Son of C 60

CONFIDENTIAL

February 15th, 1979.

MEMORANDUM FOR THE PRIME MINISTER:

Successor to Bill C-60 F3.13(1)

You asked that drafting should move ahead as quickly as possible on a "successor bill" to Bill C-60. Barry Strayer and his associates in the Department of Justice have gone at this quite vigorously and the attached memorandum from Strayer to you covers copies of the "successor bill" in both English and French.

If a bill is to be introduced in the House of Commons, there are a good many questions of policy and form that will have to be settled as outlined in Strayer's memorandum. However, the first question is whether it is desirable in the present circumstances to introduce a new bill or not. My own judgment is that it would be best not to have a new bill but rather to have a resolution of some kind (possibly along the lines of the one I sent you with my memorandum of February 12th) which would provide the basis for a debate on policy with regard to the constitution and also the basis for a mandate for future action.

If a bill were to be introduced now, I think the result would be to focus attention on a whole host of details rather than on the matters of policy and mandate that are the important things at this time.

If the decision is to proceed by way of a resolution, I think we can simply "stockpile" the draft bill and turn attention to the "second list" and other matters that will be coming into discussion with the provinces at some future point.

R.G.R.

This is very useful, and in accordance with our discussion, should be stockpiled.
Meanwhile, work should proceed on Strayer's option (5) (on page 9) ... given to the Declaration (e.g. p9, the joint address. ... The "notwithstanding" clause would seem ...)

CONFIDENTIAL

February 14, 1979

MEMORANDUM FOR THE PRIME MINISTER

SUCCESSOR TO BILL C-60

F3·13 (1)

Attached is a draft in both languages of the above measure. This has been prepared in Justice and discussed with officials of the F.P.R.O., as have the various points which follow. Mr. Robertson suggested that I forward the draft to you, Mr. Lalonde, Mr. Lang, and Mr. Reid without further refinement at this time so that you would have an early opportunity to consider the policy issues involved with respect to any further action to be taken.

General Comments on the Draft

1. You will note that it is entitled as a "Charter", reflecting the possibility that it might not be introduced as a Bill but rather by itself or as a Schedule to a Bill. The part on Rights and Freedoms is therefore redesignated as a "Declaration".

2. Whenever possible, the wording has been simplified as compared to C-60.

3. The draft reflects in substance and in organization numerous suggestions and criticisms of C-60, particularly those of the provinces and of the parliamentary committees.

4. A number of matters in C-60 have been dropped, most notably the Senate, provisions concerning the office and role of the Governor General, the statement of aims, and the original preamble (the two latter being replaced by the Ontario draft preamble of 1971).

5. For the sake of completeness, we have included all of the provisions recently under discussion with the provinces, essentially as they stood at the end of the Vancouver meeting. (The amendment procedure included is the federal proposal based on the "Toronto Consensus", which did not survive the Vancouver meeting. Indirect taxation for the provinces was not included because of the consensus not to proceed at this time with it.) It must be kept in mind that these drafts do not necessarily

... 2

reflect the actual state of negotiation as it continued last week at the First Ministers Conference; but, with the exception of Communications, no drafts emerged from the First Ministers Conference and it would be difficult on most items to formulate any agreed wording to reflect shifts of position that occurred at that meeting.

The material based on federal-provincial discussions is identified where it appears in the attached draft and consists of the following:

	Subject	Pages (English version)
(a)	Declaratory Power	21-22
(b)	Resources	22-25
(c)	Communications	25-26
(d)	Family Law	26-27
(e)	Spending Power	28-30
(f)	Delegation	31-32
(g)	Equalization	32-33
(h)	Charter (Declaration)	34-43
(i)	Supreme Court and Judiciary	44-47
(j)	Amending Formula	47-50
(k)	Implementation (Declaration of Rights and Family Law)	51-55

6. As in C-60, sections not within Parliament's jurisdiction to enact are starred.

7. There is some modernization of sections 91 and 92 of the B.N.A. Act, in this draft sections 48 and 49 (pp. 16-20), although it is recognized that in the absence of discussion of these changes in style with the provinces we would probably have to leave the language of 91 and 92 untouched at this time.

