MEETING OF OFFICIALS ON THE

CONSTITUTION

COLLATION OF DOCUMENTS

Ottawa
January 11 and 12, 1979

Canadian Intergovernmental Conference Secretariat • Secrétariat des Conférences intergouvernementales canadiennes

MEETING OF OFFICIALS ON THE
CONSTITUTION

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Ottawa
January 11-12, 1979

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CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

Proposed Agenda

Ottawa
January 11-12, 1979

MEETING OF OFFICIALS ON THE CONSTITUTION

Ottawa

January 11-12, 1979

AGENDA

Thursday, January 11th

09:30 - 12:30 - Plenary session

- Establishment of sub-committes and agreement on times of meetings
- Discussion of items other than those assigned to committees:
  - Indirect Taxes
  - Spending Power
  - Equalization
  - Offshore Resources
  - Supreme Court
  - Monarchy and Bill C-60
- Reference to other items to confirm positions reached at Toronto.

14:00 - 17:00 - Meetings of Sub-Committees on:

- Natural Resources
- Charter of Rights and Freedoms
- Communications

Friday, January 12th

09:00-10:00 - Plenary session

- Items not reached in plenary session on January 11
- Problems emerging from Committee discussions

10:00-12:30 - Meetings of Sub-Committees:

- Fisheries
- The Senate
- Any other sub-committees for which a further meeting is desirable and possible

14:00-17:00 - Plenary session

- The Amending Formula
- Reports from Sub-Committes
- Remaining Problems

DOCUMENT: 840-153/026
REVISED

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

REVISED REPORT OF THE COMMITTEE OF OFFICIALS ON RESOURCE OWNERSHIP AND INTERPROVINCIAL TRADE

Ottawa
January 11-12, 1979

CONFIDENTIAL

January 4, 1979.

DRAFT FOR DISCUSSION PURPOSES ONLY

92. (1) (present section 92)

Resources

(2) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable resources in the provice;

(b) development, exploitation, extraction, conservation and management of non-renewable resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, exploitation, conservation and management of forestry resources in the province and of sites and facilities in the province for the generation of electrical energy, including laws in relation to the rate of primary production therefrom. (Note 1)

Export from the province of resources

(3) In each province, the legislature may make laws in relation to the export from the province of the primary and initially processed production from non-renewable and forestry resources in the province and from facilities in the province for the generation of electrical energy.

Relationship to certain laws of Parliament

(4) Any law enacted by the legislature of a province pursuant to the authority conferred by subsection (3) prevails over a law enacted by Parliament in relation to the regulation of trade and commerce except to the extent that the law so enacted by Parliament,

(a) in the case of a law in relation to the regulation of trade and commerce within Canada, is necessary to serve a compelling national interest that is not merely an aggregate of local interests; (Note 2) or

(b) is a law in relation to the regulation of international trade and commerce. (Note 3)

Taxation of resources

(5) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable and forestry resources in the province and the primary and initially processed production therefrom; and

(b) sites and facilities in the province for the generation of electrical energy and the primary production therefrom,

whether or not such production is exported in whole or in part from the province. (Note 4)

Laws to be non-discriminatory within Canada

(6) No law made by the legislature of a province pursuant to the authority conferred by subsection (3) or (5) is of any force or effect to the extent that it discriminates as between purchases of the primary and initially processed production from non-renewable or forestry resources or from facilities for the generation of electrical energy for delivery in Canada outside the province and purchases thereof for delivery within the province. (Note 5)

(7) Nothing in subsections (2) to (6) derogates from any of the powers or rights that a legislature or a Government of a province has immediately before the coming into force of subsections (2) to (6). (Note 6)

(8) The non-renewable resources of the seabed and subsoil of internal waters, the territorial sea and the area of the continental margin within national jurisdiction adjacent or appurtenant to any province (which area is delimited as described in section 123 below) and all rights flowing from the economic exploitation and exploration of that area and its superjacent waters (such as the production of energy from the water, currents and winds) shall be treated for purposes of ownership and legislative jurisdiction as if they were non-renewable resources in the Province. (Note 7)

Note 1

British Columbia and some other provinces wished to have "water" added to this clause. It would then read

"development, exploitation, conservation and management of forestry and water resources in the province ...."

Note 2

Alberta and Quebec expressed their disagreement with term "compelling national interest". Saskatchewan noted that this term differed from their original wording which was "national interest that is not merely an aggregate of local interests and that is compelling in the circumstances. They also noted they were willing to consider alternative drafts.

Note 3

Saskatchewan and Alberta expressed their disagreement with the revised wording, noting this was a significant departure from the draft discussed in Toronto in mid-December. The federal government indicated that this section was not intended to offset provincial legislative powers exercised by provinces in interprovincial trade. They also agreed to examine the wording to see if it could become more precise in its (a) scope and (b) application.

Note 4

Ontario noted it had some general concern about the future application of this section.

Note 5

A number of provinces expressed disagreement with the term "discrimination as between purchases". While recognizing the need for non-discriminatory pricing and taxes the draft as presented was thought by some to be too restrictive and could effect provincial economic development.

Note 6

Savings clause

Agreed to.

Note 7

Introduced by Newfoundland, agreed to by Alberta, Saskatchewan and Quebec, other provinces reserved their position, disagreed to by the federal government.

Other

Alberta indicated that it had some concern about section 92 10 (a) being used to regulate intraprovincial pipelines interconnected with interprovincial pipelines thereby permiting extensive federal regulation.

DOCUMENT: 840-153/002

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

Resource Ownership and Interprovincial Trade

Federal

Ottawa
January 11-12, 1979

Department of Justice | Ministère de la Justice

CONFIDENTIAL

January 4, 1978

Mr. E.J. Watson,
Deputy-Secretary,
Canadian Intergovernmental
Conference Secretariat
66 Slater Street,
Ottawa, Ontario.
K1N 8B5.

Dear Mr. Watson:

It was agreed at the Continuing Committee of Ministers on the Constitution in Toronto that federal officials would further refine the discussion draft (Doc. 830-67/002) entitled "Resource Ownership and Inter-provincial Trade" for distribution to all delegations by January 11, 1979. I am accordingly attaching a revised discussion draft and would request that you distribute it immediately to provincial delegations together with a copy of this letter.

The revised draft attempts to reflect a number of matters discussed at the last meeting. These include: a broadened description of electrical generation resources; the addition of "extraction" as a process to be covered; a rearrangement in the new sub-section 92(4) to state the rules of paramountcy in a way which may be more acceptable; provision in sub-section 92(4) to reflect the federal government's caveat concerning international trade; provision in sub-section 92(5) to protect the validity of indirect taxes on exported resources; and provision in sub-section 92(6) to ensure that the new provincial powers would not be used to discriminate against extra-provincial buyers.

Criticisms were made in Toronto of the term "primary production". Unfortunately, we have so far found the term to be easier to criticise than to replace. We have the matter under study but are not in a position at this time to suggest another term. We hope to be able to discuss this more fully at the meeting of January 11-12 and it is hoped that other interested delegations will also be in a position to suggest specific solutions to the problem which was identified on page 5 of the report from the committee of officials on natural resources (Doc. 830-67/046).

Yours sincerely,

B.L. Strayer
Assistant Deputy Minister
(Public Law)

Ottawa, Canada
K1A 0H8

CONFIDENTIAL

January 4, 1979.

DRAFT FOR DISCUSSION PURPOSES ONLY

92. (1) (present section 92)

Resources

(2) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable resources in the provice;

(b) development, exploitation, extraction, conservation and management of non-renewable resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, exploitation, conservation and management of forestry resources in the province and of sites and facilities in the province for the generation of electrical energy, including laws in relation to the rate of primary production therefrom.

Export from the province of resources

(3) In each province, the legislature may make laws in relation to the export from the province of the primary production from non-renewable and forestry resources in the province and from facilities in the province for the generation of electrical energy.

Relationship to certain laws of Parliament

(4) Any law enacted by the legislature of a province pursuant to the authority conferred by subsection (2) or (3) prevails over a law enacted by Parliament in relation to the regulation of trade and commerce except to the extent that the law so enacted by Parliament,

(a) in the case of a law in relation to the regulation of trade and commerce within Canada, is necessary to serve a compelling national interest that is not merely an aggregate of local interests; or

(b) is a law in relation to international trade and commerce.

Taxation of resources

(5) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable and forestry resources in the province and the primary production therefrom; and

(b) sites and facilities in the province for the generation of electrical energy and the primary production therefrom,

whether or not such production is exported in whole or in part from the province.

Laws to be non-discriminatory within Canada

(6) No law made by the legislature of a province pursuant to the authority conferred by subsection (3) or (5) is of any force or effect to the extent that it discriminates as between purchases of the primary production from non-renewable or forestry resources or from facilities for the generation of electrical energy for delivery in Canada outside the province and purchases thereof for delivery within the province.

DOCUMENT: 840-153/019

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

Alternatives to Section 109 of the British North America Act

Federal

Ottawa
January 11-12, 1979

CANADA

CONFIDENTIAL

January 11, 1979

FOR DISCUSSION PURPOSES ONLY

ALTERNATIVES TO SECTION 109 OF THE
BRITISH NORTH AMERICA ACT

Alternative 1

Property in lands, mines, etc.

*"123.1 All lands, mines, minerals and royalties belonging to any province immediately before this section comes into effect, and all sums then due or payable in respect of any such lands, mines, minerals and royalties, belong immediately after this section comes into effect to the province or are then due and payable, subject to any trusts existing in respect thereof and to any interest other than that of the province therein."

Alternative 2

Ownership of property

*"123.1 All property belonging to any province immediately before this section comes into effect, belongs immediately after this section comes into effect to the province, subject to any trusts existing in respect thereof and to any interest other than that of the province therein."

Alternative 3

Ownership of property

"127.1 Nothing in this Act changes the ownership in any property owned by Canada or a province immediately before the coming into force of this Act."

DOCUMENT: 840-153/021

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

Newfoundland Amendment - Section 92

Newfoundland

Ottawa
January 11-12, 1979

Newfoundland Amendment

92 (5) The non-renewable resources of the seabed and subsoil of internal waters, the territorial sea and in the area of the continental margin within national jurisdiction adjacent or appartenant to any province (which area is delimited as described in section 123 below) and all rights flowing from the economic exploitation and exploration of that area and its superjacent waters (such as the production of energy from the water, currents and winds) shall be treated for purposes of ownership and legislative jurisdiction as if they were non-renewable resources in the Province.

