

Confidential

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CONSTITUTIONAL STRATEGY

NOTE TO MESSRS. M. KIRBY
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Introduction

Here is a draft note for discussion purposes.
The questions prefacing sections II, III and IV are
included to focus our thinking, but would presumably
be dropped from the final draft.

This paper is based on the *David*
That the preferred outcome of the
constitutional talks is David R. Cameron
most compatible with the goals of the
federal government.

DRC:fg

Attachment

That public acceptance of unilateral action
will depend in no small way on the
government having honestly tried to reach
agreement with the provinces. Unilateral
action is, politically speaking, an
acquired right, not a natural right.

That, if agreement with the provinces is
not reached in the September 8-12 window,
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- move on the elements of the Federal
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CONSTITUTIONAL STRATEGY

This paper considers federal government constitutional strategy from now until the autumn, focussing particularly on the August 26-29 CCMC meeting and the September 8-12 First Ministers Conference. It is divided into four sections:

- Introduction
- August CCMC meeting
- September FMC
- The post-FMC period.

I. INTRODUCTION

This paper is based on the following assumptions:

- 1) That the preferred outcome of the current constitutional talks is a negotiated settlement compatible with the goals of the federal government.
- 2) That public acceptance of unilateral action will depend in no small way on the federal government having honestly tried to reach agreement with the provinces. Unilateral action is, politically speaking, an acquired right, not a natural right.
- 3) That, if agreement with the provinces is not reached in the September 8-12 FMC, the federal government will proceed to amend the Constitution unilaterally. More specifically, that it will:
 - move on the elements of the People's Package, and perhaps other items (yet to be determined);

- introduce on or about September 29 legislation to give effect to this intent;
 - proceed by a Joint Parliamentary Address, and probably will not have recourse to a referendum.
- This shall not be undertaken*
- 4) That all things being equal, the process of constitutional negotiation will continue beyond the September FMC in some form, yet to be established.

These assumptions carry certain implications. First, from the federal point of view we are involved in a genuine negotiating process, which means Mr. Chrétien must be given some negotiating room in the August session to explore the outlines of a package on an ad referendum basis. While the authoritative and final positions and the overall judgment about whether a satisfactory package exists must obviously be left to the Prime Minister at the First Ministers Conference, Mr. Chrétien must not be forced into a position where he can do little but stonewall and prevaricate during the final CCMC meeting.

Second, it would be inconsistent with the assumptions outlined above for the federal government to do anything that would cripple the negotiations or that would lead the provinces to question Ottawa's good faith more than they do already. The threat of unilateral action and a possible referendum are credible and clearly acknowledged now. A step in the direction of unilateral action prior to the completion or ultimate break down of negotiations (say, introducing legislation on the Charter of Rights on September 8) would leave the federal government open to charges of bad faith and hypocrisy, and would doubtless jeopardize the talks.

Third, to ensure that the federal government is well positioned to act on its own if talks fail, efforts must be made throughout the coming weeks to present the government's case effectively to the public. This could within limits facilitate the negotiations themselves, for if the provinces believe that Ottawa is on to a winner politically and if they observe that Ottawa is winning the communications battle, that will be an inducement to compromise and agreement.

Thinks of this

The assumptions and implications outlined above lead us to make the following proposal, namely, that the federal government prepare three overlapping but distinguishable packages of constitutional reform:

