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May 28, 1980

MEMORANDUM FOR THE PRIME MINISTER

Strategy for Achieving a
New Canadian Constitution

Since our discussion yesterday I have given further thought to ways of achieving the several specific objectives relating to a New Canadian Constitution that you had outlined at that time. These notes on a possible strategy are the result. As you will see, a few of the suggested elements are different from ideas you had expressed. Where this occurs, the advantages and disadvantages of the contrasting courses are set out.

For the sake of completeness, I am repeating some of the "purposes" of a First Ministers meeting, which appeared at the beginning of my memorandum to you yesterday on this subject. The list of purposes has been modified to reflect yesterday's discussion.

Purposes of the First Ministers' Meeting

- (a) To confirm the determination of all governments to proceed rapidly with work on the development and adoption of a New Canadian Constitution, and thereby to add to the momentum for change.
- (b) To reach agreement on the items to be included in the first set of building blocks of a New Canadian Constitution (Package #1). This package is set out in Annex 1 in annotated form. Among other items, it would include: the Principles of a New Canadian Constitution and a Charter of Rights, including language rights. It is for decision whether the package would contain Patriation; the matter is discussed on page 5.

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- (c) To agree on the schedule for intergovernmental consideration of Package #1, and on a tentative target date for reaching agreement on the package.
- (d) To agree on the items that should be considered in a second set of building blocks (Package #2). Suggestions for this Package also appear in Annex 1.
- (e) Possibly, to explain to the Premiers the government's position in regard to popular consultation, via referenda, in respect of constitutional change.
- (f) To agree on the date for the next meeting of First Ministers at which time the aim would be:
 - (i) to have Package #1 ready for final consideration and adoption; and
 - (ii) to learn what progress had been made in respect of Package #2 items and to give new impetus to that work.
- (g) To launch the process of constitutional reform by formally re-establishing the CCMC (or some equivalent) and by agreeing to give the task of framing a New Canadian Constitution the highest priority.

A Possible Scenario:

- On June 9th, a statement of the Principles of the New Canadian Constitution (an element in Package #1) would be presented formally to the Premiers. They would have received copies a few days before the meeting to assist them in their preparations. (See Calender of Events - Annex 2.)
- The Premiers would be invited to participate with the Government of Canada in the drafting of a New Canadian Constitution, based on the Principles. Package #1, as the key and initial set of building blocks, would be described to the Premiers.

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- Indicate to the Premiers that the federal government is prepared to negotiate the items in Package #2 simultaneously and in parallel with the negotiation of Package #1. (This would demonstrate federal good faith and encourage the provinces to participate actively in the drafting of the New Constitution.)
- To avoid debate over form rather than substance, the precise form the drafting of a New Constitution would take would not be spelled out, though it would be emphasized that the aim was to have in place particular elements of a new Constitution before the end of 1980. Thus, the new Constitution might be brought about by Resolution and Joint Address, with or without federal legislation, depending on the elements of the constitution being covered and the circumstances then prevailing. The proposed course does not rule out the possibility of a Bill; it would be made an explicit possibility, but not spoken of as the preferred course.

(Note: My purpose in not suggesting that the provinces be invited to draft a Bill is also that this would seem to the provinces, and other critics, too much like the Bill C-60 approach which caused such controversy. It would also provide Mr. Levesque with an opportunity to drive a wedge between the federal government and some other provinces: he could point out that the federal government knew it could have rights in the new constitution with Parliament's approval and that this could be done easily, while "Powers" items, for example, would have to be adopted through another route (Westminster) which would take much more time; indeed, he could claim there were no assurances it would even happen.)

- The government would voice the hope that everything would be done in a collaborative spirit and that what finally emerged as Package #1 would be agreeable to all governments. However, if that proved not to be possible, the Government would wish to move ahead with the adoption of at least some of the elements of the package, with those elements then to be binding on the Parliament and Government of Canada and on the Legislatures and governments of as many provinces as wished to be bound.

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The government's intention would be made as clear as circumstances permitted in regard to the decisions to be taken in the fall. Thus, it would be said that "if agreement could not be achieved" over the next, say, four months on a common approach with respect to Package # 1, the federal government would proceed by legislation, or by whatever technique seemed best, in regard to the federal area of jurisdiction. The timetable and the form need not be made more precise than that although you may want to indicate that you would like to make Package # 1 the first item of Parliamentary business in the fall.

(Note: It is for decision whether, at the June 9 meeting, any reference should be made to the possibility of a referendum in the fall. It seems to me that you need say nothing about that then. Your options would remain completely open. You could decide in the fall whether to proceed with a Bill, with a Joint Address, with a referendum prior to or after either of these actions or in fact whether to postpone action for another 2 to 3 months. Everything would depend on your assessment of the situation then prevailing, particularly on the rate of progress being made in negotiations and on the state of popular opinion in regard to Package # 1 and the other elements of a new constitution. You may agree that there would be considerable risk in raising the prospect of a fall referendum on Package # 1 until one could be reasonably certain of winning it. That judgment could not be made until much nearer the event.)

