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SECRET

January 14, 1979

MEMORANDUM FOR THE PRIME MINISTER

The Constitution: the February Conference and Beyond

This memorandum is intended to be a "companion piece" to our briefing note to you of today's date, in preparation for our session with you on January 15, the Priorities and Planning Meeting of January 16, and the Cabinet Meeting of January 17.

A. Strategy

We have not yet had a chance to discuss with you the memorandum of December 20 (bearing the same title as this memorandum) in which we reviewed the various "possibilities and options" for the coming months. A copy is attached for convenience. Since December 20 we have had a further opportunity to think about these matters, and to see the developments on the federal-provincial stage. As we move towards Vancouver, we can say that a great deal has been accomplished, much agreement has been reached on many things, and that there are still important and difficult gaps yet to close. There is nothing in the situation which would justify the federal government abandoning the process. On the contrary, there is every reason to continue working towards the government's consistent goal: to attain a great measure of agreement.

The odds are probably quite high against an "across the board" agreement on all subjects in the manner of Victoria. The odds are quite

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high, however, in favour of being able to reach a great measure of agreement on many of the items and perhaps on most, although this depends to a considerable extent upon federal willingness to make some moves on communications, fisheries and the offshore. The more agreement that is reached on each item, and the more items there are on which a great measure of agreement is reached, the more flexibility the government will have in choosing its options at or after the February Conference.

There now seem to be four principal options, all of which involve the introduction of a revised Bill C-60 in Parliament as soon as possible (say a month) after the Conference.

(1) Take credit for the degree of agreement attained; take the provinces to task for not reaching overall agreement (à la Victoria); proceed with the new Bill C-60; place all other items on the shelf until after an election. We believe this confrontational course would be hard to justify, given the progress towards agreement that seems possible; it would make later progress still more difficult;

(2) Take credit for the degree of agreement attained; emphasize the positive achievement; continue the review exercise full speed; proceed with the new Bill C-60; express faith in full agreement being reached in the not too distant future. This would be the least confrontational course and would build goodwill with the provinces for the future. It would not project an image of a dynamic government, nor would it demonstrate that progress is actually achievable. Nevertheless, this course could be made to appear reasonable;

(3) Take credit for the degree of agreement attained; emphasize the positive achievement; continue the review exercise full speed; proceed with the new Bill C-60; and ask the U.K. Parliament to act so

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- but no action on "powers".

that patriation would take place with a new amending formula as part of the action. This would be a far more confrontational course than (1) and would invite the bitter enmity of most provinces. They would lose their lever of not approving an amending formula, and would have no changes in powers to show for it. It would present the appearance of a dynamic government but at great cost to national unity;

(4) Proceed as in (3) but ask the U.K. Parliament to deal with all the powers items on which substantial agreement exists (as well as dealing with patriation and the amending formula). This would be a far more confrontational course than (1) but much less than (3). The provinces would see some of their aspirations met and the federal government would present the appearance of a dynamic government and would have demonstrated that change could happen. Moreover, the Constitution would be in Canada and history would have been written.

- a variant of this would be to introduce the Bill + the resolutions;
- seek to pass the Bill
- do not pursue many of the resolutions.
- go to country for a mandate on the resolutions + a mandate on the Bill if not passed promptly.

From the description above of the four options, you will see that we favour either (2) or (4). For both of these it is important to strive for agreement on every item in the constitutional review. No. (4) however is the more demanding, and really requires that there be achieved a pretty substantial degree of satisfaction among governments (except Quebec) and among the people of Canada. Even the Quebec government would have to be placed in the position of having to admit that some really positive constitutional developments had taken place. The people as a whole would have to be convinced that the government had acted reasonably as well as dynamically.

It is in the light of these options that you will wish to think about such items as communications, fisheries and the offshore. For example, a turndown of Nova Scotia and Newfoundland on the latter two, will leave a bitter taste in the two provinces against everything the federal government does. If a reasonable compromise can be found that does not

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prejudice really vital federal interests, these two provinces, people and governments, would probably give sympathetic support to any actions the federal government subsequently takes.

