


SECRET

January 28, 1981

MEMORANDUM FOR EDDY ✓GOLDENBERG AND JOYCE FAIRBAIRN

Attached for your information is a copy of a briefing note on the subject of the Constitution.


Andrew Watt

AW/dc

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Business of the House

Constitution: Progress in Committee

The argument over the Committee's apparent reversal on the property rights question set back the work of the Committee considerably. It is not yet clear whether the Conservatives will try to delay the progress of clause-by-clause; Svend Robinson of the NDP is in fact taking up most of the time now. If progress is too slow, the government members will try to introduce all their amendments at once. It still seems possible that a report will be made on time, but there is a serious chance that it will not. This would not necessarily be a major drawback, since it would eliminate the possibility of demands that the committee report be debated. The Government might well win the public arguments as to who caused the failure of the Committee.

Constitution: Parliamentary Considerations

There are a number of issues relating to the consideration of the Address by Parliament which require discussion and, if possible, decision. Decisions could wait until next Tuesday's Priorities and Planning meeting, but it would be preferable if possible that agreement in principle be reached today; definite action one way or another will be necessary next Friday, and Mr. Pinard should be in a position to know how the Government is going to proceed as soon as possible. We can expect that questions as to the Government's intentions will begin very soon, in Parliament, in the Joint Committee, and in the press.

1) Procedure at the Third Stage

The Joint Committee will either produce a report recommending an Address totally acceptable to the Government, or it will not. If it does not recommend an Address acceptable to the Government, the only real option is for the Government to introduce a new motion asking Parliament to approve the desired Address; because it is so difficult to amend a committee report, the Government can only proceed by way of a motion to concur if it is prepared to accept the Address recommended by the Committee.

Should the Committee recommend an acceptable Address, the Government has two basic options: seek concurrence in the Committee Report, or introduce a motion for the presentation of the Address recommended by the Committee. (A third option, and the preferred one for a variety of reasons, would be to obtain the unanimous consent of the House to treat the Address recommended by the Committee as a Bill. We assume from the attitude of the Conservatives that they will never agree.)

The characteristics of each way of proceeding are as follows:

(a) Concurrence

- no limit on length of debate or number of amendments that can be proposed
- amendments to the Address can only be made by the House of Commons by amending the motion to concur so as to revive the Committee (with the concurrence of the Senate) and have it report back again
- the Address is not directly before the House
- there is a possibility that the Speaker would rule out of order certain amendments made by the Committee as being beyond the Committee's terms of reference; if so, it might not be possible to proceed with the motion to concur
- it will be argued that concurrence by both Houses is not sufficient authority to present an Address to the Queen; this would at the least cause delays and added controversy in Canada, and could be used in Britain as an excuse for delaying action on the Address.

(b) Direct Motion

- no limit on length of debate or number of amendments that can be proposed
- amendments can be made directly by each House

- amendments to early clauses take precedence over amendments to later clauses
- there could be arguments made that the question contains distinct propositions and so should be split into its constituent parts so that each part can be debated and voted on separately
- the Address is directly before each House, and there is therefore no doubt that approval of the motion is authority to present the Address
- there is a possibility of procedural arguments against moving the motion before debating the committee report.

Our conclusion is that there seems to be no clear advantage, either in terms of the time involved or the ease of avoiding votes on amendments, in seeking concurrence in the committee report. Whichever method is chosen, it will be impossible to avoid votes on amendments, e.g. on the question of imposing S.133 on other provinces. From previous discussions, Ministers may have the mistaken impression that proceeding by way of concurrence avoids the possibility of amendments; it is important that they understand a motion to concur is amendable.

Moving directly with a motion for an Address would avoid arguments over the procedure for amending committee reports and would also leave no doubt as to whether Parliament had actually approved the Address.

