

CONFIDENTIAL

August 14, 1980

MEMORANDUM FOR MICHAEL J.L. KIRBY

The Post-FMC Period

The attached paper, which deals in the main with speculation about the future, will have to be refined as events unfold. It will have to be reviewed at the end of the CCMC meeting, and in the course of the First Ministers Conference. It would probably not be productive to set out a series of specific recommendations at this stage. If the paper serves to help focus attention upon some possible longer-term implications of events and decisions between now and the end of the First Ministers Conference it will have served its purpose.

I look forward to your comments and those of others.

Maxine Guentle
for: Reeves Haggan

Attachment

RH:fg

CONFIDENTIAL

August 13, 1980

MEMORANDUM FOR THE PRIME MINISTER

The Post-FMC Period

Introduction

At the end of the First Ministers Conference we will find ourselves facing one of a number of circumstances:

- there might be a reasonable consensus on a wide range of items ("agreement");
- there could be a near miss, i.e., the time could run out without the necessary consensus, but in circumstances where reasonable men and women would be likely to conclude that extended negotiations would have every prospect of "success";
- the Conference could fail, ending in deadlock, breakdown or walkout;

Given the express determination of the Government to proceed with the People's Package at least, two considerations present themselves.

The Government must (1) be in an unassailable position legally, and (2) must equally be able to demonstrate an acceptable measure of political legitimacy. This paper deals only with the latter consideration.

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Political Legitimacy

(a) "Agreement"

The term "agreement" in this context seems to be incapable of objective definition. It is unlikely that there will be very many items on which most or all of the provinces will take a firm stand together, for or against. Such inherent difficulty on a single item will be compounded when we have to assess "agreement" on a package. Certain provinces have clear positions on certain items, but mostly it is a case of degrees of support or opposition. Acquiescence can be taken to be agreement, but acquiescence is frequently accompanied by reservation on one or more aspects of an item or package.

Geographical distribution is important and so is the attitude of Quebec, particularly in respect of its traditional concerns.

A possible, and subjective, definition of agreement might be:

A simple majority of the provinces representing a simple majority of the population (with an acceptable measure of geographical distribution) supporting the substance of an item or the balance of a package plus tacit acquiescence on the part of two or three of the remaining provinces, with Quebec support for (or acquiescence in) any item touching upon duality.

Should the parliamentary process begin with agreement (as defined) on a broad package or a wide range of items no very great difficulty need be anticipated. Mr. Clark could hardly mount a major challenge where a raft of tory premiers have reached a measure of agreement and the traditional positions of the NDP would make it fairly easy for them to go along.

There would, however, be long and difficult debate upon many of the items. The House might well split East-West on powers and resources and Quebec would surely have strong reservations on traditional concerns, although it is difficult to see how the Quebec Government's views can be effectively presented in the House as it is now constituted. This may turn out to be a

problem rather than an advantage.

(b) A near miss

A near miss, as defined in the introduction, could make unilateral action appear arrogant if it were not carefully and thoroughly explained to the public. While there is evidence from surveys (including the Gallup Poll) that the public would welcome speedy patriation and implementation of other Government objectives; there might not be a public disposition to favour immediate unilateral action if agreement seemed to be just around the corner. In these circumstances, the public position taken by the provinces would be of first importance.

The best case would be that the provinces not object too strenuously to action on the People's Package (possibly plus other agreed items) and concede that outstanding items could be addressed in a second stage. The worst case would be that the provinces trumpet the great progress made and challenge the right of the Government to jump the gun.

If this scenario were to present itself, the Government might have to consider carefully whether it would be better, at least in terms of timing, to press on regardless or to accept a second stage of negotiations in the hope that in the end the total time elapsed might be less. In other words, there is at least a possibility that if "agreement" were to be reached in a second stage, this stage plus passage of the Resolution by Parliament might occupy the same or less time than the bitter and prolonged debates in the House and Senate that might be expected otherwise.

(c) Deadlock

Deadlock, breakdown or walkout would raise the question of political legitimacy in its most extreme form. The Government would then have two choices.

