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February 11th, 1975.

MEMORANDUM FOR THE PRIME MINISTER

Discussions with the provinces on
"patriation" of the constitution
and an amending procedure

Since our last discussion concerning the constitution, I have been giving some thought to the way of reopening with the provinces the possibility of working toward some action on the aspects you referred to in your speech in the Debate on the Address last October. There are a number of questions as to substance and procedure that arise and your views would be very helpful before proceeding further. The main questions for consideration seem to me to be the following:

A. The scope of possible action

The options appear to be the following:

1. Revival of the Victoria Charter
(plus "patriation")

There would appear to be little prospect of success in trying this. Part II on "language rights" would bring up a very troublesome debate with Quebec on Bill 22 and there would seem to be little chance of having that part accepted in the form it took in 1971. The fact that the Charter includes some matters of substance and that Quebec said in 1971 that it had to secure something of significance to go with the Charter would make it inevitable that Quebec would want something done with regard to the distribution of powers. Last October, Chouinard told me that they would almost certainly be seeking something in respect of immigration, communications and the spending power.

*Returned by
P.M.
3/10/75:*

"Cultural sovereignty" would be another almost certain area. If Quebec raised some demands, other provinces would more than likely feel that they had to do the same. I do not see how the Atlantic provinces could avoid raising the question of offshore mineral rights. Alberta and Saskatchewan would almost certainly feel they had to get something on resources and resource taxation. It does not appear that this is a fruitful course unless we want to get into a very lengthy round of constitutional review discussions.

2. A new "constitutional package"
(plus "patriation")

There is little reason to assume that something new could be devised which would be very worthwhile without getting into all the difficulties referred to above for the Victoria Charter.

3. The "structural parts" of the
Victoria Charter (plus "patriation")

A possible course would be to avoid those aspects of the Victoria Charter that get into matters of policy or substance that affect the individual or the powers of governments. One could omit the parts on political rights, language rights, section 94A, regional disparities, federal-provincial consultation, etc. The "structural" parts that would be left would be:

Part IV	-	Supreme Court
" IX	-	Amendments to the constitution
" X	-	Modernization

Part IV would be something attractive to the provinces which could, to a degree, balance any sense that the achievement of success on the procedure of amendment plus "patriation" would be something that would redound primarily to the credit of the federal government. It might also help to make the amending procedure a bit more acceptable to some of the provinces which do not get a veto and would therefore find agreement on it as formulated at Victoria not very attractive.

It is questionable whether Part X on modernization would be accepted. It would raise the questions of reservation and disallowance and it would probably bring up the question of the Monarchy. Quebec might well feel that it would not be possible for them to be a party to anything that dealt in this way with the totality of the B.N.A. Act without getting into some of the questions of legislative power.

4. Amending procedure plus "patriation"

Here there would be two variants.

(a) The Victoria procedure - Part IX

This would certainly be the logical place to begin. The procedure was worked out with great care and it was in fact acceptable so far as the formal positions of governments were concerned at Victoria. There were criticisms of it at the time and subsequently in Quebec as establishing a procedure that would make it too difficult to secure in future the kinds of changes that were then thought likely to be desirable to give the province of Quebec the kinds of powers it might want or need for purposes of cultural protection, etc. While there were such comments in 1971, there seems to be a new awareness in Quebec, partly as a reflection of the lower birth rate and the steadily diminishing proportion of the national population in Quebec, that Quebec's influence is not likely to be greater at a future time than it is now. This could lead to the view that it is better to accept the Victoria procedure than to gamble on getting something better at a future time.

(b) A new amending procedure

Unless some province has some specific formula, it would not seem worthwhile for us to raise the question of a new procedure. The Fulton-Favreau formula was more rigid than Victoria and extremely complicated. It would be worse than Victoria from the point of view of the criticisms that were raised in Quebec in 1971. On the other hand, the critics of the Victoria formula at no time,

so far as I am aware, produced a formula of their own that would show how it would be possible for Quebec to secure more freedom of action without incurring more danger in some areas that it considers to be essential.