DOCUMENT: 830-67/ 016

CONFIDENTIAL

FEDERAL-PROVINCIAL CONTINUING COMMITTEE
OF MINISTERS ON THE CONSTITUTION

DRAFT FOR DISCUSSION PURPOSES ONLY

Suggested Revision of B.N.A. Act S. 109

Resource Ownership

Newfoundland

Toronto
December 14-16, 1978

RESOURCE OWNERSHIP

Property in lands, mines, etc.

123.1 All lands, mines, minerals and royalties belonging to any province immediately before this section comes into effect, and all sums then due or payable in respect of any such lands, mines, minerals and royalties, belong to the province or continue to be due and payable subject to any trusts existing in respect thereof and to any interest other than that of the province therein.

123.2 All lands, mines, minerals and royalties, in the area of the continental margin within national jurisdiction adjacent or appurtenant to any province (which area shall be delimited as described in sub-section (3) below) and all economic or proprietary rights in the natural resources, whether living or non-living or the sea bed and subsoil and the superjacent waters of such areas, and all rights flowing from the economic exploitation and exploration of that area, such as the production of energy from the water, currents and winds, shall belong to the adjacent province.

123.3 (a)

The delimitation of the area adjacent or appurtenant to each Province shall as between adjacent or opposite Provinces, be that area, within national jurisdiction falling within lines drawn by agreement, in accordance with equitable principles, employing, where appropriate, the median or equidistant line, and taking account of all the relevant information.

123.3 (b)

If no agreement can be reached within a reasonable period of time, the Province concerned shall resort to arbitration, one member of the Arbitration Board being chosen by each Province, and the third either by agreement of these two members or failing agreement by the Supreme Court of Canada. (Expand by reference to Standard Arbitration Clauses.)

DOCUMENT: 840-153/027

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

INDIRECT TAXATION

Report of the Committee of Officials on Indirect Taxation, The Spending Power and Equalization

Ottawa
January 11-12, 1979

INDIRECT TAXATION

1. The subcommittee of officials reviewed a number of specific legislative proposals including:

1 - a draft circulated by Ontario at the December Ministers' Conference,

2 - revised drafts (Options "A" and "B") circulated by Ontario on January 11,

3 - a draft circulated by federal officials on January 11, and

4 - a draft circulated by Saskatchewan on January 11.

2. Following discussion of these drafts, it appeared that the federal government and the majority of provinces generally favour a constitutional provision authorizing provincial governments to levy indirect taxes in order to:

- extend provincial power on taxation,
- open the possibility of some additional provincial revenue-raising flexibility, and
- reduce concerns with respect to the validity of certain taxes which are now applied.

3. At the same time, there was also a general concern among most governments that this power, if not accompanied by reasonably stringent limitations, could result in a significant

portion of the burden being passed on to individuals and businesses in other provinces. In this connection, however, Quebec noted that it believed existing constitutional limits on provincial taxing power, as for example, the tendency of the courts to consider the colourable aspects of fiscal legislation constituted an adequate safeguard against undue extra-provincial impact.

4. Because a number of members of the subcommittee were concerned about the potential extra-provincial impact of only a general limitation to accompany a draft indirect taxation provision, it was suggested that, for purposes of further discussion, it would be most appropriate to review a draft which embodied extremely narrow limits. Such a draft is attached as Appendix A.

Some members of the subcommittee expressed concern that this might have the effect of rendering a tax ultra vires if isolated transactions had extra-provincial impact. On the other hand, courts might consider that isolated incidents do not constitute "the burden of the tax."

5. It was recognized by the subcommittee that the adoption of a provision in the form outlined in Appendix A was unlikely to provide provinces with any significant additional revenue. It was believed by some as well that such a provision would not necessarily preclude discriminatory taxation practices, and that this subject might require further examination.

6. In light of the policy and technical concerns which were raised in its discussions, the subcommittee felt that the Continuing Committee of Ministers might wish to re-evaluate the general objectives and overall advantages and disadvantages associated with a broad provincial indirect taxation provision. In fact, some of the members expressed the view that, given the limitations, it was not worth seeking general provincial powers of indirect taxation.

7. In light of this, it was suggested that, if agreement on a legislative draft were not possible before the February 5 First Ministers' Conference, consideration could be given to recommending that the subject of indirect taxation be dealt with during the next stage of the constitutional review.

APPENDIX A

For Discussion Purposes Only

CONFIDENTIAL

REVISED DRAFT

January 12, 1979

Taxation within the province by any mode or system of taxation for provincial purposes but no indirect tax shall constitute a tax on the entry into or export from the province or otherwise have effect as a barrier or impediment on interprovincial or international trade or be imposed so that the burden of the tax is passed outside the province.

DOCUMENT: 840-153/014

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

Indirect Taxation

Ontario

Ottawa
January 11-12, 1979

Option A

Taxation within the province by any mode or system of taxation but no indirect tax shall be in the nature of a customs or export tax on entry into or export from the province or be imposed so that the general tendency is that the burden of the tax will be passed on to persons outside the province.

Option B

Taxation within the province by any mode or system of taxation but no indirect tax shall be in the nature of a customs or export tax on entry into or export from the province or otherwise have effect as a barrier or impediment on interprovincial or international trade or be imposed so that the burden of the tax will be passed on to persons outside the province.

Ontario
January 10, 1979.

DOCUMENT: 840-153/016

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

Legislative Jurisdiction for the Provinces in Respect of Indirect Taxation

Federal

Ottawa
January 11-12, 1979

DRAFT FOR DISCUSSION PURPOSES RELATING TO LEGISLATIVE JURISDICTION FOR THE PROVINCES IN RESPECT OF INDIRECT TAXATION

1. Strike out subsection 92(2) and substitute the following:

"2. Taxation within the province in order to the raising of a revenue for provincial purposes except that any indirect tax shall not

(a) constitute an impediment to interprovincial or international trade, or

(b) have the general tendency of passing the burden of the tax outside the province."

DOCUMENT: 840-153/032

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

Proposed Revision of Ontario Discussion Draft on Indirect Taxation

Saskatchewan

Ottawa
January 11-12, 1979

FOR DISCUSSION PURPOSES ONLY

January 11, 1979
Saskatchewan

PROPOSED REVISION OF
ONTARIO DISCUSSION DRAFT
ON INDIRECT TAXATION

Replace s. 92(2) of the B.N.A. Act with the following:

"2. Any mode or system of taxation within the province in order to the raising of a revenue for provincial purposes other than:

(a) indirect taxation that is in the nature of customs or export taxation on entry into or export from the province

(b) taxation that imposes taxes that are both:

(i) indirect taxes; and

(ii) taxes some or all of which, in their usual ultimate effect, are passed on to persons who are outside the province.

DOCUMENT: 830-67/013

CONFIDENTIAL

FEDERAL-PROVINCIAL CONTINUING COMMITTEE
OF MINISTERS ON THE CONSTITUTION

(DRAFT FOR DISCUSSION PURPOSES ONLY)

Proposal on Indirect Taxation

Ontario

Toronto
December 14-16, 1978

INDIRECT TAXATION

I PROPOSAL

. Replace 92(2) of the BNA Act with the following:

TAXATION WITHIN THE PROVINCE IN ORDER TO THE RAISING OF A REVENUE FOR PROVINCIAL PURPOSES BUT NO INDIRECT TAXATION SHALL BE IN THE NATURE OF A CUSTOMS OR EXPORT TAX ON ENTRY INTO OR EXPORT FROM THE PROVINCE OR BE IMPOSED SO THAT THE GENERAL TENDENCY IS THAT THE BURDEN OF THE TAX WILL BE PASSED ON TO PERSONS OUTSIDE THE PROVINCE

II EXPLANATION

1. Purpose

. This constitutional provision would give the provinces the power to levy indirect taxes within certain limits, in addition to the power they already have to levy direct taxes.

2. Limitations

. If a province imposes an indirect tax on products or goods, some of which may be bought by residents of other provinces, it is in effect levying a tax on residents of other jurisdictions.

. Indirect taxes can also affect interprovincial and international trade if they are used as a form of tariff.

. A constitutional provision to that effect should therefore be accompanied with limitations to ensure that:

- the burden of such taxes would be confined to the residents of the province where they are levied, and for use or consumption within the province by non-residents; and

- uses of such taxes by the provinces would not create barriers to interprovincial and international trade.

3. The Courts

. It would be up to the Courts to determine whether specific indirect taxes are acceptable or not.

4. Other Considerations

. This proposed provision is not intended to have the effect of limiting or restricting in any way:

- federal general power to levy taxes by any means;

- federal exclusive power to levy customs duties and excise taxes;

- other provincial means to raise revenue, such as those provided for in sections 92(9) and 109 of the BNA Act.

. Any distinct agreement that could be reached on indirect taxation of natural resources could be incorporated in this general provision or treated as a separate provision.

3

DOCUMENT: 840-153/023

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

Report of the Committee of Officials on Communications

Ottawa
January 11-12, 1979

CONFIDENTIAL
January 12, 1979

REPORT OF THE MEETING OF OFFICIALS ON COMMUNICATIONS

At the December meeting of the Continuing Committee of Ministers, it was agreed that:

- Canada and Saskatchewan should jointly attempt to produce a discussion draft on communications;
- the meeting of officials in Ottawa on January 11-12 should strike a Committee to examine this question and to prepare a report for consideration at the next meeting of the Continuing Committee of Ministers on the Constitution.

Officials from all governments, with the exception of Nova Scotia and Prince Edward Island, attended. The New Brunswick delegation was present for discussion of the first two subject areas only. Two documents were tabled: the report of the federal and Saskatchewan officials, which is appended, and a position paper by Newfoundland.

Four subject areas were discussed: radio spectrum management, telecommunications carriers, radio and television broadcasting and cable distribution systems.

Radio Spectrum Management

All delegations agreed that Parliament should retain jurisdiction over the allocation of bands of the radio spectrum. However, a majority of provinces supported a provincial role in specific frequency assignment due to its local social and economic implications. Differing positions were taken by provinces regarding the method by which provincial concerns might be accommodated - some provinces preferred constitutional change; others considered administrative arrangements acceptable.

Telecommunications Carriers

Three broad positions emerged from the discussion:

(a) A majority of provinces held that carriers located entirely within a single province should fall exclusively within provincial jurisdiction.

(b) Other provinces, and the federal government, recognized provincial authority over the intra-provincial operations of such companies but acknowledged a national dimension to telecommunications carriage.

(c) The federal government held that any constitutional change in the area of telecommunications carriers must involve Parliamentary authority over the international and interprovincial aspects of telecommunications, technical standards, inter-connection of systems, and regulation of national carriers.

Radio and Television Broadcasting

All delegations agreed that further attention should be given to means of accommodating provincial concerns respecting the local elements in off-air broadcasting. Some provinces preferred constitutional changes to accommodate these concerns. The federal government and other provinces preferred administrative arrangements.

