ATTACHMENT 4

October 24, 1981

SECRET

MEMORANDUM FOR THE PRIME MINISTER

The Federal Government's Final Compromise Offer

I. Introduction

This note discusses a possible government compromise offer designed to meet as far as possible the Supreme Court's constitutional-convention test so far as it relates to the content of the package. Thus it is limited to reviewing possible modifications to the Resolution which would be aimed at ensuring that the Resolution as amended would only affect provincial legislative powers with the consent of the legislature in question or with the consent of the people. Thus, if any of the options contained herein were adopted, the basis for the conclusion of the majority of judges of the Supreme Court that the current Resolution is unconstitutional in the conventional sense would be removed except as noted herein.

This memorandum summarizes material concerning the compromise offer that has been presented to you in a number of earlier notes. You will therefore be familiar with many of the passages, but we thought it useful to bring the argument together in one place. We have sidebarred the main sections which you have already seen.

You have also been given a companion memorandum on other possible "refinements" to the Resolution. This companion memorandum was written more in the context of meeting the constitutional convention test by securing, if possible, the support of the provinces.

Thus these two memoranda separately address the two ways of meeting the Court's conventionality test:

-- by having the Resolution supported by a consensus of the provinces; or

-- by having the Resolution affect provincial rights and powers only with the support of the provincial legislature or the people.

It should be noted again, however, that as explained in the first memorandum in the briefing book you received upon your return from Australia, your advisers are divided on the need for the Government to try to meet the Court's constitutionality test. And even those who feel that the Government must try to meet the test are themselves divided on whether the Government needs to do this for legitimacy reasons or for practical political reasons.

II. The Final Compromise Offer at the FMC

How and when to put forward a final compromise offer at the FMC will be considered in a note on the scenario of the meeting, to be provided to you next week. Here it is a question of considering the pros and cons of making such an offer in the first place at the FMC.

Pro

1. It would provide further evidence of the federal government's effort to respond constructively to the Supreme Court decision concerning the constitutional requirement of substantial provincial consent.
2. It would make charges of federal intransigence more difficult to sustain.
3. It would have a positive impact on the press, possibly the NDP and the British.

4. If a reasonable deal is possible with the provinces, it might help to bring that about.

Con

1. Depending on the specifics of the offer, it could alienate those persons and groups who feel that the Government is turning its back on them. To meet or approach the constitutional-convention test will require adjustments in respect of the Charter, but these proposed adjustments may attract the wrath of the NDP and may sew consternation in the ranks of those who have supported the Charter.

2. The main disadvantage is that it would make it difficult -- perhaps even impossible -- to get back to the original Resolution, should the compromise offer not be accepted by the provinces.

Conclusion

My conclusion, as you know, is that we will have to make a compromise offer at the First Ministers Conference, although, as you also know, not all your advisers agree with me on this point.

III. The Final Compromise Offer and Parliament

An issue which has been of considerable concern to us is whether the federal government -- should it wish to do so -- would be able to revert to the original Resolution in Parliament, after presenting a compromise offer at an unsuccessful First Ministers Conference.

Those who argue that the Government would be unable to revert to the Resolution, after putting forward a compromise offer, make the following points:

1. The Supreme Court has declared that substantial provincial consent is constitutionally (but not legally) required for amendments in those areas affecting provincial jurisdiction. Even if the federal government tries and fails to secure substantial provincial consent, the constitutional

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obligation to remove those sections of the Resolution directly affecting provinces remains. If the federal government's offer is such that it meets the Supreme Court's constitutionality test by removing those parts of the Resolution most directly affecting provincial jurisdiction, or by making them subject to provincial consent, the federal government cannot then back away from this offer subsequently, simply because the provinces do not accept the new package.

2. In addition, having made an offer, the federal government will be subjected to tremendous pressure to alter the Resolution accordingly, regardless of whether substantial provincial consent has been achieved or not. For those opposed to federal action, this would be tactically of crucial importance, since, if successful, it might re-open the entire debate in Parliament.

