

MEMORANDUM

NOTE DE SERVICE

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FROM
DESUBJECT
OBJETA Moderate, Acceptable Package

SECURITY CLASSIFICATION / DE SÉCURITÉ
<u>CONFIDENTIAL</u>
OUR FILE / NOTRE RÉFÉRENCE
YOUR FILE / VOTRE RÉFÉRENCE
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This is a second memorandum in response to your requests of last Thursday concerning the package of constitutional proposals that the government should aim to implement and in particular the question of whether it should be kept to a minimum or broadened to include other items of some importance.

The minimum package, I suppose, is patriation of the constitution from Britain, with an amending formula and with the Charter of Rights applicable in respect of matters under federal jurisdiction and in due course, to matters within the jurisdiction of those provinces whose legislatures decide to "opt in", wholly or partially.

I feel this is too little and too symbolic to justify all the effort that governments have put into it in the past twelve years. It will be argued that it represents a failure to agree on anything of substance. Moreover it will appear to do nothing to carry out the pledges given to the people of Quebec, during the referendum, to provide them with a reviewed federalism in which they can feel more at home in Canada. (But how can anyone be as well aware of this as Jean Chrétien?)

After reviewing the reports on what has happened in the negotiations, and reflecting on the substance of the issues I would suggest the following items as desirable additions to the minimum package, likely to command public approval and justifiable for inclusion in a Patriation resolution even if general provincial government approval cannot be obtained. The provinces would be unable to claim that anything had been taken away from them without their consent, even though they do not get all they want.

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The first addition should be a modest addition to the Charter of Rights of a nature which provincial governments would find it hard to oppose. These would be the fundamental freedoms and democratic rights, and a separate Mobility Right (qualified as noted below), but not including property rights. The provinces would have more grounds for possible objection in principle and practice to entrenching legal and language rights that could interfere with their own policies and administration.

The second addition I would suggest should be a revised section 121 designed to improve and safeguard the economic union in the interest of Canadians generally. This would prohibit barriers to interprovincial movement of goods, services and capital, as well as the interprovincial migration of people which would be covered in the Mobility Right. The provinces and the federal authorities as well would in general be prohibited from discriminating among persons by reason of their province of residence or former residence, or discriminating by law or practice, directly or indirectly, on the basis of the province of origin or destination of goods, services or capital. However, a provincial statute might be permitted to derogate from these provisions of the constitution if that statute were approved by the governments of a majority of the other provinces. Parliament might be permitted to derogate from these provisions in making equalization grants or supporting regional development to which it would be committed in the text of the constitution.

A third addition to the package, which may be more doubtful, concerns the exercise of what have been termed the "unilateral" powers of Parliament and which have been mentioned as possible actions requiring approval by a reformed and provincially controlled Senate. As the reform of the Senate may not be directly included in the package the question arises whether some other limitation should be placed on these unilateral actions of Parliament that concern the provinces. As the use of the spending power of Parliament in fields of provincial jurisdiction had not been substantially discussed this summer, and will be a valuable bargaining counter in future negotiation of amendments, I would think it should not be included in this initial package. However, I think the use of the declaratory power of Parliament, which was involved in the discussion of resources, even though withdrawn as an offer, should be made subject to approval by a majority of provinces if it is not agreed to by the province or provinces in which it is proposed to exercise it. I think this is justified if the provinces acquiesce in the new section 121 to safeguard the economic union. There were some other federal actions included in this category in the original B.C. proposals, for example federal laws to be administered by the provinces, which might be included as well at this time.

A fourth addition to the initial package should be the proposals for a modified Supreme Court which I understand are already pretty well agreed.

A fifth addition should be some transfer of jurisdiction. Family law is apparently pretty well agreed for transfer to the provinces by the governments, despite some modest public opposition based on the difficulty of extra-provincial enforcement of decisions and orders. I would think this transfer would be worth making, with efforts to make it acceptable in practice. Communications is the other field, where some substantial elements of it primarily relating to cablevision and telephone service seem to many of us laymen as reasonable subjects for provincial control, as long as federal law and administration controls the essential technical standards, the use of the spectrum and the national aspects of broadcasting. It is understood that a further effort to work out a sensible division is to be made next week, and I would suppose the result could be that the provinces will get a substantial share of the field if not as much as they want. I have often been told that this is an important field from the Quebec point of view but others close to both sides on this issue are better able to judge how far one must go to convince Quebec they have secured some real gain here.

Finally I think there should be a special amending formula to permit the reform of the Senate (which we used to believe was within the powers of Parliament under Section 91(1)). This should, I suggest require approval by only a simple majority of provinces (but representing more than half of the Canadian people) as some provinces, notably in the East, are very likely to lose proportionately in their representation and may oppose it, which may include Quebec. Another important aspect is the need to be able to approve an amendment without the approval of the Senate itself. I would suggest that if the Senate rejects an amendment which the House of Commons has approved (or just refuses to act on it) that a second approval by a new House of Commons (i.e. after a general election) should enable the amendment to go forward if the majority of the provinces approve.

I believe a package containing these six additional points, as well as patriation and a charter of rights under federal law would be regarded as a substantial step forward to which provincial governments cannot validly object, even if they have not approved it. It is a process that cannot be repeated, for it would contain within it an amending formula protecting provincial rights to some sort of provincial approval of future changes. It increases certain provincial powers, and even where it sets

limits on provincial action in the constitution itself to protect the economic union, it leaves it to a provincial concensus to make exemptions to these restraints. It protects the provinces again unilateral federal use of the declaratory power. It does not increase federal jurisdiction. It makes a serious beginning in entrenching in the constitution various rights and freedoms for Canadians. Finally, after fifty odd years of trying, it will enact a Canadian made formula by which any changes in the constitution can be made in future in Canada.

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