

R-11344

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PREVILE

c.s. - Mr. Pitfield
Mr. Smith
Mr. Kirby
Mr. B. Dewar
Mr. Drummie
Mr. Demers
Mr. Gwyn
FPRO files
Diary (1)

Mr. Coutts
Mr. Axworthy
Joyce Fairbairn
Peggy Dillman
PMO files

CONFIDENTIAL

August 30, 1980

MEMORANDUM FOR THE PRIME MINISTER

Preamble to the Constitution

Mike Kirby and I thought you might want a report on the results of yesterday's CCMC discussion of this item. Much of the story is reflected in the CCMC's report on the Preamble to First Ministers; a copy is attached.

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The issues on which the federal delegation was attempting to secure provincial agreement were as follows:

1. Explicit acknowledgement that the people are the source of authority for the continuance of the federal union.
2. Agreement that there should be no implication in the preamble that the will of Canadians in regard to the continuance of the federation, or the existence of Canada, is dependent upon or expressed exclusively through "the provinces" (or the provincial governments).
3. Recognition of the distinct French-speaking society in Canada centred in ... Quebec.

In regard to 1. (the people) agreement seems to have been achieved. Each of the proposals for line 1 in the attached draft contains this acknowledgement. (The provinces had had a draft on this from us on Thursday morning; it had been accepted in principle by the CCMC as a whole when it discussed the matter on Thursday afternoon.)

... 2

The second point presented more difficulty, though chiefly we believe because of the problem of drafting. No one claimed that the federal government was the creature/agent of the provinces. It was said that it is an integral and essential part of the federation, that it came into being with the federation, that it had not existed before and that it could not "unite" with the provinces to form a federation since it is the central government of the federation. All of this is true enough and is one of the problems with the present composition of the federal draft (a). As one delegate said to us, the federal Government of Canada is the only government that has no choice but to stay.

Claude Morin stressed that he would have no objection to a statement in the preamble to the effect that the federal government was "overjoyed" at the fact that the provinces had "chosen freely to remain" in the federation. He himself noted the apparent lack of seriousness in his phrase but felt that, if some such thought was wanted, the words could be found. (Thus the passage in square brackets at lines 4 and 5 of the Quebec proposal, (d) on page 1 of the draft Preamble.) We very much doubt that any provincial delegate would claim that, in voicing such approval (were that the course adopted), the federal government was not expressing the will of the Canadian people. (Thus, in Quebec's approach, the will of the people, as expressed through the provinces, would result in their choosing to maintain their membership in the federation; while the will of the people, as expressed through the federal government, would result in a statement that the Government of Canada approves the decision of the provinces and is satisfied at the continuation of the union.

In our view, the underlying substantive issue that will have to be resolved -- after which finding the right words will be quite manageable -- is as follows:

Quebec (though decidedly not Ontario) clearly wants some reference in the preamble stating or at least implying that provinces are remaining "freely" /and therefore, can presumably leave freely/. Of course,

this relates in Quebec's mind to the self-determination issue. There is no question, in the view of the Quebec government, that the right was exercised in the referendum, i.e. when Quebecers decided to stay in Canada. They maintain that the right was recognized implicitly by others, through the federal and other provincial participation in the campaign.

Mr. Morin has not sought any explicit reference to "self-determination". But we believe Quebec has very consciously been -- and will continue to be -- suggesting words that imply recognition, to the greatest extent their negotiators think they can extract, of this provincial right. Certainly, our best guess is that Quebec would find it very difficult to accept any new wording which appears to them to "remove" the implication arguably present in the opening of the BNA Act ("Whereas the provinces... have expressed their desire...").

-- In accordance with the federal narrative proposal tabled on August 26 (copy attached), in the ministerial discussion we stressed that it is essential that the popular "consent" on which Canada is founded be highlighted in a preamble. Our drafting work is, of course, continuing on precisely how best to reflect this point in the preamble. (Some adaptation of the B.C. #(ii) or Manitoba drafts might do the job, and in neither case would governments be mentioned.)

