinct procedures for handling the two functions,
- Model IV, the creation of two distinct bodies, a new upper house with largely provincial appointments for the general legislative review function, and a separate intergovernmental institution for the ratifying function.

At this stage, the Atlantic provinces and Manitoba preferred Model I but were willing to consider Model IV, Saskatchewan and Quebec clearly favoured Model II alone, British Columbia and Ontario favoured variants of Model III, and Alberta reserved its position. The federal representatives took the position that we would be willing to examine further all four models, stating also that final approval of any model would be related to the outcome respecting discussions on the distribution of powers items in the package of government powers and institutions.

At the beginning of the third week, the Ministers, after reviewing the four models directed the committee of officials to develop more fully proposals beginning with Model II and moving to Model III or Model IV. By the end of that week the committee of officials submitted a report outlining the powers, the method of appointment and basis of representation appropriate for the two distinct roles which might either be combined in a single hybrid institution (Model III) or two distinct institutions (Model IV).

In the first role, that of representing provincial interests in ratifying federal action in a limited range for specified matters of shared federal-provincial concern, the general view was that the range of matters requiring ratification might include:

(i) use of the federal declaratory power in a province which has not consented to its application,

(ii) use of the federal spending power in areas of provincial jurisdiction,

(iii) federal legislation to be administered by the provinces,

(iv) use of emergency powers, requiring ratification within a certain period after imposition,

The Committee retained for further examination:

(v) appointments to major federal boards or commissions in areas related to provincial jurisdiction,

(vi) matters which might emerge in the overall process of constitutional review which might prove to be appropriately handled in this way.

Considered for inclusion in this list but tentatively rejected at this time were the ratification of constitutional amendments, a role in appointments to the Supreme Court, determining "compelling national interest" on federal involvement in natural resources issues, ratification of treaties, approval of intergovernmental delegations of powers.

For this role of ratifying on behalf of provincial governments, federal initiatives in the areas listed above, the appropriate membership was considered to be instructed delegates appointed by provincial governments including the participation of provincial Cabinet Ministers. Members would cast a block vote by province. Since the role would be limited to ratifying federal initiatives, the presence of non-voting federal spokesmen to present those initiatives was considered appropriate. Most provinces favoured equal provincial representation in such a body. B.C., Quebec and Ontario preferred a weighting taking account of population and other factors but Ontario would accept equality. There was a general view that ratification would require either a majority, or a 2/3 vote, depending, in the view of some provinces, on the basis of representation selected. These criteria might be varied for issues related to dualism.

In the second role, that of serving the traditional function of an upper house as a body of review of most legislation emanating from the House of Commons, the general view was that it should encompass all federal legislation excluding (i) all measures requiring ratification under the first role outlined above and (ii) all appropriation bills, but that in this role it should exercise only a suspensive veto (90 days before repassage by the House of Commons). For these purposes it was considered appropriate that members be appointed for a fixed term of 8 years and vote as free agents. Manitoba suggested that the method of appointment be determined by the legislature concerned (as in Switzerland), but this question was left open. There was a range of views concerning the basis of provincial representation. Manitoba suggested a distribution which would give some smaller provinces a relatively greater weighting than at present. In this role, the appointment of a portion of the representatives by the federal government was considered not inappropriate: some provinces favoured no federal representatives, some a minority representation, and two 50%.

Two other issues which the Ministers directed the committee of officials to examine were considered but on both it was agreed that further discussion at the meeting at the end of August would be necessary.

The first issue was whether the two distinct roles which had been identified, should be contained within a single hybrid second chamber or be filled by two separate institutions. It was agreed that this matter might be resolved at the August meeting after further study by Ministers of the advantages and disadvantages of these two approaches and of the possible linkages that would be required in the former case.

The second question was the extent to which issues relating to duality should be dealt with by a special voting requirement or by a special committee. Quebec and Ontario each agreed to develop specific proposals for consideration at the August meeting.

While many points remain to be refined before it would be possible to turn to developing legal drafts, during the three weeks July 7-24 the provincial participants have shown a willingness to move towards a broad consensus on the ways in which either a hybrid institution or two institutions might perform the two major roles identified. This represents a significant advance from the situation during the negotiations between October 1978 and February 1979.

