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July 18, 1980

MEMORANDUM FOR THE PRIME MINISTER

c.c. The Honourable Jean Chrétien
The Honourable John Roberts

Assessment of the Second Week of Constitutional
Discussions and Tactics for the Third Week

This memorandum is organized in the same way
as our 11 July 1980 note to you, namely:

- An overview and general assessment
- A review of the twelve items
- A concluding section summarizing the
situation and seeking your reaction and
guidance.

I. Overview and General Assessment

A. Mood of the Talks

Over the weekend the provinces had time to
study the federal position paper on Powers
Over the Economy and to review Mr. Chrétien's
positions as expressed in the first week.
They are now concerned that the federal
government might decide to move unilaterally
on Powers Over the Economy as well as in the
areas of rights and patriation. The overall federal

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position is now perceived by all the provinces, but particularly the four western provinces, Quebec and Newfoundland, as a very significant hardening of its position in February 1979. The provinces clearly had not anticipated this and consequently they are upset and somewhat disoriented.

Another thing which has upset the provinces is the way in which the federal government publicized its positions at the first week's meeting. Several provincial delegations reviewed press clippings on the constitution over the weekend. For example, even in places like Regina and Saskatoon the federal position has come through clearly and forcefully. While they expected a strong communications campaign from Quebec, they did not expect the federal government to mount a similar offensive and right now they feel that the federal government is doing a better job of getting its message across in their province than the provincial governments are doing in presenting their positions to their own people. This was particularly upsetting to Saskatchewan and resulted in a very emotional attack on the federal government by Mr. Romanow on Thursday.

These considerations, combined with the provincial perception in a number of the officials' committees (e.g., fisheries and communications) that the federal government is being unreasonable, inflexible and taking an unnecessarily hard line, has combined to further change the mood of the provinces. This hardening was also reflected in the positions which Mr. Chrétien and Mr. Roberts took on the issues of Offshore Resources, Resource Ownership and Interprovincial Trade and Powers Over the Economy at the Ministers' only meetings.

However, by Thursday, there were some signs that the provinces had adjusted in some measure, even if reluctantly, to the federal strategy and that some more profitable discussions might be possible.

On Resources and Powers Over the Economy, the provinces have been making a determined, but unsuccessful effort to keep these two items separate. There is now an acceptance that the only way in which these issues will be discussed is in conjunction with one another, as is evidenced by the striking of a single committee to examine both issues. It should be noted, however, that the federal insistence on linking these two items has resulted in emotional exchanges at both ministerial and officials meetings, as the provinces (especially Alberta and Saskatchewan) realized that progress on the resources items would be achieved only after progress had been made on the powers over the economy issue.

There may well be a basic difference of principle between the federal government and the provinces as to whether the national economy transcends, or is simply an aggregation of, the regional economies. Certainly, there are some signs that the cleavage in outlook runs as deep as this. Alberta and Saskatchewan in particular want to control the terms on which their resources are sold outside the province. In effect, the Western provinces appear to believe that the national economy consists of a series of regional economies and that the provinces themselves should control these regional economies. This is a fundamentally different view of Canada from that held by the federal government and Ontario and may well be the underlying cause of the concern and resentment which the provinces have towards the federal economic proposals.

As part of our strategy for next week, we will start to emphasize our view of the country publicly as well as privately to show that we do have a view of Canada which is of value to all Canadians from all regions. In particular, we must stress that if Canada's national economy is crippled, it will be impossible for the country to resist north-south pressures. Canada will no longer survive if it is nothing more than a series of regional economies.

On the other hand, however, one must note the following facts:

- i) both the federal and provincial governments accept the principle of a Canadian economic union. Certainly, no province wants to be forced to attack it directly;
- ii) both the federal and provincial governments accept the view that in a federal system some limitation on the full sweep of an economic union is needed. All the federal government statements acknowledge this point.

From this point of view, the conflict may be more one of degree -- of where you draw the line -- than it is a conflict of principle. That, however, remains to be determined.