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Following are major policy issues requiring decision. They are for the most part interdependent.

Form of Measure

Among the possibilities are:

(1) A more or less comprehensive bill along the lines of C-60, partly to be enacted and partly to contain "deemed resolutions".

(2) A more or less comprehensive constitution as a schedule to a bill which would give effect to those parts which are within Parliament's jurisdiction (the remainder to be implemented through joint addresses and Westminster).

(3) Same, but the comprehensive constitution being tabled and referred to in a bill rather than being part of the bill as a Schedule.

(4) A publication which could be tabled which would contain all these provisions as a kind of "report" to the public on the progress of constitutional renewal - i.e. to show how far discussions have progressed up to this point - but without any proposal to implement at this time.

(5) A shorter bill limited to some or all of the matters which are within Parliament's jurisdiction to enact.

Content of the Measure

Among the possibilities are:

(1) A more or less complete constitution (it can't be complete as long as we have to leave out the Senate and do not describe the office of the Governor General). A particular question arises as to whether we should include the drafts which have been under negotiation. Apart from Family Law they do not represent a consensus, and their inclusion (even if we are prepared to endorse them) would be viewed as "unilateralism". If we do include them, in what version? As jointly developed, or as we would ideally like them?

... 4

Should the Family Law provisions be included in any event, since it represents the only consensus - its inclusion for early action thus being a demonstration of good faith by the federal government? (Even with respect to Family Law, there should be some further discussion with the provinces on the drafting). These problems would suggest that if a comprehensive document is to be presented, the format of a "report" suggested in option (4) under "Form of the Measure", above, might be the most appropriate as it would appear the least as a commitment, or as unilateral action, by the federal government.

(2) Only those items which are within federal jurisdiction such as the provisions on the executive authority, the House of Commons, the Declaration (applied to the federal authority) and the Supreme Court.

(3) Only those items referred to in (2) which are substantially new such as the Declaration and the Supreme Court.

Method of Implementation

The various possibilities depend to a large extent on what, if anything, is to be implemented at this stage and whether entrenchment is sought. Briefly put, the main options are as follows:

(1) Bill C-60 method -

(a) Advantages

This now might have some advantage of familiarity and would demonstrate the demise of C-60 more clearly.

(b) Disadvantages

(i) With respect to implementation of matters not within Parliament's jurisdiction it has been found by many to be confusing and several provinces find it objectionable (indeed some argue it would be ultra vires).

(ii) The sections which would be enacted by Parliament would proportionally be more limited than in C-60 and the immediate effect of the Bill would thus seem rather small.

... 5

(2) Enactment only of those matters within federal jurisdiction (e.g. executive government, House of Commons, Declaration of Rights as applied to the federal authority, Supreme Court - but not other judiciary matters), and a few others.

(a) Advantages

Would be the least objectionable constitutionally or from the provincial viewpoint.

(b) Disadvantages

(i) Would not now "entrench" matters that federal ministers have said would be entrenched unilaterally, since Parliament could always undo what it has done.

(ii) No subject which a province wants entrenched (e.g. New Brunswick re: language rights) could be included.

(3) Same, but with some kind of "manner and form" provision for those matters to be entrenched, such as the Declaration of Rights and the Supreme Court. This would involve an entrenchment clause providing the matter in question could not be altered, nor could the entrenchment clause, except by e.g. vote of at least 2/3 in Parliament. There is a precedent for this in s. 91[1] of the B.N.A. Act with respect to extending the life of Parliament - permissible if not opposed by more than 1/3 of the House of Commons.

(a) Advantage

This would avoid recourse to Westminster and produce a somewhat similar effect vis à vis federal matters.

(b) Disadvantage

It would not be suitable as a means of entrenching provincial matters.

(4) Some legislation (e.g. on Executive and House of Commons) but recourse to Westminster to entrench other matters such as the Declaration of Rights and the Supreme Court.

... 6

(a) Advantages

(i) This would make for clear entrenchment in a traditional manner, provided we made it clear that the entrenched matters would cease to be within federal or provincial powers of amendment in s. 91[1], s. 92[1], s. 101, etc., of the B.N.A. Act.

(ii) It would enable entrenchment of provincial matters.