2. Supreme Court

The federal position adopted on July 7 was to support the best efforts draft of February 1979 - but to agree to consider any alternatives which gained substantial support. The February draft had received the support of all but three provinces in 1979. Quebec was fundamentally opposed because it had always argued for a specialized constitutional court. Alberta supported the idea of some kind of constitutional court but not vigorously. British Columbia would not accept the best efforts draft because it wished to see the appointment of judges ratified by a reformed Senate.

The best efforts draft entrenched in the Constitution a nine-member court, a requirement that the federal Minister of Justice consult with the Attorney General of the appropriate province before making an appointment of a judge from that province, a requirement that three members of the Court be appointed from the civil law bench or bar (as is now required by section 6 of the Supreme Court Act) and a requirement that cases concerning the civil law of Quebec be heard by a special panel of the Court composed of a majority of civil law judges (as is now done as a matter of practice).

At the beginning of the discussions (July 7-25) Quebec put forward a new proposal, the essential feature of which was that a 5-judge panel of the current court would hear all constitutional issues. This panel would consist of two civil law judges, two common law judges and the Chief Justice. The proposal also provided that Chief Justices would be chosen alternately from among the civil law judges and the common law judges on the court. This proposal was similar to that of the Quebec Liberal Party set out in the Beige Paper.

Criticism of Quebec's proposal centered on the fact that it would mean that a majority of three judges could decide an important constitutional case and that the whole court would not be sitting on important constitutional cases. Accordingly, Manitoba proposed, in response to Quebec's proposal, that the present Court be increased to 11 members, 5 being civil law judges. All provinces have supported this except British Columbia which is opposed, Nova Scotia which has trouble with the "perception" of increasing the

number of civil law judges, and Alberta which has reserved its position. This support for Manitoba's proposal reflects the fact that there has developed general acceptance of the idea that a principle of duality should be reflected in the composition of the Supreme Court. Support for this principle focusses on the fact that there are two legal systems in Canada and on the understanding that different approaches to legal problems therefore exist. In addition, there is considerable support for entrenching in the Constitution the alternate appointment of the Chief Justice from among the civil law and common law judges. Only Manitoba is opposed. British Columbia reserved its position. There is also support for making the Chief Justiceship a post for a fixed term of seven years. Only Manitoba is opposed. Saskatchewan and Alberta reserved.

As noted above, the best efforts draft of February, 1979 contains only the requirement of consultation between the Minister of Justice and the Attorney General of the province from which a proposed appointee to the Supreme Court would come. The Victoria Charter and Bill C-60 had required agreement. About one-half the provinces were unhappy with the requirement of mere consultation. This led to a two-step appointment procedure being developed which has gained almost unanimous acceptance. When the Minister of Justice is considering a vacancy on the court he would first consult with all provincial Attorneys General to get their views. Then, as a second step he would be required to reach agreement with the Attorney General of the province from which the appointee comes. If the Minister of Justice and the provincial Attorney General cannot reach agreement it is proposed that such deadlock be broken by inviting the Chief Justice of Canada to join with the Minister of Justice and the Provincial Attorney General concerned to make the decision. Indeed, it is unlikely that such a deadlock-breaking mechanism would ever be used since the federal and provincial Ministers would likely prefer to agree between themselves. This deadlock-breaking mechanism has received the approval of eight governments. Only New Brunswick does not support it, Quebec and Saskatchewan support it less warmly than the other provinces. British Columbia has reserved.

A new element, referred to as the principle of equality, has been raised for discussion. The proposal is that both the federal and provincial governments should have equal capacity to refer constitutional questions directly to the Supreme Court. (At present, provincial governments may direct such questions to their respective Courts of Appeal but not to the Supreme Court of Canada.) The new proposal is generally acceptable to all provinces although two feel that direct references to the Supreme Court should not be allowed in any case but should be initiated in a lower court. The proposal would result in a slight diminuation of existing federal authority under which the Governor in Council can refer any question to the court.

Apart from some minor changes, the only other modification being considered to the best efforts draft is one which would allow Parliament to set the allowances, salaries and pensions of judges by means other than through an Act of Parliament, for example, by order in council.

3. Family Law

The Minister of Justice's opening statement expressed continued support for concurrency with the provinces on major aspects of the legislative jurisdiction over divorce as set out in the best efforts draft of February, 1979. He also suggested giving consideration to the options of (1) federal jurisdiction over the enforcement of extra-provincial orders or (2) a constitutional provision requiring enforcement of extra-provincial orders. He also expressed support for unified family courts.