The first would be to base its legitimacy on the fact that, having gone through the federal-provincial negotiation process for the nth time and demonstrated yet again that it leads to a dead-end in that the provincial leaders, or most of them, are so wedded to petty concerns about their own powers and privileges that they cannot act in the interests of Canada as a whole. An underlying assumption would be that, in the crunch, the people of Canada would side with the Government against the provinces. In this case the resolution would not be referred to committee.

In such a scenario, the results of the surveys would have to be looked at very closely. They were not taken at a time of clamorous public confrontation between the Government and the provinces, and might not hold up. There is also the question of how deeply the public holds its expressed views on patriation, rights and mobility. It is easy to be in favour of all these in vacuo, but if a contrary view of them is being presented for what might appear to be good reasons -- "power grab", "big bad federal government" -- the public might think again, and might question the need for immediate unilateral action.

The second course open to the Government would be to acquire the necessary political legitimacy by one of two other means. The first of these would be a referendum. This has been very fully discussed elsewhere and need not be dealt with in this paper, save to say that would occasion a six-month delay at least and, obviously, even if won, would involve real risks of sharp division in the country, East-West or French-English.

The second means would be to refer the resolution to a committee of the House either standing or ad hoc. This would enable the public to have its say, and, if carefully orchestrated, might result in an endorsement of the Government's proposed actions. There would, however, be considerable risks involved. Although it is unlikely, the provinces might choose to appear before the committee, resulting in a rehash of the

whole of the negotiations. The native people's organizations would certainly appear and make a great deal of noise and other interest groups would intervene. Not only would the outcome be in doubt, the time required to hear a reasonable cross-section of opinion could be very considerable. While the rules provide for reference to a committee with a time limitation it might be politically difficult to adhere to a set limit.

It is suggested that to proceed in the face of deadlock, breakdown or walkout at the First Ministers Conference might well involve real political risks and, possibly, unacceptable delays. A very careful political calculation would have to be made.

A reasonable conclusion from what has been said is that nothing is more important than the achievement of a reasonable consensus on a wide range of items. We should push very hard for this in the August negotiating session and at the First Ministers Conference, and should be seeking ways to force the provinces to declare themselves publicly on specific items.

In the development of fall-back positions on powers and resources items the Government should have in mind not only its concerns about these items but its position at the end of the day when decisions about further action will have to be made.

The other side of the penny

So far, this paper has dealt primarily with the difficulties various scenarios might present. There is, however, another side to the question.

No one doubts that there is a disposition in the country to get on with constitutional renewal and to be done with it. It is at least possible that this disposition is shared by most, if not all, of the provincial governments. All parties to the controversy might well feel something akin to relief if not satisfaction of the Government of Canada were to seize the matter and act decisively.

The difficulty lies in the recent history of federal-provincial relations. The provincial governments have had some success in presenting themselves as protectors of their citizens against a swollen, spendthrift and interventionist central government. The best possible strategy for a provincial government seeking re-election has been to run against the federal government rather than the opposition party. So, although there may be a general disposition to get on with it -- in which the provincial governments may share -- the trick is how to enable them to go along without losing face.

This is not an easy one, and cannot be answered here. The answer probably lies first in achieving some substantial progress at the August CCMC meeting, and second -- and this is the key -- in your handling of the First Ministers Conference. While you need little advice on such a matter it might be ventured that you strive to achieve a coming together of eleven first ministers to meet shared problems and to avoid any appearance that there are clearly two sides, i.e., defined federal as opposed to provincial positions on the matter.

A possible strategy of last resort

The key items least likely to be settled by the end of the First Ministers Conference are Resources and Interprovincial Trade and Powers over the Economy. Also, in suspense, is likely to be the question of the Senate and the Intergovernmental Institution. These, of course, are interdependent. Assuming that real progress can be made on all these in the meeting and conference that lie ahead it might just be possible to get agreement to proceed with the People's Package plus, leaving the "hammering-out" of the last three items to a second stage.

This second stage need not terminate in a full-fledged First Ministers Conference. Assuming that remaining differences are clearly expressed and that constitutional ministers are fully instructed, ratification by First Ministers could be conveyed to you by letter.