It is evident that, whatever one concludes about the question of principle, one can explain a good deal of the provincial reaction by referring to the following points:

- The provinces were not expecting an aggressive federal initiative in the economic powers area.
- The provinces tacitly assumed that any shift in powers would be in one direction -- toward them. They are startled to find that the game is tougher than that.
- Because the provinces are not sure of the full significance of the federal proposal on Powers Over the Economy, they are suspicious of it.
- Some provinces have chosen, not to contest the basic principles of the federal position, but rather to question the federal government's claim that balkanization has gone so far that something must be done, and to question the underlying assumption of the federal government's position, namely that it requires powers which it does not now have to manage the national economy in the national interest.

- In the intergovernmental struggle for power, the federal government has simultaneously shifted the ground and upped the stakes.
- More speculatively, the provinces may sense some shift in public opinion against them. There is no question that they recognize that Ottawa has selected an eminently politically saleable position on which to stand. (E.g., see Annex I attached.)

Mr. Romanow's comments, in his Tuesday afternoon press conference statement and in his intemperate press release on Thursday (Annex II) exemplify provincial reaction to the economic-powers issue. In commenting on the federal position on Powers Over the Economy he said that he flatly rejected the basic assumption of the paper which was that the federal government needs more power to manage the national economy in the national interest. He said that he was "very, very nervous" about federal initiatives in the economic powers area. He said further that the federal proposals would lead to "no provincial government involvement in managing their provincial economy" and this position was causing "a considerable amount of anxiety among himself and his provincial colleagues".

More importantly, however, he went on to argue that even if one accepted the premise that provincial governments were instituting barriers to trade, as suggested in the federal paper, this was "a price of federalism". In other words, he suggests that, even if the assumption of the federal government's paper is correct, provincial barriers are an economic cost we have to live with precisely because we are a federation. (On the other hand, he rarely if ever mentions the need to maximize the benefits of federalism.)

Mr. Romanow also said that the basic difference between the federal and provincial governments, particularly the resource-producing provinces, was that, whereas the provinces want to limit the trade and commerce power in the resource area, the federal government wants to expand the trade and commerce power to include the movement of services and capital. This was a fundamental, and, if the federal government does not change its mind, irreconcilable, difference between the federal government and the provinces and, he implied, could lead to the break up of the constitutional talks.

The statement tabled by Mr. Romanow on Thursday, as delegate from Saskatchewan, contains many errors of fact and errors in law. He describes himself as being "terrified" by the proposals and characterizes them as "overkill". It is fair to say that his provincial colleagues found this démarche somewhat embarrassing. In the press conference at the end of the day, Mr. Romanow backed away from the extreme positions he had taken, with evident embarrassment. Mr. Chrétien, as a result, appeared as the apostle of sweet reason and honourable compromise.

By way of conclusion to this section, I might make the following points.

- 1) All the provinces clearly understand that the federal government is not prepared to bargain rights against powers. However, this does not preclude their holding out agreement on the People's Package items until they see what is achieved on the other items. The debate is now moving into a give and take between Powers Over the Economy, Resources and Offshore Resources.

- 2) No province except Ontario (and Manitoba, which is at least in part taking a conservative, free market position) is prepared to accept the underlying assumption of the federal paper, namely that there is a problem with the economic union as it now exists. Ontario thinks that the federal government needs more power. Newfoundland has indicated a willingness to move towards the federal position, hoping for federal generosity on offshore resources and fisheries.
- 3) Saskatchewan sees the provinces as being in a "no win" position. If there is wide agreement on a majority of items, such as seven or more provinces agreeing on seven or more items, the Government of Canada will proceed on the ground of consensus. On the other hand, if there is a minimum of agreement upon very few items, the Government of Canada will proceed on the ground that consultation has failed, and that the achievement of a negotiated settlement has been shown to be impossible. It is probably for this reason that Saskatchewan, supported by Alberta, would like to see the package of twelve items accepted or rejected in toto by First Ministers in September. Assuming rejection in toto, the argument would then be that the Government of Canada would find it hard to move in a totally isolated position.
- 4) Some provinces are trying to organize a major communications offensive during the Premiers' conference in Winnipeg. We are working up a strategy to counteract this when it occurs.
- 5) Once again the federal government was hammered very badly on the offshore resources issue. The provinces, including Ontario, are unanimously opposed to the federal position. They all believe that offshore resources should be treated the same way as onshore resources.