1. The Unilateral Package. This is the package with which the Government would proceed unilaterally, should negotiations break down. If there is any doubt at this stage as to the appropriate contents of the package, we should define it broadly rather than narrowly, since it will be easier to cut back than to add on.
2. The CCMC Package. We should prepare an integrated set of proposals covering the twelve items under negotiation, based on the federal government's requirements in the light of constitutional discussions so far. In the case of certain items, the package might recommend little more than a commitment to further negotiation in the second phase (e.g., the Senate?). In the case of other items, it would confirm Ottawa's acceptance of an emerging consensus (e.g., the Supreme Court). In still others, it would involve initial (but not final) fall-back positions which Mr. Chrétien could resort to in the course of CCMC August negotiations (e.g., possibly in the linked areas of powers over the economy and resources).
3. The FMC Package. This would be the "bottom-line" position of the federal government on the twelve items, taken together, and would be reserved for the Prime Minister to use as he sees fit in the course of the September First Ministers Conference. It would involve some further movement towards the provinces on the part of the federal government beyond certain of the positions taken at the CCMC meeting and would represent the point beyond which the federal government was not prepared to go in this round of negotiations. It would have the dual purpose of serving both as a negotiating instrument to help achieve agreements if that is possible, and as a clear symbol to the public of Ottawa's effort to meet the concerns of the provinces, should negotiations fail.

While many of the elements of the three packages would be the same, they would be different from one another in certain respects, according to the different purposes they were designed to serve. All three would arise out of the necessity to turn at this stage in the negotiating process from the 12 items, taken one-by-one, to the items taken together as a unified whole, and the consequent need to assess the impact they would have collectively on our political life.

If we were to proceed in this fashion, all three would need to be ready for Cabinet review prior to the CCMC negotiations in August. This would permit all concerned to approach the CCMC and FMC negotiations with a sense of security about how far the federal government is prepared to go and at what point in the negotiations specific concessions might be made. It would also force us to consider the overall impact of a series of individual changes which might be made under the head of specific items.

Such a procedure would also help us to avoid misleading provincial negotiators or going down blind alleys. For example, if we are not prepared to include Senate reform in the first phase, then we should make that clear in our discussions of the declaratory power, the spending power in areas of provincial jurisdiction, appointments to the Supreme Court, etc.

The development of these three packages would have an important communications function, since it would permit the federal government to represent its position coherently at three critical points in the process of constitutional reform, namely, at the end of the CCMC's summer negotiations, at the end of the FMC in September, and (if negotiations fail) at the start of the process of unilateral action after September 12.

If the package used at one point in this process serves as the basis for intergovernmental consensus, it can be presented as a collective position of the governments involved; if it does not, it can be presented as the position of the federal government itself. If, for example, the FMC does not result in agreement, then the third package (the FMC Package) can be treated as a generous federal government proposal which the provinces would not accept, and the federal government can then revert to the first package (The Unilateral Package) for unilateral federal action in the autumn.

*or used for the
general package*

If this general procedure is accepted, it will require that the following work be done:

1. Preparation in legislative form of the first package (The Unilateral Package). This is already under way.
2. Determination (for the purpose of preparing the second and third packages) of how each item should be handled; e.g.,
 - should it be left to the second phase for formal agreement?
 - should an emerging consensus on the item be accepted by Ottawa?
 - should the existing federal position on the given item be maintained, even in the teeth of provincial opposition?
 - should the item be treated as a subject of active negotiation at the CCMC and FMC?
3. Preparation, for each item that is to be the subject of active negotiation, of two fall-back positions which the federal government might adopt, namely, the CCMC position and the FMC "bottom-line" position.
4. Review and refinement of the CCMC and FMC packages, based on the work done as per 2 and 3 above.

Our discussion of the CCMC and FMC in the next two sections of this note is based on the assumption that the general proposal advanced above has been accepted. We begin Sections II and III with a series of questions which need to be addressed and then offer a possible approach in each case which provides a general response to many of the issues which the questions raise.

II. THE AUGUST CCMC MEETING

1) Questions

*Minister's speech
to the press club*

*opening day of
general session*

*Should include
Federal package*

- What impact will the August 21-22 Premiers' Conference have on the CCMC meeting? What, if anything, ought the federal government to do in anticipation of that event?
- How should the agenda of the CCMC meeting be structured? If the meeting is best understood as the prelude to the FMC, rather than as an extension of the previous three weeks of negotiation, what impact should that have on the order of business?
- What fall-back positions should Mr. Chrétien go into the meeting with, and when should they be put before the provinces?
- How much emphasis should be placed on the production of a "report" to the FMC and what form should it take? Should it be simply an item-by-item account of the point reached in negotiations, or should it include in addition an attempt at developing the outlines of a package deal and at identifying the specific problems that call for the attention of First Ministers?
- How much time should the CCMC devote to the preparation of the report to First Ministers? Should it be a written document?

