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SECRET

February 17, 1981.

MEMORANDUM FOR THE PRIME MINISTER

Attached is a think piece on the constitution which I wrote on the weekend. Mr. Pitfield read it last night and thinks it is hopefully worthwhile for you to read it on an urgent basis.

It is designed to review all our options between now and the completion of the constitutional exercise rather than to recommend a specific change in our current plan.

Michael Pitfield thinks it would be useful if we could talk to you about this paper before you leave for B.C.

This is the only copy of the paper in existence. It is a xeroxed copy because I edited the original version yesterday and consequently did not retype the full paper.

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Michael Kirby

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EDITED VERSION   S E C R E T

The purpose of this memorandum is to assess the government's position on the eve of debate on the Constitutional Resolution starting in Parliament. It reviews the options, including options for change, open to the government and assesses their advantages and disadvantages.

The memorandum, and its conclusions, are based on certain assumptions which are stated explicitly throughout. These assumptions are obviously debatable. One's concurrence therefore with the conclusions of the memorandum depends in part on whether one agrees with the assumptions and, if one does not, on what alternative assumptions one would put in their place.

The memorandum also raises a series of specific questions which would need to be answered before a decision could be made as to which of the options the government should choose.

Problems: There are three potential problems with the current Resolution:

1) The problem of the legitimacy of the process in respect of the Resolution in light of provincial opposition, gallup polls, etc.

2) The possibility of the process being ruled unconstitutional by the Supreme Court.

3) The possibility of the Resolution being defeated in the U.K., particularly in the House of Lords, because of provincial opposition to it in Canada and because of the court challenges which have been launched against it.

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Possibly Relevant

Options:

1) Proceed as currently planned (i.e. passage by Parliament before April 1 and pressure the U.K. government for quick passage before the Supreme Court decides on the constitutionality of the process).

2) Proceed through Parliament and then await a Supreme Court decision before sending the Resolution to the U.K.

3) Amend the Resolution so that the Charter goes into effect only:

   (a) where a province opts in;

   (b) where a province does not opt out;

   (c) if a referendum passes:

      (i) nationally, or

      (ii) according to the criteria in Section 42.

4) Amend the Resolution in a manner outlined in Option 3, proceed through Parliament and then await a Supreme Court decision before sending the Resolution to Westminster. (This is a combination of both Option 2 and Option 3.)

5) Amend the Resolution so that it includes additional matters designed to get increased provincial support (e.g. international trade for Saskatchewan).

6) Proceed through Parliament and then seek legitimation for the Resolution via a national referendum.

7) Withdraw the Resolution and proceed with additional federal-provincial conferences in order to get wider agreement on an entirely new package.

Analysis of the Options

1. Option 7 - is rejected because it would result in no constitutional change for decades and complete loss of face by the federal government, and would have enormous political and governmental consequences, all of which are negative. We know that no progress will be made at such conferences, and unanimous agreement will certainly not be reached.

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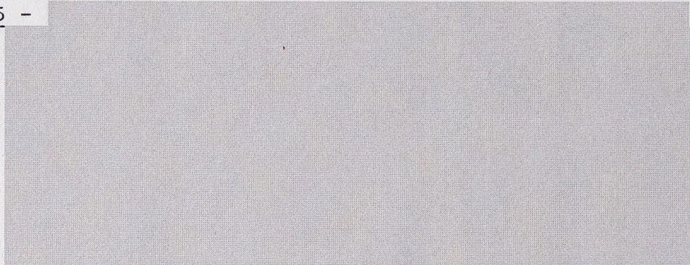
The government has moved the constitutional issue a long way, and going back to square one at this stage, given the progress made to date, would amount to abandoning all that has been gained, a price that is far beyond that which is necessary to gain further support for the Resolution.

It would also do irreparable harm to long-term relations between the provinces and the federal government because, henceforth, it would be assumed that the federal government could never move without the support of the provinces.

2. Option 6 - is rejected because it would result in an extremely divisive debate that might not conclusively determine the issue while almost certainly doing lasting damage to the federation.

3. Option 5 -



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Note that senior officials in some of the six provinces (e.g., B.C.) expect us to call for a series of federal-provincial meetings between the passage of the Resolution by Parliament in March and debate on the Resolution commencing in the U.K. in November. They believe that by calling the Premiers' bluff, by proving once again that agreement is not possible, it will make it much easier to get the Resolution through Westminster and make unilateral action much more acceptable to the Canadian people than it is now. As tempting as this might be, for a host of reasons, including what such conferences would do to heightening federal-provincial conflict, and singling out certain provinces as the "bad guys" of confederation, we should avoid recommencing negotiations with the provinces until after patriation.

