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July 28, 1980

MEMORANDUM FOR THE PRIME MINISTER

Report on the Constitutional Negotiations

Attached is a discussion paper on the current state of the constitutional negotiations. It will be discussed at Wednesday afternoon's P & P meeting and at our meeting with you on Wednesday morning. The paper brings Ministers up-to-date on what has happened during the past three weeks of CCMC meetings, and seeks:

- authority to develop, in conjunction with the appropriate line departments, new proposals on the issues of resources, offshore resources, communications, fisheries, and the Senate and to present them to Cabinet for approval before the CCMC reconvenes on August 26;
- guidance on the content of the package of items on which the government will, if necessary, take unilateral action in the fall so that drafting of the appropriate text of a Joint Address can be completed for your consideration during the week of August 18th.

The most important point of the paper for you to read is Part III on strategic issues (pp 30-40).

1. Need for some new federal proposals

You will note from Section III (pp 31-33) of the discussion paper that federal-provincial agreement on the key items in the package of government powers and institutions will require that the federal government modify some of its existing positions,

particularly its position on the resources and off-shore resources items. It is difficult to tell at the present time if there is a modification of our existing positions which will be acceptable to both federal Cabinet Ministers and the provinces. Nevertheless, if we are to bargain in good faith, we must advance some new positions since, thus far in the negotiations, we have not budged from our opening positions on any of the key items.

Therefore one element we would like to have in the RD of this meeting is authority to develop new positions in the five areas of resources, offshore resources, communications, fisheries and the Senate on the understanding that these positions will be placed before Ministers for approval before the CCMC reconvenes on August 26.

2. Guidance on the Package for Unilateral Action

On pp 36-38, the discussion paper describes a series of possible packages on which the government might take unilateral action in the fall if no agreement is reached with the provinces. In summary,

Package I: Patriation with amending formula and Charter of Rights (including mobility rights and minority language rights) applies only to the federal government with provincial opting-in.

Package II: Same as Package I, except that the Charter of Rights would be binding upon both levels of government, and it would also entrench equalization, a revised Section 121 to provide the underpinnings for a stronger Canadian economic union, and the proposal for a modified Supreme Court.

Package II A: Same as Package II except that it would not include a revised Section 121.

It is also the same as Package III A (see below) except that no item from the government powers and institutions package would be acted upon (except possibly the Supreme Court because of its linkage to rights) on the grounds that the federal government should not give anything to the provinces (e.g., family law, cable vision, etc.) unless it gets something in return, specifically at least a new Section 121 under the powers over the economy item.

Package III: Same as Package II with the important addition of those items involving some transfer of jurisdiction to the provinces on which there is agreement, or which the provinces have rejected, although they have indicated that the changes are a move in the right direction (e.g., family law, cable vision, etc.).

Package III A: Same as Package III except that it would not include a revised Section 121.

Package III A (Modified): Same as Package III A, except that the Charter of Rights would apply only to the federal government, with provincial opting-in.

It is also the same as Package I, augmented by any items agreed to by all, or virtually all provinces (equalization, Supreme Court, family law, etc.).

Package IV: Same as Package III, except it would further strengthen the economic union by a transfer of power to the federal government, probably under a new Section 91(2).

In order of increasing provincial opposition, these packages are:

SECRET

Package I  
Package III A (Modified)  
Package III A  
Package II A  
Package III  
Package II  
Package IV

The selection of the appropriate package rests on the key issues of credibility and the degree of federal-provincial conflict which the country can tolerate at any given point in time. That is, while it may be legal, is it politically wise for the federal government to act unilaterally in areas other than those which are under clear federal jurisdiction (Package I) or on which there has been provincial "agreement" (Package III A Modified)? This, in turn, raises the issues of what, other than unanimity, constitutes agreement with the provinces. It also raises the question of whether Ministers want to be able to claim legitimacy for their actions by seeking the approval of the Canadian people in a referendum before amending and patriating the Constitution. But Ministers should note that such a referendum could not be held before Spring, 1981.

