PRIVY COUNCIL OFFICE
BUREAU DU CONSEIL PRIVÉ

MEMORANDUM

Prime Minister:

This second memorandum on the constitution should be read before my memo. of Feb 11 (if you have not already read that). You will then, on reading the memo of Feb 11, be able to assist the parts in it (re "Option 5") that are now superseded.

19/II/75.

c.c.: Mr. Pitfield
Mr. Bryce
Mr. Carter
Mr. Haney
Mr. Gwyn
Mr. Gravelle
Miss Macdonald

CONFIDENTIAL

February 19th, 1975.

MEMORANDUM FOR THE PRIME MINISTER

The question of an amending procedure and "patriation" of the constitution

Since my memorandum to you of February 11th, we have had two very fruitful meetings to discuss the best way of tackling the amending procedure and "patriation" of the constitution. The result does not modify the main part of the memorandum but we have arrived at a much better alternative to what I called "Option 5 - "Patriation" without an amending procedure" - in other words, what to do if agreement with the provinces cannot be reached. We came to the conclusion that the disadvantages in this "last resort" possibility were so serious that it ought not to be contemplated even as a negotiating tactic.

An option based on "accumulating resolutions of approval"

Back in 1949-50, when we were considering how to establish a new constitution in Canada, we worked out a plan under which the British Parliament would, pursuant to a joint resolution of our two Houses of Parliament, set forth in a final piece of legislation the text of a new constitution, which would have been worked out in advance in Canada but not necessarily agreed to by all the provinces. That constitution would come into force on a date to be established by a later proclamation "stating that the Parliament of Canada and the Legislatures of all the provinces had passed resolutions" agreeing to the constitution and requesting that it come into force. The plan is set forth in a P.C.O. memorandum dated November 16th, 1950 which I am sure you and I must have worked on jointly although I do not recall any details about it. In our second meeting

this week, we considered whether this technique could not be applied to the establishment of a new amending procedure in the absence of agreement with the provinces in advance. We think it could be and that it would be distinctly better than "Option 5" in my memorandum of February 11th.

The "1949-50 plan", as adapted, would be resorted to only if it was not possible to get agreement on an amending procedure - either the one agreed to at Victoria or some modification of it. If no such agreement were forthcoming, the procedure could be somewhat as follows:

(a) A Joint Address by the two Houses of Parliament to the Queen asking her to cause a bill to be laid before the British Parliament on Canada's behalf.

(b) The Addresses would ask that the British legislation do the following things:

(i) amend the BNA Act to change the title to, say, "The Constitution of Canada Act";

(ii) incorporate into that Act a new "part" which would contain the amending procedure agreed on at Victoria;

(iii) include a proviso that the new "part" would have legal effect only when it had been approved by the Legislatures of all of the provinces (the "part" would have been included in the Joint Address and therefore would have been approved by the two Houses of Parliament);

(iv) incorporate also in the "Constitution of Canada Act" a provision that any part of it that cannot otherwise be amended before the new "part" comes into effect could be amended by concurrent action by Parliament and all ten provincial Legislatures; and

(v) terminate the power of the British Parliament to legislate in any way thereafter with regard to "The Constitution of Canada Act".

(c) Proclamation by the Governor General of "The Constitution of Canada Act" with the new "part" containing the amending procedure.

(d) Await, over time, provincial resolutions of approval.

Considerations relating to the "1949-50 option"

1. The above option would have a number of advantages. It would provide for an amending formula but it would not "impose" it. It would provide for "legitimacy" through U.K. legislation but the substance of the action would be "made in Canada" since the amending formula was devised here and approved at Victoria and would not come into effect except on the basis of action by all the Legislatures of Canada. It would provide a means of making specific changes in our constitution even if we cannot get agreement for a number of years on the general amending procedure. (While this interim method of specific amendment would call for unanimous consent, we do not think this presents any substantial risk - nor do we think that it is in fact genuinely different from what would be required to get an amendment through the British Parliament if one were wanted.) Finally, it would achieve "patriation" of the constitution without the legal vacuum that is so great a disadvantage in "Option 5".