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This would be unacceptable to the federal government as it would almost certainly lead to the loss of power in a number of areas, including offshore resources and communications.

4. Option 1 - fails to solve any of the problems listed on page 1.

It will lead to successful completion of constitutional reform without a favourable decision of the Supreme Court only if: (a) there is no defeat in the Newfoundland or Quebec courts /since it is assumed that a defeat in either Newfoundland or Quebec will result in Britain not passing the measure until the Supreme Court has rules/ and (b) Britain does not decide to stall and await a Supreme Court decision on the Manitoba appeal even if the Newfoundland and Quebec courts rule in favour of the federal government.

Question (i) How likely is (b)? If highly likely, then combined with (a), this implies that Option 1 has very little chance of succeeding.

A related question is: will Britain vote on the Resolution in the period between the case appearing on the Supreme Court docket (which must be by April 6) and the Supreme Court deciding the case? Again, if the answer is no, then Option 1 is not feasible.

This does not mean that we could not try to follow Option 1, but it does mean that the Resolution would not be voted on by Westminster until after the Supreme Court has ruled. In this case, Option 2 is preferable to Option 1 because it makes the government appear more reasonable (i.e. we will make certain that what we are doing is constitutional, not wait for the British to tell us that we must test the issue in the court before they vote).

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5. Option 2 - It is a fact that the Resolution will get to the Supreme Court (on appeal from the Manitoba decision if in no other way).

- It is possible (likely?) that the Supreme Court will rule before the Resolution is voted on at Westminster.

Question (ii) What is the probability that the Supreme Court will rule against the federal government? We must get our best estimate of this probability. It is a crucial factor in all the analysis which follows. Also, there is a related question: How would a decision of the Supreme Court be affected by the fact that the Resolution had passed Westminster before the Canadian Court ruled on the Resolution? This leads to the next question:

Question(iii) Can the Supreme Court rule after the measure has passed at Westminster? If the answer is no, and if the answer to Question (ii) is that there is a high probability of defeat in the Supreme Court, then Option 1 may be the best option, even if it has little chance of succeeding. Alternatively, this may cause us to choose Option 2.

- If we choose Option 2, the Supreme Court will almost certainly await the Newfoundland and Quebec decisions before hearing the case as the lower court references will have already been heard by the time the Resolution is through Parliament. Thus the Supreme Court would not hear the case before June; it would probably not give a decision before October; passage by Westminster before the end of 1981 would still be feasiable if the court ruled in favour of the federal government. If the court ruled against the federal government, the Resolution would be dead and the whole exercise would have been for nought.

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- All of the above is based in the assumption that no direct federal reference to the Supreme Court would be made before the Resolution is through Parliament, even if the Newfoundland or Quebec court ruled against us while the issue was still being debated in Parliament. But if the Newfoundland or the Quebec court does rule against us, then it is also assumed that we must await a Supreme Court decision before proceeding to the U.K. To fail to do so would make the entire process open to changes of gross illegitimacy. It will be hard enough to get the resolution through Parliament if we lose in Newfoundland, without trying to go to the U.K. under those circumstances. It should be noted, however, that some lawyers may argue that one should not be categorical about stating that we must go to the Supreme Court before going to London if we lose in Newfoundland or Quebec because the judgement may be very weak. The counter argument is that the public will not understand the quality of a legal judgement All they will understand is that we lost and that we should not be asking London to do something which a court says is "illegal".

- It is also assumed that we would make no public statement of our intention to refer the issue to the Supreme Court until debate in Parliament is over. This implies that it would be highly desirable to have the measure through Parliament before the Newfoundland court hands down its decision.

- A variation on Option 2 (call it Option 2A) would be to proceed quickly to Westminster and try for quick passage on the understanding that the resolution would not be proclaimed in Canada until the Supreme Court has made a decision. This is probably preferable to Option 2 (if it is acceptable to the British) because it would put added pressure on the Supreme Court to support the resolution as it would have already been ruled on by Parliament in both Canada and the U.K.

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Question (iv) Is Option 2A acceptable to the British? That is, will this solve their concerns about the legality of the measure?

- Note that in all the options relating to a Supreme Court reference there are a number of tactical legal issues which will have to be addressed (e.g., what questions will we ask the court, etc.) if we decide to go this route.

