Mr.Strayer
Mr.Carter
Mr.Gwyn
Mr.Tellier
Mr.Massé

CONFIDENTIAL

February 28th, 1979.

MEMORANDUM FOR MR. TASSE:

Probable Parliamentary action on the constitution

As you know, Barry Strayer did a memorandum for the Prime Minister, dated February 14th, which sent to him copies in English and in French of the draft "Successor to Bill C-60". The Prime Minister discussed with me, on February 26th, the plans that he presently has in mind with regard to Parliamentary action.

In view of the likelihood of an early dissolution of Parliament, the Prime Minister does not plan to have the "successor bill" introduced at this session. He has gone over the draft and his final comment to me was that "it is very useful and in accordance with our discussion should be stockpiled". It will be a matter for further attention and action depending on the outcome of the forthcoming election and the plans that seem desirable thereafter.

Subject to all the uncertainties that there have to be in the present circumstances, the Prime Minister's thinking is that it may well be desirable, after the election and after a further conference of First Ministers, to move first to action on a Joint Address in Parliament. The Prime Minister has in mind two considerations primarily. One is that it is unlikely that there will be complete agreement on the Senate or the Supreme Court - and perhaps not on many more of the subjects under discussion. In such circumstances, the "successor bill" could look pretty bare and unimpressive.

The other consideration is that the Prime Minister is concerned about the situation that will be produced if a Charter of Rights is purely and simply in federal legislation and if there is no entrenchment until all provinces have opted in or until an amending procedure receives unanimous consent. In the circumstances, therefore, he is attracted by the possibilities that there could be in option No.5 in Barry's memorandum, as referred to at the top of page 9. He is wondering whether the desirable course might not be to move by Joint Address on the Charter, on any items that have unanimous consent and on "patriation". The last would have to be on the basis that, for some period of time, amendment could only be by unanimous consent. During a defined period of time, there would be provision for any procedure of amendment that might be unanimously agreed upon. Following such unanimous agreement, there would have to be provision for a "fail-safe procedure" - possibly something along the lines of Mr.Lang's idea of unanimous consent plus a referendum.

None of this is firm and final at present, except the decision not to go ahead now with the successor bill. The Prime Minister does, however, want us to focus our work and thinking on a Joint Address that would, as indicated above, include entrenchment for the Charter of Rights. In moving to the Address, the Prime Minister's hope would be that one could have a number of provinces prepared to be locked in - especially on the language rights and, above all, on language of education. If the Address went through and were followed by legislation in the British Parliament, one would thus have, at a very early point, a Charter of Rights that would be binding on the federal government and on several provinces.

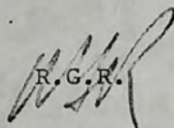
I think it will be desirable for us to get together in order to discuss this at a reasonably early point after you, Frank Carter and Barry are all back. The Prime Minister is most anxious that we should be in a position to put something to him at a fairly early point so that he can see more clearly all the pros and cons of this possible course.

The declaratory power

Barry's memorandum lists on page 2 the items in the successor bill that are based on the federal-provincial discussions. The Prime Minister said that, in reviewing these, the only one that concerns him among the positions taken by the federal government is the proposal with respect to the declaratory power. As he reflects on this, in the light of the problems that are increasingly being demonstrated with regard to energy and petroleum, he is worried about a situation in which future Parliaments would not have the constitutional capacity to move in the national interest in order to require, say, production to be carried on or to be increased from the tar sands if the national energy and oil situation is difficult and perhaps worsening. He is not satisfied in his own mind that it would be adequate to have power to act - if that is or would be available - in circumstances of emergency under the "POGG" power. The Prime Minister is accordingly wondering whether the clause limiting the declaratory power (page 21 of the draft) should not be prefaced by the words "except in cases of compelling national interest".

As an alternative to this, but a less desirable alternative, the Prime Minister raised the possibility of having a "fail-safe" amending procedure that would be based on the Toronto consensus but with no provision for unanimity in respect of resources. I told the Prime Minister that I thought that this latter would be utterly unacceptable to Alberta since it would then envisage the possibility of being totally deprived of property in or jurisdction over resources - or petroleum resources - if the interests of Parliament plus seven provinces loomed large enough. The Prime Minister accepts this point but he wants very concentrated attention to be given to this problem of the power of Parliament to act in the national interest if, as seems not at all unlikely, the energy problem could become extremely serious and a government of Alberta could see the provincial interest as being totally different from the national interest.

Perhaps we can all do some work and thinking on this problem - again with the objective of discussion at an early meeting.



R.G.R.