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June 19th, 1980

NOTE FOR: (See distribution)

As agreed at this morning's meeting, I am sending you a copy of the paper to which Mike Kirby referred, namely, Approaching Constitutional Reform: A "Think Piece". You will note that it is in draft form and that section V remains to be done. Section V will be completed by the beginning of next week and I would anticipate that it will be sent out at that time.

David Cameron

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Enclosure

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Approaching Constitutional Reform
-- A "Think Piece" --

Introduction

This paper raises some very general issues which provide a kind of back-drop for discussion of specific constitutional items. Clearing one's head on these admittedly very general points may help to invest the upcoming process of detailed negotiation with a degree of coherence it might not otherwise have.

The paper makes a number of assertions and judgments, and these are frequently cast in the form of bald propositions or statements, bereft of supporting argument. In addition, it not only asks, but answers a series of questions which bear directly on constitutional review. This is for two reasons:

1. Brevity
2. Accessibility. The exercise is designed to encourage people to clarify their own views by giving them something clear and specific to which they can react.

The paper is divided into five sections, as follows:

- I. Relevant Characteristics of Canadian Society
- II. Reasons Why Constitutional Change is Required Now
- III. Assumptions Underlying the Constitution and the Canadian System of Government
- IV. Criteria for Testing Propositions for Constitutional Change
- V. Perspective on the Twelve Items.

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I. Relevant Characteristics of Canadian Society

There are innumerable ways in which one might characterize Canada and its people. Here we are interested in identifying those characteristics which are constitutionally relevant, that is to say, which must be taken into account in any comprehensive process of constitutional reform.

Most people would agree that the following must have a bearing on the country's constitutional arrangements:

- Canada's indigenous peoples
- Duality, that is to say, the existence within Canada of French- and English-speaking communities
- Regionalism, that is to say, the existence within Canada of regional collectivities, for the most part expressing themselves within the framework of the ten provinces and two territories
- Cultural diversity, the leavening impact of subsequent immigration on the three characteristics of Canadian society mentioned above.

In addition to these obvious 'sociological' characteristics, there are a number of potentially more contentious considerations relating to Canadian society about which it is important to be clear. We will state them here as a series of propositions.

- Quebec constitutes to all intents and purposes a distinct society within Canada. While, there remains a degree of validity in the notion of a single French-Canadian community, extending beyond the borders of any one province, this notion is becoming more and more attenuated, while the concept of Quebec as a distinct society within Canadian Confederation is steadily gaining force. French Canadians elsewhere, like many other Canadians, are rather more inclined today to define themselves as members of a particular provincial community

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— as Acadiens, Franco-ontariens, Fransaskois, etc.

- 'English Canada' does not exist as a distinct society within Canada in the same sense as does Quebec. The predominantly English-speaking parts of Canada are strongly 'regionalized'; in addition, they are much more ethnically and culturally diverse than is Quebec society, which shapes their approach to constitutional reform. This 'English' side of the duality often expresses itself most forcefully through the distinctive institutions of several provinces, particularly in the case of those regions which are effectively excluded from the operations of the central government.
- There continues to be marked economic inequality in Canada, despite efforts to reduce it, and this inequality tends to be conceived more in terms of regional disparity than in terms, say, of economic class.
- Canada has experienced dramatic social, political and economic change since the War; this is exemplified by the growth of the West and the decline of Montreal. The pace of change shows no signs of slackening. The process of change for the most part transcends human will; we accommodate ourselves to it, with a good or ill grace, more than it accommodates itself to us.
- The principle of sharing to reduce both regional disparity and inequality in social services is widely accepted by Canadians; not surprisingly, however, the invitation to perform concrete acts of generosity and self-denial occasions sometimes bitter conflict. Difficulties of this sort are inevitable and very human, but they have been exacerbated by the degree to which Canadians have been encouraged to view their regional interest in contradistinction to the national interest, and by the feeling many Canadians have, rightly or wrongly, that the sharing of powers and the distribution of benefits and burdens within Confederation have been unjust.
- As was revealed during the Quebec referendum campaign, Canadian patriotism — the love of Canadians for their country — remains strong, although it lacks satisfactory channels for self-expression.

See John Smith article

To His Affairs
from the author 2/11

siogonomy" of Canadian federal society.

