

*If after the October conference, a second conference seems warranted,
we should aim for January at the latest.*

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October 4, 1978

MEMORANDUM FOR THE PRIME MINISTER

c.c. Hon. Lalonde

The Constitutional Conference
and National Unity Strategy

Mr. Robertson and I have discussed on several occasions the memorandum of September 25 on the above subject that was sent to Paul Tellier by Claude Lemelin and, in turn, passed on to you and to M. Lalonde. M. Lemelin has done everyone a service in examining the interplay of the forthcoming major events and in laying out the various options which need to be considered in preparing for them. We agree with most of what he has written. We think, however, that there are additional factors which should be considered, and we have a deep reservation about the use of one "option" that M. Lemelin listed (though did not support): i.e., the forced passage of a Constitutional Bill through Parliament next spring against strong parliamentary and provincial government opposition. Mr. Robertson had hoped to send this note to you personally, but I had not completed work on it when he left to arrange for his father's funeral. As he will not return until next week, I thought I had better pass the note to you directly.

A memorandum dated October 2 is on its way to you, reporting on the federal-provincial meeting of September 26 in Montreal which the Minister chaired. The tentative agreement that was reached on the question of the agenda for the Conference of October 30-November 1 was attained in considerable measure because of the expressed willingness of the federal government to discuss seriously the distribution of powers, the addition of an agenda item (towards the close of the Conference on November 1) to discuss "process", the strong hint that the timing of the Supreme Court decision could well make it impossible to legislate concerning an Upper Chamber within the time frame of July 1 next, and the "all but a promise" of a second Conference to discuss Phases 1 and 2 matters during the winter.

The provinces remain nevertheless highly sceptical of federal intentions, although they have at least, as a result of Montreal, abandoned their original intention of devoting their energies at the Conference to a great debate on process, on federal unilateralism, etc., rather than to a serious discussion of substance. The Conference, therefore, has some chance of succeeding in the sense of agreeing to the sorts of limited objectives outlined in the draft memorandum to Cabinet of September 21 which the Minister passed to you some days ago. This kind of agreement will lead automatically to a further Conference to deal again with all the items of substance from the Agenda of the October 30-November 1 Conference, and to do so in the light of federal-provincial studies, the Pepin-Robarts report, the Joint Parliamentary Committee report, any report from a reconstituted Parliamentary Committee, and any re-thinking which the federal government itself may have done.

The first Conference, while most unlikely to be able to reach any important conclusions on substance, should be able, hopefully, to reach a few agreements "in principle" and should certainly be able to set in train the necessary arrangements (meetings of Ministers and officials) and the necessary work plan so that when the second Conference is held, agreement can be reached on substance or major progress achieved towards such agreement.

In the light of these considerations and given the number of fields to be studied, the many ideas to be considered in connection with each field, the slowness of the decision-making process within both the federal and provincial governments, we do not think it is practical to consider a second Conference in December followed by perhaps a third early in 1979, as M. Lemelin has suggested.

It will be difficult enough, with the Economic Conference in late November, the time lost over the Christmas-New Year holiday period, the various reports, etc., to be considered and Cabinet decisions obtained on many subjects within all governments - to be ready for a second Conference, with any real hope that it could succeed, much before mid-February. Any attempt to foreshorten

the process by adding another First Ministers Conference in December would, we believe, be counterproductive on the constitutional front, and would run the risk of exposing the government to further criticism that it is more concerned with the Constitution than with the economy.

On the question of timing, there is another point to consider. M. Lemelin, in his memorandum, stresses the critical nature of the July 1, 1979 deadline as the symbolic date for federal action, and we agree with him that now is not the time to take any pressure off the provinces in that regard. Privately, however, we could recognize that, from anything now known about the timing of the Quebec referendum, there is no reason why the federal legislation could not finally be passed late in the summer of 1979. There probably exists, therefore, a period for action at least a few months longer than the July 1 deadline would indicate, if the goal is, as the Minister re-emphasized at Montreal, to show Quebecers (and all Canadians) prior to the referendum that constitutional change is indeed possible. This slight extra flexibility on timing represents an important card which could be played at the right moment with the provinces in trying to reach agreement. It also represents, however, an extra dimension in the planning of the process which lies ahead.