The provinces would be very suspicious of such a proposal, fearing that the Government of Canada would procrastinate or fail to bargain in good faith, having achieved its principal objectives. The possibility of procrastination could be dealt with by an agreed announcement of a schedule and a negotiating process, the question of good faith would depend on the progress made towards settlement of the items and the atmosphere at the First Ministers Conference.

The provincial premiers conference

This conference has the potential to do great damage to the whole process of constitutional renewal. On the other hand, it might even help. The Gallup Poll will have its effect, and it is likely that at least the better-resourced provinces will have carried out, one way or another, their own soundings of public opinion. This should be in our favour. One might expect some outcry about the Government of Canada's communications campaign, likely to be muted if the provincial perception is that it is succeeding.

There is one rather risky tactic that might be considered. In your open letter to the people of Quebec and in your public statements and press conferences you have established the precedent of personal participation in the constitutional debate. You might wish to consider sending an open message to the Premiers' conference expressing your good wishes and your hope that the Premiers will consider, along with their other concerns, what they might be able to do to forward the process of constitutional renewal, perhaps making some careful suggestions as to how they might best do this. In particular, you might identify specific items upon which you would like to have the premiers' considered views before the First Ministers Conference.

Parliamentary strategy in Ottawa

Details of procedure, time frames and probable conflicts in the assignment of House of Commons time are dealt with in detail in the attached memoranda from Messrs. Pitfield, Yanover, Watts and Tait.

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The upshot seems to be that there is no possibility of a clear run at the constitutional resolution and that it will be very difficult to get it through the House before Christmas. This appears to be so regardless of the priority assigned to the Resolution.

In the circumstances, the best course would probably be to call the House at the earliest feasible date and aim to have two to three weeks devoted to the resolution before a budget or energy legislation would manifestly have to intervene. At that point the Resolution could be referred to committee if that were deemed desirable, or set aside and returned to as a matter of urgency at the first possible date.

The problem would be eased at least if we go into this House with an acceptable measure of agreement. In these circumstances, the debate on the Resolution need not be unduly prolonged, although it is likely that a great many members would like to take part in a debate of such historic consequence. Even if there is an acceptable measure of federal-provincial agreement we would have to anticipate one or more last-ditch attempts to change the Resolution by way of amendment.

If, however, the Resolution reaches the House in default of federal-provincial agreement a long and acrimonious debate would ensue, probably to be terminated by closure in an atmosphere of such bitterness that serious damage might be done to the political process, perhaps for a considerable period of time. An offsetting consideration has been discussed above -- that all parties might be glad enough if the Government were to shoulder all the responsibility for constitutional change, leaving the provinces free to blame whatever problems were to turn up later on the "feds".

In such a worst case scenario it would be vitally important to avoid a sharp split in the country at the Ontario-Manitoba border, with every member less two in the four western provinces voting against the amendment. There seems little reason to believe that a "Patriation caucus" analogous to the capital punishment caucus could be set up, since it is unlikely that any Tories from the West would bolt. This leaves the NDP. While historically the NDP has been the most overtly centralist of the parties and therefore likely to support the Government the matter is complicated by Mr. Blakeney's position as premier of a resource-rich province.

On the political level, therefore, it would appear that any approach to the federal NDP would have to be bolstered by a rapprochement with Mr. Blakeney. This is, perhaps, a case where the strategy of last resort set out above, whereby the resources, powers and second chamber items would be held over to a second stage, might come into play.

A free vote

It is difficult to see how a free vote could be called on an issue to which the Government is so totally committed. In any event, as mentioned above, it is unlikely that any Tories would bolt, probable that the NDP members would vote their party line whether for or against, and at least possible that the Government might have difficulty with some of its backbenchers.

Strategy at Westminster

The legal and constitutional aspects of the procedures at Westminster are dealt with elsewhere, this paper concerns itself exclusively with strategic considerations.

Assumption I: "Agreement"

If the First Ministers Conference ends with a reasonable consensus on a wide range of issues, and the House and Senate debates in Ottawa, although long and hard-fought, come to an end without a sharp split at the Ontario-Manitoba border, and with the Government of Quebec in at least a grudgingly acquiescent posture, little political difficulty should be encountered at Westminster.