Cable Distribution Systems

Four of the seven provinces present and the federal government agreed that cable distribution systems could be subject to concurrent jurisdiction, provided that in the case of a conflict, federal authority could govern in relation to certain matters, viz. minimum technical standards, measures to

assist the achievement of the objectives of the Canadian broadcasting system, including the protection of the economic base of broadcasting, and measures to stimulate Canadian program production, and provincial authority would govern in respect to all other matters. It was agreed that further discussion and clarification was required to define the scope of the particular regulations or orders which would properly relate to these preoccupations.

Subject to such regulations, the appropriate provincial regulatory functions for those provinces that wished to exercise them could extend at least to authorizing cable undertakings, selecting the franchise area, regulating transfers of ownership, setting subscriber rates and charges, regulating terms and conditions of subscriber contracts, regulating community channels of local origination, including the licensing of users of such channels, authorizing and regulating instructional channels, authorizing and regulating subscription television, and regulating intra-provincial non-programming services.

Consultation

Notwithstanding the jurisdictions of the federal or provincial governments to make laws in the field of communications, it was agreed by all delegations that it would be desirable to establish consultative arrangements in all subject areas discussed.

R.G. Robertson

Chairman of the Committee on Communications

CONFIDENTIAL

FOR DISCUSSION
PURPOSES ONLY

DOCUMENT: 840-153/007

REPORT OF THE MEETINGS OF SASKATCHEWAN AND FEDERAL OFFICIALS ON COMMUNICATIONS

Introduction

1. As directed by the Federal-Provincial Continuing Committee of Ministers on the Constitution on December 16, 1978, federal and Saskatchewan officials met in Regina on December 21, 1978, and January 5, 1979, to consider questions relating to constitutional change in the area of communications and to explore whether a joint proposal could be produced for consideration by all governments in time for the meeting of officials in Ottawa, on January 11-12, 1979, which is to be followed by another meeting of the Continuing Committee of Ministers, in Vancouver, beginning on January 22. In the discussions, federal and Saskatchewan officials considered the Report to Ministers which resulted from the meeting of officials on Communications on December 15, 1978, as well as notes and principles submitted by the federal government and proposals made by Saskatchewan, Nova Scotia and British Columbia. The discussion covered four main areas: radio spectrum management, telecommunications carriers, radio and television broadcasting, and cable distribution systems.

A. Radio Spectrum Management

Existing Situation

2. Radiocommunication as defined in the Radio Act falls under exclusive federal jurisdiction. The jurisdiction of Parliament was established by the courts in the Radio Reference in 1932, including transmission, reception and the right to determine the character, use and location of radio apparatus. Canada is a party to a number of international conventions and agreements respecting radiocommunication.

Saskatchewan Comments

3. Saskatchewan officials expressed the view that federal authority over radio spectrum management should be limited to the purely technical aspects of radiocommunication. Federal power over radio frequency management would therefore comprise the allocation of frequencies for types of communications services and for the international management of radio frequencies, but would leave frequency assignment to particular telécommunications undertakings in the hands of the provincial governments, except with respect to such matters as aeronautics, defence, radionavigation or in major emergencies. Saskatchewan officials explained that frequency assignment in addition to technical criteria frequently involves economic and social considerations of provincial interest.

To recognize the federal role in radio spectrum management, Saskatchewan had advanced the proposal that there should be concurrent powers in respect of telecommunications, but that in cases of conflicts in general provincial laws would prevail except in certain specific areas where federal laws would prevail, one of which would be federal regulation for the orderly management of the technical aspects of radio-communication.

Federal Comments

4. Federal officials observed that radiocommunication cannot be contained within any geographical boundaries. They did not consider it practicable to break up the management of the spectrum, since the spectrum is a scarce resource and a single national authority must be able to establish policy and assign priorities in the use of the spectrum. However, they did reiterate a continued willingness to consider appropriate administrative arrangements to accommodate provincial concerns in situations where there is competition

for a particular frequency or where there are complex licensing matters involved. Accordingly, federal officials did not envisage constitutional change in this area.

Federal officials also noted that the British Columbia proposal stated that "licensing of the radio frequency spectrum, with its international implications, is clearly an area for federal responsibility," and that the Nova Scotia proposal stated that radiocommunication should remain under federal jurisdiction.

Points of Agreement

5. Both Saskatchewan and federal officials agreed that Parliament should retain constitutional authority over all allocation matters and at least over the technical aspects of radio spectrum management. Both agreed that further consideration could be given to appropriate means of accommodating the provincial concerns respecting economic and social issues.

B. Telecommunications Carriers

Existing Situation

6. At present, regulatory authority at the federal level is exercised over the following telecommunications carriers: Bell Canada, B.C. Telephone Company, CN and CP Telecommunications, Telesat Canada and Teleglobe Canada. Regulatory authority at the provincial level is exercised over all other telecommunications carriers. In each case, regulation extends to the entire operations of each carrier (including inter-provincial and international rates). Telephone communications across Canada is offered by Bell Canada, B.C. Telephone Company and seven provincially-regulated telephone companies through the Trans-Canada Telephone System, a consortium of these companies and Telesat Canada. In addition, there are a number of other telephone companies that are either provincially

or municipally regulated. Bell Canada and B.C. Telephone Company operate in Ontario, Quebec, N.W.T., and British Columbia, and provide some 70% of the telephone service in Canada. The CRTC has recently commenced a proceeding to review the rates and terms charges by Bell Canada and B.C. Telephone for services offered as part of the TCTS consortium.

Federal Comments

7. Federal officials recognized that under the existing distribution of regulatory authority over telephone companies, British Columbia, Ontario and Quebec did not exercise regulatory authority over the largest telephone companies operating within their boundaries. Another result of this divided authority is that unlike the situation in other countries, certain national and international aspects of the operations of the telephone system in this country are not subject to effective overall regulation from a national perspective, even though at the moment through the regulation of the interprovincial and international rates of B.C. Telephone and Bell Canada, the federal government exercises a measure of influence, albeit indirectly, over the national dimension. Officials noted that from the point of view of the federal government as well as that of industry and consumers, the present system works reasonably well. However, as indicated by Mr. Lalonde in Toronto, the federal government wanted to respond to provincial concerns and was open to discuss new approaches in this area, including either constitutional transfer or delegation of authority under Bill C-16, with respect to the intraprovincial facilities and services provided by telephone companies operating wholly within a province.

Federal officials made clear that before any changes could be agreed to there would have to be consultation with industry and the provinces concerned to resolve any technical and financial difficulties which might arise. In this regard,

federal officials noted the key aspects of the federal position put forward by Mr. Lalonde in Toronto which involved federal responsibility for technical standards, interconnection of systems, regulation of national carriers and the international and interprovincial aspects of telecommunications. They expressed the view that it may be possible to envisage a form of two-tier regulation which did not involve the degree of complexity usually associated with conventional two-tier regulation.

Saskatchewan Comments

8. Saskatchewan officials pointed to the problems associated with two-tier regulation of telecommunications carriers. They also expressed the opinion that several provinces would prefer the existing situation to the two-tier approach.

In respect to the federal proposal regarding federal regulation of the interprovincial aspects of provincially-regulated telecommunications carriers, Saskatchewan believed it necessary under any such scheme that the intraprovincial aspects of all federally-regulated carriers, including CN/CP, should fall within provincial jurisdiction.

Points of Agreement

9. In view of the complexity of this issue and the lack of consensus among the various jurisdictions involved, both Saskatchewan and federal officials agreed that it would be appropriate to deal with this matter after the conference of First Ministers on the constitution and in the light of progress on other issues.

C. Radio and Television Broadcasting

Existing Situation

10. Radio and television broadcasting falls under exclusive federal jurisdiction.

Saskatchewan Comments

11. The provincial officials stated that the impact of broadcasting affects, and is reflected in, the provincial culture and way of life. Thus, while there is much to be gained from exposure to nationally-coordinated broadcasting policies, there is a clear requirement for an extensive degree of provincial control in order to protect and enhance the institutions and values which are unique to each province. Accordingly, the preference of the Saskatchewan government for concurrency with general provincial paramountcy and federal paramountcy for certain aspects, as contained in the Saskatchewan draft of December 15, 1978, was re-affirmed. Specifically, federal paramountcy would be limited to matters concerning: the regulation of the technical particulars of broadcasting, the regulation of national broadcasting networks, the regulation of the national origin of program content, the regulation of extra provincial broadcasting technologies and the use of broadcasting facilities for aeronautics, navigation and defence or in national emergencies.

The provincial officials considered that Parliament now has sufficient powers with which to encourage a high level of Canadian program production (i.e. the taxing, spending, trade and commerce and copyright powers). They questioned the validity of federal arguments to the effect that comprehensive federal regulation is necessary to ensure the continued economic viability of the broadcasting industry.

The issue of the extention of broadcasting services was also discussed. While it was recognized that this may be a matter of federal concern, provincial officials contended that it is not now adequately encouraged in the Broadcasting Act and asserted, moreover, that present regulatory practices have

inhibited the development of institutional and technical arrangements which would facilitate the extension of service.

Provincial officials specifically challenged the federal assertion that sectors, i.e. affiliates and networks: private and public corporations, of the Canadian broadcasting system were inextricably intertwined due to the economic and corporate characteristics of the industry. They questioned its empirical basis and requested the particular empirical studies sustaining this premise.

Finally, it was stressed that constitutional amendment is preferable to administrative arrangements involving the delegation of authority.

Federal Comments

12. Federal representatives recognized provincial concerns over local aspects of the broadcasting system, including the need for local programming, the importance of local and regional cultural values, and extension of programming to all areas within the province, and contended that these were reflected in the statement of objectives for the Canadian broadcasting system in the Broadcasting Act as well as in Mr. Lalonde's statement of principles submitted on December 14, 1978. At the same time, federal officials stressed the inter-dependent character of the broadcasting system, in which the ability of broadcasters to provide local programming or to extend service to uneconomic areas is determined by their revenue base, which is dependent in turn on the availability of advertising revenue and the extent of support from network arrangements. The evolution of broadcasting in Canada has demonstrated that the process of program production and procurement as well as the pattern of advertising support for broadcasting inherently involves transfers of contribution

between markets, provinces and regions, and it is necessary in broadcast licensing to consider and deal with the competitive effects of stations in other provinces and in the United States. Because the local, regional and national aspects of the economic base of broadcasting and the process of program procurement and distribution are so intertwined, federal officials did not envisage that a transfer of constitutional jurisdiction in radio and television broadcasting would be practicable. They did point out, however, that administrative changes to accommodate provincial concerns would be open to discussion. In particular, they referred to existing arrangements such as:

- support for extension of service from provincial development corporations;
- licensing of provincial educational stations, and contracts between provincial educational authorities and private stations or the CBC for program distribution;
- consultative committees involving direct discussions between federal and provincial agencies involved, organized on a provincial or regional basis. The Atlantic Consultative Committee on Communications is one example.
- annual meetings between federal and provincial Ministers of Communications.