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- Tell the Premiers that soon after the meeting on June 9th (giving them the dates if these have been decided) there will be a debate in the House of Commons about the Principles for a New Canadian Constitution. It would not be a debate in which any Resolution would be put to the House or a vote taken, but would provide members with an opportunity to express their views on the scope and content of a New Canadian Constitution.
- Suggest to the Premiers that the joint work with the leadership of the native peoples on the item "Canada's Native Peoples and the Constitution" be undertaken towards the end of the year or perhaps early in 1981. It will take several months for the native people and governments to prepare themselves for the discussions on the complex issues which they wish to discuss, e.g. aboriginal rights and such a time-table would pretty well guarantee that all concerned would be well prepared. In the meantime, governments would pay special attention to any representations received from the native peoples in regard to items in Package #1 or #2.

Patriation

It is for decision whether Patriation (and the Amending Formula) should be included in Package #1 or Package #2. The logic that Patriation is a necessary companion to the Sovereignty of Canada is inescapable. At the same time there is a heavy risk that the provinces will regard a Package #1 that includes Patriation as representing virtually everything that the federal government would see as essential in a New Canadian Constitution. Attainment of that federal objective would be, for the provinces, a sign that the federal government did not intend to proceed seriously or urgently with Package #2 or subsequent packages.

The reaction in Quebec, partly for traditional reasons and partly out of a desire by Mr. Levesque to win support among the electorate, could be expected to be strongly negative. Certainly Mr. Levesque could be expected to try to use it as "evidence" of federal bad faith. Mr. Ryan is

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understood to be much opposed to early Patriation and his support would seem to be essential before the government could, for example, proceed with a referendum on a Package #1 that included Patriation.

On the other hand, if both Mr. Levesque and Mr. Ryan were to criticise Patriation, that might neutralize it as an issue in a Quebec election campaign, since both would be attacking Ottawa. Whether that is the spirit in which adoption of a New Constitution should proceed is another question.

One possible means of allaying - but not eliminating - concern about Patriation would be for the federal government to show very rapidly its good faith in regard to Package #2 items. That would involve, almost out of necessity, extensive compromises on some of the "Powers" items, compromises which might go beyond what the federal government would consider prudent in other circumstances. All in all, we would be much inclined to recommend including Patriation and the Amending Formula in Package #2 rather than have it in Package #1, even for negotiating purposes.

Whether Patriation goes in Package #1 or Package #2, we would suggest not mentioning the prospect of an automatic twenty-four month period between possible Patriation and the adoption of a new Amending Formula.

Other Questions Related to the Scenario:

- (a) Parliamentary Debate on the Principles: Through the PCO we have notified Mr. Pinard of the possibility of the debate on June 11 and 12. We have asked that this information be kept in the strictest confidence and provided it to him so that he may ensure that those two days will be kept reasonably free. You will wish to decide when he should be brought more fully into the planning.
- (b) Public Information: Once the Statement of Principles has been agreed in principle by the governments and work is started on the drafting of a new constitution, steps will need to be put in train to explain in a comprehensive and thorough way what these principles mean and what the process of introducing a New Canadian Constitution means to the people of Canada. Such an undertaking would be required whether a referendum was envisaged or not.

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- (c) Public Opinion Surveys: A series of surveys should be undertaken to determine public reaction to the Principles of a New Constitution and how they should be modified to make them more acceptable.
- (d) A Federal Committee of Ministers: You will wish to consider establishing a Federal Committee of Ministers to examine with care the Package #2 items and to develop the federal position on them.

While I think it is essential that we tell the provinces that work on Package # 2 will start at the same time as the work on Package # 1 - indeed unless we do this they will not join us in a cooperative effort on Package #1 - we must not underestimate the difficulty there will be in establishing the federal government's position on Package # 2 items. At the present moment, the people in this town, including Ministers, are all over the lot on the question of what powers the federal government should have and what powers should be given to the provinces. This conflict of views will emerge in stark fashion ~~we~~ we try to go from a set of principles to conclusions about what these principles imply federal powers need to be (as opposed to what federal Ministers and officials want them to be).