We would have to anticipate, however, that the National Indian Brotherhood, perhaps supported by the Native Council of Canada and Inuit Tapirisat, will have geared up a few backbenchers, probably in the Labour Party, to intervene in the debate.

This would be tolerable, unless the native peoples were to succeed in forming a "ginger group" of about 20 or more skilled debaters and rules experts who could manage to delay passage of the legislation and stir up a major controversy in the media.

It is difficult to see how the native peoples could manage to do this. Ginger groups tend to form around domestic issues and, although among at least the older members at Westminster there is likely to be a sentimental and emotional attachment to the "Red Indians" based on childhood reading and games of "Cowboys and Indians", the whole thing is likely to appear a bit remote. It might also be noted on the plus side that ginger groups are not generally formed by older, more experienced members.

The meeting between negotiating ministers and representatives of the native peoples on August 25 provides an opportunity to try to fend off political activity of this kind. Ministers should endeavour to avoid any suggestion that the August 25 meeting is a tedious formality and try to come to grips with native concerns. In particular, emphasis should be put on the fact that we are in the first stage of a continuing constitution -- building process in which they will continue to play a part.

Although it probably can't be done it would be most helpful if careful reference could be made on August 25 to

- the fact that there will be a specific and generous statement of the special position of the native peoples in the principles/preamble;
- the fact that in our planning for a renewed Senate we include a number of seats for representatives of the native peoples.

In any event, and particularly if we have reason to believe that a ginger group is forming, we will have to prepare for the possibility of activity in the British media. Planning should include the strengthening of the information capacity at Canada House, at least by provision of facts and advice, possibly by assigning experts from CUIO to Canada House.

Assumption II: Breakdown or minimal agreement

The worst case would see a sharp split of the country in the House of Commons, at the Ontario/Manitoba border, combined with total opposition to perhaps patriation at this time and in these circumstances on the part of Quebec, and a strong reservation on the part of Alberta.

"Splitting the country" would be grist to the mill for opposition members at Westminster whether or not they amount to a ginger group. It is, however, likely to be tolerable. Certainly the British government and opposition leaders should have no difficulty -- they would see voting patterns in Canada as a Canadian affair.

Clamorous opposition by one or more provinces would be a very different matter. For better or worse it would force Westminster to choose between different parts of the Canadian federation. The precedents suggest that they would act on the Parliamentary resolution, but there is no precedent for passage of "Canadian" legislation in the face of determined provincial opposition.

While it is true that in the case of the 1907 amendment on provincial subsidies British Columbia did intervene in London the circumstances were very different. Mr. McBride, the Premier of BC went to London with the support of his legislature but also with credentials issued at Ottawa in the name of the Governor General. In those far-off colonial days his intervention was made to the then Secretary of State for the colonies (Lord Elgin) and the then Parliamentary Under Secretary of State for the colonies (Winston Churchill). In the event the British government found an elegant solution, removing the words to which BC objected, but on the grounds that they were "unusual and unsuitable in an Act of Parliament". The words in question were "final and unalterable".

It might be assumed that Alberta in the end would choose to fight its battles at home, which could involve embarrassment rather than difficulty at Westminster.

Quebec too might prefer to settle its problems domestically but equally might in the end decide to intervene in some way in London. This becomes a likelier prospect if MM. Lévesque and Ryan find themselves in a measure of agreement, even if for different reasons.

Simple patriation with or without provision for amendment would give Quebec little to work with since it would not involve federal-provincial relationships. Such a statement is easy to make, but it would be imprudent to assume that Quebec would concur in it, and there may be some room for mischief-making at least.

If, however, the package taken to Westminster were to include items that clearly do involve federal-provincial relationships e.g., a Charter of Rights binding on all governments, the position would be very different.

The world has changed a great deal since in the last twenty years. Perhaps only superficially and on a per occasion basis the public is better informed and likelier to get stirred up about matters of less than immediate concern.