Federal officials also noted that new arrangements could be envisaged such as:

- the proposal by Mr. Lalonde that provincial bodies should be entitled to non-commercial general broadcasting licences from the CRTC subject to appropriate regulations;
- increased efforts to make federal broadcasting regulations congruent with provincial concerns on specific product advertising;
- increased efforts to improve the variety of television programming available in rural and remote areas,

through various means, including satellite distribution;

- differing proposals as to the structure and membership of the CRTC, possibly within the framework of Bill C-16.

Points of Agreement

13. Both Saskatchewan and federal officials agreed that federal authority in respect to radio and television broadcasting should extend at least to the technical aspects, the CBC, interprovincial networks, satellite distribution, and the regulation of Canadian content. Both agreed that further consideration should be given to appropriate means of accommodating the provincial concerns respecting at least the local elements in broadcasting.

D. Cable Distribution Systems

Existing Situation

14. The Capital Cities and Dionne cases have established that at present there is exclusive federal jurisdiction over broadcasting receiving undertakings, i.e. cable distribution systems which among other matters receive and distribute broadcast signals whether or not such signals originate within the province. Jurisdiction over purely closed-circuit undertakings wholly located within a province has not been addressed by the courts.

Federal Comments

15. Federal officials noted numerous advantages of the present arrangement, including the benefits in cost and efficiency, of having a single authority regulate all aspects of cable television. On the other hand, Mr. Lalonde's statement of December 14, 1978, recognized that many aspects of cable television, particularly in regard to carriage, were

local in character and could be regulated at the provincial level. Federal officials also stressed that the extensive financial commitments and investments of cable operators must be borne in mind and that in considering future arrangements, these realities should be taken account of and difficulties they might face must be resolved in the best way possible and only after consultation with representatives of the cable industry. Based on Mr. Lalonde's statement, federal officials suggested the following framework for discussion:

> The regulation of cable television systems could be concurrently under federal and provincial jurisdiction. It would be provincial responsibility to license, or otherwise authorize, cable distribution systems operating entirely within a province and to regulate their intraprovincial carriage functions; and to authorize undertakings to provide non-commercial programming services. Notwithstanding this, it would be federal responsibility to make general regulations or orders with respect to the introduction and provision of programming services on cable systems regardless of the technical means of distribution used. Federal preoccupations would relate to:
>
> 1. minimum technical standards;
> 2. regulations or orders to assist in the achievement of the objectives of the Canadian broadcasting system, including the protection of the economic base of broadcasting; and,
> 3. regulations or orders having for their purpose the stimulation of Canadian program production.

Federal officials stressed that this framework was not expressed in constitutional language and was put forward on a conceptual basis; the constitutional expression of the framework would require further consideration by federal Ministers and discussion between governments. In practical terms, however, the proposed framework would result in the province being able to regulate cable distribution in some or all of the following respects:

- to select the geographical franchise area;
- to regulate transfers of ownership;
- to set subscriber rates and installation charges;
- to regulate terms and conditions of subscriber contracts;
- to regulate community channels of local origination including the licensing of users of such channels;
- to authorize or regulate instructional channels;
- to authorize and regulate subscription television;
- to authorize and regulate intraprovincial non-programming services.

The proposed framework would permit the federal government to issue regulations or orders in respect to such matters as:

- signal carriage and signal priorities;
- program duplication and substitution;
- prohibition of commercials on closed-circuit channels, where necessary;
- allocation of revenues to Canadian program production;
- minimum technical and quality standards.

As was indicated in the discussion of radio and television broadcasting (see paragraph 12 above), federal officials also were prepared to envisage various administrative arrangements to accommodate provincial concerns in respect to the areas of federal responsibility. These might include:

- increased efforts to make broadcast signal regulations compatible with provincial concerns about specific product advertising;

- measures to ensure that federal regulations or orders were issued after due consultation; and
- differing proposals as to the structure and membership of the CRTC, possibly within the framework of Bill C-16.

Federal officials also noted the comment in Mr. Lalonde's statement that there were many administrative arrangements, such as delegation, that could precede and/or complement an eventual constitutional amendment.

Saskatchewan Comments

16. The provincial officials reiterated the points they expressed with respect to broadcasting. Further, provincial officials noted that cable distribution in a province with respect to many of the services carried is purely local in nature. Thus, there is a clear requirement to protect and foster cultural values in the province by means of extensive and substantive control over the cable industry. They recognized that the federal proposal on cable regulation was dependent upon the continuance of Parliament's authority over radio and television broadcasting and responded to the federal proposal with that premise in mind.

With regard to the three federal preoccupations, the Saskatchewan officials responded as follows:

1. The jurisdiction of Parliament over minimum technical standards should be limited to matters involving the interference by cable television systems upon other federally-regulated matters and signal quality standards pertaining to broadcast reception.
2. Measures to assist in the achievement of the objectives of the Canadian broadcasting system should be limited to matters directly related to national broadcast networks and to Canadian

content of broadcast signals.

3. With respect to measures to assist Canadian program production the points made under the broadcasting topic were repeated.

Moreover, regarding all the preoccupations, provincial officials stated that such services that are not broadcasting services should be subject to provincial jurisdiction.

The Saskatchewan officials regarded the list of proposed provincial regulatory functions as a positive step but considered that a broader provincial role is essential. With regard to the examples of federal regulatory functions, they made the following observations:

1. The regulation of signal carriage would be acceptable provided that this be restricted to programming prepared for national network broadcasting. In addition, regulation governing signal priorities should be restricted to general priorities among categories of channels rather than the assignment of specific channels.
2. It would be acceptable to have federal regulation of matters concerning program duplication and substitution provided that such regulation could extend no further than existing policies dealing with the substitution of Canadian programs for those which originate in the United States.
3. The prohibition of commercials on closed-circuit channels by federal authorities would be unacceptable as this would serve to limit the ability of provincial governments to promote local and community programming.
4. Saskatchewan officials did not consider it desirable that the regulation of arrangements designed to allocate revenues to Canadian program production be covered by

a specific constitutional provision in the communications field as Parliament now has sufficient powers (i.e. the taxing, spending, trade and commerce and copyright powers) to provide for this.

5. The regulation of signal technical quality is acceptable provided that it be restricted to the act of signal reception at the "head-ends" of cable distribution undertakings.

The Saskatchewan officials emphasized that constitutional amendment in the field of cable distribution systems is required rather than administrative arrangements involving the delegation of authority. Finally they stated that such amendment must be comprehensive and not limited to certain discrete areas.

Points of Agreement

17. Both Saskatchewan and federal officials agreed that cable television systems could be subject to concurrent jurisdiction, provided that in the case of a conflict, federal regulation would govern in respect to certain matters, and provincial regulation would govern in respect to all other matters. The matters in respect of which federal regulations or orders would govern in the case of a conflict would relate to the three federal preoccupations, viz. minimum technical standards, measures to assist the achievement of the objectives of the Canadian broadcasting system, including the protection of the economic base of broadcasting, and measures to stimulate Canadian program production. It was agreed that further discussion and clarification was required to define the scope of the particular regulations or orders which would properly relate to these preoccupations. Subject to such regulations, it was agreed that the appropriate provincial regulatory functions for those provinces that desired to exercise them extended at least to the following matters,

viz. authorizing cable undertakings, selecting the franchise area, regulating transfers of ownership, setting subscriber rates and charges, regulating terms and conditions of subscriber contracts, regulating community channels of local origination, including the licensing of users of such channels, authorizing and regulating instructional channels, authorizing and regulating subscription television, and regulating intraprovincial non-programming services. It was also agreed that this list was not necessarily exhaustive. Apart from constitutional changes, both Saskatchewan and federal officials agreed that further consideration should be given to appropriate administrative arrangements to reflect provincial concerns relating to specific product advertising, the issuance of federal regulations or orders after due consultation, and the structure and membership of the regulatory institutions.

Further Steps

18. Saskatchewan and federal officials agreed that the exchange of views on the foregoing matters has been candid and productive, and that in the limited time available, tentative agreement had been reached on a number of points. They concluded the best interest of Canada would be served by the establishment of a more rational distribution of legislative authority in the area of communications and by the adoption, as a first step, of the points of agreement contained in this Report. The officials agreed to forward this Report to the meeting of officials on January 11-12, 1979, in order to ascertain whether other governments could subscribe to the points of agreement or bring forward other proposals for consideration. Both federal and Saskatchewan officials also recognized that the four areas discussed above were inter-related, and that governments might wish to reserve their positions until an overall framework was achieved. At the same time, federal officials stressed again the importance of industry consultation before any final

agreement was reached. Saskatchewan officials, for their part, asked that federal officials prepare a discussion draft in constitutional language. Federal officials took note of this request.

Regina
January 5, 1979

CONFIDENTIAL

DOCUMENT 840-153/012

Communications Sub-Committee

Federal-Provincial Continuing Committee

of Minister on the Constitution

Position of the Government of Newfoundland on the Division of Constitutional Responsibilities in Communications

Ottawa
January 11-12, 1979

Newfoundland Constitutional Proposal on Communications

The position of the Government of Newfoundland on constitutional reform in the area of communications is that: "communications is first and foremost a matter of provincial concern". This leads to the following jurisdictional divisions of responsibilities in communications between the Federal and Provincial Governments:

1. Provinces should basically control all aspects of telecommunications systems with the exception of international telecommunications

   Canadian telecommunications systems are basically designed to meet provincial needs; social, cultural and economic. Since the obligation to serve is provincial, control must also be provincial. National telecommunications systems are primarily a collection of provincial systems, hence such systems, to the extent that control is necessary for interworking on a national basis, must be controlled, where necessary, by the provinces exercising regulation through inter-provincial regulatory arrangements. Implied provincial paramountcy requires that national carriers operated under federal legislation be subject, where necessary, to regulation by the provinces exercising regulation individually or through inter-provincial regulatory arrangements.

   One specific implication for Newfoundland is that the Provincial Government must obtain jurisdiction over the telephone service provided in Newfoundland by Canadian National Telecommunications. The Government of Canada acquired ownership of these telephone facilities in 1949 under the Terms of Union of Newfoundland with Canada. Return of ownership to private enterprise in Newfoundland is hence a constitutional matter.

   It is acknowledged that the Federal Government should retain control of international telecommunications and could act as a court of last resort in inter-provincial matters.