For example, if we believe that the federal government must retain strong economic powers in order to manage the economy in the national interest, what non-economic powers are we prepared to devolve to the provinces? As you know, Ian Stewart and I are working on possible answers to this question. But from the P&P meeting a couple of weeks ago and several conversations I have had with Ministers recently, it is clear that many Cabinet Ministers are strong centralists who will resist the transfer of any powers to the provinces. If we allow this attitude to prevail (even to the extent of retreating from positions we offered at the First Ministers' Conference in February, 1979 as, for example, EMR and I suspect Communications will want us to do) then negotiations on Package # 2 are doomed to failure. Moreover, in the mind of the average western Canadian this failure will be largely attributed to the lack of western representation in the Cabinet and to the government's lack of understanding of the aspirations of the West. This result would be extraordinarily damaging to the attempts the government is making to open doors to the West and to bring it into the mainstream of Canadian political activity.

A major effort will therefore be required to develop a consistent federal position on the basis of the principles and to sell this position to the key players in Ottawa. In short, the task of selling the federal government's position will be every bit as difficult within the government as it will be to sell it to the people of Canada.

To effectively sell the federal government's version of "the new Canadian constitution", we will have to use a wide range of communications techniques, many of which will have to be participatory. For example, not only should the Premiers be asked to help us draft Package # 1 and then take it back for debate in their Legislatures and not only should there be a debate in Parliament, but we will also have to promote various kinds of public participation in the debate on the principles. Ethnic and native groups, for example, will have to be given an opportunity to comment on the general thrust of Package # 1 (even though they need not necessarily be given the chance of expressing their views on its details until the package is introduced in Parliament).

In short, the selling of the federal position must involve a two-way dialogue not just a one-way communications program. We must involve Canadians in our cause. It is, after all, their constitution we are building. This involvement is essential if we are to realize our basic goal: to raise the political consciousness of all Canadians, as Quebecers have had their political awareness and understanding increased in recent months, so that we win the hearts and minds of Canadians over the opposition of some provincial Premiers. We cannot do this with a one-way propaganda campaign. Neither can we do it, if what we are selling reflects purely a centralist view of Canada.

The energy issue

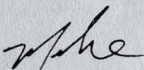
Finally, it seems to me that we can turn the energy issue to our advantage if we have the confrontation with Alberta shortly after Package # 1 is introduced into Parliament. (That is, around November 1). By that time we will have explained to Canadians what our view of the country is and from this explanation, based as it is on a clear statement of principles, will flow the logic of the federal government's energy position. In short, we will have taken nearly five months - June 9 to November 1 - to talk to Canadians

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about our view of Canada and the role of the federal government. We will then illustrate this role by using the energy issue. In a pedagogical way, energy will be the illustrative example of all we have said in the previous few months about the role of the federal government. For this reason, and for the others I have already given you, I urge a four-month delay in the confrontation with Alberta. (Ian Stewart tells me such a delay will increase the federal deficit by \$400 million).

It is, of course, not clear that Lougheed will agree to a delay. But you may want to embarrass him into accepting it by asking him in front of the other First Ministers if he is prepared to set the oil price issue aside until November 1 as part of the determined effort on the part of all First Ministers to achieve major constitutional change by that date. In this way, even if he refuses, you will have given Premiers Blakeney and Bennett an opportunity to disassociate themselves from Premier Lougheed in a way they would find harder to do if your proposal to Premier Lougheed was not made in their presence and if your proposal was not made in the spirit of asking him to respond to a higher calling - the renewing of the Canadian federation.


Michael J.L. Kirby

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May 28, 1980

The First Package
(of "building blocks" of a New Canadian Constitution)

1. Principles of the New Canadian Constitution

- to become the major component of the preamble and introduction to the New Constitution

2. Charter of Rights

- imposing limitations on governments and guaranteeing individual and collective rights
- to include language rights, possibly with provision for provinces to "opt-in"

3. Equalization

- imposing obligations on all governments, but more particularly the federal government, for the benefit of the people in the various regions of Canada

Possible Additional Items

4. Patriation (with or without the Amending Formula)

- if the "First Package" is presented as a group of items for federal-provincial work over the summer, it would be difficult to list "Patriation" alone, as provinces would recognize that it involves no "work" as such
- work this summer on the amending formula in general is unlikely to be productive, but progress could be made on the legislative delegation aspect
- Patriation should also be considered as a candidate for the Second Package

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5. Miscellaneous Items such as symbols, federal executive, national capital, etc.

- these could include, by and large, the "rest of Bill C-60" after subtracting 1, 2 and 3 above, and the Supreme Court and Senate which are shown under The Second Package
- it might be best, however, for work on these items to proceed internally with consultation with the provinces shortly before use, rather than complicating the process of consultation on The First Package over the summer

The Second Package
(of "building blocks" of a New Canadian Constitution)

Note: - This is an attempt to blend the first priority items of the provinces (as far as we know them) with some items of concern to the Government of Canada.

- A notation is provided at the end of the package of those items from the "list of 14" of February 1979 which are not included herein.