Judging by various comments which you have made from time to time, and the comments M. Lalonde made to the Special Joint Committee and to the assembled provincial representatives at Montreal, the government's basic objective could be perhaps stated in this way:

The fundamental goal of the government is to achieve an important measure of constitutional change, with a great measure of support for that change, early enough in time for that change to act as a major influencing factor in the Quebec referendum (quite apart from the great potential of such an achievement for enhancing national unity across all of Canada).

Given the timing problem posed by the Quebec referendum and the need to demonstrate progress, the much less desirable but secondary objective is as above, without the "great measure of agreement", but with a clear demonstration to the Canadian people that the government had really tried to achieve agreement and could genuinely say "look, we tried our best, but the provinces as you have seen, have not been reasonable."

That is what the [unclear] of has been [unclear] in 50 years

It is these assumptions about the government's objectives that have led us to propose the simultaneous study of Phase 1 and Phase 2 items. We agree completely with Claude Lemelin that few provinces can be expected to support the federal government on any important Phase 1 changes unless they can be assured of action on some important Phase 2 questions of interest to them. The submission to Cabinet of September 21 is based on that assumption. Movement along those lines at the next Conference, and more concretely at the following Conference, presents, we believe, the only possibility for attaining the goal as stated above. And, if the goal is not achieved in spite of this federal movement, the government would be in a far better position to say to the people that it had really tried.

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Assuming then that the government moves along these lines at the Conference and adequate preparation is made for the second Conference, the government could be in one of three positions towards the end of February, after the close of the second:

- (1) It would have a great measure of agreement with the provinces on parts of Phase 1 (including the Charter) for passage of a revised Bill C-60 by Parliament and agreement on parts of Phase 2 for passage of a resolution through Parliament asking the U.K. to act. The odds are probably against this result, but it is such an attractive possibility that it would seem illogical not to devote much care and energy to attaining it. If it happened, you would seem to have the choice of proceeding with the legislation and resolution in Parliament

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with a reasonable chance of early approval, or of calling an election with the agreement as part of the "mandate" sought;

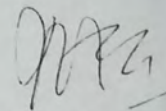
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- (2) Despite the devotion of care and energy, little or no agreement would have been achieved. However, the provinces would have clearly acted unreasonably or greedily in rejecting reasonable proposals and compromises. The government would probably have nothing to gain and very much to lose in trying to force legislation through the House in such circumstances, given the declared opposition, say, of a majority of the provinces and the undoubtedly noisy opposition in Parliament (shades of the Pipeline Debate). It could, however, take its case direct to the people in the knowledge that it had acted reasonably and had demonstrated that reasonableness. (This situation, while probably tolerable, would clearly not be as desirable as number (1) above.);
- (3) It would have a doubtful situation, somewhere between (1) and (2), or where (2) was more the case but federal reasonableness had not yet been satisfactorily demonstrated. The government would have the choice in that situation of going to the people, or of pursuing a further attempt to reach agreement or to demonstrate reasonableness which could involve a third Conference in March or early April. It is doubtful that such a Conference could be useful at such a late stage before an election, but by no means impossible. Provinces might see such a situation as an opportunity which might not come again to make some gains on matters of interest to them.

You will see that, in setting out these possible outcomes, we have been banking on the fact that the passage of legislation by July 1 is not, in the final analysis, essential, but passage within a few months thereafter is very likely to be essential. This in no way would oblige the government to abandon July 1 as its stated goal in the near future. Mr.

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Lalonde's way of handling this delicate question in Montreal (as reported in a separate memorandum to you of October 2) demonstrates how the date can be left in play as an encouragement to action, without becoming a centre of controversy which excludes progress on substance.

Planning for these outcomes would, in practice, also leave open an option which Claude Lemelin mentioned at the end of his memorandum - the publication of a new and more ambitious Bill C-60 - which would serve instead of legislative action as the basis for the federalist case during the Quebec referendum. This is not mentioned in order to advocate this option or to reject it, but simply to show that a great deal of flexibility does seem to flow from the "scenario" suggested above.



F.A.G. Carter

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