- 6) Saskatchewan agrees that there is some national role in resources, but insists on provincial ownership and, in effect, provincial primacy. How to resolve the conflict between provincial ownership and the national interest is an issue with which none of the resource producing provinces, including Saskatchewan, has come to grips. It seems likely, however, that in view of the tough position which has been taken by the federal government, Saskatchewan would now accept the best efforts draft as the final resolution of the resources issue.

B. How well is the Government of Canada's strategy working?

Our broad five-point strategy summarized in last week's memo continues to serve us well.

- With few, if any, exceptions, provinces now accept the distinction between the People's Package and the package for the governments.
- With regard to the deadline, provinces generally accept it for the People's Package and further are beginning to wonder if the Government of Canada does not intend to have the deadline apply more broadly, in particular to move unilaterally on powers over the economy.
- There is a wide, if grudging, acceptance that the Government of Canada will not bargain powers against rights.
- "Give and take" is now widely conceded as a principle for those issues composing the package of powers for governments, although specific results as yet are few for either side.
- Establishment of the central linkage between resources and powers over the economy has been achieved, as is evidenced by the establishment of one committee to deal with both and by the emotional debate on this point on Thursday afternoon.

The provinces appear to accept privately that the Government of Canada is winning this round of negotiations. Intelligence reaching us suggests that they have not conceded the outcome, but rather believe that the Government of Canada will find it difficult to maintain its momentum and initiative through the third week. This means that we should maintain relentless pressure on the provinces.

In the two weeks of negotiations now ending we have conceded nothing strategically. Indeed we have gained important strategic ground by the major focus on powers over the economy. The provinces had expected that our only sticking point would be the people's package. They now realize that we are equally firm on the powers issue. This has helped us to keep the discussions on our grounds, within our strategy and to our schedule.

C. The People's Package

Although the concentration in Toronto was on powers over the economy, a full day was spent in ministerial discussion of the People's Package. Provinces showed little disposition to move rapidly or effectively in this area. This may have been due in part to their reaction when our position on powers over the economy was made clear, and in part to their unwillingness to show any give on the People's Package until they have gained as much as possible on resources.

We did, however, manage to have committees established in all three People's Package areas.

One of our key objectives in the third week will be to have another ministerial discussion of aspects of the People's Package. Among other things, this will enable us to highlight the package in press conferences and press briefings. Mr. Morin has particularly asked to have a discussion of principles in Vancouver, and this was accepted by Ministers.

II. A Review of the Twelve Items

This part of the memorandum reviews the items under the 3 categories used in the memorandum of July 11.

(a) People's Package

Charter of Rights
Patriation
Principles

(b) Items where there is likely to be agreement by 7 or more provinces plus the federal government

Equalization
Supreme Court
Family Law
Fisheries

(c) Tough items from the federal point of view

Resources
Offshore Resources
Powers over the Economy
Communications
Senate

A. People's Package

(i) Charter of Rights

In private ministerial discussions on July 16, New Brunswick and Ontario supported entrenchment of the Charter. Ontario's support is limited to certain categories of rights. Newfoundland also continued to support entrenchment, but this support is not unconnected to its receiving certain powers from the federal government (offshore resources and fisheries). Quebec may be persuaded to accept entrenchment of fundamental freedoms and democratic rights and some well-established rights. Other provinces generally opposed entrenchment, with Nova Scotia and P.E.I. preferring to defer further discussion of the Charter until offshore issues are settled.