Although the British public generally lives in blissful ignorance of Canadian affairs, the events of 1970 and the election of the Parti Québécois (if not the results of the referendum) are widely known even if little understood. All this has sharpened the profile of Quebec in Britain as elsewhere and seeds of discord sown by the PQ might find fertile ground in the British media. There is certainly the possibility of a major controversy in the British media which would, in itself, be a major news story in Canada.

Scottish, Welsh and Northern Irish nationalists might be expected to take up the cause at Westminster. While these elements in the British House, at least at this distance, appear to be less effective than was the case some years ago, they might seize upon the Canadian issue to draw attention to themselves, particularly if it were to become a cause célèbre in the press.

Should the package taken to Westminster contain a Charter of Rights it would probably arrive at a time when the British House still has before it its own Bill of Rights. This circumstance might possibly cause British MPs to look more closely at the Charter than they might otherwise.

In all probability a scenario of each difficulty will not evolve. It has been outlined here only because it is surely best to be prepared for the worst.

To meet such a possibility we would need to have the best possible intelligence about Quebec's intentions and to find a way to monitor any signs of incipient activity at Westminster. We would also have to be prepared to counter any hostile media campaign in London.

It would be premature at this time to elaborate any detailed strategic or tactical planning for such intelligence or monitoring. Were such activity on our part to leak it could cause the greatest embarrassment, probably, in the end, for no good reason.

Michael J.L. Kirby

R. Haggan:fg

Post-scriptum:

If the House of Commons and Senate in Ottawa were to be presented with anything like the draft "portmanteau" resolution dated August 8, 1980, debate could occupy months, even if the rule of relevance were strictly adhered to. This draft represents, of course, a maximum but the point can still be made that the shorter and narrower the resolution the better chance there is of speedy and comparatively harmonious passage.

We should have in mind, as events develop, that to go to Westminster with nothing more than patriation and an amending formula would be the nearest, clearest and least contentious course to take.

For better or for worse, in 1980 we are planning to take action that will be historic in its consequences. Future generations will look back to 1980 as a key date in Canadian history. Do we really want them to observe that the principles of the Constitution were established and a Charter of Rights enshrined by Act of Parliament at Westminster, rather than by the Parliament and Legislatures of Canada?

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Consolidation of Material in the
Pitfield, Yanover, Tait and Watts
Memoranda and Related Material:
For Insertion in Memorandum on
"The Post-FMC Period"

Instruments, Parliamentary Procedure and Strategy

We have consulted with PCO and the Parliamentary Business Group of the Office of the President of the Privy Council (Messrs. Tait, Watt and Yanover) about constraints, other considerations and possible options which will shape the federal government's strategy in the Canadian Parliament and at Westminster, given the object of rapid passage of the Resolution on the Constitution (i.e. the ROC), with the largest possible measure of support and legitimacy. In sum, the situation is as follows:

A. In Ottawa

1) The Resolution

The ultimate instrument sought from the Canadian Parliament is a resolution of both Houses addressing the Queen. This may be a joint resolution or separate resolutions. If the resolutions are separate, they need to be at least consistent, to the extent the U.K. is expected to act (verify).

It is anticipated the resolution will petition the Queen to lay before Westminster a specific legislative proposal spelled out in the resolution (verify). This proposal would provide for a Canadian Constitution which (verify):

- a) Has "the force of law" in Canada, but which is not a statute of the

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Canadian Parliament or any provincial legislatures. (Verify. Question: Could the Canadian Parliament itself pass a legal document with the same status? Presumably, yes, although the legal link with the U.K. would be forfeited).

b) Includes:

- (i) An amending formula, which permits varying degrees of entrenchment for the various provisions of the Constitution, e.g. some parts could be amended by a simple or two-thirds majority in each House of Parliament, whereas other parts would require legislative approval of Parliament and a specified number of provincial legislatures.
- (ii) A Charter of Rights (including mobility rights), and
- (iii) The substance of all other existing constitutional-type legislation (British and Canadian) relevant to Canada subject to any other specific changes included in the proposal.

c) Is expressed in two equally-valid versions: one in English and one in French, and

d) Is preferably in consolidated form.