2. Provinces should control those aspects of broadcasting which are local or provincial in nature

Provinces should obtain jurisdiction over those aspects of broadcasting which relate to preservation and development of local cultural values, the dissemination of informational and educational material and consumer protection (for example, advertising), areas of primary provincial responsibility. This requires recognition of the right of provinces, with respect to content and licensing, to control local and educational broadcasting in a province.

Federal control of the national broadcasting system, the extent of which should be defined by federal-provincial agreement, is acknowledged. Federal control of the use, without artificial guide, of the radio frequency spectrum is also acknowledged. Co-ordination between the provincial and national aspects of broadcasting is to be achieved by federal-provincial consultation.

3. Provinces should control telecommunications infrastructure used in the delivery of national broadcasting services with the exception of broadcast transmitters.

Telecommunications systems used in the delivery of national broadcasting services which are logically a part of the provincial telecommunications infrastructure, for example, cable systems, must be under provincial control. Such systems generally use existing support structures in provincial rights of way, are functionally similar to existing telecommunications infrastructure and have the potential for carriage of services other than broadcasting.

In the particular case of cable television this implies that the federal government must transfer regulation to the provinces. Cable systems which presently carry television signals are regulated by the federal government under the Broadcasting Act as broadcasting-receiving undertakings. Recognizing that cable systems will in the future be used to carry broadcast signals, safeguards could be agreed upon for carriage of national broadcast services.

DOCUMENT: 840-153/025

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

REPORT OF THE COMMITTEE OF OFFICIALS ON

THE SENATE

Ottawa
January 11-12, 1979

CONFIDENTIAL

January 12, 1979.

THE SENATE

This paper reports on the meeting of federal and provincial officials in Ottawa, January 11, at which there was a discussion based on the federal paper (Document 840-153/011) which had been prepared pursuant to the decision of Ministers at the December 14-16, 1978 meeting in Toronto. The paper identified four "elements" or matters which would have to be considered in designing a reconstituted Senate, and provinces were asked to indicate their preferences with regard to each of these four elements. The four are:

1. The method of choosing Senators.
2. The tenure of Senators.
3. The powers to be given a new Senate.
4. The distribution of Senate seats among provinces or regions.

After a general discussion of the purposes of the Senate, and of some of the broad options available, officials discussed each of these elements in turn. The views expressed were necessarily tentative or offered as "reflections", because a number of delegations had not had an opportunity to obtain

detailed guidance from their respective governments on all elements. Also, for two provinces, the question of reconstituting the Senate is not a high priority matter; and for one province any change in the Senate that would detract from federal-provincial conferences as the primary forum for resolving intergovernmental issues would be undesirable.

What follows is a summary of the views which were expressed in relation to each of the four elements. The Committee of officials recognized that the four elements were, by necessity, interrelated so that, for example, the powers decided for a reconstituted Senate should be appropriate having regard to the method whereby Senators are chosen.

1. The method of choosing Senators

Eight provinces prefer that provincial governments appoint all Senators. One province would prefer that half of a province's Senators be appointed by the provincial government and the other half by the federal government. The remaining province, New Brunswick, opposes direct representation of provincial governments in national institutions such as the Senate, and suggests that the federal government should appoint all Senators, as at present.

Consequently, no province favours the method of choosing Senators which was proposed in the federal Constitutional Amendment Bill (Bill C-60). That method envisages that half of a province's Senators would be chosen by the House of Commons, and half by the provincial legislature, the seats being divided among the political parties according to the popular vote at the most recent federal or provincial election respectively.

2. The tenure of Senators

Three options were considered: (i) tenure for the life of a given legislature; (ii) for the life of a legislature, subject to earlier termination at the discretion of the provincial government; or (iii) for a fixed term of years that would exceed the life of a legislature.

Six provinces favoured Senators being appointed for the life of the legislature. Ministers of two of these provinces had previously expressed a preference for fixed terms, but in relation to the Bill C-60 proposals. If provincial governments are to appoint Senators, the "life of the legislature" would probably now be preferred. One of the six provinces would find a fixed term equally acceptable. The federal proposal in Bill C-60 was also that Senators be appointed for the life of the legislature.

One province prefers having Senators appointed for the life of the legislature but recallable by the provincial government.

Manitoba prefers a fixed term of 8 years; and New Brunswick (which prefers federal appointment) suggests a fixed term of 7 to 10 years. One province spoke of a "limited term", which would probably fall under this option but could conceivably fall under the first one.

3. The powers to be given a new Senate

The various aspects of this element are complex, for several reasons. First, it was difficult for some provinces to say whether there ought to be a category of legislation which would be subject to an absolute veto by the Senate, because it may be agreed in the course of the constitutional discussions that legislation, such as the federal use of its spending and declaratory powers, should be considered by the provincial governments or legislatures under an alternative procedure. Secondly, the discussion gave rise to a consideration of some possibilities that were new to officials present, such as the possibility of dividing legislation into two categories, each subject to a suspensive veto but only one of which would be

subject to Senators voting on instructions from the government which had appointed them. On this question as many as five provinces were unable to express a view, so that no conclusion can be drawn at this stage. Subject, therefore, to these inherent difficulties, the conclusions were as follows:

New Brunswick prefers that the Senate retain its present powers. Four provinces prefer a suspensive veto, some of them suggesting a longer delay before it may be overridden than is envisaged in Bill C-60 and one saying that there should be a second Commons vote to override a Senate veto. British Columbia, Ontario and Manitoba prefer the identification of a category of questions in regard to which the Senate would have an absolute veto. Two provinces were not in a position to express a view. Federal officials said they thought that in general a suspensive veto would be appropriate if a substantial proportion of Senators were to be appointed by provincial governments.

Two provinces found "interesting" the Manitoba list of matters (Document 830-67/049) recommended as Senate powers, although one of these provinces noted that a suspensive rather than an absolute veto might be desirable in relation to these matters.

Six provinces opposed the Bill C-60 proposal of a "double majority" voting mechanism for measures of linguistic significance, although four of these stated that they believe an alternative method of protecting the position of the French language should be sought. Four provinces did not express a view.

4. The distribution of Senate seats among provinces or regions

Five provinces prefer that each province be given an equal number of Senate seats. Several of these provinces objected to the principle of combining provinces into regions for the purpose of allocating seats. British Columbia prefers that five "regions", of which it would be one, be given an equal number of seats. Ontario and Quebec prefer that the distribution of seats be weighted, by taking population into account. Two provinces did not express a view.

Conclusion

At the Toronto meeting Ministers decided (see Document 830-67/052) that:

(a) the Committee of officials considering a reconstituted Senate should attempt to outline a draft proposal for consideration at the January meeting of the Continuing Committee; and

(b) governments should try to be in a position to make decisions on this question at the January meeting of the Continuing Committee.

While the broad outlines of a reconstituted Senate that may be acceptable to most provinces may be discerned from this report of the officials' discussion, further work by members of the Committee of officials is necessary before the next meeting of the CCMC; some delegations may want to seek further guidance from their respective governments.

Nicholas Gwyn
Chairman of the Committee on the Senate

DOCUMENT: 840-153/011

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

The Senate

Federal

Ottawa
January 11-12, 1979

CONFIDENTIAL
January 10, 1979

THE SENATE

Purpose of this paper

This paper has been prepared pursuant to the decision of the Continuing Committee of Ministers on the Constitution taken at its meeting in Toronto, December 14-16, 1978.

The decision of the Continuing Committee

At the Toronto meeting Ministers discussed in executive session the question of changed constitutional provisions relating to the Senate. They agreed as follows: (see Document 830-67/052)

- that the federal government would prepare a paper for discussion purposes outlining the various elements and principles to be considered in reconstituting the Senate; following which provinces are to indicate which elements and principles they could each generally find acceptable. Note was made that the draft proposals put forward by British Columbia and by Manitoba should serve as the bases of this paper. The paper should be made available to all delegations by January 11, 1979.

- that the officials meeting in Ottawa on January 11 and 12 should establish a Committee to consider the question of the Senate and to report on this matter at the next meeting of the Continuing Committee of Ministers on the Constitution. Note was made that this Committee should review the paper to be prepared by the federal government, and should attempt to outline a draft proposal on this matter for consideration at the January meeting of the Continuing Committee;

- that federal and provincial governments should try to be in a position to make decisions on this question at the January meeting of the Continuing Committee of Ministers on the Constitution.

Principles

This paper does not attempt to set out in a comprehensive way what are the relevant principles, because the results could be the subject of unnecessary contention among governments. The federal government's views about underlying objectives and principles are stated at length in the paper entitled House of the Federation by the Honourable Marc Lalonde, released in August 1978. However, on one principle there seems to be general agreement among governments, and that is that the House of Commons should remain supreme, so that parliamentary government will be preserved.

.../2

Elements

This paper is therefore mainly a check-list of those elements which have to be discussed and of the considerations which attach to them. The paper is divided into four sections, each dealing with one of the four main elements, which are:

1. The method of choosing Senators.
2. The tenure of Senators.
3. The powers to be given a new Senate.
4. The distribution of Senate seats among provinces or regions.

For each of these four elements the proposals of British Columbia and Manitoba are noted as well as those of the federal government which formed part of the Constitutional Amendment Bill (Bill C-60). The Manitoba proposals were put forward for discussion purposes only in Document 830-67 049. Also, for some elements, certain other options are listed; and there are "notes on relationships to other elements". The interrelationship of the various elements should constantly be kept in mind because the elements which eventually make up a reconstituted Senate must of course be compatible with one another.

Indication by provinces as to which elements they prefer

Provincial governments are asked to decide which elements they prefer, and to indicate their preferences according to a scale along the following lines:

1. Desirable
2. Acceptable
3. Barely acceptable
4. Unacceptable

1. THE METHOD OF CHOOSING SENATORS

British Columbia proposal

Apppointed by each provincial government.

Manitoba proposal

Appointed by each provincial government; or, alternatively, one half by the federal government and one half by each provincial government.

Federal proposal

Half to be chosen by the House of Commons, and half by each provincial legislature, the seats being divided among the political parties according to the popular vote at the most recent elections. Senators could not also be members of Parliament or of provincial legislatures.

Other options

Direct election by popular vote.

.../3

Notes on relationship to other elements

The method of choosing Senators will determine to a large extent the political authority they can command and the power which they can effectively exercise. Therefore this element is intimately related to element number 3, the powers to be given to a new Senate.

2. THE TENURE OF SENATORS

British Columbia proposal

The life of the provincial legislature.

Manitoba proposal

A fixed term of eight years. Initial appointment of one-half of the Senators should be for four years to permit some overlapping thereafter.