(b) Disadvantage

Would involve additional recourse to Westminster since it could not be the last time unless patriation were to be sought unilaterally at the same time.

(5) With particular reference to the Declaration of Rights, it should first be noted that Parliament has no authority to set conditions as to how or to what extent a province can or must opt-in to the Declaration. In C-60 we hold out the "incentive" of repeal (by Parliament) of disallowance and reservation if a province opts-into the whole Declaration or Charter. Whether or not this is a real incentive, it cannot be used as a means for inducing a province to opt-in to any particular groupings of rights and freedoms. In short, we cannot impose such conditions on the provinces except through action by Westminster. Such action could:

(a) entrench the Declaration at the outset vis à vis federal matters and vis à vis those areas of provincial jurisdiction which particular provinces were prepared to accept at that point; and

(b) provide for other provinces to opt-in later to any or all classes of rights and freedoms.

The various classes of rights and freedoms among which they might choose could be:

(a) fundamental and democratic rights and freedoms;

(b) legal rights;

... 7

(c) mobility, property, and non-discrimination rights;

(d) educational language rights; and

(e) other language rights (courts, legislation, statutes, government services).

If we were to entrench the Charter or Declaration in this way, the lack of an amending procedure could give rise to particular problems. With these new provisions, problems could arise requiring amendments. Considering that only some provinces (those which had opted-in) would have a direct interest, and then only to the extent of the rights they had accepted, it would be open to question what a proper amending procedure would be. There might have to be a special formula for change built into an entrenched Declaration. This is a question which could require further study if early entrenchment of the Charter is contemplated. It should be noted in this connection that the parliamentary committees warned against entrenching a Charter of Rights before we have a new amending formula.

Relationship to Pépin-Robarts Report

It should also be noted that if the government proceeds now with a measure containing all or most of the material in the draft, it could be interpreted as a rejection of the Pépin-Robarts approach in several respects such as the following:

(a) This is a piece-meal approach to constitutional reform; they advocate a complete revision of the constitution.

(b) The composition of the House of Commons would not provide for some members being chosen by percentage of popular vote of the respective parties.

(c) There would be nothing like the Council of the Federation with a special mandate in areas of provincial concern.

(d) The Supreme Court would not be composed of 11 judges (six common law and five civil law) and divided into specialized panels.

... 8

(e) The distribution of powers would not have been entirely recast in a logical fashion, nor would residual powers have been given to the provinces.

(f) The spending power would not provide for compensation to governments of opting-out provinces "where appropriate".

(g) The use of the declaratory power would not be subject to the consent of the provinces except in the area of resource "works".

While this may not be a sufficient reason for not proceeding with some measure, it could possibly affect the contents to be included at this time depending on what kind of response the government wishes to demonstrate to that report.

Summary

To advance the work of drafting much beyond this point it is necessary to have some direction as to the form, content, and method of implementation of the measure. Without trying to suggest all possible combinations of the above factors, the main possibilities seem to be as follows:

(1) A bill dealing only with the Declaration at the federal level and the Supreme Court;

(2) A bill dealing with all matters within federal jurisdiction: i.e. items in (1), plus the executive authority, the House of Commons, and miscellaneous others;

(3) A bill in the style of C-60, enacting items in (2) and containing "deemed resolutions" with respect to other matters;

(4) A document not in the form of a bill, either tabled separately or attached to a bill as a schedule (which bill would give effect to those parts within federal jurisdiction), with a joint address being introduced to implement such of those parts as are not within federal jurisdiction on which action could be taken;

... 9

(5) A joint address to entrench those matters on which the government now feels it can move - i.e. the Declaration and the Supreme Court, with some provinces being referred to ~~in the Declaration~~ as entrenched and others being able to opt-in later;

PM chooses this

(6) A comprehensive document published and perhaps tabled, on which no action would be taken for implementation; it would be presented as a report of the progress on renewal of the constitution.

B.L. Strayer

Encl.

c.c. - Honourable Marc Lalonde
- Honourable O.E. Lang
- Honourable J. Reid
- Mr. R.G. Robertson
- Mr. R. Tassé
- Mr. F.E. Gibson
- Miss E. MacDonald
- Mr. Fred Jordan
- Mr. N. Gwyn