

c.c. Hon. Reid
Mr. Hébert
Mr. Pitfield
Mr. Robertson
Mr. Coutts
Mr. Flemming
Miss Macdonald
Mr. Massé
Mr. Tellier
Miss McQueen
Mr. Marchand
Mr. G. Smith
Mr. I. Stewart
PMO File
PCO File
FPRO File
Diary (6)

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January 14, 1979

MEMORANDUM FOR THE PRIME MINISTER

Constitutional Review

Briefing notes in connection with:

- (a) Priorities and Planning, Tuesday, January 16
- (b) Special Cabinet, Wednesday, January 17
- (c) Our session with you on Monday, January 15

We will endeavour to have this note passed to you today (Sunday) as it may be of assistance not only in preparation for the two meetings mentioned above, but also for the session we hope to have with you tomorrow afternoon (Monday, January 15). While Mr. Lalonde will not be available tomorrow, Messrs. Lang and Reid will both be there. We gather that the bulk of the time at Priorities and Planning will be available for the constitutional discussion, and the whole of the Special Cabinet on Wednesday.

- (1) The discussion in Priorities and Planning on January 16

Your colleagues in Priorities and Planning have now participated in several meetings of the Committee devoted to the Constitution and were aware of the positions that federal Ministers were to take at the Ministerial Meeting in Toronto on December 14-16. Those whose departments are intimately involved will have been kept fully up-to-date. The others will not be familiar with progress at Toronto, nor with

what has just transpired at the federal-provincial meeting of officials here in Ottawa on January 11-12.

We would see the Priorities and Planning meeting as an opportunity for:

- (a) Ministers to bring themselves up-to-date and to prepare for the discussion in Cabinet on January 17;
- (b) a discussion of what new positions may need to be taken at the Ministers Meeting in Vancouver (January 22-24);
- (c) a short discussion on practical arrangements for the February Conference;
- (d) a discussion, in whatever depth you may feel is desirable at this time, of the general lines of federal strategy on the whole constitutional question.

Unfortunately, five Ministers will be absent from Priorities and Planning: Messrs. Jamieson, Horner, Gillespie, LeBlanc and Chrétien. At least in the cases of the last three mentioned, their officials have had full opportunity to keep them in the picture.

To facilitate discussion in the Committee, we are preparing a document which is intended to bring Ministers up-to-date and to provide an indication of those areas where decisions or guidance are required in preparation for Vancouver. The document can be of use, therefore, as a basis for covering (a) and (b) above. You could ask Mr. Lalonde to lead Ministers through it, or if you and Mr. Lalonde wished, Mr. Robertson could do this. We will not send the document* to Ministers who are neither members of Priorities and Planning, nor otherwise directly involved, as we do not yet know your plans respecting the Cabinet meeting on Wednesday. This is a point we could discuss with you on Monday afternoon.

In connection with (c) above, we sent to you yesterday a memorandum and a proposed letter to the Premiers concerning the February Conference.

*A draft of most of it is attached.

A final version should be ready when we see you on Monday.

You may wish to raise points with us on Monday in that regard, or to discuss some aspects with your colleagues in Priorities and Planning. The proposal that the Conference be partly open and partly closed will be of interest, as will perhaps the plan to "work" everyone many extra hours to make up for the absence of a third day.

In connection with (d) above, we are sending you a separate memorandum today entitled "The Constitution: the February Conference and Beyond".

(2) The discussion in Cabinet on July 17

You may wish to have, simply, a broad oral report by yourself, or by Mr. Lalonde, supported perhaps by oral assessments from Messrs. Lang and Reid. The discussion would touch on the points still at issue, the chances of success, and the degree to which further federal movement would be warranted. The problem with this, however, is that most Ministers are unaware of what has been put on the table at the various federal-provincial meetings already held.

The document mentioned above is an attempt to provide a general picture of where things are on each subject, without going into all the details on which lengthy discussion might easily develop to the detriment of a discussion of the points which should receive priority consideration. You may wish, therefore, to have the document distributed to all Ministers. If that is not done, then you or Mr. Lalonde would wish to take a fair amount of time in Cabinet describing the position that is now on the federal-provincial table for each item, before concentrating on the points still in contention with the provinces.

(3) Where things now stand

(A brief summary follows of the situation on each item as reported in the document. It is perhaps useful to note that of all the items listed, four

can be considered as "just about agreed upon", i.e., Indirect taxation, Family Law, Equalization, and the Declaratory Power. The order used is that chosen by the Ministers Meeting at Mont Ste-Marie for that meeting and for their subsequent meetings on the Constitution.)

- (i) Resources: we have moved a long way towards agreement, but there are still important differences. Alberta wants the federal capacity to intervene in interprovincial trade limited to "emergencies", rather than to a "compelling national interest", and we cannot give way on this. We have protected our international power very carefully, and could give slightly in that respect. British Columbia, Quebec, and others would like to see water resources added to the list. If this were done, it is likely all but Alberta would be pretty satisfied;
- (ii) Indirect taxation: the federal offer to permit the effects of indirect taxation to flow outside a province in connection with natural resources has helped greatly towards reaching a solution on the resource item. It has left provinces generally much less interested in the residual component of indirect taxation. A legal draft is available in case of need, but provinces may not press the issue. In any event, no serious problem is likely to arise in reaching agreement on this item;
- (iii) Communications: because the federal government placed this item on the agenda for change last October, most provinces assume that the federal government wants an agreement in this area. An agreement is quite possible (even probable) on one aspect: cable distribution systems. Some modification in the present federal position (no formal "offer" has yet been made) might be required to ensure that this occurs. In return for such an offer, the federal government would obtain a significant

degree of control over the content of closed-circuit systems (which are probably not now under federal jurisdiction) and would have made an important gesture vis-à-vis Quebec public opinion;