2) A Possible Approach to the CCMC

It seems clear that the best approach to the CCMC is to regard it as preparatory to the FMC which will follow a week later. If this is so, the focus of attention for the week of negotiations at the end of August should be placed on the report which the CCMC will be making to the First Ministers.

The minimum expected would be an item-by-item progress report on each of the twelve items. But we would argue that this would not be nearly so helpful to the FMC or nearly so consistent with the mandate and aspirations of the CCMC as

an integrated statement which would report, not only on progress on each of the twelve items but which would point to the main outlines of a possible package that First Ministers might agree to and that would identify the problem areas that require the special attention of the eleven heads of government. This is what Mr. Chrétien and the federal delegation should be pushing for.

When the agenda is struck with Mr. Romanow in mid-August, this objective should be made explicit, and a consideration of the kind of report the CCMC might make to First Ministers should be one of the very first items on the agenda of the CCMC. The general objective of the CCMC meeting ought to be to begin, if at all possible, to move towards the common ground that the eleven governments might share, with the object of facilitating the development of consensus on the part of First Ministers.

CCMC bargaining ought to be in terms of an overall package, and each item should be considered in relation to the other items which are to compose the integrated set of proposals. It is here that the second package discussed above (The CCMC Package) will be important.

If this approach is followed, the federal delegation ought to begin the negotiations on August 26 with a draft of the report to the FMC already prepared. The time will be very short for the production of such a report and the ground will be covered more quickly if a draft is already available. Not only that; he who writes the first draft is likely to have a greater impact on the final result than he who does not.

Clearly, Mr. Chrétien will be obliged to speak ad referendum, as will other Ministers, but we would argue that he should be quite frank and straightforward with the provincial representatives at that stage, setting out the pressures and problems he (and they) face, as he understands them, and laying out the kind of package he thinks he would be able to sell to his Cabinet

*what if Romanow
is no longer an
honorary*

if it was agreed to by the other governments. In doing so, he could underline once again, the special place that the people's package has in the thinking of the federal government and his conviction that the federal government will move in the autumn on those items at least, come hell or high water. Just as he may have to become an advocate before his Cabinet of the developing consensus, should it begin to emerge, so should he encourage the provincial ministers to become an advocate of him and his approach within the councils of their own governments.

The goal of the federal government for the end of the CCMC negotiations should be the following: either to have a report which Mr. Chrétien is prepared to defend in Ottawa early for submission to the FMC on September 8; or, failing an agreed upon common report, to have the federal government's CCMC package "on the street" and being explained to the Canadian public as a generous set of proposals which the federal government put before the provinces, but which they were unable, at that stage, to accept. Needless to say, the items of direct appeal to the people ought to figure largely in any such communications effort.

*Don't let it into the
from Mr. Hunt?*

III. FIRST MINISTERS CONFERENCE, SEPTEMBER 8-12

1) Questions

- The CCMC is slated to "report" to the FMC. What precisely does that mean? Does it mean an oral or written report? Presented by whom? How long would the presentation and initial discussion of it take?
- The FMC is scheduled to last five days, which is a very long time. Why? How can First Ministers make effective use of their time? Is the focus to be almost exclusively on the First Ministers, or should there be a significant role for the "constitutional" Ministers as well? If so, what?

