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CONFIDENTIAL

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, but Ontario's support is limited to certain categories of rights. Newfoundland also continued to support entrenchment, but left little doubt that this support is not unconnected to its receiving certain powers from the federal government (offshore resources and fisheries). Quebec may be convinced to accept entrenchment of fundamental freedoms and democratic rights. Other provinces generally opposed entrenchment, with Nova Scotia and P.E.I. preferring to defer further discussion of the Charter until offshore issues were settled.

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.

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, 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.

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 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". 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; on the uncertainty about the state of the division of powers; 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 whether a legislature were gaining or losing legislative power. We wondered about the double disparity 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. In a Constitution that required uniform behaviour by all legislatures once a general amendment was adopted, this is obviously the only course. Where diversity is expressly permitted for dissenting provinces (as in the Alberta plan) such a requirement seemed inequitable. 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 could 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.

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).

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 about the middle of August.

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- (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 at 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 duality. Support seems to be coalescing around 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.

In addition, there seems to be general consensus on giving federal and provincial governments an equal right to refer constitutional questions to the Supreme Court.

Ministers will review this item again next week.

iii) Family Law

Discussions among officials went reasonably well, although Manitoba and P.E.I., firmly opposed the transfer of divorce grounds to the provinces. 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.

Positive 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 the transfer of 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 exception, 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 import 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. The subject will likely be tackled by Ministers almost as soon as discussions resume at Vancouver. 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.

2. | The federal side may well be called upon, in these circumstances, to make some first conciliatory move on Resources quite early in the Vancouver sessions.

ii) Offshore Resources

iii) Powers Affecting 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 position paper and draft articles 91(2) and 121 are annexed to this memo.~~)>

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.

Alberta and Saskatchewan are negative partly because of their concept of Canada, but also because of their anger at our position on resources and because of the linkage we have made between Resources and Powers Over the Economy. (~~I am appending to this memorandum a statement made by Mr. Romanow on Thursday.~~) 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 remains one of exclusive federal jurisdiction but they insisted on the right to participate in policy dimensions of spectrum assignment decisions. Quebec have 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 precedent 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.

Provinces have not committed themselves to national goals.

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 extend 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 take 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 in which they have asked guidance from Ministers on each of these four topics. Ministers have agreed to reflect on the issues brought to their attention by officials and will rediscuss the matter at an appropriate time, in Vancouver, before officials are asked to 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 provincial appointment; 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.