Federal proposal

The life of Parliament or of the legislature in question.

Notes on relationship to other elements

If Senators are appointed for the life of the legislature they may feel they have more of a political mandate and be more "representative" than Senators who have been appointed by a government or legislature no longer in office. Element No. 3 is therefore related.

3. THE POWERS TO BE GIVEN A NEW SENATE

British Columbia proposal

Voting would be different for Category A and B matters.

Category A:

An outright veto for the Senate on

- most constitutional amendments (any one region has a veto)
- appointments to the Supreme Court and to major federal agencies and commissions
- use of the federal declaratory power
- use of the federal spending power in provincial areas of jurisdiction
- federal laws administered by the provinces

A province's vote would be cast as a bloc by a Senator who is a provincial Cabinet Minister.

Category B:

A suspensive veto of three months on almost all remaining legislation.

A province's complete contingent of Senators would be free to vote as they individually choose.

.../4

Manitoba proposal

For most matters the Senate's veto could be overridden by the Commons passing the same law again at its next Session; or after, say, six months have elapsed, whichever comes first.

A negative Senate vote on a government bill would not undermine the government's authority.

Consideration should be given to the proposals of the Committee on the Constitution of the Canadian Bar Association that the Senate's approval should be required for the following matters (in the absence of such approval the legislation would fall):

Two-thirds approval for

- measures to regulate intraprovincial trade that are declared to be essential for the management of national or international trade.
- general economic objectives binding on the provinces (also subject to yearly review).
- use of the declaratory power, unless the province concerned agreed.

Majority approval for

- use of the emergency power in matters other than war, invasion or insurrection.
- ratification of treaties respecting matters predominantly within provincial legislative authority and multilateral trade treaties.

Federal proposal

The new Senate would have only a suspensive veto: after a certain time delay the government would have the option of presenting a bill for royal assent. However, certain urgent bills may be presented for assent after the Senate has had them only seven days if such step is authorized by a two-thirds Commons vote.

Senators would, as now, be able to initiate legislation other than money bills. They would be eligible for inclusion in the federal Cabinet, and as Ministers could answer questions in the Commons and take part in a Commons debate (though not vote). Ministers who are MPs would have similar privileges in the Senate.

The government of the day would not have to command the "confidence" of the Senate in order to survive.

Senate approval would be required for Supreme Court appointments (this proposal is now likely to be dropped), and for senior appointments to certain institutions established by Parliament, such as federal crown corporations and regulatory bodies.

Measures or provisions of "special linguistic significance" would require the approval of a majority of French-speaking Senators as well as a majority of English-speaking Senators.

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Notes on relationship to other elements

As already noted, the powers to be given a new Senate should be decided with reference to the method of choosing Senators and to their tenure. To the extent that a double majority vote on linguistic matters is seen to offer special protection to one or more provinces (such as Quebec) rather than others, element No. 4 is also related.

4. THE DISTRIBUTION OF SENATE SEATS AMONG PROVINCES AND REGIONS

British Columbia proposal

A small Senate of about 60 seats, with equal representation from five regions.

Manitoba proposal

(a) The representation of the Atlantic and Western regions must be increased.

(b) Ideally, each Province should have equal representation.

(c) Failing agreement on (b), the Provincial representation might be equal for all Provinces other than Prince Edward Island, Quebec, Ontario and British Columbia. Prince Edward Island would have less Senate seats, whilst Quebec and Ontario would each have approximately double the number of seats allocated to the other Provinces, with British Columbia somewhere in between. By way of example, the Provincial Senate seat allocation might be as follows:

Newfoundland	10
Nova Scotia	10
New Brunswick	10
Prince Edward Island	6
Quebec	20
Ontario	20
Manitoba	10
Saskatchewan	10
Alberta	10
British Columbia	16
	122

The number of seats have been kept even to permit an equal number of Senators to be appointed for overlapping terms.

(Note: The Manitoba paper does not specify how many seats should be given to the Territories.)

.../6

Federal proposal

The distribution of seats in the present Senate and in the proposed House of the Federation

	Share of total Population[1]	Present Senate		House of the Federation	
		Seats	%	Seats	%
Yukon	.1	1	1.0	1	.8
Northwest Territories	.2	1	1.0	1	.8
TERRITORIES	.3	2	1.9	2	1.7
British Columbia	10.8	6	5.8	10	8.5
Alberta	8.3	6	5.8	10	8.5
Saskatchewan	4.0	6	5.8	8	6.8
Manitoba	4.4	6	5.8	8	6.8
WEST	27.5	24	23.1	36	30.5
ONTARIO	36.0	24	23.1	24	20.3
QUEBEC	26.8	24	23.1	24	20.3
Nova Scotia	3.6	10	9.6	10	8.5
New Brunswick	3.0	10	9.6	10	8.5
Prince Edward Island	.5	4	3.9	4	3.4
Newfoundland	2.4	6	5.8	8	6.8
ATLANTIC	9.5	30	28.9	32	27.1
Total	100.0	104	100.0	118	100.0

[1]Based on population estimates for January, 1978, as published in *Canadian Statistical Review*, Statistics Canada, April, 1978.

A further option

One other possibility is a Senate with five regions, with four having equal representation and the fifth (British Columbia) having roughly one half of the number of seats given to each of the other four regions.

Notes on relationship to other elements

The distribution of seats is related to elements 1, 2 and 3, inasmuch as the more power that is exercised by the Senate, the more critical is the question of the distribution of seats.

TRANSITIONAL ARRANGEMENTS

This is not really a further element, but appropriate arrangements for effecting a transition from the present Senate to a new one will be important and governments ought to give them careful consideration.

DOCUMENT: 840-153/024

REVISED

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

REPORT OF THE COMMITTEE OF OFFICIALS ON SUPREME COURT

Ottawa
January 11-12, 1979

CONFIDENTIAL

January 11, 1979

FOR DISCUSSION PURPOSES ONLY

XI THE COURTS AND JUDICIARY

General

Independence of the judiciary

[0. The independence of the judiciary is a fundamental principle of the Constitution of Canada.]

The Supreme Court of Canada

Supreme Court of Canada Constitution of Supreme Court

1. There shall be a general court of appeal for Canada called the Supreme Court of Canada.

2. The Supreme Court of Canada shall consist of a chief justice, to be called the Chief Justice of Canada, and eight other judges, who shall be appointed by the Governor General.

ligibility for ppointment

3 (1) A person is eligible to be appointed as a judge of the Supreme Court if, after having been admitted to the bar of any province, the person has, for a total period of at least ten years, been a judge of any court in Canada or a barrister or advocate at the bar of any province.

Appointment of judges from Quebec

(2) At least three of the judges of the Supreme Court shall be appointed from among persons who, after having been admitted to the bar of Quebec, have, for a total period of at least ten years, been judges of any court of that province or of a court established by Parliament or advocates at the bar of Quebec.

Procedure on vacancy

4. Where a vacancy in the Supreme Court occurs, the Minister of Justice of Canada shall consult with the Attorney General of the province or Attorneys General of the provinces from which the persons being considered for appointment come.

Tenure of office of judges of Supreme Court

5. (1) The judges of the Supreme Court hold office during good behaviour until they attain the age of seventy years but are removable by the Governor General on address of the Senate and the House of Commons.

alaries, allowances nd pensions of udges of Supreme ourt

(2) The salaries, allowances and pensions of the judges of the Supreme Court shall be fixed and provided by Parliament.

Ultimate appellate jurisdiction of Supreme Court

6. The Supreme Court has exclusive ultimate appellate civil and criminal jurisdiction within and for Canada.

Appeals with leave of Supreme Court

7. An appeal to the Supreme Court lies with leave of the Supreme Court from any judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, where, in the opinion of the Supreme Court, any question involved is one that ought to be decided by it.

Appeals from references by Lieutenant Governor

8. An appeal to the Supreme Court lies from an opinion pronounced by the highest court in a province on any matter referred to it for hearing and consideration by the Lieutenant Governor in Council of that province.

Additional appeals

9. In addition to any appeal provided for by this division, an appeal to the Supreme Court lies as may be provided by any Act of Parliament.

Laws respecting jurisdiction of Supreme Court; references of questions of law or fact

10. Parliament may make laws

(a) conferring original jurisdiction on the Supreme Court in respect of matters in relation to the laws of Canada; and

(b) authorizing the reference of questions of law or fact to the Court and requiring the Court to hear and determine such questions.

Questions relating to civil law of Quebec

11. Where any case before the Supreme Court involves a question of law relating to the civil law of Quebec and no other question of law, that case shall be heard by a panel of five judges at least three of whom have the qualifications described in section 3 sub-section 2 or, with the consent of the parties, by a panel of four judges at least two of whom have those qualifications.

Organization, maintenance and operation of Supreme Court

12. Parliament may make laws providing for the organization, maintenance and operation of the Supreme Court, and the effectual execution and working of this division and the attainment of its intention and objects including laws providing for the appointment of such ad hoc judges as may be necessary to ensure quorums.

Courts for Administration of Laws of Canada

Constitution of courts for administration of laws of Canada

13. Parliament may, notwithstanding anything in the Constitution of Canada, from time to time provide for the constitution, organization, maintenance and operation of courts for the better administration of the laws of Canada, but no law providing for the constitution, organization, maintenance or operation of any such court shall derogate from the jurisdiction of the Supreme Court of Canada as a general court of appeal for Canada.

Appointment and Tenure of Office of Judges of Superior, District and County Courts and their Salaries, Allowances and Pensions

Appointment of judges of superior, district and county courts

14. The Governor General shall appoint the judges of the superior, district and county courts in each province, except those of the courts of probate in Nova Scotia and New Brunswick.

Procedure on vacancy

15. Where a vacancy occurs in the superior, district or county court of a province, the Minister of Justice of Canada shall consult with the Attorney General of the province as to persons being considered for appointment.

Selection of judges appointed by Governor General

16. The judges of the courts in each province appointed by the Governor General shall be selected from among members of the bar of the province or from among judges who were members of the bar of the province prior to their appointment as judges.

Tenure of office of judges of superior courts

17. The judges of the superior courts of the provinces hold office during good behaviour until they attain the age of seventy years but are removable by the Governor General on address of the Senate and the House of Commons.

Salaries, allowances and pensions of judges generally

*18. The salaries, allowances and pensions of the judges of the superior, district and county courts in each province, except the courts of probate in Nova Scotia and New Brunswick, shall be fixed and provided by Parliament.

eputy judges

19. (1) For the purpose of enabling persons being tried or giving evidence in any superior, district or county court in a province to exercise any right they may have by law to be tried or heard in English or French according to their choice, the Governor in Council may, notwithstanding section 16, at the request of the Attorney General of that province, appoint any person who has been a judge of a superior, district or county court of any other province, or any person who is a judge of such a court of any other province with the consent of the Attorney General of such province, to be a deputy judge of any superior, district or county court in the province on behalf of which the request is made.