- How much of the meetings should be held in public and how much in private? More important, what activities or functions can best be carried out behind closed doors and what things could most usefully be done before television cameras?
- How does one reconcile the negotiating objectives and the public relations objectives of the federal government with respect to the FMC? The first set of objectives are critical if the talks lead on to success; the second assume greater importance if the talks ultimately fail and the federal government is forced to act unilaterally.
- What should the FMC aim to produce at the end of the week? An inter-government consensus on a package of reforms together with an agreement on how to proceed thereafter (if possible)? An item-by-item record of the positions of the eleven governments? General concluding statements by each of the eleven heads of government?
- What should the federal government be looking for at the end of the week? What should the Prime Minister say, depending on the outcome? How can the FMC be most effectively used as a spring board for subsequent federal action, whatever it may be?
- What constitutes agreement at the FMC? Should the federal government be trying to get provinces on record, accepting or rejecting proposals on an item-by-item basis? Or should it seek acceptance or rejection of the package in toto? Or both?
- What arrangements should be made for continuation of the process of constitutional reform in the second phase, to follow the September FMC?

2)

A Possible Approach to the First Ministers Conference

In designing a possible model and in considering how federal strategy can best be implemented, we have several concerns in mind:

- The need for the Prime Minister to maximize the possibility of general agreement if at all possible, while at the same time consolidating his position in public opinion should negotiations fail.

- The necessity of giving each premier the platform at some point in the talks, but not in such a way as to derail the negotiations or sour the atmosphere.
- The importance of having regular television spots (and, hence, open sessions) at intervals throughout the week and of using the media effectively to increase popular awareness of constitutional reform.
- The consequent requirement that the federal government's public presence at these talks should always be constructed in a way that renders the federal position readily intelligible and highly attractive for ordinary citizens. Clarity, simplicity and popular appeal are the bywords in this respect. No one will win the hearts and minds of Canadians by floundering about in the swamp of communications technology in all its detail.
- The advantage of projecting an image of the Prime Minister as the leader of the country as a whole, bending every effort to reach an accord with the provinces that will be to the advantage of all the people of Canada. Mr. Trudeau's powerful TV image is hard-edged. There is little uncertainty in the public mind about his determination and toughness; but people doubt his capacity to get along with the provincial governments and to reach an agreement in an atmosphere of give-and-take.

The condition that the people's package be kept separate from the other items on the list and that the reasons for this be communicated to the public.

The need to convince Canadians, not only that Ottawa is prepared to walk the extra mile to try to reach an agreement, but that it is entirely reasonable for the federal government to proceed unilaterally if negotiations break down.

We present for discussion a possible schedule for the week of the First Ministers Conferences:

... 11

*Prime Ministers should
of time (M.R.-7) on
our position*

*not for reference
to proceed with a
large package*

First Ministers Conference
September 8-12
A Possible Schedule

Monday	Tuesday	Wednesday	Thursday	Friday
<u>Afternoon or evening:</u> FMC begins with presentation and general discussion of CCMC report. No round robin of opening statements by First Ministers. Starting of ministerial sub-committees if necessary.	<u>All day Private Sessions:</u> 1. FMC to address thorny political issues 2. Ministerial sub-committees work on: - highly technical items (e.g., communications) - items which are close to agreement (eg, family law)	<u>During the day: Private sessions continue.</u> <u>Evening: Public sessions:</u> FMC meets to receive sub-committee reports, and to report publicly on progress so far.	<u>All day: Private session of FMC</u>	<u>Morning: Private session of FMC</u> <u>Afternoon and/or evening Public session:</u> - Report on results of week's negotiations. - General concluding statement by each First Minister. (Prime Minister speaks last.)

Are these necessary or should we achieve consensus & then act.

11-A-

If, however, it should prove impossible to avoid an opening round robin we should consider how this time could be put to the best use, both from the point of view of substantial negotiation at the Conference and of stimulating public interest in and support for the whole process of constitutional renewal.

In his agenda telex to the Premiers the Prime Minister might suggest that since the conference may well be historic in its long-term effects upon Canada the opening day be devoted to thoughtful discussion of the country as a whole, how it might be strengthened and shaped to serve best the interests of the people.

Each First Minister would be invited to speak to this question. These speeches, followed by a general discussion would be intended to put in place a conceptual framework within which negotiation of specific packages or items (starting on the second day) would be better understood by the press and the public.

The Prime minister should open the session, giving him an opportunity to set the tone of the discussion.