As regards 3..(Quebec as centre of French-speaking society), you will see that whereas previously there was only the federal version, there are now two choices (lines 17 and 18). Quebec was given the opportunity to suggest the second version partly by Ontario's pugnaciousness in opposition to "self-determination", and partly because of the concerns about the federal draft raised by some provinces with Francophone minorities. These provinces said their people will not accept that Quebec is, in effect, the key to their survival.

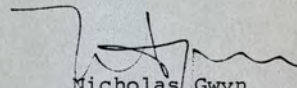
Until Ontario, quite unnecessarily, disturbed the situation, the original federal proposal had been very well received by Quebec and was in the process of being accepted by the other provinces. We would rate its eventual acceptability to Quebec at a bit better than 50/50 if the difficulties with the opening segment (lines 2&3) can be overcome. Quebec approval would be even more likely

if "though not confined to" were dropped, but this might well make it more objectionable to some other provinces.

As matters stand there is agreement on 15 of the 20 lines (the exceptions are 2 and 3; 8; 17 and 18). Lines 17 and 18 may well be resolvable if 2 and 3 are.

The difficulty with line 8 is that the provinces which oppose an entrenched Charter - at least 7 - do not want it implied that there will be a Charter in the Constitution. They therefore favour "federation". We have pointed out to them that "Constitution" does not mean only the written Constitution and that legislatures (their preferred means of "protecting" rights) are included within "Constitution". We have not told them that the actual phrase will probably be something like "Canadian Constitutional Charter" - as contained in the draft measure you have seen.

Proposals on how these two remaining questions might be dealt with will be contained in the Memorandum to Cabinet which will be delivered to you tomorrow.


Nicholas Gwyn

Attachments

12 Preamble

You will want to introduce this item as Chairman (see tab -)
and then ask Premier Levesque if he has any comments. After Premier
Levesque has finished, you might ask Premier Bennett to speak. At this
point, you might want to speak. Your speech is at tab - ~~Answer~~

Draft 2 He

Pages 1, 2, 3, 4

PREAMBLE

(Mr. Chrétien will be presenting the CCMC report on this item during the preliminary round of discussions on Monday. Notes for his use appear under Tab __.)

When the item is formally considered by the EMC, you might lead off the discussion. (Notes for your statement are at Tab __.) A new draft of the Preamble appears at Tab __. The opening lines have been prepared with a view to reflecting the points you have raised with us, and, to a lesser extent to take account of major provincial preferences.

The issues identified in the CCMC report are:

1. With regard to lines 1 to 5 of the "best efforts" draft which of the five alternative versions should be adopted? If none of these, should one of these be modified for inclusion?
2. With regard to lines 17 and 18 of the draft, which of the two alternative proposals should be adopted? and,
3. Once the choices have been made in regard to the first two issues, is the draft acceptable?

The federal objectives for this item:

Your suggested opening statement (at Tab __) is drafted to help achieve the following objectives by the end of the discussion:

1. to ^{Develop A} ~~maintain~~ consensus around the content of CCMC best efforts draft (copy at Tab __);
2. to achieve agreement on an opening sentence stating that the free will of Canadians, not provincial governments, is the ultimate basis of Canadian unity;
3. to ^{Develop A} ~~maintain the apparent ministerial-level~~ consensus for national recognition of the "distinct French-speaking society" ^{with particular reference} ~~now widely~~ regarded as ^{to} synonymous with Quebec, while avoiding adoption of wording that you feel would seem to confine the francophone "home" to Quebec.