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With respect to language rights, most provincial Ministers remained silent. Alberta indicated it will not accept entrenchment; Manitoba and P.E.I. felt that language rights should be dealt with as a separate issue, outside the Charter, possibly as an amendment to Section 133.

In sum, at this point there is very little provincial support for entrenching a Charter. The mood of the discussions was rather negative, with the exception of New Brunswick, Newfoundland and Ontario. Nevertheless, it may yet be possible to convince several more provinces to accept the Charter with the limited basic rights (fundamental freedoms, democratic and some legal rights) and possibly even some of the others, provided there is an override ("notwithstanding") clause (an approach many provinces seem to favour if there is a Charter).

Putting aside for the moment further debate on the principle of entrenchment, Ministers agreed to establish a committee of officials (which has not yet met) with the following mandate:

- (1) Study the federal draft with a view to clarifying the language.
- (2) Examine the impact the entrenched rights would have on provincial legislative powers.
- (3) Examine the legal implications and practical impact of the proposed legal rights.
- (4) Consider the possibility of entrenching the Canadian Bill of Rights (the Diefenbaker Bill), rather than the proposed Charter.
- (5) Consider the possibility of entrenching the Charter of Rights at the federal level only, thus giving the provinces the opportunity to assess the impact of entrenchment.
- (6) Review the practicalities of including an override clause in the Charter.

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(ii) Patriation and Amending Formula

Ministers discussed this item on July 16 with all governments participating. There appeared to be little support for the "Toronto consensus" or "Victoria", but a surprising amount of provincial interest in Alberta's mathematical plus "opting out" proposal. B.C. strongly opposed the idea, only in part because it is not based on a regional approach. Quebec seemed interested and said it would continue to discuss the item even though it maintains that this should be one of the last items dealt with in the revision process.

Officials were instructed to prepare constitutional drafts based on both the Alberta and B.C. amending proposals, as well as one on legislative delegation, which has attracted much explicit support from provinces and which none has opposed.

Only a short meeting of officials was possible on July 17, but it was sufficient to bring out some of the major problems with Alberta's proposal. Its formula provides that amendments would be effected if agreed to by Parliament and by 2/3 (i.e. seven) of the provinces representing over 50% of the population. Some amendments would be binding on all provinces. However, amendments which "affected":

- (a) the powers of the legislature of a province to make laws,
- (b) the rights or privileges granted or secured by the Constitution of Canada to the legislature or the government of a province,
- (c) the assets or property of a province, or
- (d) the natural resources of a province

would only be binding in provinces that had supported the amendment - the remaining 1, 2 or 3 provinces (out of 10) would continue to act as though the amendment had not been made since it would not apply to them. More than anything else the formula reflects the Alberta government's profound distrust of the Canadian majority and "central Canada".

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Despite wide ministerial interest, and though several governments did not speak when officials met, only Newfoundland supported the proposal. The major criticisms came from B.C. and P.E.I. who focussed on the "checker board" on top of "checker board" effect which would result in time; and on the lack of practicality in the scheme. Federal representatives, while taking no position, raised questions about the "special statuses" that would multiply, especially because opting out could occur whenever a legislature might gain or lose legislative power as a result of an amendment. We wondered about the double disadvantage in which some legislatures of successor governments could be placed: those provinces which had opted out originally might not be able to change their minds later, when governments changed. If amendment of the constitution required that all legislatures were bound, successor governments should obviously also be bound. However, where (as with Alberta's formula) diversity is expressly permitted for dissenting provinces it seemed inequitable to bind successor governments. We did not, however, mention the fail-safe element in the formula - that Parliament's consent is required for any change.

There was no opportunity to discuss B.C.'s proposal, which is basically "Victoria", but applied to 5 rather than 4 regions and expressed by legislatures or by votes in a new Senate.

(iii) Principles/Preamble

All 10 provinces joined us in drawing up a list of subjects which would be used in drafting a preamble or statement of aims of a new Constitution. Listing of the items was carried out on the basis that it involved no commitment by any participant. No government could subscribe to the full list. Many of the items listed could, however, be acceptable in principle to most provinces once they come to terms with the idea of a preamble.