In Montreal, the Ministers stated general provincial concerns and then referred family law to the Committee of Officials dealing with the Supreme Court and the Charter of Rights. There was complete agreement on the need for unified family courts and general agreement to continue on the best efforts route.

In Toronto, the issues identified for further consideration by the Committee were:

- The enforcement of extra-provincial maintenance and custody orders: Ontario and Quebec felt this could be handled by provincial legislation. There was general recognition that comprehensive family law legislation must recognize the mobility of Canadians and that deficiencies exist in the present law and best efforts draft in this regard. The question was adjourned to the Vancouver meeting.

- The question of extending federal paramountcy over the recognition of divorce and the jurisdictional bases on which divorce is granted to include annulment and nullity decrees: After discussion, this question was adjourned to the Vancouver meeting.

- The Manitoba position on retaining federal jurisdiction in the whole field of divorce and expanding that jurisdiction to cover the enforcement of all maintenance and custody orders: Prince Edward Island supported this position but the other nine jurisdictions opposed it.

- The Manitoba proposal that the provinces be given jurisdiction to appoint family court judges with full family law jurisdiction to facilitate the establishment of a unified family court system: All eleven jurisdictions agreed with this proposal.

In Vancouver, the committee met on July 23 to discuss the questions adjourned from Toronto as follows:

- The recognition of annulment and nullity decrees and the jurisdictional bases for granting annulment and nullity decrees: All governments, except Quebec and Ontario, supported federal jurisdiction in this area. (New Brunswick was not present.)

- The possibility of inserting in the Constitution a provision similar to section 14 of the Divorce Act which would provide that custody and maintenance orders have effect throughout Canada: Quebec said it could support this proposal only if it is the law of the receiving province that governs the recognition of the order. British Columbia supported the proposal but felt it should be subject to contrary provincial legislation. It could be automatic unless provincial laws provided to the contrary. On the vote, four provinces, Manitoba and Prince Edward Island, and British Columbia and Newfoundland (subject to the reservation on provincial paramountcy), supported the proposal. Three jurisdictions, Canada, Saskatchewan and Alberta, reserved their position and three provinces, Nova Scotia, Quebec and Ontario, opposed the proposal.

- The question of whether a provision should be included in the Constitution giving individuals the right to file maintenance orders made in one province, in another province with power in the receiving province to make laws in respect of variation and the limitation of recognition: All jurisdictions agreed that this matter should be tabled for further study and conclusion at the August meeting of Ministers.

The outstanding question on the recognition and enforcement of maintenance and custody orders involves matters essentially of a technical rather than a policy nature. Consequently, it is not felt that further Cabinet guidance is required at this time.

4. Communications

The initial federal position on communications, and tentative results to date are summarized as follows:

Initial Federal Position	Tentative Results to Date
To strive for agreed objectives as a guide to future discussions;	Failed in the first week;
To stress the integrated nature of the four issue areas (cable television, broadcasting, telecommunications and radio spectrum);	Successful;
To stress the intra-provincial/inter-provincial principle in all issue areas;	Some difficulty in the telecommunications carriers area;
On cable distribution: to keep the February federal draft on the table, ascertaining provincial concerns with a view to amending the draft to take in both provincial and federal conerns;	Two drafts, one federal and one provincial were developed. Conciliation and possible other approach will need to be considered;
On broadcasting: to listen and consider provincial proposals;	Provinces have asked for a "role in programming" at the constitutional level;
On telecommunications carriers: to offer to transfer the intraprovincial aspects of Bell, B.C. Tel and Terra Nova Tel to the respective provinces with federal responsibility for the interprovincial and international aspects of all telecommunications carriers, interconnection and access; and,	Some difficulty; provinces do not accept exclusive federal jurisdiction over interprovincial aspects: provincial alternative has been developed; and,
On the radio frequency spectrum: to affirm the present exclusive federal jurisdiction.	Some measure of agreement but depends on other issue areas.

The CCMC Sub-Committee of federal and provincial officials on Communications met in Montreal, Toronto, and Vancouver and reported to Ministers at the end of each week. Four topics were discussed in Montreal and Toronto, i.e.:

- the radio frequency spectrum;
- telecommunications carriers;
- cable;
- broadcasting.