It is proposed that the provinces should speak in reverse order, beginning with Newfoundland and ending with Ontario. This might be seen as a welcome change in itself and would probably please those provinces who normally form the robin's tail. It would also have the advantage of putting Quebec far down on the list. This could be important since, if Quebec were to speak in its normal position M. Lévesque could at least try to derail a high-level discussion of Canada as a whole by taking non-negotiable positions on specific items.

The second day would then begin with the CCMC report and continue with a first round of negotiations, in public. Since the undertaking is to have a public meeting, it might be easier to move to private discussions after two days rather than one before the television cameras.

The general idea here is to provide for a combination of public and private sessions which will maximize the achievement of two objectives:

- a) a negotiated settlement, if possible;
- b) public understanding of and interest in the issues, and public support for the position of the federal government.

Constitutional negotiation is not intrinsically interesting; at best, it is an acquired taste. Thus one objective would be to hold those sessions in public which would provide a snap-shot or summary statement of the broad sweep of constitutional reform, and which would give to Canadians in distilled form the positions of the eleven governments so that they could judge for themselves the reasons for the success or failure of the negotiations. Serious negotiation is best conducted in private; thus a second objective would be to schedule ample time in the course of the week for First Ministers to compose their differences and to come to terms with one another if that is their common intention.

The conference would begin very much as a working session, receiving the report of the CCMC on the progress made to date, with First Ministers reacting generally to that report and determining what further work needs to be done and by whom. Opening statements by First Ministers would be avoided so that the week's discussions would not be pre-judged or soured by what was said at the outset, and so that the tension and pressure would build towards the end of the week. In addition, this would put the Prime Minister at a marginal advantage, since he alone as chairman would be given the opportunity of making a few opening remarks to kick the conference off.

On the other hand, if the conference is to begin in a low-key fashion, it should end up with a bang. Friday would be the time when all heads of government would be given the opportunity to say what they want, and when the success or failure of the process would be broadcast and driven home to the people of Canada. All First Ministers would begin work on Monday, then, with their eye on what they would be wanting to say at the end of the week. Friday (if possible, Friday evening) would be the moment for the Prime Minister to assert his national leadership, either

by confirming the success of the discussions which the Government of Canada precipitated and the historic nature of the accomplishment, or by recording the failure of the process and revealing what the Government of Canada proposed to do as a consequence. If negotiations did not succeed, this would be the point at which the Prime Minister could make the "bottom-line" package, which he had presented privately to the Premiers, public and appeal to the country at large on the basis of that rejected offer. He could then go on to indicate his intention to proceed as rapidly as possible to implement the first package (The Unilateral Package), the core of which would be those issues deemed to be of special concern to the people.

IV. THE POST-FMC PERIOD

A paper on this subject will be prepared by the beginning of next week. In the meantime, there are some questions that need to be addressed.

1) Questions

- What, precisely, will be taken to constitute failure and what will be taken as success at the FMC? From the point of view of the federal government, half-success or partial failure would be the least satisfactory result of all: could this happen? How would the Government of Canada deal with that?
- How important will it be to make commitments to pursue constitutional discussion into a "second phase"? What items would the federal government wish to see pursued, or wish to avoid? What timetable might be envisaged? If a clear commitment to continue in this fashion becomes important how might it most convincingly be made?
- If it becomes necessary to proceed unilaterally, what package of reforms will the federal government wish to move on?

*A list should be
tabled on Day One
including any economic
items - This should be
conditioned on success.*

- If unilateral action is undertaken, where will the Government look for its source of legitimacy -- to a certain degree of provincial agreement, to Parliament, to a referendum? How will it cope with strong and consistent opposition from one region of the country, e.g., Quebec or the West?
- How rapidly could legislation based on unilateral action be put through Parliament, at what cost, and how would it relate to other government measures planned for this winter?
- Would it be the intention of the federal government to patriate first and then use the amendment formula decided upon to effect the other changes in the Constitution, or would the British Parliament be asked to amend the Constitution as required, to be followed after that by patriation? What is the anticipated role and behaviour of the British Parliament?