4. To demonstrate to the people of Quebec that the Federal government recognizes the existence of a distinct French speaking society in Canada and that the Federation is maintained by the free will of Canadians

4. with regard to the next provincial election in Quebec, there may be a fourth objective should objectives #2 and #3 not be achieved: to demonstrate to Quebecers that (a) the federal government had played the lead role in winning wide national support for entrenching the ideas of a "freely maintained" federation and a "distinct French-speaking society"; and, if Mr. Lévesque's FMC stance warrants it, that (b) the national consensus which could have been confirmed was destroyed primarily because he sacrificed achievement of Quebec's traditional goals" by pushing everyone beyond reason to get what he wants -- e.g., an explicit right to "self-determination" -- rather than what most Quebecers want.

Suggested federal tactics for discussion of this item

By the end of the opening statements, it should be fairly clear whether First Ministers have accepted the CCMC best efforts draft.

A. If there is general acceptance you could probably obtain consent to proceed immediately to the two substantive "wording problems". (This order of discussion might help channel most of the Premiers' debating energies into these several specific lines only -- so that they may be that much less prone to lengthy debate when the time comes later to approve or reject the draft as a whole.)

If the opening statements convince you that the "best efforts" consensus has started to unravel, you could try to repair it, or at least to block off further defections, by drawing on the approaches outlined in the talking points at Tab _____. (These also include material on the possible function and place of Preamble in the Constitution.)

B. Discussion of opening sentence (lines 1 - 5 of best efforts draft): Unless there have been major changes of heart since last week, you should encounter no opposition per se to stating that the will of Canadians is the ultimate basis for Canadian unity. However, Mr. Lévesque may also say, for example, that if it does not flow through the provinces, the "will of Canadians" must mean that the (English-speaking) majority can always imprison the (Quebecois) minority.

You could respond that, obviously, none of us wants a formulation which implies or suggests a basis for keeping a large group of Canadians in Canada against its clear and democratically-expressed will. Then you could read out a draft sentence (perhaps saying it is based on a British Columbia suggestion at CCMC) of this nature --

"The citizens of Canada, or Canadians, wish their country to remain freely united as a sovereign and independent state ..."

-- and ask Mr. Lévesque if that's okay so far, encouraging other First Ministers to carry the ball in responding to him as required.

You would have a good chance of ending this particular debate with a wide consensus, if you then offered to recognize "the contemporary and historical reality, quite important to most Canadians, of Canada's provincial dimension." You could do this by proposing that the "new" (or "B.C.") draft sentence you read out in your first intervention be completed with an additional phrase, so that it read:

Stok [Canadian citizens] wish *not to remain* *the various provinces* *of* *Canada*
 "The [citizens of Canada], [or Canadians], wish *not to remain* *the various provinces* *of* *Canada* their country to remain freely united as a sovereign and independent state, a *federation of provinces* under the Crown ..."
 etc.

C. Discussion of "distinct French-speaking society"

(lines 17 - 18 of best efforts draft): The starting point for any scenario of this discussion is whether you find acceptable Quebec's proposed wording: "recognizing the distinct ^{character of Quebec society} society of Quebec, with its French-speaking majority."

In the Quebec wording
unacceptable?
Stok
 (1) If Quebec's wording is acceptable: we suggest the preferred scenario would be one in which you appear to accept it not primarily because Quebec prefers it, but because other provinces with francophone minorities prefer it, while Quebec finds it satisfactory. You could begin the discussion by saying that you prefer the federal wording (or not state any preference), but that you understand several provinces may feel their francophone minorities would have problems with it, and then ask an appropriate Premier (e.g., Mr. Hatfield) to elaborate.

The Quebec wording is not acceptable to the federal government as it ignores the one million French speaking Canadians outside of Quebec. You should try to convince Premiers that it is not 2-15 previously to protect the interest of these minorities that the Quebec wording is unacceptable.

It also turns out that there have

SECRET

- 5 -

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(If it also turns out there have been important "defections" from the CCMC substantive consensus, the most likely motivation would have been fear that the clause (as federally-worded) could be used by courts to bind majority-anglophone provinces to provide more French schools, public services, etc. ^{This is a phony argument and you should reject it} Hence, you could also use your agreement to the Quebec wording -- which, of course, does not as readily seem to imply any such demands on the majority-anglophone provinces -- as a means of retrieving "defectors".)