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(2) A deputy judge may be appointed pursuant to this section for any period of time and his or her appointment may be terminated at the pleasure of the Governor in Council.

Interpretation

20. For the purposes of this Division, the term "province" includes the Yukon Territory and the Northwest Territories.

SUPREME COURT

Section 0

Concern was expressed by some provinces about the effect of this section. It was thought the section might enable judges to assert that they were entitled to administer the courts, including matters such as determining court facilities. Also, it was suggested that it would strengthen the position of judges vis-à-vis their Chief Justices by enabling such judges to justify actions such as refusing to sit on certain circuits or cases.

The alternative of placing the statement in a preamble was noted.

It was agreed that a report would be made to Ministers indicating:

(1) the purposes for which the section was included (educative and as a statement of a basic constitutional principle), and

(2) the provincial concerns respecting the possible effects of the section, and

(3) asking for a decision by Ministers.

Section 3

- British Columbia expressed its reservation that if there is to be regional representation for Quebec, there should be representation on the five region concept proposed by British Columbia.

Section 6

- Quebec stated its position that the Quebec Court of Appeal should be the final court of appeal in all civil code cases.

- Subject to the above reservation, there was general agreement on the section.

Section 8

- It was suggested that provincial governments should have the right to refer questions concerning the constitutionality of federal legislation directly to the Supreme Court.
- Concern was expressed that this could greatly increase the number of reference questions going to the court (a procedure which the court is known to dislike).
- It was agreed that this issue should be referred to Ministers for decision.

Section 10

- It was agreed that subsection (a) would be considered further with a view to deciding whether:
  (1) it could be deleted, or
  (2) if it was necessary to protect some existing jurisdiction of the court, it could be rephrased to authorize such ancillary jurisdiction without encompassing "original jurisdiction" generally.
- Subject to the above potential modifications, there was general agreement.

Section 11

- There was broad agreement on this section, although Manitoba expressed some concern.

Section 13

- Concern was expressed by some provinces that the section as drafted expanded Parliament's power to establish courts for the administration of the laws of Canada.
- Concern was expressed by almost all provinces that even if the section did not expand Parliament's authority, both this section and the existing section 101 of the B.N.A. Act,

from which section 13 derives, were unacceptable because they allowed Parliament to establish a parallel system of federal courts. Some provinces felt that Parliament's authority to establish courts, or to expand the jurisdiction of the federal court, should be limited to exclude therefrom criminal law. Others felt that Parliament's authority in this regard should be even more limited. Ontario undertook to draft a revised section 13 to accomplish this purpose. Federal officials stated that the suggestion raised a new issue which would have far reaching effects. Also, the issue was already under discussion between federal and provincial officials in another forum.

Section 14

Some provinces expressed the view that "section 96" judges should be appointed by the Lieutenant Governor in Council. Ontario suggested an optional approach whereby provinces which wished to appoint such judges would do so, while those which did not so wish, would not. Quebec, and some others, felt that the section should be dropped from the proposals altogether as it would be inconsistent to in some sense "approve" sections 14, 15 and 16 by including them in the proposal, even though this was done on the understanding that the method of appointment would be reviewed at a later time.

It was noted that the Record of Decisions of the Continuing Committee of Ministers in Toronto stated that the Committee "had agreed to provide for consultation regarding the appointment of judges pursuant to section 96 and that the

further study (of the appointment of section 96 judges) referred to in point 4 of the report would not be undertaken by the Committee of Officials until after the First Ministers Conference on the Constitution to be held in February 1979."

Section 19

- Concern was expressed that the present draft would allow the choosing of a specific judge for a specific case.

- Some provinces suggested that an alternative would be to specifically allow Parliament to establish a panel of judges to be used at the request of a Province in the cases contemplated by section 19. Federal officials took the position that this could be done under the present draft.

General Reservations

- Quebec expressed its general reservation that neither section 3 nor the other provisions respecting the Supreme Court were acceptable to it because it wished to see a constitutional court established.

- Alberta expressed support for the idea of a constitutional court.

DOCUMENT: 840-153/003

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

The Supreme Court: Courts and Judiciary

Federal

Ottawa
January 11-12, 1979

CONFIDENTIAL

December 28, 1972

FEG:go

FOR DISCUSSION PURPOSES ONLY

THE COURTS AND JUDICIARY

General

Independence of the judiciary

0. The independence of the judiciary is a fundamental principle of the Constitution of Canada.

The Supreme Court of Canada

Supreme Court of Canada

1. There shall be a general court of appeal for Canada called the Supreme Court of Canada.

Constitution of Supreme Court

2. The Supreme Court of Canada shall consist of a chief justice, to be called the Chief Justice of Canada, and eight other judges, who shall be appointed by the Governor General.

Appointment of judges from Quebec

3. At least three of the judges of the Supreme Court shall be appointed from among persons who, after having been admitted to the bar of Quebec, have, for a total period of at least ten years, been judges of any

court of that province or of a court established by Parliament or advocates at the bar of Quebec.

Procedure on vacancy

4. Where a vacancy in the Supreme Court occurs, the Minister of Justice of Canada shall consult with the Attorney General of the province or Attorneys General of the provinces from which the persons being considered for appointment come.

Tenure of office of judges of Supreme Court

5. (1) The judges of the Supreme Court hold office during good behaviour until they attain the age of seventy years but are removable by the Governor General on address of the Senate and the House of Commons.

Salaries, allowances and pensions of judges of Supreme Court

(2) The salaries, allowances and pensions of the judges of the Supreme Court shall be fixed and provided by Parliament.

Ultimate appellate jurisdiction of Supreme Court

6. The Supreme Court has exclusive ultimate appellate civil and criminal jurisdiction within and for Canada.

Appeals with leave of Supreme Court

7. An appeal to the Supreme Court lies with leave of the Supreme Court from any judgment of the highest court of final

resort in a province, or a judge thereof, in which judgement can be had in the particular case sought to be appealed to the Supreme Court where, in the opinion of the Supreme Court, any question involved is one that ought to be decided by it.

Appeals from references by Lieutenant Governor

8. An appeal to the Supreme Court lies from an opinion pronounced by the highest court in a province on any matter referred to it for hearing and consideration by the Lieutenant Governor in Council of that province.

Additional appeals

9. In addition to any appeal provided for by this division, an appeal to the Supreme Court lies as may be provided by any other Act of Parliament.

Laws respecting jurisdiction of Supreme Court; references of questions of law or fact

10. Parliament may make laws

(a) conferring original jurisdiction on the Supreme Court in respect of matters in relation to the laws of Canada; and

(b) authorizing the reference of questions of law or fact to the Court and requiring the Court to hear and determine such questions.

Questions relating to *Civil Code* of Quebec

11. Where any case before the Supreme Court involves a question of law relating to the *Civil Code* of Quebec and no other question of law, that case shall be heard by a panel of five judges at least three of whom have the qualifications described in section 3 or, with the consent of the parties, by a panel of four judges at least two of whom have the qualifications described in section 3.

Organization, maintenance and operation of Supreme Court

12. Parliament may make laws providing for the organization, maintenance and operation of the Supreme Court, qualifications for appointment as judges and the effectual execution and working of this division and the attainment of its intention and objects.

Courts for Administration of Laws of Canada

Constitution of courts for administration of laws of Canada

13. Parliament may, notwithstanding anything in the Constitution of Canada, from time to time provide for the constitution, maintenance and organization of courts for the administration of the laws of Canada, but

no law providing for the constitution, maintenance or organization of any such court shall derogate from the jurisdiction of the Supreme Court of Canada as a general court of appeal for Canada.

Appointment and Tenure of Office of Judges of Superior, District and County Courts and their Salaries, Allowances and Pensions

Appointment of judges of superior, district and county courts

14. The Governor General shall appoint the judges of the superior, district and county courts in each province, except those of the courts of probate in Nova Scotia and New Brunswick.

Procedure on vacancy

15. Where a vacancy occurs in the superior, district or county court of a province, the Minister of Justice of Canada shall consult with the Attorney General of the province.

Selection of judges appointed by Governor General of Canada

16. The judges of the courts in each province appointed by the Governor General shall be selected from among members of the bar of the province or from among judges who were members of the bar of the province prior to their appointment as judges.

Tenure of office of judges of superior courts

17. The judges of the superior courts of the provinces hold office during good behaviour until they attain the age of seventy years but are removable by the Governor General on address of the Senate and the House of Commons.

Salaries, allowances and pensions of judges generally

18. The salaries, allowances and pensions of the judges of the superior, district and county courts in each province, except the courts of probate in Nova Scotia and New Brunswick, shall be fixed and provided by Parliament.

Deputy judges

19. (1) For the purpose of enabling persons being tried or giving evidence in any superior, district or county court in a province to exercise any right they may have by law to be tried or heard in English or French according to their choice, the Governor in Council may, notwithstanding section 16, at the request of the Attorney General of that province, appoint any person who has been a judge of a superior, district or county court of any province, or any person who is a judge of such a court of any province after consultation with the Attorney General of that province, to be a deputy judge of any superior, district or county court in the province on behalf of which the request is made.

Tenure of office of deputy judges

(2) A deputy judge may be appointed pursuant to this section for any particular case or cases or for any specified period of time and his or her appointment may be terminated at the pleasure of the Governor in Council.

Interpretation

20. For the purposes of this division, the term "province" includes the Yukon Territory and the Northwest Territories.

December 28, 1978

Comments on Supreme Court Provisions

1. The redraft dated December 28 reflects generally the discussions of the committee of officials in Toronto, December 14-16.

2. The sections on the tenure and salaries of the Supreme Court judges have not been combined with those dealing with tenure and salaries of section 96 judges. It seems more logical, as a drafting matter, to have all provisions relating to the Supreme Court fall under one heading (heading (b)) and all provisions relating to section 96 judges fall under a different heading (heading (d)).

3. Sections 10 and 12 have not been combined as was discussed by the committee because they clearly deal with different matters. Section 10 deals with jurisdiction, section 12 with all other aspects. In any event the only duplication which would be avoided by combining the sections are the opening words "Parliament may make laws". An attempt has been made, however, to shorten section 12 in other respects.

4. Section 11 of the draft sets out a new alternative that could be considered for dealing with civil code cases. It is based largely on the provision, on this subject, which was contained in the Victoria Charter.