Two topics only were discussed in Vancouver by the Sub-Committee, following directives given by Ministers; i.e.:

- telecommunications carriers;
- cable.

Following the meeting in Vancouver, the situation on the four topics is as follows:

1) Radio Frequency Spectrum

An agreement was reached by Ministers early in the week in Vancouver to the following effect:

- that the authority over the radio frequency spectrum should be defined as a purely technical matter and, on this basis, be recognized as exclusively within federal jurisdiction;
- that questions relating to the use of authority over the spectrum as a means of implementing policy in other areas of communications should be considered in discussing those areas.

Of the three remaining topics, the situation is now the following:

2) Telecommunications Carriers

In Montreal, on July 8th, the federal government offered to transfer to the provinces of Newfoundland, Quebec, Ontario, and British Columbia jurisdiction over the intra-provincial aspects of certain carriers now wholly regulated by the CRTC, namely Terra Nova Tel in Newfoundland, Bell Canada, and B.C. Tel. The federal government said, however, that this new arrangement must, of course, recognize federal jurisdiction in all parts of Canada over all interprovincial and international aspects of telecommunications, technical standards, interconnection of systems and the continuing federal regulation of national carriers: CNCPT, Telesat, and Teleglobe.

The federal proposal related to exclusive federal jurisdiction over the interprovincial activities of the telecommunications carriers and exclusive provincial jurisdiction over the intra-provincial activities of the telecommunications carriers. Ministers then requested officials to develop other options. Provincial officials developed the following alternative which was acknowledged to be without prejudice to the federal position as stated in Montreal:

> Concurrent powers over the interprovincial aspects of telecommunications carriers with general provincial paramountcy but subject to federal paramountcy in the following fields of exceptions:
>
> - the general management of the technical aspects of the radio frequency spectrum;
>
> - the use of telecommunications and telecommunications systems for maritime and aeronautical communications, defence or national emergency;
>
> - satellite communications; and,
>
> - national and international carriers such as CNCP Telecommunications, Teleglobe and Telesat Canada.

Substantial progress has been made in this area. In Toronto, the provinces essentially refused to discuss this matter unless the federal government were to withdraw its option of July 8th In Vancouver, provincial governments agreed to develop an option which would reflect their perception of the concerns of both levels of government. A great deal of work remains to be done to further develop the provincial option. What is clear, however, is that no province has agreed to be excluded from at least some measure of involvement in the interprovincial aspects of telecommunications carriers. The current federal proposal provides for no such involvement. For this reason, no province has accepted it at the officials level. At the Ministerial level, in Vancouver, Ministers directed the Sub-Committee of Officials to prepare a draft amendment following an approach based on concurrency over the interprovincial aspects of telecommunications carriers with general provincial paramountcy and federal paramountcy over specific areas, in time for consideration by Ministers at their next meeting.

3) Cable

As directed by Ministers, officials considered the February 1979 cable draft and another which represents provincial views as expressed in Document 830-70/043 dated Vancouver, January 22-24, 1979. Both drafts deal with concurrent power over cable with, however, the following differences:

- the federal draft extends the concurrent jurisdiction to closed circuit which is not now within federal jurisdiction. The provincial draft leaves closed circuit to the exclusive jurisdiction of the provinces;

- the areas of paramountcy are different. In the federal draft, federal paramountcy would be recognized over:

  - Canadian content;

  - Canadian broadcast programs and services;

  - technical standards.

The provincial draft would recognize this federal paramountcy in a much more limited way, namely:

- the reception and conditions of carriage of broadcast signals;

- technical standards relating to the reception and carriage of broadcast signals; and,

- the national origin of broadcast programs content.

Provincial officials indicated their preference for the Vancouver draft over the federal draft while setting out the pros and cons of each draft, an exercise Ministers directed the Committee to perform. It turned out to be evident that the federal February best efforts draft was no longer acceptable to provincial officials. It was apparent that there was resistance to granting federal jurisdiction over closed-circuit as well as to an all pervasive federal role in content on cable. The Committee sought direction from Ministers as to whether the Committee should develop a "best effort" draft based on the Vancouver draft or any other option. Ministers in Vancouver directed officials to prepare a "best effort" draft, for the next meeting of the CCMC, based upon the Vancouver draft, or alternatively to develop some other approach as directed by Ministers.