The major drawbacks to moving a resolution directly are:

- (a) It could appear to leave the committee report in limbo. This may raise some procedural problems which will require careful handling, but will not be a significant point if the Government's motion proposes an Address identical to that recommended by the Committee. It would be helpful, though, if the Committee itself were to recommend that the Government introduce a motion for the presentation of an Address.
- (b) If a direct resolution is introduced, it will be easier for the opposition to present its amendments in such a way that only the first few clauses have been discussed before the Government is forced to use closure; the result could be to make it look as if Parliament had been prevented from studying the remaining clauses. This possibility exists during debate on a motion to concur as well, since it is open to the opposition to concentrate their amendments on the early clauses of the Address. Mr. MacEachen feels strongly that this is a more serious possibility with a direct resolution; moreover, he is quite concerned about the possibility that the Speaker could be persuaded to divide the question into its constituent parts, as was done in the flag debate in 1964, in order to allow the House to express a separate opinion on each one. This could be fatal, since a separate debate would have to take place on each part of the divided question, and closure used separately each time. There is, however, no precedent for the use of the Speaker's power to divide the question on a motion to present an Address to the Queen, and the weight of argument seems to be against its use in this case. Mr. Pinard

is preparing arguments as to why the resolution should not be divided; e.g. there are no contradictory clauses, the provisions all relate to one subject (the Constitution), the main question is whether or not an Address should be presented, and members have an opportunity to move amendments to clauses which they oppose.

There are similarly disadvantages to proceeding by way of a motion to concur:

- (a) It may be that if the Opposition raised the point the Speaker could rule the Committee Report out of order because it contained amendments which went beyond its terms of reference (e.g. the NDP resources clause). If this happened, the Government would either have to move that the report be referred back to the Committee to delete the offending clause, or introduce a resolution directly. The political advantages of being forced to proceed in the latter way could be considerable, of course: not only would the Opposition be seen to be opposing the resources amendment, but also the Government would have been provided with an excuse for not debating the Committee Report.
- (b) The opposition might be able to convince people that amendments to a committee report are well-nigh impossible because of the complex procedure involved. The Government might therefore be seen as trying to avoid debate. The length and intensity of the Committee study of the resolution may provide a good answer to this, though. (Up to January 9, 107 M.P.'s and 47 Senators had participated in the proceedings of the Committee.)

- (c) The Opposition (and some Liberal Senators such as Senator McIlraith), have argued that concurrence in the Committee Report would not be sufficient to allow the Queen to act. From a logical point of view, the concurrence of both Houses in a recommendation that an Address be presented would seem to be a clear expression of the will of Parliament; moreover, there is no clear requirement that a formal Address be sent to the Queen at all. However, even though the British Government (or Parliament) should not look behind the request of Canada, if there were any disposition on the part of the British to seek excuses for delay the fact that the Address had never been directly approved by the two Canadian Houses of Parliament could provide such an excuse.

There is one precedent (the 1915 Senate amendment) for an Address based in part on concurrence in a committee report. In that case, the resolution was referred to a Committee of the Whole in the House of Commons and the Committee's report was concurred in, whereupon the concurrence of the Senate in the Joint Address was sought and obtained. This is not a very strong precedent, and we may be sure that the Opposition will continue to claim very strongly that concurrence alone is not authority to present an Address.

In summary, both choices have dangers. The crucial questions are:

- (a) how real the possibility is that the Speaker would divide the question if a direct resolution were introduced;

- (b) whether proceeding by way of concurrence would cause delays in the U.K. and draw charges of unfairness; and
- (c) what the attitude of the NDP is.

On the last point, Mr. Pinard is trying to speak to Stanley Knowles before Cabinet meets.

2) Strategy for Debate

Whichever procedural method is chosen, consideration will have to be given soon to the fundamental strategy for the debate in Parliament. In particular, it will be necessary to decide whether to engage the Conservatives on their ground, i.e. the legitimacy of the Government's action, or to attempt to focus the debate on the substance of what is to go in the Address. The Conservatives have already strayed from their chosen path of opposing amendments "made in the U.K.", by proposing changes to the Charter in committee. Careful negotiation might tempt them to continue to propose substantive amendments in the House, and this could be to the Government's advantage.

The choice of procedure is relevant here: it is more likely that substantive amendments will be proposed by the opposition if the debate is on a resolution for an Address than if it were on a motion to concur. This will have to be weighed against the possibility that the opposition could drag out the former debate and make closure harder to justify, and the possibility that the Speaker might divide the question.

3) Timing

You may want to raise with Ministers four aspects of the timing of the debate:

(a) Length of the debate

Ministers will want to consider how many days the debate should be allowed to continue. They may want to consider that:

- the resolution has not yet been debated directly by the House
- there are other urgent and important measures
- there is pressure to deal with the economy
- time allocation is not possible, since there is no Bill
- the use of S.O. 33 will be very controversial and could affect the time required to deal with other legislation.

