

*FRP 2/6  
Keep this small incident  
not to draw attention to  
failure to present a plan  
judicially, at least in  
constitutional terms  
DRC: PO is of very  
importance for government  
have to respond*

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May 25, 1981

*file  
Constitutional  
Planning  
Short term  
F3-11(1)*

MEMORANDUM FOR DAVID CAMERON

STRATEGIC PLANNING  
AND THE CONSTITUTION

This paper places upcoming work on the Constitution in the broader context of strategic planning in FPRO and attempts to develop a constitutional strategy that will be consistent with and complementary to the broader federal-provincial relations strategy.

1. Short term and middle term strategies

For the purposes of this paper, it is assumed that patriation of the Constitution with an amending formula will take place. The short term strategy is inherent in the Special Order adopted by both Houses and it, in turn, presupposes a favourable ruling by the Supreme Court. Work is going on elsewhere on alternate short term strategies in the event of an ambiguous or an unfavourable ruling by the Court.

This paper deals with a middle term strategy, from the time of patriation in mid or late 1981 to the end of the interim period, which may last for two to four and a half years.

The Federal-Provincial Environment

Three other high-profile issues in the area of federal-provincial relations (fiscal relations, energy and the economy) will have to be resolved during the middle range period and the constitutional question cannot be divorced from a consideration of them. Furthermore, it must be assumed that federal-provincial relations will be very strained -- at least, with respect to most provinces -- following patriation.

a) Fiscal relations

One of the concerns of the government, now and after patriation, will be to arrive at new fiscal arrangements with the provinces by April, 1982. Given the current financial position of the government and its determination to achieve

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greater "clout", both economic and political, to shape the national economy, it may be assumed that there will be hard bargaining and that the federal government will display a determined effort to achieve its fiscal goals, despite provincial opposition. If the federal government ultimately has to impose a settlement opposed by most -- or, indeed all -- of the provinces, federal-provincial relations will be even further strained by a federal government determined, by all appearances, to reverse the decentralist movement of the last 25 years and to oblige the provinces to assume greater fiscal responsibility for the programmes they administer.

b) Energy

During the short range period, the most acute question to be resolved is that of pricing and revenue-sharing and this matter will be very much in the forefront immediately after patriation (on the assumption that the first phase of work on the Constitution is quickly terminated). There will be winners and losers (divided between East and West) either in the event of a rapid price increase or of a maintenance of a low price or, in the event of an incremental policy, general unhappiness. Other aspects of federal energy policy, such as the vigour with which the government pursues Canadianization and the question of offshore resources -- are perhaps of less urgency, but the decisions taken in the field of energy will colour federal-provincial relations.

c) The Economy

The continued high rate of inflation, chronic high unemployment and, in some areas, lagging growth have led to calls for a First Ministers' Conference on the Economy. In this area, public pressure may cause the Premiers to adopt a more cooperative stance.

While a degree of federal-provincial tension is inevitable in a federation and, indeed, a certain level of tension may be beneficial, the current constitutional debate may have come close at times to overloading the system. The questions of fiscal relations and energy policies will place additional strains on federal-provincial relations during the interim period. On the other hand, public pressure may cause the Premiers to adopt a more cooperative approach to the Resolution of broad economic issues.

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Options

In the current environment, there appear to be three options open for consideration:

- a) a "stand-pat" option, perhaps camouflaged by an apparent desire to seek constitutional change, which would be designed to ensure that, while discussions took place during the interim period, no substantive changes would occur and the Victoria formula would come into effect;
- b) a genuine effort to seek accommodation with the provinces on change during the interim period, to prepare the way for further change after the interim period (when a more flexible amending formula would be in place) and to ensure that a formula other than that of Victoria will come into effect;
- c) maintaining the momentum gained during unilateral patriation and playing upon current economic difficulties, an aggressive attempt to secure greater powers for management of the economy.

In assessing the merits of these options, one must bear in mind the Prime Minister's lack of enthusiasm for the Victoria formula over the past year and his preference for a "mathematical" formula, his commitment since last September to Upper House reform, the willingness of the government since October, 1978, to contemplate changes in the distribution of powers and the constitutional obligation, after patriation, to pursue the question of aboriginal rights.

Constraints on developing a middle term strategy

There are a number of constraints that must be borne in mind in developing a middle-term strategy:

- a) the impact of fiscal and energy negotiations and the state of the economy on federal-provincial relations, coupled with the legacy of unilateral patriation;
- b) the requirement that the rights of aboriginal peoples be on the agenda of First Ministers' constitutional conferences and that representatives of aboriginal peoples be invited to participate in the discussion of such rights;
- c) the requirement that elected representatives of the territories be invited to participate in the discussion of matters which, in the view of the Prime Minister, affect them;

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- d) the government's repeated assertion (and promise) that change could and would take place after the constitutional "impasse" had been resolved by unilateral action, which may have created public expectations;
- e) the requirement that constitutional inactivity after patriation not provide new ammunition to the government of Quebec;
- f) the need to avoid worsening Western alienation.