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It now appears that at least 4 provinces are preparing preambles or equivalent statements: Saskatchewan, Quebec, B.C. and Ontario (which circulated an officials' re-draft of its 1971 preamble). At the request of Quebec there will be a private ministerial meeting on this subject next week.

We are carrying on informal, bilateral discussions with a few, selected provincial officials and plan one more short meeting with all provinces next week. At this stage, we foresee little prospect of a cooperative drafting effort involving several provinces. As already envisaged, we will be drafting the preamble of a joint address, and expect to have something for you to consider by August 18.

B. Items where there is likely to be agreement by 7 or more provinces plus the federal government

(i) Equalization

There is nothing new to report on this item. The position remains as it was last week, i.e., nine provinces and the federal government in agreement on the substance of the best efforts draft as modified by Quebec; British Columbia still questions the need to entrench a particular system in the Constitution.

(ii) Supreme Court

The most significant development with respect to discussion on the Supreme Court is the growing support for reflecting in the composition of the Court the duality that arises from our two systems of law. As many as six provinces have indicated their support for a Manitoba proposal which was put forward as a reaction to Quebec's proposal for a 5-judge constitutional panel. Manitoba's proposal is that the Supreme Court be increased to 11 members, 5 of those members being civil law judges and 6 being common law judges.

A second major issue being discussed is whether Supreme Court judges should be appointed by the federal government after consultation with the appropriate provincial Attorney-General or only after agreement has been reached.

Ministers will review this item on Tuesday morning in Vancouver.

(iii) Family Law

Discussions among officials went reasonably well, although Manitoba and P.E.I., firmly opposed the concept of concurrent powers in respect of divorce grounds. There was recognition of the need to improve the system of enforcement of maintenance and custody orders. In this regard, officials explored the possibility of a constitutional provision that would give all such orders full legal effect across Canada.

Consideration was also given to a federal proposal to retain exclusive jurisdiction over the recognition of nullity decrees (similar to the best efforts draft on divorce recognition). Discussion on these two proposed changes in the proposals will be continued by officials in Vancouver, with a reasonable chance of reaching agreement, provided a number of difficult practical issues can be resolved. Manitoba will likely hold out against concurrency on divorce grounds, but favourable consideration of their concerns over enforcement of orders may assist in softening their position somewhat.

(iv) Fisheries

Some progress was made on specific aspects of this item: inland fisheries, aquaculture and certain inshore species such as clams and oysters. There is a provincial consensus that there should be, in general, exclusive provincial jurisdiction in these areas. The federal response was that such a transfer could be considered with specified exceptions, most importantly with respect to salmon.

Coastal fisheries remains a contentious area. The federal position is to retain exclusive jurisdiction, perhaps with an improved mechanism for consultation, but that we would consider a "broad consensus" proposal from the provinces. Most of the provinces want some form of concurrent jurisdiction, with the important exception of Nova Scotia which seems to prefer the status quo constitutionally, with better consultation.

Ministers agreed that a draft would be prepared in the areas of tentative agreement such as inland fisheries. In addition, it was agreed that a "best efforts draft" would be prepared with respect to the coastal fisheries, setting out options if necessary.

C. Tough items from the Federal Point of View

(i) Resource Ownership and Interprovincial Trade

This item was briefly discussed during the opening "round" at Montreal. It was debated subsequently at a private meeting of Ministers in a context, however, which saw the main attention given to the separate item on Offshore Resources. By the close of the Montreal discussions, the provinces had been told that the federal government was not prepared to support those important sections of the 1979 Best Efforts Draft which provided for provincial concurrency in trade and commerce in resources and a limit (to situations of compelling national interest) on federal power over interprovincial trade. They had also been told that there was no federal support, either, for the 1979 draft on the declaratory power.