5. "Patriation" without an amending procedure

You will recall that on one or two occasions in 1970 and 1971 we discussed the possibility of "patriating" the B.N.A. Act without establishing an amending procedure. We decided that it would be an undesirable course since it would place us in a situation in which there would be no way of amending those parts of the Constitution that do not come within the amending power of Parliament under section 91 or of legislatures under section 92. While undoubtedly "patriation" without an amending procedure should be a last resort, there are some reasons why it would be worth considering, either as a fall back position or as a tactical element in negotiation. The following considerations occur to me:

(a) Clear indication that the federal government is prepared to consider "patriation" with no amending procedure would improve our bargaining position greatly. It would be apparent to Quebec (and to other provinces) that the federal government is not a prisoner of provincial consent and that it can act to "bring the B.N.A. Act to Canada" (along the lines you discussed last autumn) whether they agree or not. While it could be argued that simple "patriation" would not be much of an accomplishment, I think in fact it would be. It would, after 100 years and more, end the power of the British Parliament to legislate in relation to the Constitution of Canada.

(b) Indication that we are prepared to "patriate" with no amending procedure would increase the likelihood that agreement would be worked out on an amending procedure either now or at a future time. No government, either federal or provincial, would feel very comfortable with no amending procedure. The discomfort on the provincial side would be a good deal greater than on the federal side. They would realize that

a future Parliament or a future Supreme Court might hold that a "vacuum" in legislative power is intolerable for an independent country in which, in some form, all powers would then reside. Such a feeling might lead, at some time, to unilateral action by a future Parliament. Such action might be upheld by a future Supreme Court. Any possibility of this kind would provide quite an incentive to agree on a procedure.

(c) So far as Quebec is concerned, the incentive to find some formula now might well be even greater than for the other provinces. A "patriated" constitution, with no procedure, could present the risk referred to above of a future Parliament acting unilaterally and taking over the power to amend. Alternatively, if Parliament did not assume such a power, or if the Supreme Court ruled against it, there probably could be no amendment without unanimous consent of the provinces. This would be a much less attractive possibility than the Victoria formula for future constitutional adjustment that Quebec might still aspire to.

(d) From the federal point of view, "patriation" without an amending procedure is probably not a very terrifying prospect. There seems little likelihood that we will be stuck in a situation where anything vital cannot be done or worked out either by the federal Parliament or by some form of agreement with the provinces. We would probably not be much, if any, worse off than we are now.

Altogether, it strikes me that it might be a good idea to let it be known at a reasonably early point of discussions that, in order to achieve the objective of "patriation" to which you referred so strongly last October, the federal government would move for that without any amending procedure if it cannot get agreement on a procedure in the next 12 months or so. On reflection, I am of the view that this would be a good deal less hazardous than to hold out the prospect of the federal government moving unilaterally, even after an election, for "patriation" with a procedure for amendment that did not have provincial agreement.

If we were to hold out this "last resort" option, the technique of handling it would require very careful consideration. In substance, it could probably be devised in one of two ways:

- (i) There could be straight "patriation", with legislative action by the British Parliament to terminate its power with regard to the B.N.A. Act for all time, while saying nothing whatever as to the method of amendment. The difficulty about this is that it might create doubt as to the legitimacy of any formula for amendment that might be worked out in future.
- (ii) The British Parliament could, as part of its legislation, provide that the amending procedure for those parts of the constitution that do not come under sections 91 or 92 should be whatever might be at some future time agreed upon in Canada and legislated by the Parliament of Canada. Something of this sort would remove doubts about legitimacy. However, it would have its own difficulties. Would one try to define what is meant by "agreed upon"? (By whom? With what degree of consent? etc.) It could also raise some nationalistic objections about our future constitutional action deriving its authority from a British statute rather than from the Canadian people, etc.

B. Tactical approach

In the light of the above considerations, I would suggest that the best approach so far as substance is concerned would be to start with option no. 4 - a proposal that the federal and provincial governments agree to having action taken on the amending procedure that was agreed to at Victoria plus "patriation". This would have the advantage of not being susceptible to representation as a reopening

of total constitutional review or even of the Victoria Charter as such. On the other hand, it would rest the substance of the procedure squarely on the formula that did, at that time, (so far as formal positions were concerned) achieve unanimous agreement.

Presumably we should resist anything that would divert or expand the discussion into constitutional review generally or consideration of specific but substantive aspects of change because this would almost certainly lead to frustrating discussions that would bog the whole procedure down. The sole exception might be the "structural" parts of the Victoria Charter referred to in option no. 3. If the provincial governments saw any attraction in having agreement include Parts IV and X of the constitution (Supreme Court and modernization), presumably the federal government should be prepared to go along. If there is resistance to modernization but there is a wish to have the adjustments about the Supreme Court, presumably that ought to be acceptable.