4) Broadcasting

Little can be reported on broadcasting since no directives were given by Ministers in the first days of the Vancouver meeting. Provincial officials have expressed, however, in Montreal and Toronto, a need for some provincial involvement in broadcasting programming and have linked in this respect the discussion on broadcasting with the one on cable. At the end of the Vancouver Officials' meeting, the Committee asked Ministers for guidance in this area before further discussions can take place. Ministers have told officials they are ready to consider options that would include options with a constitutional role for the provinces in the authorization and regulation of programming undertakings and services.

Federal officials have not been instructed with respect to possible fall-back options. As a result, they were perceived to be on the defensive and without flexibility, thereby at odds with the federal Minister's stated openness. The effect of this on the negotiations was to cause frustration among provincial officials and a radicalization of provincial positions (10 against 1). It was also apparent that some provinces do not as yet have fall-back positions either.

Federal and provincial officials will be meeting in Toronto on August 12-13 to pursue their mandate. As this meeting is before the Premiers' Conference, it will be a good opportunity for the Federal government to give a clear signal that it is willing to bargain. New instructions are therefore needed to allow for flexibility and the ability to develop new approaches.

III Strategic Issues

A. Assumptions

The discussion which follows is based on the following two assumptions:

1. That the federal government will present to Parliament a Joint Address on a package of constitutional reforms early this autumn; based on agreement with the provinces if possible, unilaterally if necessary.

2. That a negotiated package, which meets most if not all of the federal government's objectives, and to which the provinces can agree, is preferable to an imposed package, which includes all of the items of most concern to Ottawa.

Ministers are asked to confirm these assumptions

There are three strategic issues which need to be addressed in the coming weeks:

- What new positions should the federal government put on the table when CCMC Ministers next meet on August 26 or when the First Ministers meet on September 8?

On resources, the federal government began by withdrawing from two of the three key positions it had offered in the best efforts draft of February 1979. It withdrew the offer to give the provinces concurrent jurisdiction over international and interprovincial trade in resources with federal paramountcy, restricted in the case of interprovincial trade, to the case of "compelling national interest." It withdrew the offer to give up the unrestricted use of the declaratory power in connection with resources. It left on the table the offer to give the provinces the right to impose indirect taxation.

The current federal position is completely unacceptable to most provinces, particularly the western ones. However, one result of the federal government's tough stand to date has been to change the thinking of some of the provinces (e.g., Saskatchewan) so that they might now accept some compromise position between the current federal position and that of the best efforts draft. In other words, at the start of the constitutional negotiations, the provinces assumed that the 1979 Best Efforts Draft was the least they would get on the resources issue. They now realize it is more than the best they can get. Some compromise positions will be developed during the next three weeks in conjunction with the Department of Energy, Mines and Resources for discussion by Ministers before August 25.

Offshore resources is the only issue on which all ten provinces are on one side as far as the principle is concerned (in favour of treating offshore resources like onshore resources) and the federal government is on the other. Some movement by the federal government on this issue could be a key factor in achieving a consensus on a range of other issues. The federal government is committed to putting a new proposal for at least administrative arrangements on the table before CCMC Ministers meet on August 26. This proposal will be developed in conjunction with the Department of Energy, Mines and Resources for discussion by Ministers before August 25.

The final issue of powers over the economy is one in which it is proposed that the federal government maintain its current position. Initially some of the provinces, particularly western ones, showed little willingness to move toward the federal position (in contrast to Newfoundland and Nova Scotia which have largely supported the federal position).

However, near the end of the negotiations last week, Saskatchewan abandoned its previous strong opposition to the economic union proposals of the federal government and agreed to entrench the principle of the economic union in the Constitution. The challenge now is to find a way to make this principle operative (that is, to enforce it). Saskatchewan is opposed to enforcement though the courts and wants nothing more than a commitment to the principle in the constitution. There may be ways around this problem, however, by making

it politically difficult for a province to derogate from the principle, and work on this possibility will be undertaken during August. However, because the federal government's position on the economic union is popular with the press and, likely, the Canadian people (which accounts for some of the extreme emotion it has generated on the part of people like Mr. Romanow), little compromise on our hard line position seems required at this time.

