

URGENT

David

Comments
- we should have a
2 how meeting before
3 go away (Aug 6 - Aug 22)
on strategy otherwise the papers
may be way off base.
- suggest the group include
you, Eddie, Frank, me
plus interview also you want

*W/K
July 25/81*

CONFIDENTIAL

July 24, 1981

F. P. R. O. B. R. F. P.
Michael Kirby

MEMORANDUM TO MICHAEL J.L. KIRBY

JUL 24 1981

Paper on Post-Patriation
Constitutional Strategy

A revised paper on post-patriation constitutional strategy will be available around August 16. As we agreed, this paper might then be given to the Prime Minister for his August reading and circulated to the Coordinating Committee prior to Montebello on August 24-5. In the meantime, however, you might wish to see the main points of the paper in skeletal form and to provide me with your comments.

1. Following patriation, the federal government will have achieved two of its most important constitutional objectives: patriation itself and the entrenchment of the Charter.
2. The time following patriation can be divided into two periods: the interim period during which a permanent amending formula is sought and unanimity for constitutional change is required; and the period thereafter, when some form of permanent amending formula requiring less than unanimity is in place.
3. The Government will have at least two principal objectives during the interim period:
 - resolving the question of an amending formula, preferably without resort to a referendum, an objective which will require consideration by the Government of a number of options if it does not wish the Victoria formula to come into effect;

- ensuring that discussions with aboriginal peoples about constitutional change affecting them is "kept on the rails".

4. The Government has a third objective, the reform of central institutions, which could be pursued with governments during the interim period, which could be pursued with governments after the interim period, or which could be pursued by the Government of Canada and Parliament in an exploratory manner (such as through a Joint Committee of the Senate and House of Commons) during the interim period.

over a continuation of the first and 3rd options which is what I think I now favour

5. It seems clear that the Government of Canada believes that expectations respecting constitutional change, particularly in the area of powers, should be lowered after patriation and that the guiding principle for all future changes in the distribution of powers should be the notion of balance: for every power given to the provinces there should be a compensating gain, i.e., no net decentralization.

agree absolutely

If this is so, it may well require the federal government to reassess the positions it took last summer on powers items and to withdraw earlier offers.

agree almost certainly we will have to retreat

6. The Government will wish to prepare its approach to the provinces respecting the agenda for the Constitutional Conferences during the interim period with the following considerations in mind:

- A short agenda (restricted to the amending formula and aboriginal rights) would allow governments to concentrate their efforts on resolving the question of an amending formula and to increase the chances of finding agreement on something other than the Victoria formula, which is not the preferred option of the Prime Minister. It would also highlight the question of aboriginal rights, although this might be managed by developing a special process and timetable for the handling of native issues.

it is not clear that about agenda increases the chances of success in the amending formula negotiations. why do you say this?

general idea

But a linkage between the amending formula and the Senate might be a force they.

- A long agenda will disperse efforts and encourage linkage between different items, leading perhaps to an all-or-nothing package approach, which will lessen the chances for reaching agreement on the most critical item (i.e., the amending formula) and increase the chances of Victoria coming into effect by default.

We should discuss I am a long way from being convinced on this.

- As for the reform-of-central-institutions item, a long agenda would mean that it would begin to be discussed immediately, but with little prospect of progress until after the interim period is over, whereas a short agenda would mean that that item would be set aside temporarily (along with, for example, division-of-powers items in which the provinces are interested), with the possibility that the interim period could be shortened significantly.

7. Should the Government wish to make an effective argument in favour of the short agenda, two things appear necessary:

- the Government must be in a position to argue credibly that Victoria is not its preferred option and that it would be prepared to consider alternatives that might be more congenial to the provinces; and,
- the Government must give clear indication that the process of constitutional discussions will not come to an end with the expiry of the interim period. Since some provinces feel that there will be nothing left that the federal government wants, a formal commitment of some kind might be made to further constitutional discussion; in addition, continued federal-government interest might be conveyed by exploring, perhaps through a white paper or Joint Committee, the reform of central institutions outside the inter-governmental forum, a device that could also have the advantage of strengthening public participation in the discussion of constitutional change.