It will be essential, if the debate is to be cut short at some point, that steps be taken from the very beginning to set the stage for closure. Mr. Pinard will be giving some thought to this.

(b) Should the debate take precedence over all other government business?

The income tax legislation (Bill C-54) may not have been passed by February 9. There will be political pressure to pass the Bill by the beginning of March, because a large number of individual tax refunds cannot be processed until the Bill become law. The Borrowing Authority will have to be passed by April 1. Both Bills are controversial.

It might be useful to broach the question of whether the constitution should be debated continuously from February 9 until its final approval or whether the debate should be interrupted from time to time to deal with budgetary measures. Mr. Kirby strongly favours debating it continuously in order to dispose of it as quickly as possible. Mr. Pinard, on the other hand, thinks the number of weeks spent by the House on the constitution are more important in the public's eye than the number of days, and he would therefore prefer that some time be allowed during the constitutional debate for opposition days, debate on the two Bills mentioned above, and possibly debate of other urgent measures such as the Canada Post Corporation Bill.

(c) Calendar

If the debate on the third stage began on February 9 (the earliest possible date), and proceeded continuously for a total of 20 sitting days (for example), the Address would be approved by the House on March 6. Quite apart from possible interruptions for other government business, however, there will probably have to be at least 3 allotted days in that period, which means that the constitutional debate would take up all the government time between February 9 and March 12.

(d) Should the debate go on concurrently in the Senate?

Whether the Government proceeds by way of concurrence or by moving a resolution directly, it has the choice of delaying the Senate debate until after the House of Commons debate has finished. The time difference will be minimal, since it is unlikely the Senate would spend more than two weeks on it, particularly if the Government took advantage of the Senate Rules to force long sittings and full weeks.

A concurrent debate would be somewhat harder to manage, and there might therefore be more risk that the Senate would vote to amend the Address. On the other hand, there will be considerable pressure within the Senate for an early debate; if the Government decided to proceed with a direct resolution, there would be a serious risk that while the debate was going on in the House, some Senator would move concurrence in the Committee Report. On the whole, if party discipline can be guaranteed a concurrent debate is safer.

A final decision on this question can await resolution of the issue of amending the Address insofar as it affects the role of the Senate. The Senate's willingness to approve the Address quickly may depend very much on what amendments are made in this regard.

(e) Tactics

It has been suggested that to set the stage for a limited debate in the House, the Government should propose a schedule for the debate, including extended hours and extra sittings. Such a move seems useful, but Ministers may want to consider whether proposing it before February 6 could affect the work of the Committee at a crucial stage, and whether the proposal would be seen as a signal that closure is to be imposed.

Another question is whether the Government should inform the opposition parties of how it intends to proceed. The risk of allowing the Opposition to prepare counter-tactics must be weighed against the chances of obtaining an understanding as to how the third stage will proceed. The Government should also make efforts as early as possible to justify its choice of procedure to the press and the public.

Summary

The choices are between moving concurrence in the Committee Report (if the Report is acceptable) and introducing a new resolution. The issues are very difficult and decisions will turn on Ministers' sense of how the debate would proceed, and what the political effects of imposing closure would be, in each case.

A decision on at least the choice of procedure should be made at Cabinet if possible, as well as on the question of whether Mr. Pinard should approach the opposition.

Watt

ANNEX A

Amendments to a Committee Report

When a motion to concur in a committee report is before the House, an amendment can be put which would have the effect of referring the report back to the committee with instructions to the committee to amend the report in a particular way (Beauchesne 652, 660). If the amendment to the motion to concur is adopted by the House, the committee would then reconsider its report, amend it and report back to the House. Another motion to concur would then have to be moved if concurrence were still desired.

The form of the motion to amend is as follows:

"that the Report be not now concurred in but that it be recommitted to the Committee with instructions to"

In the case of a special committee, it may be necessary to add the words "and that the committee be revived for this purpose", because a special committee may cease to exist when it submits its final report (the precedents are mixed).

There is no limit to the number of amendments which can be proposed to a motion to concur, but only one amendment and one sub-amendment would be considered at a time. Each amendment is debatable in the same way as the main motion; i.e., every member can speak once for forty minutes.

In the case of a special joint committee, the concurrence of the other House would be necessary to revive the committee and to give it its instructions. It is not clear what would happen if the second House had already concurred in the committee report.

Watt