- Discussions with the Premiers on June 9 are more likely to result in additions to the suggested package than in deletions therefrom.

1. Resource Ownership and Interprovincial Trade
(including related aspects of the declaratory power and indirect taxation)

- this would have the same scope as the old item No. 1 from the "list of 14"

- no further net major concessions should be needed; the offer on the declaratory power should be withdrawn, a clear definition would be needed for "compelling national interest" and some adjustment might be needed on the definition of "resources" (particularly concerning water). Federal departments feel, however, that the February 1979 offer went too far

- any federal movement would be tied to "Powers Affecting the Economy"

2. Offshore Resources

- nothing more than a promise to study concurrent jurisdiction was made in February 1979

- for agreement now, some concessions would be needed, perhaps on the 75-25 revenue-sharing, on ownership within the 12-mile limit, concurrency on some aspects, and guarantee of a provincial voice (not control) in major decisions on pricing and production

- also tied to "Powers Affecting the Economy"

3. Powers Affecting the Economy

- this would cover at least two major federal concerns:
 - a much stronger section 121 limiting or preventing provincial discrimination respecting the flow of goods, services and capital (the mobility of persons would be covered in the Charter of Rights)
 - a clearer definition of the federal capacity to deal with economic emergencies
- these are the two most essential points from the economic questions covered in the "second list" of February 1979

4. Communications

- the "concessions" on cablevision offered in February 1979 would probably, on balance, have added to federal powers and this would need another look
- to reach agreement with Quebec, an important new concession would almost certainly be required concerning the licensing of radio and television stations aside from Radio-Canada
(This could be a matter handled by a new constitutional provision for delegation.)

5. Family Law

- all but Manitoba agreed in February 1979. Now Newfoundland and Prince Edward Island share Manitoba's concerns
- the problem might be solved by those provinces accepting the majority view, or by reverse delegation

6. The Senate

- some new, imaginative approach will be needed to gain some of the advantages of the proposals of British Columbia, the Livre Beige, and Bill C-60, while avoiding the disadvantages
- the subject can include examining the possible use of the Senate in connection with the federal "unilateral powers" including the spending power, declaratory power and emergency power
- the subject could extend to looking at the possible relationship between the First Ministers Conferences and the Senate concerning the "unilateral powers"

7. The Supreme Court

- a vital building block in any new Constitution
- to reach agreement with Alberta and Quebec, a new look will be needed at the handling of constitutional cases (the Livre Beige idea of a dualist bench would need to be given some consideration)
- some concessions may be needed on the related question of appointment of judges to Superior Courts

Possible Additional Item

8. Patriation (with the Amending Formula and "delegation")

- see notes on "Patriation" in The First Package
- a strong argument can be made that provinces will be more co-operative in dealing with the two packages if Patriation is part of the Second

Note concerning The First and Second Packages in
relation to the February 1979 "list of 14"

- the monarchy remains "dropped"
- the spending power is raised obliquely, under the Senate. No agreement is likely on the spending power as long as the federal government wishes to pay the people, and not the provincial governments, of "opting-out" provinces
- a possible solution would be constitutional confirmation of the special arrangement Quebec has had for many years, leaving the other provinces (which feel less strongly) as proposed in February 1979
- indirect taxation appears only under "Resources". This accords with the CCMC decision of October 1979
- the declaratory power appears only under "Resources"
 - and solely to provide the chance to withdraw the federal/February 1979 offer. Provinces may insist that the whole question be on the agenda. It would not be easy to solve, given sharp differences of views all around
- fisheries is not included; only Newfoundland wants constitutional change. Mr. LeBlanc, with strong arguments on his side, is very much against such change. It is a subject to be avoided, if possible, in The Second Package.

CALENDAR OF EVENTS

- May 28, Wednesday : Send telex to Premiers inviting them to meeting of June 9
Inform House of proposed date.
- May 29, Thursday : New draft of Principles to the Prime Minister for consideration.
- May 30, Friday : Discuss new draft of Principles with Prime Minister
Further revision to Prime Minister for consideration over week-end.
- June 2, Monday : Statement of Principles and content of Packages #1 and #2 to be decided by Prime Minister
- June 3, Tuesday : Statement of Principles and content of Packages to be discussed with P & P
- June 4, Wednesday : Possible briefing of Caucus on Statement of Principles.
Letters to opposition leaders about the Statement of Principles.
- June 5, Thursday : Possible Cabinet discussion of Principles and content of Packages
Text of Statement of Principles forwarded to Premiers
- June 6, Friday : Briefing for First Ministers meeting given to Prime Minister.
- June 9, Monday : Meeting of First Ministers
- June 11-12, Wednesday: Possible debate on Principles in
Thursday the House.