Those, on the other hand, who contend that the federal government would be able to revert to the Resolution, after having made an offer to modify it, make the following points:

1. The offer was made in the context of intergovernmental negotiation, and it carries no more obligation to follow through on it than does an offer put forward by any government in any other negotiations.

2. The federal government has said all along that provincial agreement was impossible, and the latest round of negotiations serves to confirm this.

3. The Resolution is now more a Parliamentary measure than an intergovernmental measure. Vast amounts of time and effort have been spent in improving it and these accomplishments cannot be thrown away, to be replaced by a modified package from which provincial consent was still withheld.

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4. The Resolution has also been extensively reviewed and improved by public participation, in particular via the Joint Parliamentary Committee on the Constitution, and again the Government and Parliament cannot responsibly turn its back on this effort. In addition, the aspect of the Resolution of particular interest to citizens is the Charter of Rights, the very thing to which many provinces are taking exception.

Conclusion

It is my conclusion that the federal government would able to revert to the terms of the original Resolution, even after having made an unsuccessful compromise offer, should it wish to do so. It should be recognized, however, that this would be a very difficult political task.

This having been said, I believe that we will have nevertheless to place a compromise offer before Parliament.

Neither side has as yet emerged victorious from the period following the Supreme Court judgement. It is my belief that the federal government will need to strengthen its position further, and is in a position to do so, whether the opposition parties accept or reject the offer. If they reject it, the Government will then be in a position to push ahead with the original Resolution, with or without the "post-patriation amendment" scenario, which we have discussed and which is summarized in the final section of the note; if they accept it, the price of strengthening the Government's position will be a watering down of the Resolution in some respect.

I should point out that some of your advisers disagree with this conclusion. They argue that the Government has in the past several weeks done enough to entitle it to proceed with the original Resolution and its position is likely to be strengthened after the FMC. The public wants the Constitution out of the way and is fed up with the wrangling and the debate.

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Therefore, why take the risk of ending up with a compromise measure when you will be in a position to get the whole thing?

The fact that there are two streams of opinion on this issue is to my mind an indication of the difficulty of the decision you and the federal government are facing, a decision which is difficult because it depends on considerations of principle, on predictions about the long-term effects of one course of action or another on national unity, and on a set of complex judgements about the state of public opinion and the views and likely reaction of significant groups and persons on both sides of the Atlantic.

IV. The Nature of the Final Compromise Offer: Options

The options presented in this section relate to the Charter of Rights and Freedoms and the provisions on Aboriginal Rights and to the triggering mechanism for a referendum determining a permanent amending formula. These are the main areas in which adjustment of the Resolution to meet the constitutional-convention test should be sought.

The Equalization provision and the Natural Resources amendment raise specific issues.

The Equalization provision technically affects the powers of provincial legislatures although the impact is in reality minimal. It would be illogical to have it subject to opting in and opting out, since, if it exists at all, it must apply across the board. In addition, making it subject to opting in and opting out would be strongly resisted by Premier Hatfield. Thus it should be excluded from those two alternatives. A justification for this decision could be readily developed. On the other hand, if a referendum were contemplated, it might be politically desirable to include the Equalization provision because of its popularity, although it would be important to clear this with Premier Hatfield.

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The Natural Resources amendment does of course, clearly affect the powers of legislatures, favourably from the provincial viewpoint. Furthermore, there is no illogicality about making that amendment subject to optingin and opting out, as there is in the case of the Equalization provision, although the Government has taken a strong political position against such a procedure. Therefore, the possibility of including the Natural Resources amendment in the opting in, opting out and referendum alternatives should be considered, given the political appeal of this amendment from a provincial point of view. However, it would be important to consider the impact on the federal NDP of proceeding in this fashion. One could readily make a case for excluding it from the three alternatives, should that be politically desirable.