The full impact of these "withdrawals" by the federal government took time to "sink in", and was probably appreciated fully only when it was made clear, at Toronto, that no easing of the federal position should be expected until provinces moved on matters of federal interest, particularly on Powers Over the Economy. The federal stand on Resources has not been directly discussed by Ministers at Toronto, but has been attacked strongly in other discussions on various occasions, particularly in talks about the economy. In the meantime, with the blessing of Ministers, an officials committee covering both Resource Ownership and Powers Over the Economy is slated to continue work in Vancouver, concentrating on the Economy first.

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(ii) Offshore Resources

The positions of the provinces can be summarized as follows:

- they believe that, in principle, offshore resources should be treated like onshore resources, although Manitoba, Ontario and New Brunswick are not all that committed to the principle;
- New Brunswick appears to have some sympathy for administrative arrangements;
- Ontario and Manitoba have no strong views.

While several provinces feel that it is not appropriate for the CCMC to be discussing administrative arrangements, Mr. Chrétien was able to get provincial agreement to further work by officials on such an approach as well as on aspects of a concurrent jurisdiction approach. To induce provinces to explore the administrative route, it was necessary for him to indicate a federal willingness to consider arrangements involving a more generous provincial share of resource revenues than that currently in place for the Maritime provinces. However Mr. Chrétien continued to express his view that, at some level of wealth, the provincial share of revenues should be "capped" with the major portion of revenues then flowing to the federal treasury.

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(iii) Powers Over the Economy

There is no doubt that the federal position on Powers Over the Economy dominated the Conference this week. Last week the provinces seemed to be put off balance because they did not anticipate the federal position on this item. This week the provinces were shocked that our position is as firm as it is and much to their dismay, they discovered that we will not bargain other economic issues until we get satisfaction on the economic union. Our press release this week on possible legislative drafts for safeguarding the Canadian economic union is attached (Annex III).

The provincial reaction can be summarized as follows: Ontario is strongly in favour of our proposal without accepting all of the details; Newfoundland and Nova Scotia are very sympathetic as long as they can be assured that the proposals will not hurt the disadvantaged areas of Canada; Prince Edward Island will come along without too much difficulty; New Brunswick is opposed but does not know why; Quebec sees this as a federal power grab; but while it will remain opposed, it is very embarrassed to have to argue against the concept it put forward in its White Paper; Manitoba does not seem to understand the issue, but may very well be persuaded to agree to the principle we have put forward; British Columbia appears to agree with the basic principle but is concerned about how it will impinge on provincial rights. British Columbia may agree with us if we can satisfy some technical concerns.

Alberta and Saskatchewan are caught in a dilemma. They recognize and are angry about the linkage between this item and Resources. They are not really arguing against the principle of an economic union; rather, they are arguing that there is nothing really wrong with the operation of the economic union at the present time and that, therefore, constitutional reform is unnecessary, and appears merely to be a federal power grab.

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Alberta and Saskatchewan are negative partly because of their concept of Canada, but also because of our position on resources and because of the linkage we have made between Resources and Powers Over the Economy. How they will come out in the end will depend upon whether their interest in federal concessions on resources outweighs their principles about the type of country they want.

It may very well be that next week there will be major movement in the direction of the federal position if we give some indication that this will lead to some compromise on resources.

(iv) Communications

Ministers decided in Montreal that officials should discuss specific issues in the light of national goals. Officials in Toronto proceeded to discuss the following:

(a) Radio Frequency Spectrum

Provincial officials have recommended that this area remain one of exclusive federal jurisdiction but they insisted on the right for provinces to participate in policy dimensions of spectrum assignment decisions. Quebec has asked for jurisdiction over frequency assignments.

(b) Telecommunications Carriers

Provincial officials have agreed that there is a national dimension to interprovincial telecommunications carriage, but they will not agree to a discussion of the federal position of exclusive federal jurisdiction over interprovincial telecommunications. They are willing to discuss options that would set out the constitutional role of both levels of government on the condition that we drop our position on federal "exclusivity" in the area of interprovincial activities.