The categories for developing a federal strategy for federal-provincial relations

Ralph Heintzman, in his paper of May 1, 1981, on Strategic Planning, identified three broad "categories" for reflexions on long term strategy:

- a) nation-building;
- b) government-citizen relations;
- c) intergovernmental relations.

The development of a constitutional strategy should be consistent with the objectives being pursued in these "categories" (which, as he noted, overlap) in the broader federal strategy.

In the area of the Constitution, "nation-building" can be pursued through the process of constitutional discussions (e.g., seeking to lower the level of acrimony in federal-provincial constitutional discussions and demonstrating that the Canadian federal system can work and produce results, or by aggressively pursuing policies designed to strengthen the "national" government) and through the substance of further changes (e.g., entrenchment of the Supreme Court, Upper House reform, etc.), where both the process and the substance are designed to increase the legitimacy of the federal government.

"Government-citizen relations" can be strengthened by increased legitimacy (see above) and by underlining the perspective of the federal government in negotiations on the distribution of powers: the objective of a realignment in the distribution of powers is to ensure that the citizen is better served.

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"Intergovernmental relations" can be strengthened and improved through a conciliatory approach to the process of constitutional discussions and through the priority the government attaches to constitutional changes designed to ensure greater collaboration between governments (e.g., provincial participation in the nomination of Justices to the Supreme Court, a generally acceptable amending formula, Upper House reform, etc.). On the other hand, if the growth of "executive federalism" is seen as a force that creates and develops acrimony, and if FMC's are seen as forums for provincial whipping of the federal government, the government may wish to decrease the visibility of intergovernmental relations and to make greater use of "unilateral powers" under the Constitution to pursue "national" objectives.

A middle-term strategy for the Constitution

The strategy to adopt for the Constitution will depend upon the option chosen by the government.

a) The Conciliatory Approach

If the government adopts a conciliatory approach to the Constitution, an effective strategy might be instructed by the following considerations:

- the need to separate, to the degree possible, discussions on the Constitution from those on fiscal relations and energy, which may prove acrimonious;
- the adoption of a positive and conciliatory stance towards constitutional change, coupled with concrete offers (as in October, 1978);
- adoption of a process (e.g., low profile private negotiating sessions) better designed to produce concrete results than televised First Ministers' Conferences;
- providing thorough ground-work by Ministers and/or officials through bilateral and/or multilateral meetings prior to a second "working" First Ministers' Conferences;
- establishing a realistic agenda, to the degree possible, of items for discussion, perhaps distinguishing between first and second lists.

b) A "Stand-pat" Approach

If the government adopts a "stand-pat" approach, an effective strategy might call for separating work on the Constitution from

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work on fiscal relations and energy and the adoption of low profile private negotiating sessions. However, the government would be guarded in its commitments and would encourage the overloading of the agenda which would lessen the chances of agreement on any one item or on a short list of changes.

c) An Aggressive Approach

In the event of an aggressive approach, the government might wish to link work on the Constitution to work on fiscal relations, energy and the economy; to insist that "powers over the economy" be an item of urgent priority; and to use an open First Ministers' Conference to take the offensive and to demonstrate that the provinces are trying to balkanize Canada.

The Mood

In choosing between the options, the government will have to assess the mood that will prevail in the various provinces after patriation and the mood of the Canadian public, nationally and regionally.

a) The public

Recent survey evidence indicates that 76% of Canadians are somewhat concerned or very concerned about the degree of federal-provincial conflict. Moreover, 72% feel that the federal government is at least partially to blame for the current level of conflict, whereas only 42% assign any blame to provincial governments. In addition, 69% of Canadians now believe that there is at least some danger of Canada breaking apart in the next few years and again they blame the federal government generally, or the Prime Minister in particular, for this state of affairs.

If these views are maintained over time, an aggressive approach to the Constitution would be unlikely to increase political support for the government party or "legitimacy" for the federal government.

Furthermore, the public may have become "saturated" on the constitutional issue over the past year and be eager to see the Constitution dropped as a current high profile matter for Resolution.

✓ These considerations might militate in favour of a conciliatory or "stand-pat" approach to the Constitution in the middle-term period.