B. The Form of a Future Bill C-60

You will be interested, we are sure, in reading the attached memorandum of January 9 from Barry Strayer. I hope there will be some opportunity to discuss the proposal it contains when we meet with you on Monday. It seems to me that, while it does not overcome all the problems raised by those who attacked Bill C-60, it goes a very long way towards doing so. Moreover, it would provide a flexible instrument which would permit sections to be handled either as part of an Act of Parliament or as part of a resolution to the U.K., with final choices not having to be made until the last moment.

C. The "Second List" Items for the Continuing Constitutional Review

If there is time on Monday, we might speak of this briefly. We have not had time to do a paper on this subject, but would hope to have something in your hands by mid-week. While there will not be a chance to have Cabinet discussion of this before the Vancouver meeting, Messrs. Lalonde, Lang and Reid will all wish to have your thoughts on the subject.

While Mr. Robertson has not seen this memorandum, the major points therein have been discussed with him, and I believe carry his support.

F.A.G. Carter

F.A.G. Carter/JV

CONFIDENTIAL

Department of Justice / Ministère de la Justice

MEMORANDUM / NOTE DE SERVICE

January 9, 1979

TO/A: Mr. Gordon Robertson and Mr. Roger Tassé

FROM/DE: B. L. Strayer

SUBJECT/OBJET: FORM OF CONSTITUTIONAL MEASURE(S)

Comments/Remarques

A NEW APPROACH

I have been giving this problem a good deal of thought because we are discussing with the provinces various issues related to implementation of constitutional changes, while at the same time we are trying to proceed with a revision of Bill C-60.

Up to the present, we have been assuming that what would be required would be a revised Bill C-60, essentially with its present structure, and some resolutions for joint addresses to deal with various Phase II matters (distribution of powers, amending formula). It was assumed that the provinces would prefer that these latter changes, at least, be dealt with in the more traditional way of special resolutions.

Instead, what I would now propose is that we consider having a new kind of document which we would call "The Constitution of Canada, [1979]" or "The Canadian Constitutional Charter [1979]" or something else which would indicate that it was not an act of the Parliament of Canada nor of any provincial legislature. It would contain essentially what we would in any event put in a revised Part I of Bill C-60, plus the Phase II matters such as noted above. The "designated provisions" as in Bill C-60, plus the new distribution of powers matters and the amending formula, would all be starred indicating they are beyond the power of Parliament to deal with unilaterally.

Once the text of this document is settled, a very short bill could be introduced in Parliament, probably attaching it as a Schedule for the purpose of identification.

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The bill would provide for Parliament giving the force of law to specified sections of the document (i.e. all those within Parliament's jurisdiction which are not starred in Bill C-60). As for the starred provisions, resolutions could be introduced in Parliament whether simultaneously or later, as circumstances would dictate, for joint addresses approving all or some of the starred provisions. (If introduced simultaneously, perhaps one debate on the whole measure would suffice; but there might be good reasons for postponing dealing with the resolutions, and this scheme would permit such flexibility.) The provinces would, one hopes, pass resolutions approving the same provisions, probably also including the document as a Schedule to their resolutions. If the document included an amending procedure which could first be approved by Westminster as part of patriation, the starred provisions could be brought into effect by that procedure. Otherwise, they could be given effect directly by Westminster. It would, however, be unnecessary to say anything in the Bill or the Schedule as to such eventualities.

Such a document would in future then be amendable (assuming a formula along the lines of our discussion paper) by Parliament with respect to certain parts, by Proclamation of the Governor-General based on appropriate resolutions with respect to other parts, and even by provincial legislatures with respect to anything in it that could properly be regarded as a matter of provincial constitutions. Thus the document would clearly look like "joint property".

ADVANTAGES

1. Many provinces appear to resent the seemingly unilateral device of a federal statute. They will always have difficulty in subscribing to constitutional provisions which in form at least are part of a federal statute. Nor will they be at ease in future with a constitution for Canada which is in this form. A separate document which might be annexed to a federal statute for purposes of validation of certain parts of it would be a different matter - more like the western Natural Resources agreements or the Terms of Union with Newfoundland which were annexed to statutes of both the United Kingdom and Canadian Parliaments.