The proposal would also provide for the repeal of any of the above-mentioned British constitutional-type legislation.

This means when the resolution is tabled in Parliament, all these elements must be in-

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cluded with it, and therefore in a state of readiness.

2) Process

Before exploring strategic considerations, the technical aspects of the process for the resolution might be noted. For the House of Commons, this process is as follows:

1. Both technical and substantive amendments are permitted. Technical amendments may be introduced during _____? reading and substantial amendments during _____? (verify). (Any significant difference, while in committee?).
2. Normal procedure would limit consideration to one amendment or sub-amendment until debate thereon is concluded. Alternatively, but less saleable politically, would be to adopt report stage rules and define time limits for consideration of the resolution. Although this procedure would provide for written notices of amendments, grouping amendments for debate, and providing a specified time for debate, it would first require a motion which might itself require closure for passage.
3. Except for the Prime Minister and the Leader of the Opposition, who have unlimited time, speeches are limited to forty minutes. Each member may speak once on the main motion, once on each amendment and once on any sub-amendment.
4. Debate may be terminated by closure.
5. Time allocation cannot apply to a resolution.

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- with debate* 6. A resolution may be referred to a committee with or without a time limit and with or without authority to travel (verify).

In the Senate, the process is similar, except that there is no closure and the use of the unlimited question period and other devices can be employed to filibuster.

In either House a decision must be made whether or not to permit a 'free vote' on grounds the subject is non-partisan in nature.

3) Timing

There is the prospect of an unusually difficult parliamentary session this Fall, and possibly next spring as well, even without the constitutional resolution. Apart from the pressing need for a Budget and other urgent business such as the need to revise or extend the Bank Act and to implement tax proposals from earlier budgets, before the year end, there is a strong likelihood of the need for contentious legislation on energy-related matters. This latter requirement could arise as early as October 1, a significant date for Alberta oil pricing. If Alberta acts offensively in respect of federal policies, this may require offsetting federal action (verify). In this event, the House will likely be in an uproar, in which case, unilateral federal action on the constitution in the House may certainly be expected to exacerbate the situation, which in turn will make consideration of the constitutional resolution more difficult.

The House is currently adjourned until October 15 (verify). For fiscal reasons primarily, it may become essential for the government to act on the energy as well as the budget front, before the year end. It may thus be necessary, for this purpose alone to recall the Commons at an earlier date. In this event it will not be feasible to also complete the passage of contentious legislation on the constitution

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before the year end, even if the House is recalled at the first opportunity after the September 12 ending of the First Ministers Conference, estimated to be about September 24. (This date allows for the required minimum notice period and the need to finalize a federal proposal in the light of developments at the First Ministers Conference. Even this early a date presents grave risks in respect of logistics, or a premature anticipation of the outcome of the First Ministers Conference

It is assumed advance preparation of a federal proposal on a contingency basis, including printing, etc. is unacceptable because of the risk that the First Ministers Conference is seen as a charade.)

If this worst possible timing scenario unfolds as a setting for the tabling of the constitutional resolution, there will undoubtedly have to be important time gaps, when the House will have to focus on other items besides the constitutional resolution. Given these other federal priorities, it will be difficult to maintain a sense of urgency about the resolution, if extensive consideration of it in the House, must be deferred for three or four months after a late September introduction. Alternatively, postponing its introduction until December or so, would also be risky, since any federal momentum generated by the First Ministers Conference results could well be lost in the interval, and there is the risk that such federal inaction would be counterproductive to the federalist forces, should a Quebec election intervene.

In the House of Commons, unless closure is imposed, the time taken for the passage of a resolution is essentially unlimited as long as amendments are being proposed (verify). Once closure is decided upon, passage can occur within ? sitting days. In the event an associated bill is required (for example, to authorize a referendum), the minimum period for passage of a bill using time allocation at all stages is three and one half weeks,

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unless there is unanimous consent to proceed more quickly.

Except that closure may not be applied, timing considerations in the Senate are similar.