II. Reasons Why Constitutional Change is Required Now

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That is exceedingly general. A series of more specific reasons for constitutional reform are advanced below. The first four are primarily symbolic and emotional in nature, while the last three are substantive.

1. The expectations, both of the people and of governments, are now such that no resolution of the strains through which Confederation is passing is possible in the absence of significant constitutional change. Rightly or wrongly, the people of Canada have been told so often that constitutional change is needed that they now believe it. They want or need "change" even though they don't know what change they want or why it is needed. This sentiment is felt in differing degrees in different parts of the country.
2. More specifically, the people of Quebec require the satisfaction of achieving substantial constitutional reform, and they need to live under a fundamental law that in their eyes reflects the French fact, as well as the English fact, adequately.
3. To a lesser degree, this need for symbolic satisfaction exists in certain parts of English-speaking Canada as well, for example, in the West. But it is complicated. Debate over the Canadian flag or the monarchy reveals the extent to which the "English-Canadian soul" is divided; some people continue to find meaning and emotional sustenance in traditional British parliamentary forms, while others feel the need to assert a distinctive identity and to build indigenous institutions and forms.
4. Despite the fact that Canadians are living in a rapidly changing society, and despite the fact that the roles and relationships of governments have been altering very quickly as well, a great many people believe that we are frozen in the status quo because we have not been successful in effecting formal constitutional change. Such change is now necessary, then, both to satisfy that not entirely rational, but politically significant sentiment, and also to clothe our fundamental law again in the legitimacy and loyalty which has been drained away from it during the past couple of decades of contention.

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5. The respective roles and responsibilities of the two orders of government have become muddled, particularly as province after province has grown to maturity and has come to occupy the full constitutional space (and sometimes more) assigned to it in the BNA Act. Thus the tasks proper to each order of government need to be re-established, as do the relationships among them.

6. The efficiency and responsiveness of the common institutions of the federation (Parliament, the federal public service, the Supreme Court, the main regulatory agencies, the Constitution itself) need to be enhanced, both to preserve and renew the vitality of our democratic traditions and to provide a political focal point for the loyalty and sense of common purpose of Canadians.

7. A number of specific grievances, hobby-horses and bones of contention have been advanced by several of the participating governments; it is worthwhile providing satisfaction on these points wherever possible, so long as it is not inconsistent with the national interest.

III. Assumptions Underlying the Constitution and the Canadian System of Government

There are a number of critical assumptions which people make, often implicitly, in approaching constitutional reform, and which have a direct bearing on the kinds of policy positions which are regarded as acceptable or unacceptable. We will discuss these as a series of questions to which we will append our responses.

1. Is the federal government the senior government in Confederation, the first among equals, or the agency of the provinces?

- a) The BNA Act, with its provision for reserve and disallowance, the declaratory power, the peace, order and good government clause, the federal appointment of lieutenants-governor, etc., etc., clearly answers that it is the senior government, with rights of intervention and control over the provinces.

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- b) "Classical" theories of federalism argue that the central government and the constituent states are equal and sovereign in their own areas of jurisdiction, under a constitution. This position is endorsed in the Canadian context by Pepin-Robarts, the Beige Paper and several provinces.
- c) A "confederal" approach, of which there are some exponents in Canada, would argue that the central government is the creature of the provinces, established to perform certain common tasks on their behalf, but dependent finally on the will of the provincial units to associate together.

There is a good deal of emotion and pride involved in this debate. Option b) has a good deal to recommend it in the present circumstances, and probably reflects the contemporary reality of provincial societies and the overall judgement of the majority of Canadians more closely than either of the other two.

The central government might not lose much, and it might facilitate constitutional discussion, by acknowledging the principle of constitutional equality, while at the same time making very sure that its responsibility for the whole is confirmed and that the necessary, specific "national interest" instruments are preserved in good repair. By this we mean two things:

- first, that, despite the principle of constitutional equality, the central government is alone in having the entire country as its constituency and field of responsibility, and no process of constitutional reform should leave this in any doubt; and,
- second, the central government has an indispensable responsibility to deal with national emergencies and to identify and respond to situations of "compelling national interest". Even though there might be some constitutional provision or mechanism for provincial review, the federal government must necessarily be the lead player here, and the vast majority of Canadians accept that.