(c) Broadcasting

To date federal officials have offered no change regarding present federal jurisdiction. Provinces now demand, as a condition to continuing discussions, an assurance that they will receive some jurisdiction on broadcasting in areas of local broadcasting, including advertising, educational matters and programming. Provinces challenge the federal position that there must be a single, integrated, interdependent broadcasting system based on federal exclusivity.

(d) Cable

Provinces, while acknowledging the federal offer of concurrency set out in February 1979, have retreated from accepting that position because they say the federal powers as explained in Toronto in November 1979 are more extensive than they thought earlier. Provinces now seek assurances that the role they demand in broadcasting extends to cable.

Federal officials did not have the mandate to give them this assurance. They have, however, agreed to review the paramountcy wording of the February draft with a view to taking into consideration specific provincial concerns in order to propose acceptable amendments while protecting fundamental federal concerns.

Ministers received the report of the Committee of Officials asking for guidance from Ministers on each of these four topics. Ministers have agreed to reflect on these issues and will review the matter in Vancouver before officials reconvene.

Provincial officials feel they have now heard fully the arguments presented to them by federal officials which pertain to the need to maintain a single broadcasting system. Although federal officials have indicated a willingness to listen and consider provincial proposals in this area, provincial officials are asking for some reassurance that the federal government is ready to consider the possibility of constitutional changes which will recognize a provincial role in local programming, before any further discussion takes place.

(v) Senate

A Committee of Officials on the Senate identified four "models" for the purposes of discussion: Model I, a "traditional" House of review, but with members appointed solely, primarily, or on a 50% basis by the provincial governments, but not subject to provincial government instruction; Model II, a "House", largely or solely controlled by provincial governments, that would be an institution for ratifying federal action on a limited list of specified matters of shared federal-provincial concern, but without an additional general power of legislative review; Model III, a "hybrid" House (e.g. B.C.'s proposal) that would combine the review function and the ratifying function in one body, but which would provide separate procedures for handling the two functions; and Model IV, the creation of two distinct bodies: a new Upper House with provincial appointments for the review function and an inter-governmental institution for the ratifying function.

The Committee proposed, in its report, to address itself to matters such as method of selection, representation and powers in Vancouver.

At the plenary session of Ministers on July 17, it became clear to Ministers that they would have to give further consideration to certain fundamental questions, such as the basic functions, composition and powers of a new Upper House. A ministerial discussion of this item is scheduled for Tuesday morning in Vancouver.

III. Future Strategic and Tactical Considerations

Our conclusion at the end of Week 2, then, is that the Government of Canada's strategy is working well. The federal government has successfully taken the offensive with an approach that so far has proven to be attractive and "explainable" in public. The provinces as a consequence are on the defensive.

The situation, however, is unstable, and it is unlikely that the federal government will be able to retain the initiative if it does not make some selected moves in the course of the third week. The first two weeks have permitted the federal government to establish its negotiating position and to structure the framework of discussion in the way best suited to advance its interests.

It seems to us that the moment has come when some signals should be given of a willingness to move from a tough negotiating position towards common ground, assuming there is reciprocal movement on the other side.

As you will see from a review of Part II of this note, we are now beyond the point where a generalized assertion of the principle of give-and-take will serve. If progress is to be made in Week 3, and if the federal government is to continue to preserve its position of strength, careful consideration needs to be given to precisely what signals might be given to the provinces. Thus it will be important to address the following questions as we move into the Vancouver sessions:

- What might the federal government indicate that it was willing to give?
- Conditional upon what reciprocal provincial movement?

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- When and how would it be most useful to transmit the appropriate signals?

All this raises some broader considerations with which we would like to conclude this memorandum. Week 3 can be regarded as the conclusion of the first round of intensive negotiations, or as the beginning of the period leading through the late August session to the First Ministers' Conference in September. It is clear that the latter perspective is the more appropriate fashion in which to approach the Vancouver discussions.