A question then, must also be whether the resolution should be tabled simultaneously in the House and Senate, or whether consideration of the resolution should be sequential, and hence span a minimum time period of seven weeks (verify). The former route risks an outcome with two substantially different resolutions requiring reconsideration unless control is carefully maintained (verify).

4) Political Legitimacy

The steps necessary to ensure the resolution passes with the greatest measure of support possible will depend on the circumstance under which the tabling occurs and will have a significant impact in turn on the process chosen and the timing. Thus there will probably have to be trade-offs made between the twin objectives of "rapid passage" and "the greatest measure of support". To a certain extent, there will also be circumstances where pursuit of one objective may be counterproductive. For example, the alienation caused by undue rush, may result in defeat or delay in other areas. In making a judgement on these trade-offs the following considerations should be borne in mind:

- a) Will the resolution already have received complete support, or substantial agreement from the provincial Premiers at the First Ministers Conference? Will the Premiers have seen all the elements of the resolution during the Conference so that their public positions on each element are known?
- b) Is there the possibility that endorsement of the address would be given by provincial legislatures at least

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to the extent envisaged by the proposed amending formula? If so, how long would this take to occur? Would such endorsement be affected by intervening elections in Quebec, Ontario, and possibly British Columbia? (Presumably, if provincial endorsement is likely to fall short of the proposed amending formula, supporting provinces could be discouraged from formally endorsing the resolution, so as to avoid accentuating differences with non-supporters and encouraging non-supporters to pass conflicting resolutions.)

- c) Opinion polls suggest there is currently strong public support for rapid unilateral federal action to patriate the constitution and make reasonable amendments to meet the expectations of Quebecers (verify). Would this support evaporate, if indeed the federal government used every device at its disposal to move quickly, and ignored pressures to assume a more considered pace. This likelihood must shape federal decisions in respect of the use of committees, closure, and simultaneous consideration of the resolution in both Houses.
- d) If it is necessary to substantiate the opinion polls through a referendum, sufficient time would be required to permit the passage of a referendum bill and to hold the referendum. Logistical considerations suggest that such a referendum could not be held before March or April 1981. A small offsetting time-saving in passing the resolution might eventually be achieved by a specific provision in the referendum bill imposing a time limit on the debate for the ensuing resolution, and by specifying the wording of the resolution in the referendum legislation itself.

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- e) If the mood of the House is obstreperous due to other events, public support for unilateral action on the constitution may be at risk, particularly if the federal posture in each area is aggressive and arrogant. In such a context, a sustained government effort at courtesy and reasonableness may save time in the constitutional debate overall.
- f) Legitimacy for the federal action as seen by Canadians, and more particularly in the U.K., will be jeopardized if there is a severe geographic or ethnic split in the federal support. To avoid this may necessitate special efforts at gaining the full support of at least one of the two parties with strong Western support. Alternatively this aim might be met through a free vote or through a careful reference to a parliamentary committee aimed to elevate the committee's considerations beyond a partisan level.
- g) The support of provincial governments may depend on a persuasive federal promise, that this phase is but the beginning of a continuing process of constitutional review. To a weary and near-cynical public, anxious to have the government focus on bread and butter issues (the economy and energy), this promise may weaken their interest in constitutional matters, even for the present. For Quebecers, however, especially for the "school" which believes patriation should await complete constitutional reform, any progress emphasized as partial, rather than complete, may result in the loss of their tentative support.

B. In the United Kingdom

1) Process and Timing

To effect the requested changes will require the passage of a bill by both the House of Commons and the House of Lords, as well as receipt of Royal assent. Once introduced, the formal process is essentially the same required to pass a bill in Canada. However, because of the likely possibility that the Prime Minister and the Leader of the Opposition may agree to the passage of the bill with little or no debate, there is the optimistic prospect that the bill could be passed in as little as six weeks (four weeks in the Commons and two weeks for the Lords), if urgent consideration is given; however it would be prudent to expect a slightly longer period even at best. A bill can be introduced any time the House is in session. The House usually convenes in late October, breaks for a month or so at Christmas, and again for the summer. However, it should be noted that the Speaker has special prerogatives to ensure that the rights of minorities are being protected. This could result in some delays (verify). If a "ginger" group in support of Her Majesty's loyal Red Indian subjects should develop, for example, this could result in some slowdown (verify).