In our October 8th memorandum to you we indicated that with any of the proposed modifications, an argument will still be made by the dissenting provinces that the process, and perhaps certain aspects of the amending formula provisions, remain "unconstitutional". However, it would be very difficult to make this argument effectively with the public because of the fact that the federal government's proposed amending formula would come into effect after a national referendum which would give it legitimacy, by agreement on a new formula in which case the formula meets the constitutionality test, or after two years of consultation which in itself will add an element of legitimacy.

In addition, the Department of Justice contends that the Supreme Court itself acknowledges that one procedure, that is, a direct call to the people by way of a referendum, would be a valid way to proceed as long as it respects the federal character of Canada. Respect for the federal character of Canada could be effected in one of two ways:

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1. The provincial governments would need to be given a real and fair role in the process leading to the selection of the ultimate amending formula by way of a referendum calling for -- and only for -- a national majority. An aspect of this issue is examined later in this section of the note.

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2. The expression of the will of the people deciding on an amending formula would need itself to be reflective of the federal character of the country -- meaning by that, that a single, national majority would not be sufficient to carry and that a double majority (national and provincial or regional à la Victoria) would be required. We do not believe this alternative is viable in respect of the amending formula, since it would mean that, if federal and provincial amending formulas were put to the people for choice, neither might receive the required double majority in which case there would presumably be a return to unanimity. This alternative, however, would be available in respect of a Charter of Rights as there would only be one Charter put to the people.

We discuss later a number of changes that you might wish to consider in order to ensure that the provinces are given a fair role in the process leading to the selection of the ultimate amending formula. This point is also discussed in the companion memorandum on "refinements".

The Charter of Rights and Aboriginal Rights

In the opting-in or opting-out options respecting the Charter, the opting could be done on a class-by-class basis, but we strongly recommend against this so as to put maximum pressure on provinces to take the parts of the Charter they do not like in order to get the parts they do like.

(A) Provincial Opting-in

Advantages

1. Ontario and New Brunswick would be inclined to opt in for the whole Charter immediately. Some other provinces would undoubtedly voluntarily opt in to one or more classes of rights, such as fundamental freedoms, democratic rights and, in some cases, legal rights, if class-by-class opting-in were provided. If it were not, it is difficult to predict how other provinces would react to protracted internal pressure.

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2. An opting-in formula would provide a basis from which civil rights groups could bring substantial pressure to bear on provincial legislatures and groups to opt in. Provincial Liberal Parties could adopt opting-in as a major plank in their platforms. (Mr. MacEachen regards this as a major advantage.)

3. Opting-in would be seen as fair and just by most provincial governments because the initiative, subject to pressure from the electorate, would be left in their hands.

Disadvantages

1. An opting-in formula, of all three alternatives, is likely in the short if not the long term to have the greatest "checkerboarding" effect. It is the option that most easily allows a provincial government to ignore the Charter.

(B) Opting-Out

To give effect to an opting-out arrangement, the Government would postpone proclamation of the Resolution for a few months, during which time provinces would have the opportunity of passing the necessary opting out provisions through their legislatures. Those provinces that had not acted by the time of proclamation would then be bound by the full provisions of the Resolution.

1. Ontario and New Brunswick would automatically be bound by the full Charter in accordance with their preference. Thus, there would be immediate coverage in those two provinces.

2. Because of the enormous political onus that an opting-out formula would place on provincial governments, it might well result in less "checkerboarding" than opting-in. It will take a tremendous act of political will to move in a legislature to eliminate the application of the Charter in a province if our polling results on the popularity of the substance of the Charter are accurate.

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Disadvantages

1. Of the opting-in/opting-out options, opting out comes closer to failing to meet the Supreme Court test of constitutionality, since it imposes a positive obligation upon the provinces without their consent, namely, the obligation to get out formally if they did not wish the Charter and/or the Aboriginal Rights provision to apply to them.

2. Once a province has opted out, conditions encouraging it to opt back in may or may not exist. To ensure that they do, we suggest that a province can opt out for the life of a legislature but that to stay out, its legislature must vote to do so within the first year of the life of a new legislature (i.e., within one year after each provincial election). In effect, if opting out is used, we propose opting out with a sunset provision.