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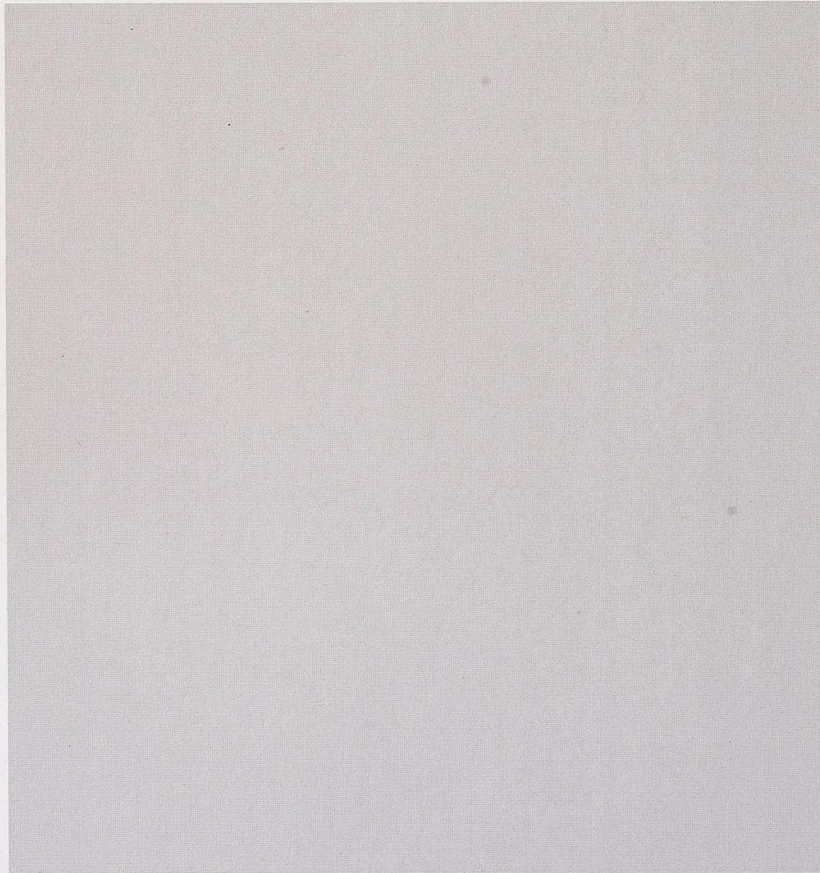


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b) The provincial governments



On balance, the mood of the public and most of the provincial governments would suggest that a conciliatory or, at least, a "stand-pat" approach to the Constitution would be more conducive to supporting the broad governmental objective of nation-building at this time. In the event of a referendum on the amending formula in two year's time, however, the government may revert to a more aggressive role.

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Elements of a Federal Strategy

a) Timing and nature of the initial First Ministers' Conference

Given that the interim period may only last for two years, there is much to commend an early meeting of First Ministers on the Constitution as an indication of the government's good faith. An early First Ministers' meeting would deal with the agenda and would best be held in private. It might be held in late September or in October before the question of fiscal relations becomes critical and at which time agreement may have been reached on energy pricing. *why?*

The process of constitutional negotiations and the timing of subsequent First Ministers' Conferences could be resolved at the initial meeting. Conducting negotiations through the Continuing Committee of Ministers on the Constitution (supplemented by meetings of officials) may be assumed by the provinces to be the established way of proceeding. The second meeting of First Ministers should not be held until after adoption of the new Fiscal Arrangements Act, but there will probably be pressures for a second meeting before or at the time of the expiry of the first year of the interim period to take stock of the state of negotiations.

b) An open or closed FMC

Although the September, 1980, FMC was announced as "public", the arrangements finally agreed upon provided for a significant amount of time in closed sessions. The Premiers themselves acknowledged the utility of private sessions in working out their "Château consensus" last September and eight Premiers more recently arrived at agreement on a "patriation package" (e.g., the Vancouver formula) behind closed doors. Consideration should be given by the government to proposing to the provinces that the first and second constitutional FMC's should be held in private, preferably in a setting away from the madding crowd and more conducive to encouraging First Ministers to establish more relaxed relationships (e.g., Jasper, Banff Springs, Manoir Richelieu). This would also have the advantage of lessening the media "hype" and the expectations of early or dramatic movement. It would also reduce or remove the strong possibility (otherwise) of First Ministers posturing before the television cameras. ✓

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c) The agenda

The amending formula must be on the agenda as a high priority item. The Constitution Act, 1981, provides for three possible ways of resolving this issue:

- by unanimous agreement;
- by referendum;
- by the automatic coming into force of the Victoria formula if neither of the first two ways produces results.