During August, as compromise positions are developed on each of the issues mentioned above, bilateral discussions will be held with various provinces so that we have a good understanding of the likelihood of the acceptance of these positions before the CCMC meeting on August 25 and preferably before the Premiers meeting on August 21 and 22. If none of the provinces have seen strong signs of movement by the federal government before the Premiers meeting, it is highly likely that the result of that meeting will be a hardening of provincial positions and the creation of a united provincial front. We must try to prevent this from happening.

In summary, there is a possibility (but not a probability) of an agreement on a fairly wide range of issues in September, but this will come only if each province believes that it got something out of negotiations in an area of particular interest to it. To achieve this will require that the federal government develop new proposals in five areas: resources, offshore resources, communications, fisheries, and the Senate.

New proposals are needed not only to make progress in the negotiations, but also to enable the federal government to prove it is bargaining in good faith. Federal Ministers have said from the outset that they would bargain, that they would be flexible and participate in a genuine process of give-and-take. They will have to start doing this when the CCMC reconvenes on August 26.

A final point is worth emphasizing here. It would seem to be distinctly preferable to reach a settlement to which all governments can agree, so long as that settlement meets the federal government's essential objectives. To achieve such an outcome will require serious and imaginative bargaining on Ottawa's part both at the CCMC meeting in August and at the First Ministers meeting in September. At the same time, federal bargaining in good faith is essential, even if negotiations ultimately fail, for in that case the federal government must be in a position to make its case effectively with the public as it proceeds with unilateral action.

Thus, either way, the federal government must be seen to be bending its energies between now and September 12 to reaching agreement with the provinces if that is at all possible. It would be very damaging to the federal case if the summer's exercise could be made to look merely like a public relations charade by a federal government which had decided at the outset to proceed with unilateral action and hence had not negotiated in good faith.

C. Selling the Federal Government's Position

The federal government's communications plan will have three phases:

- Phase I: Sensitizing the public to the constitutional debate,
- Phase II: Presentation of the federal government's proposals for change,
- Phase III: Promotion of the option of the Government of Canada.

This plan has been approved by the Communications Committee of Cabinet.

The first phase in particular will be emphasized from now until the end of the First Ministers Conference in September. The second phase would become the dominant dimension of any federal communications effort in the post-September 12 period. Phase III would be applied if the Government of Canada should feel obliged to proceed unilaterally or with a national referendum.

Between now and mid-September the communications objective will be to create a climate of public credibility and receptiveness vis-à-vis the constitutional process with a program that will inform and educate with material that is factual and non-confrontational so far as the provinces' positions are concerned.

Therefore, during this early period, in order to avoid confrontation which could poison the atmosphere for the First Ministers Conference, current plans call for erring on the side of non-confrontation when a decision has to be made about whether or not a particular communications instrument or activity will be used. On the other hand, if the provinces jump into the communications game in a big way in order to explain their positions on constitutional issues to their own residents (as B.C. has indicated it may do through the use of radio and T.V. ads, etc.) then the federal government may be forced to respond in kind, which means that Phase II could start before the First Ministers Conference. The Premiers Conference August 21-22 in Winnipeg is clearly one event to watch closely from this point of view.

It is important that there be close co-ordination between the constitutional information plan and the communications activities relating to energy.

D. The Contents of the Package on which Action is to be taken

As the constitutional negotiations continue, it is becoming more and more apparent that the provinces, the media, and that part of the public which is following the debate are expecting the federal government to take some kind of unilateral action if the present round of talks does not produce an agreed upon package.

This expectation is now so firmly ingrained that it is reluctantly accepted by all parties. The prospect of unilateral action has given rise to what can be described as pro forma criticism; it has not yet provoked serious opposition. This is probably so because all provinces know that the public is fed up with constitutional debate and is likely to support a unilateral federal initiative if that is what is necessary in order to achieve some degree of constitutional change.

Whatever criticism does arise will be more over the concept of unilateral action itself than over the content of such action unless, of course, the content is a clear power grab by the federal government. The concept of acting unilaterally can give rise to accusations of arrogance, contempt, etc. It will be easier for the provinces to campaign against arrogance than to campaign against detailed constitutional changes.

For this reason, any type of unilateral action -- large or small -- is likely to give rise to much the same type of criticism even though there may be some (probably minor) difference in the intensity of the criticism depending on what the unilateral package contains. And because of the symbolism of patriation, especially as fostered by successive Quebec governments, much of the debate may center around patriation rather than around the rest of the package.