More important, for timing considerations in respect of Westminster is the willingness to schedule the bill. This could be significant, if there is any serious taint of political illegitimacy to the Canadian resolution, British politicians could easily delay, on grounds that 'rush' is inappropriate for such a profound subject. This kind of delay would be subtly done, and difficult for the Canadian government to object to. If it has taken eight difficult months to secure passage in Canada, it may be difficult to complain about a piecemeal, two to four month scheduling delay in the United Kingdom. On the other hand such a delay could make the rough Canadian passage, less of an issue in the Westminster debate.

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We are advised that there is little likelihood of an extensive debate in Westminster in any event, although there is always the risk. It would be embarrassing and humiliating for Canadians to have this occur to any significant degree, particularly if the debate should focus on the substance of the Charter of Rights, or other substance, which legally, British parliamentarians are entitled to do. The occurrence of such a debate could presumably give the Canadian government sufficient public support in Canada to justify a unilateral declaration of independence (leaving the British the prerogative of repealing their own out-dated legislation if they wish)! However there is also the risk, a British debate would fuel any internal divisiveness on the Canadian government's constitutional position, instead.

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C. Conclusion

In sum, under the most propitious scenario, with full provincial government and public support for the resolution, and full UK accommodation of Canadian wishes, there is the prospect that patriation could be concluded before the year-end. The main risk of delay would be provinces wishing to pass endorsing legislation before the resolution is forwarded to the Queen, if these efforts are held up by intervening elections or other delays. However this could be avoided by provincial ratification, post facto, instead, or by general agreement that the accord shown at the First Ministers Conference is sufficient.

However, a more realistic target date for patriation might possibly be July 1, 1981, Canada Day. This scenario would probably require the earliest feasible tabling in the House of Commons (about September 24) and the Senate (about), to avoid the possible tensions expected in October and so launch the resolution in a relatively favourable setting.

It would probably be judicious for the government to announce its intention at the outset to have the resolution referred to a parliamentary committee, as a means of,

- (i) enhancing the legitimacy of the resolution,
- (ii) demonstrating the reasonableness and good faith efforts of the federal government,
- (iii) educating the public, and
- (iv) keeping federal momentum on the constitutional issue, while debate on other pressing issues is underway.

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This gesture would probably be worthwhile, even if the First Ministers Conference is in full agreement with the federal initiative. However the scale of committee investigations would be scaled down commensurately. Nevertheless, a committee would usefully serve as a forum for various interest groups and sustain momentum if the House must debate other matters. For similar reasons, a Committee may be desirable even if it is necessary to introduce a referendum bill. In such an event, however, the referendum bill should include the time-saving features mentioned above.

Regardless, the federal posture should endeavor to maintain strong public support for its action. If it will not jeopardize passage of the resolution, it should avoid closure and permit a relatively free vote. Every effort should be made to avoid a geographic or ethnic division in the House vote. Because of the timing factors, a referendum should be considered, only as a last resort, if the deck stacks up in the House against unilateral action.

With respect to a parliamentary committee, there may be some merit in considering separate Commons and Senate committees, rather than a joint committee, and there should probably be reasonable time limits imposed on the Committee timetables. Two committees would permit the Senate Committee to travel, and so keep the Commons Committee in Ottawa, and its members available for the difficult session anticipated. If a committee is empowered to travel, however, its focus should be explicitly on the substance of the resolution, with a technical emphasis, so as to avoid charges of wastefulness. and a repeat of the Pepin/Robarts travelling enquiry.

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Finally, many of these considerations will depend on the substance of the resolution. If it deals only with patriation now, and a delayed amending rule, there should be little debate except perhaps from Quebec. In such a case, there would be little to be gained from Committee consideration. If instead the proposal is significantly at odds with the Premier's wishes, an extensive effort may be required to establish and document its political legitimacy and support for the substance of the resolution itself, bearing in mind that the Prime Minister's mandate from his last election is probably sufficient to justify to some extent his initiatives to bring about bona fide constitutional renewal and reform.