- (iv) The Senate: except for British Columbia, no province regards it as vital that an agreement be reached on the Senate. Interest, however, seems to be increasing. With some "give" by British Columbia, considerable positive support for some reasonable version of the Senate may develop. As is discussed in the document, it seems worthwhile to pursue this possibility, given that the version likely to emerge would not seem unacceptable to the federal government;
- (v) Supreme Court: Quebec and Alberta remain wedded to the concept of a constitutional court, and British Columbia to a court which would guarantee them a permanent member. The others all seem in reasonable agreement concerning the court itself, and even Alberta and B.C. are not likely to react strongly against the proposal as it now stands. All the provinces, however, are interested in S. 96 judges, and this may remain a bone of contention;
- (vi) Family Law: only a few technical points remain to be resolved. No problem is likely to arise in reaching agreement on this item;
- (vii) Fisheries: Nova Scotia, which at first took a more moderate position than Newfoundland, has now firmly joined the latter in seeking concurrent jurisdiction. Neither province will be satisfied, as we had hoped at first, with a provision for compulsory consultation, and there is now considerable bitterness at what is seen as federal attempts to split the Atlantic provinces. The current federal position, at the least, needs a second look, including the question of the inland fisheries which most provinces wish to control;

- (viii) Offshore Resources: as in the case of fisheries, Newfoundland will not settle for compulsory consultation; it wants full ownership. Nova Scotia has been hardening its position. Both would likely settle for concurrent jurisdiction, with ample federal paramountcy on matters which are vital to the federal government. Again, the current federal position needs a second look, even if only to reconfirm it. (We ourselves believe change is desirable.);
- (ix) Equalization: British Columbia remains opposed, but everyone else has accepted a legal draft on this item, and there is no further work to be done;
- (x) Charter: provincial views against a Charter run deep indeed, and it is not just stubbornness on their part. Many believe that rights will be better protected, and protected faster, if matters are left to Parliament and the legislatures. By this stage, however, few provinces would object to Parliament passing a Charter applicable to itself, and the opposition against providing for "opting-in" will not be carried far if there is general satisfaction on the "powers" side. Some provinces may opt-in for some parts, but no amount of pressure (or giving away of powers) is likely to bring extensive adherence in the near future;
- (xi) Spending Power: it is apparent that the provinces will not agree to a proposal which sees the money, in "opting-out" provinces, going to the people and not the government. Quebec wants the power so restricted as to be useless. While most other provinces also reject the federal proposals, they are not pressing hard for strong restrictions, and seem more concerned with a clearer definition of when and how consultation takes place, and with protection from the federal government going back on its agreements. No new federal proposals should be made;

the item will not be the subject of agreement in February, but there may be general support simply to carry the item forward for more study. This outcome would be more probable if the federal government declared its intent to adopt henceforth, in practice, what it has proposed concerning compulsory consultation under the Constitution;

(xii) Declaratory Power: with the federal offer to exclude the use of the declaratory power as a means of taking over natural resource primary production sites, agreement on all other aspects seems to have been reached with all but Quebec (which feels the power should be done away with). There is no further work to be done;

(xiii) Amending Formula: Quebec has abstained. Among the rest, there has been a fairly strong movement towards a "7 provinces with 85% of the population" formula, with British Columbia clinging to the Victoria formula. With some minor adjustments here and there, it seems reasonably hopeful that all but Quebec and B.C. will agree at the end;

(xiv) The Monarchy and the Preamble:

Note: All of the above items up to xiii inclusive are dealt with at greater length in the document. It does not deal, however, with the Monarchy or the Preamble. We thought you might wish to discuss with us on Monday afternoon how best to handle these items. The Preamble is likely to cause little problem now that we have indicated willingness to use something like the 1971 Ontario draft in place of the Preamble and Statement of Aims in Bill C-60.

In the Monarchy, however, there are several important differences which are likely impossible to settle. Given the Ontario position (supported

by at least British Columbia, Manitoba and Saskatchewan), the Governor General "may" rather than "shall" do his duties, and Her Majesty must remain in Parliament. Assuming there is no federal desire to give in, thought needs to be given to the best "line" to take at Vancouver and at the February Conference, and in revising Bill C-60, bearing in mind potential problems in Parliament.

(4) Strategy

As mentioned earlier, a separate memorandum on strategy is being sent to you. The answer to the question "what is there in all this for the federal government?" can only be answered in the light of the strategic choices. Hence the final answer on how far to go on each item, whether in giving further powers to the provinces or in insisting on acceptance of the federal government's ideas concerning the Charter, central institutions, an amending formula or the timing for the attainment of all these things, depends on what strategic line is to be adopted.

While you may wish to avoid at this stage a full discussion of strategic considerations and choices, either at Priorities and Planning or in Cabinet, you may wish to give Ministers at least some "feel" for the broader picture, in leading them to make wise decisions on such matters, for example, as the federal position on fisheries, offshore resources and communications.

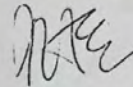
(5) Steering Committee meeting in Toronto, Tuesday evening, January 17

Mr. Reid has been making the arrangements with the provincial Ministers (Saskatchewan and Alberta) and you might wish, on Monday afternoon, to ask him

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about this. The purpose of the meeting in Toronto is to plan for the Vancouver meeting of January 22-24.

While this memorandum has not yet been seen by Mr. Robertson, it has been prepared in full consultation with him.



F.A.G. Carter

F.A.G. Carter/JV