3. Of the opting-in/opting-out options, it would likely be the less attractive to the provinces because it would transfer the onus to them to take action to get out from under the Charter.

Note: Tom Axworthy and André Burelle have suggested that opting-out should be a 2/3 vote of the legislature. Only in the provinces of Alberta, Nova Scotia, Saskatchewan and Prince Edward Island do the government parties control over two thirds of the seats. In Newfoundland the government needs to win an upcoming by-election to have two thirds of the seats. In British Columbia and Manitoba the NDP opposition would ensure that the legislature did not opt out. In Quebec the outcome would depend on the PLQ, and Ontario and New Brunswick would make no effort to opt out. I do not favour this wrinkle because it would seem to be "politically tricky "and Machiavellian", and in fact moves further away from the Supreme Court's test of constitutionality.

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(C) National Referendum

Advantages

1. This option would eliminate "checkerboarding".

2. A referendum formula would place the decision on the application of the Charter with the voters rather than with legislatures. A Charter approved by the citizens of Canada would carry great authority in the country.

3. A referendum option would mobilize all civil libertarian interests on a national basis without leaving the initiative in the hands of the provinces.

4. A referendum would establish the democratic principle that if two levels of government disagree on something as fundamental as a constitutional amendment, the people who elect those governments should break the impasse.

5. A referendum would establish the principle of the right of the federal government to consult all Canadians as a means of achieving a constitutional amendment.

6. Our survey results show that this is the option Canadians prefer (from among the three proposed) and that the support for the Charter, and individual elements of it, has not changed for over a year. Canadians still overwhelmingly support the substance of the Charter.

Disadvantages

1. This option is likely to be unattractive to all provinces. For the dissident eight, it would take the initiative out of their hands into the hands of the people on an issue that would affect the powers of their legislatures. For Ontario and New Brunswick, it would place at risk the application of the Charter within their provinces when they have voluntarily undertaken to be bound by it. From our point of view, we risk having the Charter applicable in no province.

a province could still bind itself as could we by constn. amendment affecting it.

2. The referendum would raise the question of what constitutes passage, an issue which we discussed briefly earlier in connection with the amending formula. The "constitutionality" problem could remain if by that we mean that the powers of the legislature of a province could be eroded without the consent of the legislature of the province and contrary to the wishes of the people of the province. If, on the other hand, we accept the double majority principle (national plus provincial or regional à la Victoria) advanced by Justice above, the "constitutionality" problem could be met, although the political problem might still remain.

3. The referendum option would raise a very complex and acrimonious campaign. The Charter of Rights is too complex for a simple "yes" or "no" decision on the part of the average Canadian. The referendum battle would mobilize all the "crazies" on both the right and the left fringes. It would force groups that are generally in favour of the Charter but that are deeply concerned about the impact of one or two provisions (for example, the Churches on the right to life or the police chiefs on legal rights) to make agonizing choices.

4. A referendum campaign, unless it provided the people of Quebec with a veto, would provide a national platform for Lévesque on the issue of infringement of provincial rights that transcends the special interests of Quebec.

5. The timing of a referendum campaign might be such that the issue would be settled in the absence from office of the current Prime Minister.

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Will Great Britain be less inclined to adopt resolution, saying "have your referendum first".

The Triggering Mechanism for a Referendum Determining a Permanent Amending Formula

Originally, the referendum could only be triggered if eight provinces having at least eighty percent of the population of all the provinces agreed to a proposal. The requirement of eight provinces would have ensured that at least two provinces in either of the multi-province regions agreed; the requirement of eighty percent of the population would have ensured that both Ontario and Quebec also agreed. This was designed to constitute a form of provincial "national consensus" not unlike the requirements for provincial consent under the Victoria formula (six provinces spread over four regions representing in practice, about 80% of the population). The option approved by Parliament would constitute a federal "national consensus". The people in a referendum would then have chosen between the two "national consensus" options.