Presumably one ought not to say anything about option no. 5 unless a province indicates that it would not be prepared to go along with agreement on an amending procedure or that it thinks it is futile to reopen the matter because no agreement will be achieved. At that point, possibly the position should be taken that your government is of the view that it is simply not in keeping with the status of this country to have the legislature of another country continue to have the power to legislate about our constitution. You made this clear in October 1974; there was general indication of agreement on all sides in the House of Commons; and the government is determined to bring this situation to an end during its present term of office. While it would prefer to do that with agreement on a suitable procedure for amendment, it is prepared to do it without such agreement, if necessary.

Indication of the above decision would, of course, bring not only the argument of the technical difficulties referred to under option no. 5 but it would also bring the allegation that this would be "unilateral action" which would be

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"unconstitutional" or "not in accordance with the spirit of Confederation" or something of that kind. To this, the response would seem to be two-fold:

- (a) Governments have been trying for nearly 50 years to get agreement on a procedure and you are trying once more. It would not be for lack of consultation or willingness to agree that the federal government would move to action of this kind.
- (b) What is proposed under option no. 5 is not unilateral action to establish a procedure of amendment. It is simply unilateral action, because agreed action would have been demonstrated to be impossible, to terminate the power of the British Parliament to legislate for Canada. It would not add to the power of Parliament in relation to the legislatures; it would not establish any amending procedure; and it would leave completely open to future agreement whatever the governments of a future day might decide upon as an appropriate procedure for amendment.

C. The opening of discussions with the provinces

It seems to me that the opening of this matter should be "low key" and by way of bilateral discussions. However, to make that effective, it might be desirable for you to use an informal and private moment during the conference of April 9th-10th - perhaps at a dinner that you might be giving to the Premiers - to say that you do want to reopen with them the question whether we cannot, at long last, "patriate" our constitution. You could indicate that it is a matter of national indignity to perpetuate the present situation and that you would hope that you and they might be able to bring it to an end without getting into all the problems of constitutional revision that frustrated the last effort. You could say that you would be writing

to each of them shortly about your ideas on the matter and that you would be asking me to go to see each of them in order to talk about the possibility of getting action in the very near future.

Between now and the conference, we can have a letter from you to each Premier made ready so that it can be sent shortly after the conference with whatever adjustment may be desirable in the light of developments there and of any reaction you get in the informal discussion suggested above. Subject to further consideration, the letter could be devised in terms of the "tactical approach" suggested in pages 6 to 8 (above). The letter could end with the request that each Premier see me at a time that would be convenient to him. I would then plan to visit each province sometime in the latter part of April and May.

Almost certainly, the Premiers will want to have their Attorneys General and possibly a legal officer or two present for the discussions and probably I should have someone from the Department of Justice with me. However, I would suggest very strongly that the initial discussion should not be essentially a "legal" one and should not be by the Minister of Justice with the Attorneys General. If success is to be achieved in this, I think it is essential that the discussions be launched as being by you with the Premiers - and it is for this reason that I think some initial, however brief, discussion occur between you personally and the Premiers collectively during the April 9th-10th conference. Depending on developments, it will probably be necessary to have discussions of a more legal kind later on, but clearly these should be later.

Further consideration here

I have talked to Don Thorson briefly on the ideas I have outlined above and I am having a meeting with him and our own people on Monday.

Following that discussion, I will have a clearer impression of the reactions we must anticipate and of the problems of policy and tactics that need to be considered. There is no need for me to have any reaction from you before the meeting on Monday, but it would be most helpful to have your comments and direction before you leave on your European trip if at all possible.

I should add that, if you agree with the suggestion that I visit each Premier on your behalf in the course of April and May, I think it would be wise for the occasion to be used to discuss matters other than the amending procedure and "patriation". Frank Carter and I have very few opportunities to talk to the Premiers about questions that are particularly bothering them and which often they have very little chance to discuss with you. I think it would be useful if Frank went with me on the visits; if we used the meetings for general discussions with the Premiers; and if, in addition, we arrange to meet individual Ministers and senior officers as required to discuss whatever problems may be most important in each case.

yes

R.G.S.