2. As a negotiating factor, this option would have all the advantages I suggested for "Option 5". In particular, it would remove from provincial hands the possibility of using the federal desire to achieve agreement on an amending formula as a lever to secure substantive amendments that they think the federal government would not otherwise concede. While removing this leverage from the provinces, it would do it without adding in any unilateral way to the legislative power of the Parliament of Canada. It would be extremely difficult to attack.

3. While it could be argued that it might take years to accumulate ten resolutions of approval for the amending procedure, this is not a serious disadvantage since there would be provision for specific amendments. The position would be no different than the situation that often exists in the United States for constitutional amendments there. Often it requires a good many years before the necessary proportion of approvals by State Legislatures is accumulated for constitutional amendments.

4. One question for consideration would be whether there should be any provision that a resolution of approval by a provincial Legislature should be irrevocable. On the whole we are inclined to think it should be. If it is not irrevocable, it would mean that a provincial government could at some time withdraw a resolution of approval that had been given earlier in order to use it as a bargaining tactic against the federal government or against other provinces. Irrevocability might somewhat slow down the passage of resolutions of approval but this would not be a serious factor since a pretty considerable time lag would be involved anyway.

5. It would be for consideration, partly depending on what had emerged in the course of discussions with the provinces, whether the federal government would want to cause the Victoria provisions on the Supreme Court also to be incorporated in "The Constitution of Canada Act". There would be advantage in doing this as an earnest of the federal government's wish to have a thoroughly equitable situation in our constitution of the future. The disadvantage would be that it would be a unilateral concession of something that might be a bargaining counter later. If the Supreme Court provisions were to be included at the outset, a further question would be whether they should come into effect forthwith or whether they should not come into effect until the same time as the amending procedure did. The latter provision would provide an incentive to provinces to pass resolutions of approval for the amending procedure and for the Supreme Court provisions.

6. There could be considerable attraction in this option for Mr. Bourassa in the sense that it would remove any need to put a measure before the Assemblée nationale at this time. He could wait until whenever he thought the time was ripe to move. This could be a very real advantage if the political situation in Quebec is precarious.

Tactical approach

In general we agreed with the tactical approach outlined in section B of my memorandum of February 11th - that we start with "Option 4" (the amending procedure agreed on at Victoria plus "patriation"); that we be prepared to consider modifications to the Victoria amending procedure; that we be prepared to consider inclusion of Part X of Victoria on the Supreme Court and that we make a serious effort to get agreement for action on this basis. In short, agreed action would be the prime objective.

If one could not get agreement on the above basis, our recommendation would be that, at an appropriate time, it be made clear that the federal government will proceed on the "1949-50 option". One question is whether indication of the federal government's determination to use this option, if it cannot get agreement, should not be made at a fairly early point. The main reason for doing that would be to make clear that the federal government is not going to be subject to "blackmail" to concede other constitutional revision in order to achieve "patriation". This knowledge might substantially alter the attitudes the provincial governments would take in the negotiations.

If, in the end, action had to be on the basis of the "1949-50 option", our thought would be that, in moving the Joint Address before the House of Commons, you should table the Victoria Charter (with or without modifications) as the substance of what your government would propose as the first amendment to be made to "The Constitution of Canada Act" once the proposed amending formula had come into effect. That would make clear that securing the amending formula was not "the end of the line" as far as you and the government are concerned, but is rather a means of securing the other desirable things that were in the Charter: political rights, language rights, modernization, removal of reservation and disallowance, etc., etc.

The opening of discussions with the provinces

In general we are still of the view expressed in Part C of my memorandum of February 11th

to the effect that the opening of this matter should be "low key"; that it should proceed by way of bilateral discussions; and that the process should be initiated by you at a reasonably early point. We think it is for further consideration whether it would be best for you to do that informally and privately during the conference of April 9th-10th, or by means of letters after the conference. It might depend on the way the conference goes and on what the mood is.

We will be carrying on work on this matter in the course of the next few weeks. Any comments or guidance would be helpful whenever you have time to consider this.

R.G.R.