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April 1, 1975



Disused

MEMORANDUM FOR THE PRIME MINISTER

Discussions with the Provinces on
the "Patriation" of the Constitution

The Basic Approach

You advised me a few days ago that you agreed with the approach outlined in my memoranda of February 11th and 19th. The essentials are:

a) As to Substance

What is to be proposed at this time is simply:

- (i) re-confirmation of the amending procedure agreed on at Victoria for those parts of the constitution that cannot now be amended in Canada (i.e. - Articles 49, 50, 51, 52, 56 and 57 of Part IX of the Victoria Charter, attached), plus
- (ii) "patriation" of the constitution. Insofar as changes of substance or form may be desirable, these would be left for consideration after patriation and for action under the new amending procedure.

b) As to Method

(This would talk to each of the provinces)

The method of discussion would be bilateral in the following sequence:

- (i) private and informal mention by you to the Premiers of what you are proposing, this probably to be at your dinner on the evening of April 9;

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- (ii) a letter from you to each Premier outlining the proposal at greater length and going into the whole process as envisaged. It would say that I would contact his office to arrange a meeting to discuss the whole matter with him on your behalf;
- (iii) visits by me (plus probably one or two officials) to each provincial capital during May and June to see the Premier, to answer any questions he may have, to get his reaction on the proposal and to follow up with discussions with provincial officials as required;
- (iv) report to you during and after the above visits to determine what and when the next stages ought to be.

Opening the matter with the Premiers on April 9

On the basis of the above approach, presumably what you would want to say to the Premiers when they are here would be along the following lines:

- a) To recall that at Victoria in 1971 there was complete agreement on the amending procedure.
 - Mr. Bourassa's reasons for saying "Non" did not include any rejection or criticism of the procedure.
- b) To point out that Canada is the only country in the world that is unable to amend its own constitution in all respects.
 - It is a national indignity and the sole remnant of our colonial status.
- c) To remind them that we have been trying for 50 years to get agreement on an amending procedure and to "patriate" the BNA Act.

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- We did finally get agreement on the procedure at Victoria.
 - It would be a historic achievement if you and the 10 Premiers could be the ones who completed the task of "patriation".
- d) You think it would be most unwise to re-open any discussion of the substance of the constitution at this time.
- There would be many points of disagreement.
 - It would take months and years.
 - It would divert a great deal of the time and effort of First Ministers at a time when there are many other very urgent matters.
- e) Changes in the Constitution can be considered later and can be made under the new procedure.
- There will be no more problems about doing them then, as time permits and as circumstances require.
- f) You would like to have me visit each of them, on your behalf, in the next month or two to discuss your proposal and what it would involve and you would be writing to each to give fuller information in advance of my visit.

I do not think that any discussion is required: indeed it might be best not to have it. All that is wanted is introduction by you of the idea and an indication of their willingness to take a look at this limited proposal.

Discussion notes along these lines will be included in your briefing book.

Particular Questions

Without trying to anticipate all the many questions that will have to be considered as the process develops, there are a few for attention now:

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a) The Position of Quebec

Mr. Bourassa will be much concerned about your proposal because:

- (i) it will re-open in the media and the public a very difficult issue for him in relation to "constitutional reform";
- (ii) acceptance of the proposal would raise the criticism that he is "throwing away" a bargaining lever in agreeing to an amending procedure without, in return, getting changes of substance; and
- (iii) action by the Assemblée Nationale to approve an Address to the Queen for the necessary action by the British Parliament will drag up all the most controversial and explosive issues relating to "souveraineté-association", the distribution of powers, the monarchy, etc., etc.

You might want, on April 9, to indicate to Mr. Bourassa -- and in a way that the others hear -- that you are aware that there are problems for him in the proposal but they are not insurmountable if the press and the public have a few points brought out such as:

- (i) There is no bargaining lever in the amending procedure: Victoria showed that. Neither the federal government nor the other provinces are going to be blackmailed into changes they do not accept in order to get it.
- (ii) The best way to move toward constitutional reform is to show that Quebec is prepared to move and is not a hopelessly intransigent obstacle -- as it seems to the other provinces to be after 1964 and 1971.
- (iii) Quebec has a real interest in getting the Victoria amending formula now. It has the lowest birth-rate in Canada and low immigration. Unless the formula is accepted while

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Quebec has over 25% of the population it will be very hard to sell it to the other provinces.

b) When to refer to the "fall-back" position

In our brief discussion the other day I said I thought it would be best not to refer to the fall-back position (the "1949-50 option") until the prospect of getting agreement had been tested. It is a difficult and important question. The considerations seem to me to be the following:

- (i) The "fall-back" position is clearly less desirable for the federal government -- and for the country -- than action on the basis of full agreement now.
 - The fact of agreement and of agreed action would be a big "plus" nationally and a big accomplishment for you and the government.
 - We would have the amending procedure now, not in 5 or 10 years. We do not want, therefore, to make the fall-back position known if it would diminish the chance of getting agreed action.

- (ii) For Mr. Bourassa, the fall-back position would have obvious attraction. It would make it unnecessary to have action by the Assemblée Nationale at an early date; it would get the issue out of the way for the time being; and it would get the Victoria formula established as the formula in the process of acceptance while Quebec still has over 25% of the population. These considerations might lead Mr. Bourassa not to agree to participate in joint action. To that extent this argues against revealing the fall-back at an early point. It is possible, however, that knowledge of the fall-back would help Mr. Bourassa in his argument with his public and the Assemblée Nationale. He would be able to show conclusively that there is no bargaining

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lever in the amending procedure; it can be accomplished (ultimately) without a bargain. With that demonstrated, he could argue that it is better to get the amending procedure now, and be able to use it, than to have it in suspense and incapable of use until some future time when all provinces agree. A procedure hanging half-accepted and incomplete might provide an argument against constitutional reform until unanimity, and therefore acceptance, has been completed.

- (iii) For the other provinces, who do not hold to the "bargaining-lever theory" about the amending procedure, I think there would be only disadvantage in letting them know at an early point of the fall-back proposal. It would almost certainly reduce their propensity to agree. Why agree and have to act when there is a way out that does not involve the inconvenience of arguing for the amending procedure (a Quebec veto, etc.) and putting it through their legislatures?

On the whole, it seems to me it would be best not to reveal the fall-back until at least the first round of discussions by me with the provinces has been completed. The one qualification on this that might be worth considering would be the possibility, if Quebec is pretty negative at the outset, of indicating that, as you hinted in your speech of last October, there are ways of avoiding being frustrated and blocked on this and that the question of agreement on a procedure is definitely not a lever that can force the federal government (or the other provinces) into constitutional change. You (or I, for you) could say that you do not want to go into this now but you want them to believe

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that there is a solution (not by way of force majeure or an "election-referendum"), but it would be less desirable, both for the country and for Quebec, than agreed action. One could say that the nature of this "solution" will be revealed later as something they could use as an argument in favour of joint action now.



R. G. R.

PRIVATE DISCUSSION WITH THE PREMIERS RE "PATRIATION"
OF THE CONSTITUTION

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Premiers along the following lines:

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