If the assumptions underlined in the previous two paragraphs are correct, the government should take action on a bold package rather than on the one which leads to the least possible resistance.

There are essentially four alternative packages which might be considered in terms of unilateral action. Each contains a Charter of Rights (which includes mobility rights and minority language rights) and patriation of the constitution with some type of amending formula, be it temporary or permanent. The rest of this paper describes the four possible packages and analyses their respective advantages and disadvantages. Each package is broader than that which precedes it.

So far as the powers of governments are concerned:

- the first package would limit certain powers of Parliament without in any way affecting the powers of the provincial legislatures;
- the second package would limit the powers of both levels of government;
- the third package would limit certain powers of each level of government, while at the same time giving certain additional powers to the provinces;
- the fourth package would limit certain powers of each level of government, while at the same time giving certain additional powers to the provincial governments and certain additional powers to the federal government.

Package I

Essentially what this approach would do would be to patriate the constitution (with an amending formula), and entrench a Charter of Rights (with mobility rights and minority language rights), applicable only to the federal government and to whatever provincial governments decide to opt in. As far as minority language education rights are concerned, it might be that they would only become effective after a certain number of provinces with a certain percentage of the population adopt the Charter although it would be preferable to include them as one of the rights to which provinces can opt in.

The advantage of this approach is that the Constitution will have been patriated and there will be some form of Charter of Rights even though it will apply only in areas of federal jurisdiction and in those provinces which voluntarily adopt it. No province will be able to argue that any of its rights or powers had in any way been affected by unilateral federal action.

The disadvantage of this approach is that, while patriation will have been achieved, and will undoubtedly be considered by some as having considerable symbolic importance, it will lead to a situation in which, instead of enshrining rights in such a way as to apply equally to all Canadians, the rights attaching to Canadian citizenship will be dependent upon province of residence. This is contradictory to the concept of a right as something which is so important that it should apply to all Canadians.

More importantly, the question which will be asked about this package is: why is this all that came out of such an intensive period of negotiations, when there was no need for a process of intensive negotiations if the federal government is just amending the Constitution to affect only federal powers. This will be seen as something less than the renewed federalism which has been promised to the people of Quebec. It will also be a wasted opportunity since it is highly unlikely that the climate for constitutional change will be as positive as it is now for a long time to come.

Also, the fact that there will be the perception of no significant change will give both Mr. Lévesque and Mr. Ryan the chance to continue over the next few years to pursue alternatives which are likely not to be acceptable to Ottawa. In addition, patriation by itself will be controversial and will provoke criticism by certain circles in Quebec, including both Lévesque and Ryan. It would be unfortunate to have to fight this criticism without in the end having a great deal to show for it.

Finally, there is some evidence to suggest that the provinces expect (although they definitely do not favour) federal unilateral action to include, a Charter of Rights binding on all Canadians. Meeting this expectation should not present insuperable political difficulties, given the public support which appears to exist for an entrenched Canadian Charter of Rights.

Package II

Essentially, this package would include patriation, a Charter of Rights binding upon both levels of government, equalization and a revised Section 121 which would provide the underpinnings for a stronger Canadian economic union. This package should also include the proposal for a modified Supreme Court because of its close relation to the Charter of Rights issue, the clear expression of duality contained in the proposed form of the new court and the fact that it is not a "powers" issue, but more of a people issue.

This means that in the area of human rights, certain powers would be taken away from both levels of government. In the area of the economic union, some powers of both levels of government would be restricted; but there would be more restrictions on the exercise of certain powers by the provinces than by the federal government. However, there would be no transfer of powers.

The advantage of this approach is that in addition to patriation, considerable constitutional change would be evident. Rights would be guaranteed for all Canadians wherever they live. In economic terms, because of the entrenchment of a broader Section 121, Canadian citizenship would be more meaningful than it now is. At the same time, no one should accuse the federal government of any type of power grab (although no doubt some of the provinces would try to accuse the federal government of a power grab because of a new Section 121).

The disadvantage of the second approach is precisely that it removes rights and powers of provinces without their consent even if such rights are transferred to the people (or, Saskatchewan would argue, to the courts) instead of to the central government. There will undoubtedly be some outcry by the nationalist forces in Quebec that the federal government is engaged in "centralism" because powers have not been given to Quebec. This will not be too much different from the criticism of Package I, namely that nothing has been done to meet the needs of Quebec.