Thus Ministers need to address three specific questions:

1. Are they prepared to act unilaterally in areas of shared or purely provincial jurisdiction without provincial agreement, even if this action involves a transfer of power from the federal government to the provinces (e.g., Package III A (Modified))?
2. What, other than unanimity, constitutes federal-provincial agreement?
3. If agreement cannot be reached, do Ministers want to hold a national referendum on their desired package before proceeding to amend the Constitution?

As you know, our recent surveys show a substantial majority of the Canadian people believe that the federal government should not move unilaterally in areas of shared or purely provincial jurisdiction without the support of provincial governments covering 75% of the population. However, the Canadian people also strongly support the holding of a national referendum if this 75% target is not reached as a result of federal-provincial negotiations. Finally, Canadians overwhelmingly support everything in Package III.

Given this last fact, the basic issue which Ministers must resolve is:

- whether they should proceed with Package III (which our surveys suggest is generally popular with the public) in the face of provincial opposition,
- whether they should seek the support of the Canadian people for Package III through a referendum, or,
- whether they should fall back to one of the less contentious packages.

This last question brings into the discussion the interaction between the energy and constitutional issues. Given the major conflict which now appears inevitable between the oil producing provinces and the federal government, do Ministers want to further escalate federal-provincial conflict by adopting a constitutional package which is stronger, and hence less acceptable to the provinces, than Package I or perhaps Package III A (Modified)?

It is important that officials receive guidance at this point in time on the most likely Package so that drafting of the appropriate resolution for the Joint Address can proceed.

In handling this portion of the P & P meeting, it would be desirable to avoid as much as possible getting bogged down in the details of specific elements of the People's Package. Memoranda will be sent to you later this week on alternate amending formulas and on the detailed components of a Charter of Rights. Once we have your reaction to these memoranda, we will proceed with

drafting the text for a Joint Address. This will be sent to you on Friday, August 15.

### 3. Negotiation Tactics

You will note from page 33 of the discussion paper, that in order to make it more difficult for the provinces to combine into a united front, it is important that we enter into bilateral discussions with some of them (e.g., Newfoundland and Nova Scotia on offshore resources, Saskatchewan on resources) before the national Premiers' meeting on August 21-22. This means that new positions on key issues will have to be developed and given at least tentative Ministerial approval within the next three weeks so that we can discuss them with the provinces.

In the absence of Cabinet approval, can we enter into negotiations with provinces by advancing new positions provided that these positions have the support of Mr. Chrétien, Mr. Roberts and the Minister of the appropriate line department? In so doing, we would make it clear to the provinces that we could not guarantee Cabinet approval of the positions we were advancing, but in order to make the negotiations meaningful we would have to say that there was a reasonably good chance that the positions would receive Cabinet support if they were accepted by the provinces. It would be desirable to have this point covered in the RD.

Ministers may also want to discuss the communications plan outlined in the discussion paper (page 34), to see if they agree with the emphasis being given.

It should also be pointed out to Ministers that in view of their inter-relation, the communications programs on the constitutional and energy issues will be very closely coordinated.

### 4. Timing of Parliamentary Action

The other major issue Ministers may want to discuss is the timing of Parliamentary action on the constitution in relation to a fall budget and measures which may be required to implement the government's energy program. In particular, Ministers should decide if the Joint Address on the Constitution should be introduced before the budget (perhaps as early as the week of September 15, which would be the week

after the completion of the First Ministers Conference) or after the budget debate is over (thus delaying its introduction until close to November 1).

Ministers may also want to discuss in a preliminary way the process which the Joint Address will take in the House. For example, will it go to a committee? Will it be debated in Committee-of-the-Whole? Will the vote on the resolution be a free vote in an effort to get support from MP's representing all regions of the country or will the whips be on? In the latter case, should an effort be made to get the support of the NDP before a decision is made on which Package to take unilateral action? However, you may prefer not to discuss these issues in detail until we have given you a memorandum on a possible parliamentary strategy which will be developed in conjunction with PCO and Mr. Pinard's office by August 15.

#### 5. The Meeting

Following our meeting with you on Wednesday morning, Mr. Chrétien will prepare a set of recommendations for Ministers on the central issues raised in the discussion paper and this memorandum. This may help to focus Ministerial discussion on the key strategic issues on which we need guidance rather than on the details of the current state of negotiations on each of the twelve items under discussion with the provinces.

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Attachment