- In summary: Options 2 and 2A would solve problems 2 and 3. That is, they have the benefit of clearly establishing the constitutionality of the process before the Resolution is enacted and, having gained victory in the Supreme Court, the passage of the measure in the U.K. would be greatly eased.

- Options 2 and 2A have to significant drawbacks:
  - while they might help to resolve the legitimacy problem, through a favourable Supreme Court ruling, they would not resolve the problem completely;
  - they run the risk of losing the entire measure if the Supreme Court rules against the federal government.

- Thus one's ultimate assessment of the desirability of Options 2 or 2A rather than Option 3 rests crucially on the answer one gives to Question (ii). That is, what is the probability of the Supreme Court ruling against the federal government on a reference to test the constitutionality of the current Resolution.

6. Option 3 - The essence of Option 3 is that it is designed to attack all the problems outlined on page 1, including the legitimacy problem. It increases the probability of a favourable ruling by the Supreme Court whenever that occurs, and increases the acceptability of the measure in London and the chances of getting it passed this session. (For example, it satisfies the essence of the Kershaw report even if the six provinces continue to do, because Option 3 would not ask Westminster to amend the Constitution and impose the amendment on the provinces, unless the imposition is ratified by the Canadian people in a referendum or agreed to by the provinces according to some form of opting-in or opting-out procedure.)

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- The drawbacks to Option 3 are:

  - it might lose the support of the NDP. (This would have to be carefully checked.)

  - it might lose the support of the special interest groups who now support the Charter (although there may be ways to minimize this loss, and see below).

  - it would result in a highly divisive referendum as described on page 2 in respect of Option 6 or in potentially acrimonious debates in provincial legislatures with equally divisive effects and a potential for a checkerboard of provinces to which the Charter applies or does not apply.

- The advantages of Option 3 are:

  - it would appeal to the growing feeling in the country that there is a need for compromise by the federal government; that we need to hold out at least a small olive branch to the provinces;

  - it would probably ensure the continued neutrality of Buchanan and restore the neutrality of Blakeney, although it would probably not win the active support of either;

  - it would almost certainly resolve the U.K. problem, completely;

  - it would increase the probability of winning in the Supreme Court. (Question (v) - By how much?) Again, the answer to this question is a most important factor in the analysis which follows.

- The main issue which needs to be confronted in assessing the merits of Option 3 is the following:

Question (vi) Will the adoption of Option 3 be perceived publicly as:

a) a statesman-like gesture; an historic compromise at the right moment; a positive gesture; an indication of the government's concern with the level of conflict in the country;

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or b) a backing off, a retreat, a defeat for the federal government at the hands of the Premiers and the Leader of the Opposition?

- If b) is the answer, as is most likely even if we are extremely careful how we present to the public our decision to support Option 3, will this lead the Premiers to believe that we will always back down in the face of fierce opposition? That is,

Question (vii) What are the spillover effects (e.g., into the energy negotiations) of choosing Option 3, particularly if b) is the answer to Question (vi)?

- In short, the public perception of, and reaction to, a decision to support Option 3 is a crucial factor in assessing its political feasibility.

- In the following analysis of Options 3A, 3B and 3C, it is assumed that the Charter will be treated as a whole. That is, we would not impose certain parts of the Charter (e.g., language rights) and leave other parts (e.g., equality rights) for opting-in, opting-out or a referendum. To fail to do this, leaves us with all the same legal problems we have now (i.e., we gain nothing in terms of our legal position) and also leaves us open to the charge that we are interested in protecting the rights of certain minorities(e.g., francophone children living outside Quebec) more than others (e.g., the old, the handicapped, etc.) This is a politically untenable position. To put it another way, it was precisely because of this political problem that the Cabinet decided to impose the whole Charter on the provinces rather than only part of it and, if anything, this problem is more acute now because of the way in which the Charter has been strengthened. Finally, if we decide on Option 3C, we will want the support of as many special interest groups as possible in the referendum campaign and so it would not be tacticly advisable to give some of them the rights they want before the referendum begins (i.e., they should all have a major stake in seeing that the referendum passes).

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- In what follows, it is also assumed that any referendum on the Charter would involve only the question of whether Canadians want or do not want the Charter which will be approved by Parliament in the debate which starts tomorrow. Canadians would have to vote for or against the whole Charter. They could not just take parts of it. Moreover, the Charter would not have to come back to Parliament for debate once it has been approved in the current "third stage" debate. For this reason, it would seem to be unwise and unnecessary to sever the Charter entirely from the package as has been suggested by some people. We should avoid going completely back to square one on the Charter if at all possible.