In summary, this package constitutes significant renewed federalism; and it might not provoke much more public criticism than Package I.

Package II A

A more modest variation of this package would be to drop Section 121 and proceed with the rest of Package II. This would remove the economic dimension of Canadian federalism from contention, with the attendant advantages and disadvantages, but would protect the freedom of movement of persons, on the assumption that mobility rights were included in the Charter. It would also apply the Charter, including minority language education rights, to all governments.

Package III

Essentially this package includes all of Package II with one important addition. It adds those items involving some transfers of jurisdiction to the provinces which have either been agreed upon, or rejected by the provinces as not going far enough, even though provinces have agreed that they are a move in the right direction. This would mean that family law, some elements of communications (e.g., cable T.V.), and possibly something in resources and offshore resources (depending on where these items stand at the conclusion of the First Ministers' meeting) would be included in the package on which action was taken in the fall.

The advantage of this approach is that while certain powers now exercised by the provinces have been restricted under the new Section 121, the only change in jurisdiction is from the federal government to the provinces. The package is larger than Package II and thereby provides for more "renewal". It gives some things to the provinces which they do not get in Package II and so would possibly make a stronger economic union under Section 121 easier for them to swallow. There is even less justification for an accusation of a power grab by the federal government than there is with Package II.

The disadvantages of this approach are less than with Package II. There will be accusations that Ottawa has not given up enough powers or has not given up those powers which are contained within the "traditional" demands of Quebec. However, it will not be difficult to argue in response that half a loaf is better than no bread at all and, of course, there will always be the possibility of further change in the future.

On the other hand, it may be argued that no federal powers should be given up without a corresponding transfer of power from the provinces to the federal government. While this is a good argument, it may well be that a revised Section 121 is sufficiently important to the federal government -- that it is a sufficient "gain" for us -- that we might be prepared to give some additional powers to the provinces in order to make the package more saleable.

Package III A

Again, a more modest variation of this package would be to drop the new Section 121, but proceed with the other elements of Package III. This would be done on the understanding that mobility rights for persons would be included in the charter binding on both orders of government, thus protecting the free movement of citizens, and goods (i.e. only to the limited extent that internal tariffs on goods are prohibited by the existing Section 121), if not of capital and services.

The provinces would clearly prefer this package to Package II A since it gives them some new powers in family law and communications without imposing on them the restrictions contained in a new Section 121.

Package III A (Modified)

An even more modest package would be Package III A but with the Charter of Rights applying initially only to the federal government with provinces having the right to opt-in to it. This package is the same as Package I with the addition of any items on which there has been reasonable federal-provincial agreement.

This package would be more acceptable to the provinces than any other package except Package I, but it would leave the federal government in the position where it was giving something to the provinces (e.g. family law and some parts of communications) while getting nothing in return. Thus it would not be consistent with our basic negotiating position which has been that agreement on the powers items must involve give and take.

Package IV

This approach is similar to the third alternative except that it would provide as well for a transfer of power to the federal government probably under a new Section 91(2). While the draft of this new section has been received with great suspicion (but not overt opposition) by the provinces, it should be noted that even here we may be able to sell a new Section 91(2) if the existing federal proposal is modified to protect current provincial jurisdiction subject to unrestricted federal paramountcy in interprovincial movement of goods, services and capital.

The advantage of such an approach is that it would mean all encompassing constitutional reform and would provide the federal government with most of the additional powers it needs in the economic area.

The disadvantage is that it would transfer powers from the provinces to the federal government without the consent of the provinces. It would be seen as a power grab unprecedented in the history of Canadian federalism and could give rise to grave criticism. This option would be much harder to sell than any of the other packages.

Next Steps

In order to make the necessary preparations for unilateral federal action, should negotiations break down, it is important to have a sense of what kind of package the Government of Canada might be willing to contemplate taking unilateral action on. Clearly, the precise composition of the package would need to be reviewed in September after the First Ministers Conference when the situation is clearer.

When Cabinet has decided on the package that is to be implemented, officials will undertake the drafting of the instruments to be laid before Parliament. (Work is already underway on the instruments needed for the People's Package.) At the same time we will analyze the process that must be followed in the House and develop a parliamentary strategy for presentation to Ministers in late August.