The majority of provinces are in favour of the Vancouver formula, but the federal government is firmly on record as being opposed to opting-out and not being committed to the Victoria formula. Of the options available to the federal government, the following may merit consideration:

- (i) supporting a mathematical approach to the amending formula that would treat all provinces the same way, with no opting-out.
  - Most of the provinces now support equal treatment of all provinces, but Alberta, Quebec and perhaps Newfoundland firmly support the concept of opting-out. Furthermore, the agreement of eight Premiers on the Vancouver formula provided for unanimous consent on some matters to give special protection to Quebec (e.g., composition of the Supreme Court).
- (ii) Same as above, but with provision for unanimous consent on some items (e.g., the Toronto consensus approach of December, 1978).
- (iii) Same as above, but with explicit provision for a special role for Quebec (e.g., the RGR formula). Probably anathema to Alberta and perhaps most provinces.
- (iv) Same as above, but with opting-out on a limited range of matters (e.g., jurisdiction over and/or ownership of natural resources).

Support for any of these options as an initial bargaining position by the federal government could be viewed as evidence that it was not wedded to the Victoria formula. The government, given the predisposition of the Prime Minister, will wish to make a concerted effort to find formula that avoids the characteristics of the Victoria formula that are objectionable to the majority of the provinces, while also avoiding a formula

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that would permit opting-out on the Charter of Rights. With concerted effort, unanimous agreement on an amending formula by or before the end of the interim period might be possible and would establish a new sense of optimism respecting the process of constitutional negotiations and provide an auspicious beginning to the next phase of constitutional change.

The question of aboriginal rights must also be on the agenda. Attached please find a paper prepared by Denis Marantz which discusses different ways of handling this item.

Other than these two items, the other matters to appear on the agenda are open to negotiation. However, the requirement of unanimous consent for any amendment during the interim period makes it highly improbable that there will be agreement on anything other than the amending formula (if that) during the next phase of negotiations.

The Prime Minister has indicated that he would like to see early movement on the Upper House. While this is the priority of the government of British Columbia, it is viewed with great suspicion by the Alberta government and does not have a high priority with any other provincial government. If the federal government were to propose inclusion of this item on the agenda, it would be difficult to resist pressures to include the other central institution that was discussed in 1980, the Supreme Court.

Any attempt by the federal government to include anything on the agenda other than the amending formula and aboriginal rights will be met by demands by various provinces that items of particular concern also be added. The question of equalization is one that will be resolved and it is unlikely that British Columbia will feel strongly enough, after patriation, to have it opened once again. The same cannot be said about the Charter of Rights. The federal government has announced that it will strongly encourage Ontario to accept greater language rights and this may open the door for Manitoba and other provinces to request that the Charter be reviewed by the CCMC.

Alberta, perhaps supported by Saskatchewan, may also ask that the provisions of the Constitution Act, 1981, respecting natural resources and interprovincial trade be re-examined.

Of the other items on the agenda last year, it is unlikely that any province would propose a preamble (principles) or powers over the economy. There will be pressures to include communications (Saskatchewan, Quebec and Ontario), Family law (Quebec and Ontario) and the offshore (Newfoundland). However, Newfoundland might agree to have fisheries discussed separately as a matter for administrative agreement.

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Finally, Quebec, which played a very low profile role in the negotiations last year, may propose (in preparation for a more active role in a year or so) that culture and social policy also be included.

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If the federal government seeks to have anything more than the amending formula and aboriginal rights on the agenda, one might well end up with eleven items on it. This might not be a bad thing. It would have the advantage of diminishing the relative importance of aboriginal rights if, as seems likely, a major breakthrough with unanimous consent does not occur in that area. Furthermore, lack of movement on any item (save, perhaps, the amending formula, where the pressure for agreement will be greatest) need not be damaging. The federal government has argued that the all-or-nothing package approach with the objective of unanimous agreement on each and all amendments has led to an impasse and failure to move will confirm once again this analysis. However, work on some items during the interim period may lead to early movement on some amendments once a more flexible amending formula is in place (e.g., family law).

On the other hand, if bitterness is high after patriation, if a number of provinces are convinced that the chances for unanimous agreement on any item other than the amending formula are next to nil during the interim period and if governments are worried generally about the amount of resources spent on the Constitution during the past few years, there may be a general view that the discussion of items other than the formula and aboriginal rights should be postponed until after the interim period.

On balance, a broader rather than a narrower agenda would be in the interests of the federal government and it would allow earlier discussion of central institutions. However, the willingness of the provinces to continue such an expensive process may be contingent upon their perception of how well disposed the federal government is towards significant movement on a broad range of issues. In this regard, it may be useful to re-examine all the issues once again in a memorandum to Cabinet to get a clearer mandate for negotiations during the next phase.

James Ross Hurley

Att.  
/jam