- In assessing the various alternatives under Option 3, it has been assumed that two criteria are important to take into account:

Criterion i): the process of non-imposition of the Charter on the provinces should involve maximizing the political pressure on the provinces to accept the Charter.

Criterion ii): Rights (like citizenship) should not vary from province to province.

- The first criterion is obvious; it is part of any political bargaining process. If we are going to back off on the Charter, we want to make it as politically difficult as possible for the provinces not to accept the Charter.

- The second criterion is highly controversial. It will ensure that the six Premiers who now oppose the Charter will continue to do so. But it is almost certainly highly saleable to Canadians. Given the mobility of the Canadian population, it would be easy to explain that their basic rights should not change when they move from province-to-province. This would be a very difficult argument for the Premiers to refute (although they would try very hard to do so). In short, criterion ii) is politically highly saleable.

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- Option 3A, the opting-in option, fails to meet either of the above two criteria, hence it is rejected.

- Option 3B, the opting-out option, meets criterion i) but not criterion ii), hence it too is rejected.

- It should be noted, however, that Option 3A or Option 3B, or variations on it like the proposed Pickersgill formula, are the only options acceptable to those who argue that rights should not be imposed on the provinces and that the will of provincial legislatures should not be overruled by a referendum. Thus, for example, Gordon Robertson would probably be opposed to Option 3C.

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- Option 3C, the referendum option, raises two issues: what triggers a referendum and what are the criteria by which a referendum is deemed to have passed. It also raises the question of what the subject matter of a referendum should be: that is, should we seek legitimacy for the whole resolution through a national referendum, or should the referendum be restricted to the Charter recognizing that a referendum on the amending formula is now possible under Part V of the resolution. (Part V is the interim amending formula Part; it was formerly Part IV but was redesignated in Committee.) My strong preference would be to limit any new referendum to the Charter alone. It would be easier to win and, most importantly, would not set the complete package at risk. All that could be lost would be the Charter. We would still get patriation and an amending formula even if the referendum was defeated.

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- In accordance with criterion i), a referendum should be triggered by having provincial legislatures opt-out (i.e., a legislature would have to vote that it did not want its citizens to be protected by the Charter of Rights). This will enable special interest groups and Liberal and NDP opposition parties to put great pressure on provincial governments to not opt-out.

- There are a variety of criteria which could be used to determine where a sufficient number of legislatures have opted out to warrant the calling of a referendum. My preference would be that a referendum must be held if a majority of provinces representing a majority of Canadians vote to opt out. However, weaker criteria could be used (e.g., if 3 provinces vote to opt out, or if provinces representing a majority, or say 40%, of Canadians vote to opt out, etc.). Stronger criteria could also be used (e.g., the 7 provinces and 80% criteria now required for a referendum to be held on the amending formula. This is too strong a criterion since it would immediately be perceived by the public as implying that a referendum on the Charter will never be held because Ontario supports the Charter and it has 35% of the Canadian population.).

- Note that an argument can be made for using the same criterion for calling a referendum on the amending formula as is used for calling a referendum on the Charter, in which case the existing criteria in Part V of the resolution might need to be changed. This, of course, would run the risk of the provinces putting forward a formula which would result in Quebec not having a veto over future constitutional change. Alternatively, we can leave Part V as is, and use a different criterion for calling a referendum on the Charter.

- As for the issue of the criterion by which the referendum is deemed to have passed, there are three possibilities: national passage by a majority of Canadians, passage by a majority of voters in each province, passage under the criterion of section 42 of the resolution. This last alternative would be totally consistent with the resolution as long as the referendum was held after Part VI had come into force, since

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it would amount to a constitutional amendment under the provisions of Part VI. The middle alternative is worse than the last one since it would make it almost impossible to win the referendum and is a tougher criterion than section 42 so it should not be considered further.

- The first criterion, passage by a simple majority of Canadians, is the best alternative for it follows from the national character of rights. Rights, unlike powers, are not regional in their impact. Rights, like citizenship, should be decided equally by all Canadians regardless of where they live, hence only the national vote should count. Moreover, where the vote is counted, no regional or provincial breakdowns should be given, only the national total should be known. In addition, the national as opposed to regional (section 42) criterion maximizes the probability of the referendum being passed. Finally, our surveys have repeatedly shown that 45% of Canadians believe that the only criterion for the passage of a referendum should be a national majority, 45% believe that a referendum should have to pass in every province, and only 10% support the regional passage criterion (like that contained in section 42).