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(ii) ~~If the Quebec wording is not acceptable, you would try to convince Premiers with French-speaking minorities that it is precisely to protect the interests of these minorities that you cannot accept Quebec's wording. For this purpose -- as well as to set the debating parameters should Mr. Lévesque not go along with the federal wording -- you might wish to draw on the talking points included at Tab . If a wording "compromise" is acceptable to you, you can also explore with Mr. Lévesque and the others whether the federal wording could be accepted if the words "not confined to" were dropped (thereby probably softening, rather than "changing", the meaning of the phrase).~~

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D. When and if you feel First Ministers are about ready to consider accepting the draft as a whole, you could provide a transition to "putting the question" by pointing out there are only two additional points, which can probably be settled without extensive discussion.

1. at line 8 of the best efforts draft: whether to say the fundamental purpose "of the constitution" or "of the federation"? If you consider both acceptable, you would simply seek

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The above wording is not acceptable to the federal government as it ignores the million French speaking Canadians outside of Quebec. You might seek support on this issue from Premier [unclear] .
.../6

You might want to consider using both Constitution and Preamble so that the it would read "the fundamental principles of the Constitution and of the Preamble". The rest of the text would follow better.

a majority view. If your strong preference is "of the constitution", you could argue that it is the more precise and appropriate reference for a constitutional preamble. (If there is opposition, it might come from a Premier fearing that it implies constitutional commitment to a charter of rights. You could assure him: the term "the constitution" does not refer only to the legal document that follows, but also to the people, Parliament, legislatures and courts -- any one or all of which can also fulfill the constitution's purposes, including protection of rights. Hence, there is no charter being "sneaked through the backdoor".)

2. at line 12: (You can say that the Native leadership has officially communicated their acceptance of this phrase, and therefore confirm -- unless there is objection. This point to be confirmed.)

If consensus is achieved on a draft preamble, you could emphasize that this is a welcome sign of Canada's developing identity and helps provide a promising framework for later talks on specific items. Should you detect lingering unease among the Premiers, you might help soothe them by reconfirming the CCMC recommendation that there should be opportunity to receive further "stylistic" changes.

If a draft preamble is not agreed to, you could close the item by stressing whatever partial consensus does exist, in order to help create the basis for "legitimacy" of any preamble that the federal government might decide to proceed with by itself.

SECRET

- 7 -

You might begin the discussion by reading your own statement (Tab _).

At its conclusion, you could ask whether any Premier wished to make any remarks.

At the conclusion of the discussion you might sum up by indicating:

- areas of agreement,
- areas of consensus ~~with a count and naming~~
of who stands where,
- any decisions for further action.

*If you may want to adjourn the meeting for the day
and suggest that First Ministers meet for a working dinner in the
evening.*

QUEBEC PROPOSAL

PREAMBLE AND STATEMENT OF PURPOSE OF THE CONSTITUTION

In accordance with the will of Canadians, it is the will of the provinces of Canada, in consort with the federal government, to remain freely united in a federation, as a sovereign and independent country, under the Crown of Canada, with a constitution similar in principle to that which has been in effect in Canada;

THE FUNDAMENTAL PURPOSE of the Federation is to preserve and promote freedom, justice and well-being for all Canadians, by:

PROTECTING individual and collective rights, including those of the native people; *

ENSURING that laws and political institutions are founded on the will and consent of the people;

FOSTERING economic opportunity, and the security and fulfillment of Canada's diverse cultures;

RECOGNIZING the distinctive character of the people of Quebec which, with its French-speaking majority, constitutes one of the foundations of the Canadian duality;

CONTRIBUTING to the freedom and well-being of all mankind.

This phrase is subject to acceptance by the native leadership.