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2. Is the object of constitutional reform to disentangle the respective jurisdictions of the two orders of government or to manage the inevitable overlap?

- a) Historically, the theory of watertight compartment or the "layer-cake" theory made sense to many federalists.
- b) Today, most people recognize the inevitability of overlap and thus incline towards the "marble cake" theory of federalism.

This is not an "either-or" situation, and as an operational guideline it is no doubt reasonable to say that one will compartmentalize where that is possible and overlap where it is not; in that case, it becomes necessary to discover which powers and functions of government fit into which category. We would contend, however, that the areas of overlap are great and growing, and that finding ways of coping with that fact is a greater constitutional challenge than trying to construct water-tight compartments.

Those who are struck by the importance and inevitability of overlap give high priority in constitutional discussion to the institutions which might manage that overlap (a reformed upper house, institutionalized first ministers' conferences, etc.).

3. Should the constitutional equality of the provinces be accepted as a principle, and, if so, how should it be expressed?

- a) Presumably most advocates of the direct constitutional expression of special status for Quebec do not accept this principle, at least in this important respect, nor is it recognized by those proposals or arrangements (for example, amendment formula or Senate representation) which treat provinces in part on the basis of their population size rather than on the basis of their status as constituent units in the federation.

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- b) There is a fairly strong and general feeling that this principle should be broadly recognized. All provinces would enjoy the same constitutional prerogatives, but could, within limits, choose to exercise them differently, energetically, or in some cases, not at all. Quebec's distinctive requirements, then, are addressed by offering arrangements to provinces across the board, which it is anticipated that Quebec alone will accept. Acceptance of this principle also gives greater salience to such devices as legislative delegation, which permit the practical recognition of the fact that provinces which are constitutionally equal are, empirically speaking, radically unequal in economic power, fiscal muscle, commitment to local autonomy, etc.

*What are the consequences
of special status or special
status?*

The second response seems to us to be the more suitable one, taking into account the status and needs, not only of Quebec but of several other provinces as well. It is possible, however, that this position should be reviewed carefully, since it may be the case that "special status" for Quebec would meet many of Quebec's needs and that hostility to the idea in English-speaking Canada has waned.

Is the Canadian federation too centralized or too decentralized?

- a) There are many Canadians, outside of Ontario, who believe that the Canadian federation is excessively centralized. In English-speaking Canada, this view is held particularly strongly in the West. In Quebec the opinion is widespread. Whether this perception is accurate in fact is, of course, debatable. What is not debatable is that many people hold it.

The PQ leadership, with the exception of Jacques Parizeau, claim that the Canadian federal system is centralized and getting more so all the time. The image is of a federal government, controlled by an anglo-phone majority, seeking ever more power at the expense of Quebec, thus incapacitating the provincial government in its efforts to protect French culture and society. Needless to say, many people looking at Quebec City and Ottawa today, find the idea of English domination a mildly amusing fiction.

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- b) Many Canadians, on the other hand, argue that Canada is very decentralized, that it is "the most decentralized federal system in the world". While most would acknowledge that the Depression years, World War II and the post-war reconstruction period was a time of relative centralization, the tide has been setting against the federal government and in favour of the provinces. Some would argue that we have gone about as far as we can go.

While recognizing the extraordinary complexity of the issue, we would express the following views:

- We do not subscribe to the "slippery-slope" theory of decentralization, that is, the argument that we are teetering on the brink and that any further decentralization is likely to push us over the edge into disintegration. The issue is more complex than that, and, while there may be solid grounds for concern about eventual disintegration, the question of decentralization is but one of them, and may upon examination turn out to be more symptom than cause.
- The current degree of decentralization is broadly speaking acceptable, given the contemporary aspirations of Canadians, and it is workable as well. What one should be concerned about is preserving the same net balance of forces between the central and provincial governments.
- Many important issues in the area of constitutional reform do not have any obvious centralizing or decentralizing implications (e.g., principles, human rights, reformed upper house, etc.). It is the division of powers that is in fact germane here.
- In the area of the division of powers, one should be prepared to re-balance the relationships between the two orders of government, decentralizing in some areas and centralizing in others.

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5. Is it feasible to assign broad policy sectors primarily to the provinces (such as culture and social policy) while retaining others for the central government (such as broad economic-policy matters)?