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2. Closely linked with 1 is, in my view, a provincial unwillingness to follow a novel methodology which is a federal innovation. This will continue to be at least an unarticulated obstacle to consensus on implementation procedures. If we were to suggest the above scheme as a response to provincial concerns (set out further in the following points) it would probably engage their support because it would then be perceived more as a joint venture.

3. Ontario, and to a lesser extent some other provinces, have raised legal arguments about the "deemed resolution" approach. In brief, these arguments are along the following lines:

   (a) Parliament can't say that a section in an Act is instead a resolution; if it tries to, the United Kingdom wouldn't so regard it for the purpose of accepting it as a joint address to Westminster;

   (b) Parliament can't include in a bill matters over which it has no jurisdiction; yet this is of necessity what it would do in Bill C-60 which through the designated provisions makes provision for matters not within Parliament's jurisdiction;

   (c) in particular, Parliament cannot provide, as Bill C-60 tries to do, that certain parts which are applicable to both levels of government (e.g. Statement of Aims, Charter) would come into effect at once vis à vis the federal authority: these parts contain matters not within federal jurisdiction which, according to Ontario, are not severable from the rest and, therefore, the whole would fall;

   (d) Parliament cannot anticipate the subsequent amending procedure by which designated provisions (s. 125), the Statement of Aims (s. 130) or the Charter (s. 131) would be brought into effect.

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Comments/Remarques:

While these legal problems are for the most part, in our view, far-fetched, no amount of explanation of our position is likely to persuade Ontario and some other provinces, at least at the official level. These difficulties would largely disappear if the validating bill and the resolutions were split so that the designated provisions generally would be dealt with by an amending procedure not referred to as such in the federal bill (although the "document" might contain a new formula), and if we entrenched the Statement of Aims (or as its replacement, a simpler preamble) and the Charter through the patriation/amendment process. If opting-in was still to be a feature of the Charter, this could be provided for in a section like 131 which would be designated: - i.e. the opting-in process would be adopted with the approval of the provinces, even presumably of those who don't intend to opt-in. If we still wanted to make the Charter effective at once at the federal level, Parliament could so provide and we could afford to take a chance on the kind of severability issue Ontario has raised. (Once in force, it would be entrenched vis à vis Parliament, if we had a new amending formula in place. too.)

4. This approach would avoid some procedural anomalies which could arise if we were to proceed with a Bill and resolutions simultaneously in two or more separate measures. For example, a revised Bill C-60 would probably carry sections 91 and 92 essentially as they are now, while resolutions based on federal-provincial discussions would propose the replacement of 91[1] and 92[1] by a new amending formula, and the amendment of 92 by the new resources clauses. This would be confusing and, as Fred Gibson has suggested to me, might violate parliamentary rules against dealing with the same matter in the same session in different ways with different measures. By leaving the presently designated provisions for separate approval through resolution rather than enactment, we could combine them with new Phase II material in one integrated document.

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5. This could probably also assist with the present structural problem we have that in part at least is responsible for Bill C-60 having both a preamble and a statement of aims. If the latter is to be turned into a preamble, it could probably appear at the outset of the separate constitutional document in a way in which it could not when contained within Part I, called the Constitution of Canada Act, which is within another Act, the Constitutional Amendment Act, 1978.

6. Such a structure would seem more compatible with the kind of amending procedure which we envisage, one involving many amendments to be made by Proclamation of the Governor-General. It seems anomalous to contemplate amending an Act of Parliament by Proclamation. This procedure seems more consistent with the amendment of a document that stands apart from ordinary laws of Parliament. At the same time, it is not anomalous for Parliament or a legislature to alter other instruments by statute: this happens occasionally with respect to e.g. corporate charters, contracts, wills, trusts, etc.

7. There are some elements of the Victoria Charter concept in this, in the sense of having a document such as the Charter which would stand apart from other forms of law.

CONCLUSION

I would hope that we could have further direction on these matters in the near future to facilitate drafting. If we should move to a format along the lines suggested, it will be important to do it in a way which will engage the support of the provinces and will be perceived as an accommodation of their concerns.

B.L.S.