

S E C R E T

October 23, 1981

MEMORANDUM FOR MICHAEL KIRBY

First Ministers Meeting

The following are my views both on the structure of the meeting and on the content of our offers.

I. Structure

It seems to me to be advantageous for opening statements to be made in public. The Federal position was greatly enhanced on the first day of the September 1980 Conference when the Prime Minister first listened to all of the Premiers and then put forward his own position. I would recommend a similar process. This would force the Premiers to put a position on the table in public and it would soon be clear whether they really want a compromise. If you accept my recommendations in the second part of this note, the Prime Minister would be able to be flexible where necessary and tough where he should be tough.

II. Substance

In looking at the package, clearly there are areas where compromise is not necessary and other areas where compromise is desirable. Obviously there need not be compromise on patriation, equalization, resources, or native rights. The major area for compromise should be the amending formula.

It is evident that the major problems with the amending formula are the perpetual veto for Ontario, the deadlock breaking mechanism which can by-pass completely provincial legislatures, the unfounded fear in Alberta that the Federal proposal will steal natural resources and the unfounded fear in Newfoundland that in theory the Terms of Union may be changed without the consent of Newfoundland.

Each of these problems apart from the deadlock breaking mechanism can be resolved by proposing the adoption of the Toronto Consensus. Ontario and Quebec will not have a perpetual veto although in practice neither province is likely ever to have less than fifteen per cent of the population. I might go beyond the Toronto Consensus and require the approval of Quebec for all future changes regarding language.

The Toronto Consensus would mean no second class provinces, it would require unanimity with respect to resources, and it would resolve Premier Peckford's problem with the Terms of Union.

In addition, the offer made to Saskatchewan last January with respect to the triggering of a referendum went a long way towards meeting the problem of by-passing provincial legislatures. I would recommend making that offer again.

It would seem to me useful for compromises of this magnitude to be made in public because it would put the Premiers in a very difficult position if they refuse to compromise themselves.

With respect to the Charter of Rights, I would not offer any compromises. The Charter reflects a great deal of hard work and compromise and cannot easily be improved. The substance of it is very popular and any compromise would risk losing the support of the N.D.P. and of the many different constituencies touched by its various sections.

The Prime Minister could indicate his willingness to accept improvements and, if he wants, although I do not think it necessary, might even suggest adding as examples of improvements a guarantee of property rights, an extension of Section 133 to all provinces, or complete freedom of choice in education. But I would be very much opposed to his backing off on any of the substance.

If the opening statement is made in public, the Prime Minister could speak to each section of the Charter and ask each Premier which rights should not be guaranteed in the Constitution.

I would not change language of education rights. We know from experience that each draft of Section 23 caused different problems with different groups. Tinkering with the present section will not resolve the fundamental opposition of the nationalists in Quebec but it will arouse new opposition from whoever might be affected by the tinkering. I would apply the old maxim of "if it ain't broke, don't fix it" to this section and indeed to the whole Charter!

Finally, because of the popularity of the Charter, I would want to see it in effect immediately. I do not see the need for compromise on timing. However, as you know, the equality rights in Section 15 do not come into effect for three years. If it is felt necessary that some gesture be made towards the critics who state that the Charter is not made in Canada, it might be possible to suggest that the Charter will come into effect immediately and will remain in effect unless three years after patriation, seven provincial legislatures representing 85 per cent of the population (consistent with the Toronto Consensus) call for a referendum seeking the abolition of the Charter. In such a case, the Charter would be abolished if there were a national majority and a majority in seven provinces with 85 per cent of the population against the Charter.

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The above suggestion could be made as part of a bottom line position. I would vigorously object to moving from that position to a referendum in the very near future on whether there should be a Charter. My strong view is that Canadians want the constitutional debate ended now. A national referendum would prolong the debate and would add to divisiveness. The last thing we need is another referendum in Quebec regardless of the issue.

Could we discuss this at your convenience?

*5/11
Eddie*

Eddie Goldenberg

c.c.: R. Tassé
F. Gibson
T. Axworthy