- a) Some people argue that, while it may not work across-the-board, it is possible to go some distance down this path, and that this direction holds promise of improving the situation.
- b) Others contend that it is impossible, that these critical policy fields are inextricably interwoven, and to attempt artificially to separate them will lead to much difficulty.

While we acknowledge that the issue is complex and the overlap extensive, it is our contention here that a) is the more appropriate response and that some effort to assign broad functions to each order of government would be helpful in approaching constitutional review. However, we would make the following points:

- It is unlikely that any particular assignment will take full account of what the main provincial priorities are. Not all provinces want control over culture; some, and Quebec is by no means absent from this list, want greater control over their economic life. Thus the battle is well and truly joined in an area central to Ottawa's interest and responsibilities, and selective decentralization, say, in the cultural field, even assuming that that is possible and desirable, will not in itself do the trick.
- The principle of direct payments to citizens on the part of the federal government needs to be protected, and it is more easily expressed in the social and cultural than in the economic field.
- The special responsibility of the federal government for the management of the economy is widely acknowledged by Canadians. The issue here is to determine what powers the federal government genuinely needs to have in order to manage the national economy in the national interest.

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- Where it is more a question of access to revenues than a matter of economic management, one can obviously not expect any easy agreement between governments. Much of the discussion about division of powers is, in fact, a quarrel over money.
6. How is the "Canadian national interest" defined and expressed?
- a) One line of argument is to say that for all practical purposes the national interest is what the federal government (or the Parliament of Canada) says it is. Ottawa is the national government, that is to say, that government which has the interests of the country as a whole at heart and which has the responsibility of determining and advancing the national interest, even at times against the local interest as it is expressed by the various provincial governments.
 - b) Another view is to acknowledge that the central government's role is of primary importance in articulating the national interest, but to insist that it is not the only government to have responsibilities in this regard. The provincial governments, since their actions can have an important impact on the well-being of the country as a whole, must be understood to have a responsibility for participating in the articulation of the national interest. It may be that Canada currently lacks adequate institutional means for ensuring the responsible participation of the provinces in the formulation of national policy, but their claim, given the current distribution of powers and the general sweep of government in the modern state, is legitimate.

Our response to this question is b). We do not see how it can, practically speaking, be otherwise. What we have, currently, is a situation in which the brute facts of life, as outlined in b) above express themselves in a relatively unregulated and unsatisfactory fashion (consider, for example, the issue of provincial barriers to trade, or the foreign borrowing activities of provinces); what seems to be required is to find ways of integrating these forces into the process which defines, advances, and protects the national interest.

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One can see that the answers to such questions as these begin to provide what might be called a constitutional profile, or a rough configuration of commitments and preferences which will shape the judgments one makes subsequently about more detailed constitutional items.

The answers we have provided in this section have certain clear implications. This might be illustrated by referring briefly to a minor question of vocabulary here. Given our general position, it would make more sense to speak of the "central government" instead of the "federal government", since in an important sense all eleven governments are "federal governments", that is to say, governments in a federal system. Also, one could have political institutions which are "federal" and "national" in scope and role but which are not central government bodies (e.g., first ministers' conferences, an eleven-government upper chamber, a "constitutionalized" supreme court). And it would perhaps be preferable to speak of two "orders" of government, rather than two "levels" of government, if one accepts the principle of the constitutional equality of the provincial and central governments.

IV. Criteria for Testing Propositions for Constitutional Change

The following are some possible criteria against which to assess specific proposals for reform.

1. Does the proposal meet certain of the symbolic or substantive requirements referred to in Section II above?
2. Does it serve to advance the constitutional expression of the principle of duality?
3. Does it help to accommodate the forces of regionalism that are changing Canadian society?
4. Will the proposal be likely to strengthen the forces of integration and encourage loyalty and patriotism to Canada?
5. What impact does the proposal have on the efficiency of Canada's governments?

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6. What impact does it have on the democratic process and on the responsiveness of Canada's governments?
7. Does it help to accommodate the forces of regionalism that are changing Canadian society?
8. How does this proposal fit into the total package of changes under negotiation? Will it as part of that package help to re-establish a functional equilibrium of forces?
9. Is the proposal likely to increase inter-governmental conflict in the future or to encourage intergovernmental cooperation?
10. Does the proposal preserve flexibility for the future, and does it facilitate continual adjustment to changing circumstances?