- In summary, a comparison of Option 3 with Option 2 reveals that under Option 3 we get:

  - a virtual guarantee of getting patriation, with an amending formula, by July 1;

  - a virtual elimination of the possibility of complete failure (since Option 3 is less likely to be struck down by the Supreme Court than is the existing resolution);

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- an opening up of the possibility of partial failure (we might lose the Charter);

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- the disadvantage of being perceived publicly as having been defeated and of being on the run.

- the disadvantage of possibly losing part of the package if we believe that we are virtually certain to win in the Supreme Court on a reference involving the current resolution.

- the disadvantage of the certainty of highly divisive debates in legislatures and the possibility of a similar debate in a nationwide referendum.

- Thus, the choice between Options 2 and 3, rests on two factors: the assessment of the probability of winning in the Supreme Court with the current resolution and the degree of concern one has about the political legitimacy of imposing the Charter on the provinces.

- Any decision to proceed with Option 3 would require that it first be discussed with Broadbent, Davis, Hatfield and the U.K. government (Pym? or Thatcher while she is in the U.S. next week?) to see if the pros and cons have been properly evaluated above.

- If a decision was made to proceed with Option 3, it raises two timing questions:

i) when would the referendum be held;

ii) where would the decision to adopt Option 3 be made public, and how.

- On the first question, there are two alternatives:

a) Have the referendum right after the constitution is patriated from the U.K. This has the advantage of our making effective use of the momentum for constitutional reform which will arise from the act of patriation and ensures that the leader of the "yes" forces in the campaign will be Prime Minister Trudeau. It has the disadvantages of not giving the provinces much time to

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opt-out (or of forcing them to do so while they are still angry and before special interest groups and opposition parties can put pressure on them to not opt out), of not allowing a cooling-off period in federal-provincial conflict over the constitution and of giving no opportunity to use the next two years (and the two FMCs called for under section 32) to reach an agreement on the Charter with enough provinces so that a referendum can be avoided.

b) Therefore the preferred timing is to hold the referendum on the Charter in the two-to-four year time period now allowed, under Part V, for the possible referendum on the amending formula. Thus the referendum could be held before, after, or at the same time as the next election. This timing would allow the government to build strong support for its position among a wide range of special interest groups and thus broaden its base of support across the country.

- As for when a decision to support Option 3 should be made, clearly the answer must be as soon as possible in order to make the debate in Parliament relevant to the final form of the resolution which the government wants. Political considerations will have to determine whether the decision should be made public before, after, or on the eve of the Conservative convention. House business considerations will determine the process by which the required amendments can be introduced and voted on. This will be a crucial factor affecting timing.

Question (viii) When can the government introduce amendments in the House? How can it be sure that the amendment will be voted on, etc.?

- As for how a decision to support Option 3 should be made public, the preferred procedure would be to use the Prime Minister's speech in the House for this purpose. Such a speech would have to be short, very clear and addressed to the Canadian people rather than Parliament. A possible outline is as follows:

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- Liberals and NDP agree with the Charter and want to impose it on the provinces;

- Conservatives say that the Charter is the will of the people but do not want to impose it on the provinces (quote Clark and Epp extensively);

- so we will not impose it unless the people vote for it in a referendum or unless a majority of the provinces do not opt-out;

- this should enable the Conservatives to support the amended resolution (unless they take the view that it is the will of provincial legislatures not the will of the people as expressed in a referendum which is most important);

- this should enable the provinces to support the resolution also;

- we are making an historic compromise in the interest of national unity;

- moreover, a two year cooling-off period allows for possibility of agreement on the Charter (as well as the final form of the amending formula);

- referendum only if governments cannot agree, in which case we believe the people who elect both governments should break the deadlock;

- proposed change in the package reflects the distinction we made from the outset and the difference between the people's package and the power's package;

- proposed change means the resolution imposes nothing on the provinces which the people do not want so it meets the concerns of the Kershaw report;

- call for an FMC as soon as the resolution is passed by Westminster and the constitution has been patriated.

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7. Option 4 - is too cautious. There should be no need to await a Supreme Court ruling before going to Westminster if we are not imposing the Charter on the provinces.