The required number of provinces was dropped to seven by the Joint Committee. (This is also the number required under the Premiers' Accord for an amendment to pass.) Since eight provinces are currently agreed on a formula, the requirement of seven does not seem unreasonable. It is the 80% requirement, however, that would prevent the Premiers' Accord from being put to the people in a referendum.

To meet the test of fairness regarding provincial-government participation, as outlined earlier in the memorandum, the Government might consider the following options:

1. To agree to drop the population requirement to 60% or 50% which would (under current circumstances) likely ensure that a referendum would take place at the end of the interim period; or

2. To agree to drop the population requirement to 50% or 60% but to require that Quebec be one of the seven provinces agreeing to the provincial alternative since the original figure of 80% was designed to ensure that Quebec was part of the provincial "national consensus"; this would protect Quebec's

position in the event that the current alliance of the eight breaks down during the interim period since otherwise a provincial alternative without Quebec governmental support could be adopted by a simple national majority in a referendum, even though rejected by a majority of Quebec voters.

V. Implementation

In closing, we will consider briefly the manner in which the Government's compromise offer might be implemented.

The FMC may produce the required substantial provincial consensus, it may break up in failure, or it may result in one or two more provinces agreeing to support the Government on the terms of the compromise offer.

Given any of these possible outcomes, but particularly the last two, how does the Government -- should it wish to do so -- ensure that its compromise offer will be adopted by Parliament? This is an issue that would inevitably arise in the minds of the provinces who were prepared to agree to the compromise offer.

There are two significant responses you might make to the provinces. Neither involves, nor should it involve, accepting delay.

1. You might say simply that you will be prepared to place the compromise offer before the opposition and to press them to agree to replace the original Resolution with it and proceed forthwith. You could indicate that it would also be the job of the supporting provinces to pressure the opposition to accept the compromise offer. If the opposition refused to accept that offer, then you would be forced reluctantly to proceed with the original Resolution.

2. You might commit yourself to the "post-patriation amendment" strategy outlined below. In this scenario, you would request the Parliamentary opposition to agree to replace the Resolution with the compromise offer as per No. 1 above. You would also indicate that, if they did not agree, you intended to proceed as follows:

    -- pass the original Resolution and send it to Westminster.

    -- As soon as possible after that, and prior to proclamation of the Westminster-approved original Resolution, submit to Parliament a new Resolution to provide authority to implement the compromise offer by way of constitutional amendment.

    -- Offer the provinces, say, 180 days from the day the Senate votes, until about June 1, 1982 a period during which time they are invited to adopt in their respective legislatures equivalent resolutions to the new federal resolution.

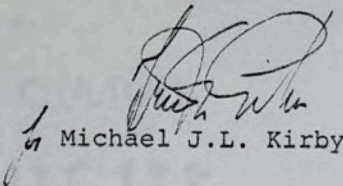
    -- If these parallel resolutions were adopted by Parliament and all the provincial legislatures prior to the expiration of the 180 days, then the original resolution would be proclaimed and immediately amended according to the unanimity rule of Section 37 to give effect to the compromise offer.

    -- If the parallel resolutions were not adopted by Parliament and all the provincial legislatures, then the original resolution without modification would be proclaimed.

Having this prospect laid out before them might encourage the opposition parties to agree to accept the compromise offer. It would also provide a credible if elaborate response to the question of how the federal government is going to follow through in Parliament on any agreement reached at the FMC. It

also gives the provinces a reasonable length of time to act, even if the Resolution is not through Westminster for several months. It would mean that if the compromise offer were not proceeded with, the blame would rest with the recalcitrant provinces or the opposition, as you would have tried to make the measure constitutional in the conventional sense. Finally, this procedure would ensure that there could be a patriation ceremony July 1, 1982.

--- Legal texts, prepared by Justice and covering the three main options outlined in this paper, are attached.



for Michael J.L. Kirby

Attachments