This being so, we should be bending our efforts to ensuring that we come out of the Vancouver meetings well set up for the month of August. On the assumption that it is in the interest of the federal government to have the process continue as expeditiously as possible, we should be seeking to establish a set of arrangements which will permit officials to cover as much ground as possible in anticipation of the Ottawa August 26-29 CCMC meeting. This argues for determining the lines along which inter-governmental consensus might be developed and the directions officials should move in working out problems prior to the August meeting. By the end of the week of July 28th, we will have prepared for you a further strategy paper reporting on the Vancouver meetings and outlining a strategy for the period through the September First Ministers' Conference.

It might be useful for us to develop a negotiating timetable which would carry us through to the end of the First Ministers' Conference. With respect to each period it could establish the tactical objectives of the federal government, the negotiating position of the federal government (elaborated with respect to specific items), the federal government's expectations vis-a-vis the provinces, the public relations plans of the federal government, etc.). The periods which I would identify for this sort of treatment are:

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| Week 3 | Vancouver |
| 28 July - 25 August | Interim period prior to final CCMC meeting. Energy pricing negotiations and Winnipeg Premiers' Conference intervene. Committee work to continue. |
| 26 - 29 August | CCMC |
| 30 August - 7 Sept. | Interim |
| 8 - 12 September | FMC |

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It is really in the light of this overall process, and in the light of federal government objectives leading up to the First Ministers' Conference, that one will be best able to determine the specific steps that it would be advisable to take at an earlier stage in the process. For example, if it is concluded that no major moves can be contemplated until the late August CCMC meeting, but that it is desirable to accomplish some necessary preparatory work during the August interim period, then one might plan to give in Vancouver some discreet indications of where federal government thinking is moving, without in any sense boxing the federal government in.

The point to recognize is that, in our judgement, if there is no sign of give on Ottawa's part in Week 3, then the meeting will end on a sour note and one will not be able to expect that much useful work at the officials level will be done in the intervening four weeks. It may be that this will prove to be consistent with overall federal strategy, as it is blocked out for the next 6 weeks, but we should not stumble into this situation unwittingly.

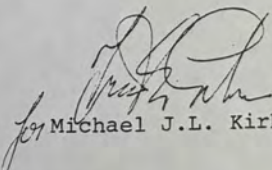
In our opinion, however, ending the Vancouver meeting in that way would be undesirable. The time has come when we should indicate privately to at least some of the provinces that we have fall-back positions on the two key issues of resources and off-shore resources and that we will move towards those positions if the provinces first move towards our positions on powers over the economy. For your information, but not for disclosure to the provinces at Vancouver, the fall-back positions in these two areas, as agreed to by EMR and contained in the draft cabinet memorandum of June 27th, are attached (Annex IV).

With regard to the other ten items, we intend to proceed as follows:

- i) On the Supreme Court: in the light of the constructive talks we have had to date we intend to move forward as follows:
 - a) To support the Manitoba proposal of an eleven-member court, with five judges being appointed from Quebec;

- b) To support the entrenchment in the constitution of the principle of alternate appointment of common law and civil law Chief Justices;
 - c) To accept the principle of fixed terms for Chief Justice-ships, probably of a seven year duration;
 - d) To agree to a requirement that appointment to the court by the federal government be with the consent of the appropriate provincial Attorney General, as was contemplated in the Victoria Charter and Bill C-60, but with a simpler mechanism to break a possible deadlock;
 - e) To agree that the provinces have the right to refer constitutional questions directly to the Supreme Court.
- ii) On another group of items (Economic Powers, Communications, Fisheries, Rights and Amending Formula), we will let the provinces know that we will give careful consideration to their concerns and suggestions between the Vancouver and Ottawa meetings.
 - iii) On the Senate, we will continue to stall, with no promises or hints of federal positions or proposals to come.
 - iv) On the remaining items (Family Law, Equalization and Preamble/Principles) there is no present need for hints of further movement on our part.

Perhaps these considerations might be pursued in more detail at our meeting on Monday.


for Michael J.L. Kirby