5. Section 19 is also new. It deals with a matter not discussed by the committee. The section would allow the superior, district or county court judges of one province to sit in another province, when the Attorney General of a province so requests. Such special appointments would be allowed only when necessary for the purpose of allowing a person to be tried or heard in the official language of his choice when such right of choice existed under some other law.

DOCUMENT: 840-153/008

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

Manitoba's Comments on the Redraft on the Supreme Court

Manitoba

Ottawa
January 11-12, 1979

CONFIDENTIAL

MANITOBA'S COMMENTS ON THE REDRAFT ON THE SUPREME COURT
FOR THE CONTINUING COMMITTEE OF MINISTERS ON THE CONSTITUTION

1. Sections 9 and 10 should be combined so that a new combined section would read:

   "Parliament may make laws

   (a) Conferring additional appellate jurisdictions on the Supreme Court

   (b) Conferring original jurisdiction on the Supreme Court in respect of matters in relation to the laws of Canada, and

   (c) Authorizing the reference of questions of law or fact to the Supreme Court and requiring the court to hear and determine such questions."

2. Subject to anything Quebec may have to say on the subject, section 11 should not form part of the Constitution. The substance of the proposal can be given effect to by legislation or rules. Quite apart from the undesirability of entrenching such detailed provisions, the section gives to litigants in cases involving a question of law relating to the civil code of Quebec a guarantee not given to litigants in cases involving a question of law relating to common law, i.e. that the majority of the panel will have been trained in the system of law in issue before the court. The question of which judges hear which cases may best be left as a matter of practice.

3. The words "notwithstanding anything in the Constitution of Canada" should be deleted from section 13. They are taken from, in adapted form , section 101 of the B.N.A. Act 1867 which authorized the organization of a general court of appeal as well as additional courts for the better administration of the laws of Canada. The organization of a general court of appeal may well have infringed the provincial power under s. 92(14) of the B.N.A. Act, but a federal court to administer the laws of Canada, i.e. law outside provincial jurisdiction does not so infringe and the words objected to are surplusage unless it is intended that the federal court can deal with matters within provincial jurisdiction.

   Also, section 13 should be:

   (1) limited to laws of Canada other than criminal law, and

   (2) amended by inserting the word "better" before "administration"

4. To section 15 should be added the following, or words to the effect:

   "as to the person to be appointed to fill the vacancy"

5. The concept of appointing a particular judge to hear a particular case, which is a result of this proposed section, is unacceptable as interference with the impartiality of justice. The determination of which judge presides at a trial is a matter for the judges themselves and not for governments to determine. The anxiety to permit a choice of official language for a trial should not interfere with the guarantee of a trial by a regularly appointed judge assigned to the case in the ordinary way.

   Another objection to the proposed section is the lack of tenure necessary to the concept which could undermine judicial independence.

FAMILY LAW

Secretariat Note: This item was not discussed at the meeting of Officials on the Constitution held in Ottawa, January 11-12, 1979. It was referred for discussion at a Meeting of Officials to be held in Vancouver on January 21, 1979.

DOCUMENT: 840-153/ 030

REVISED

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

REPORT OF THE COMMITTEE OF OFFICIALS ON FISHERIES

Ottawa
January 11-12, 1979

CONFIDENTIAL

Report of the Committee of Officials on Fisheries

January 12, 1979

Chairman: Cyril Abery

Nova Scotia and Newfoundland tabled a joint proposal for constitutional change concerning fisheries. This replaces the previous proposals by the respective provinces and is attached. The new joint proposal differs from the original Newfoundland proposal in four major respects:

1) it provides for provincial jurisdiction on the basis of fish stocks rather than geographical areas;
2) there is provision for recognition of the traditional fishing patterns of provinces with respect to fish stocks;
3) there is a dispute settlement mechanism provided in the event of disagreement between provinces in the allocation of fish stocks -- the ultimate decision-maker being the federal Cabinet;
4) residual powers are explicitly assigned to provincial legislatures.

Discussions in the sub-committee centered on the Newfoundland-Nova Scotia proposal and the following issues and questions:

1) the status of an administrative agency as originally proposed by Nova Scotia
   - it was indicated by Newfoundland and Nova Scotia that their proposal implicitly contemplates administrative arrangements for the practical implementation of the revised fisheries jurisdiction although such agencies would not be enshrined in the Constitution;

.../2

2) the possible repugnancy of one province's legislation with that of another.

- federal officials suggested that clause 95A(1) might require modification to take account of possible repugnancy; Newfoundland failed to see the need for such a provision since interprovincial agreements on allocation (having been taken) would preclude such repugnancy occurring.

3) whether the proposal would result (on the Atlantic coast) in five sets of provincial regulations:

- federal officials expressed concern that the proposal would lead to each province having its own regulations, precipitating inefficiency in fisheries management, e.g. different mesh sizes prevailing for the same fish stock; in response, Newfoundland and Nova Scotia indicated that a significant proportion of all regulations would remain federal under Parliament's jurisdiction over conservation; in addition, it was felt that uncertainty as to which regulations apply in any circumstance would be mitigated by the fact of specific permits being obtained from specific provinces with specific conditions attached; it was noted that the new situation would pose no greater problems than exist now with respect to the Gulf of St. Lawrence where Newfoundland fishermen, for example, may have to comply with federal regulation in one area and Quebec regulation in another;

- federal officials asked how enforcement of differing regulations would be achieved; the answer was that enforcement would be federal largely deriving from jurisdiction over conservation;

4) Was federal jurisdiction in relation to conservation set out with sufficient clarity in the Newfoundland-Nova Scotia proposal.

- following from the discussions above the sponsors agreed to add a new item as 3(e) under areas of federal paramountcy namely "conservation of fish stocks" -- the existing 3(e) becoming the new 3(f);

5) Would the Newfoundland - Nova Scotia proposal (and the implicit joint administrative agency) lead to the same types of problems as were experienced with ICNAF.

- federal officials expressed concern that multi-party administration would result in the same failures as was the case with ICNAF eg. competition with no common control point; Newfoundland and Nova Scotia took exception to the international analogy and explained that the over-riding federal conservation role would avoid such problems; in addition they agreed that clauses 5(a) and (b) could be expanded to provide for final federal determinations in a larger number of areas <u>if</u> shown to be necessary.

6) how the Newfoundland - Nova Scotia proposal treats inland fisheries;

- it was pointed out that the proposal treats inland and seacoast fisheries identically;
- several provinces, notably Manitoba and Quebec, submitted that the provinces should have exclusive jurisdiction over inland fisheries; Newfoundland and Nova Scotia agreed that the reference to inland fisheries could be deleted from their proposal and expressed support for the notion of exclusive provincial jurisdiction over inland fisheries.

7) the philosophic question as to whether proprietary rights in ocean fish stocks should be granted to coastal provinces;

- federal officials pointed out that the joint proposal would have the effect of vesting proprietary rights over ocean fish stocks in coastal provinces; the question was raised as to whether this resource should remain the common property of all Canadians;
- it was pointed out that proprietary rights to inland fish had been transferred to the prairie provinces in 1930;
- Newfoundland and Nova Scotia acknowledged they were indeed seeking change and considered this appropriate and justifiable in the context of the current constitutional review bearing in mind other provincial proposals for change.

On balance, the provincial positions reflected in the meeting were as follows:

B.C. - no official positions, support for some type of joint management; notion that West Coast fisheries might require different arrangements than on the East Coast; minimum requirement "forced consultation"

Alberta - basic support for Newfoundland-Nova Scotia proposal

Saskatchewan - support for Newfoundland-Nova Scotia proposal in terms of sea coast fisheries; position not yet developed with regard to inland fisheries

Manitoba - exclusive jurisdiction over inland fisheries (given that ownership was granted 1930 transfer); no position expressed on Newfoundland-Nova Scotia proposal

Ontario - no position expressed

Quebec - exclusive provincial jurisdiction for fisheries in the province with concurrency and provincial paramountcy in areas adjacent to the province except possibly for the setting of global quotas

New Brunswick - perhaps no greater provincial jurisdiction necessary, but better management of resources, e.g through joint management, consultative agency

P.E.I. - in accord with previous Nova Scotia proposal and not in position to comment on new joint proposal.

N.S.-Nfld. - see proposal attached.

The federal position remained unchanged from that taken by Ministers in Toronto although federal officials undertook to bring the new joint proposal to the attention of the federal government. Newfoundland undertook to circulate, prior to the meeting in Vancouver, written responses to any of the questions raised by the federal government in Toronto which are pertinent to the joint proposal.

DOCUMENT: 840-153/022

CONFIDENTIAL

JANUARY 10, 1979

DRAFT FOR DISCUSSION PURPOSES ONLY

NOVA SCOTIA - NEWFOUNDLAND

POSITION ON FISHERIES

Presented at:

Officials Meeting
on the Constitution

Ottawa
January 11-12, 1979

It is the position of the Provinces of Nova Scotia and Newfoundland that fisheries must be a concurrent jurisdiction in the constitution with federal paramountcy for some items and provincial paramountcy for others. In particular, we believe that the Federal Government should have paramountcy in the following areas:

- International Negotiations
- Surveillance
- International Enforcement
- Basic Research
- Applied Research to determine Global Quotas (Conservation)
- Quality Standards for Exports (including inspection for that purpose)
- Licensing of Foreign Vessels (Based on residual quotas)

The Province would have paramountcy in the following areas:

- Determination of quotas after the Federal Government has determined Global Quotas
- Division of Quotas
- Harvesting Plans
- Allocation of Aquaculture and Fish Farming Areas
- Licensing - Local Boats and other Provinces

The residual power with respect to fisheries shall lie with the provinces.

Our position, we believe, is both reasonable and justifiable. By providing for federal paramountcy in the areas we have defined, the ability of the Federal Government to manage the national economy and deal with foreign nations, is, in no way impaired or undermined. On the other hand, concurrent jurisdiction with provincial paramountcy in those areas which have a direct impact on how the fishery industry is developed within a Province will ensure that it has an effective role in the development of a most crucial segment of its economy.

Attached is a suggested section on Fisheries.

NOVA SCOTIA - NEWFOUNDLAND

SUGGESTED SECTION ON FISHERIES

(a) Section 91 (12) of the British North America Act should be repealed.

(b) The enactment of a separate section in the British North America Act in the following terms"

"95A (1) With respect to fish stocks adjacent to each province (as defined in subsection 5 below), the legislature may make laws relative to the sea coast (and inland)* fisheries but any law covering those matters set out in sub-section (3) shall have effect in and for the province so long as they are not repugnant to any Act of the Parliament of Canada made under sub-section (2).

(2) The Parliament of Canada may make laws relative to the sea coast (and inland)* fisheries but any law covering those matters set out in sub-section (4) shall have effect in and for any or all of the provinces so long as they are not repugnant to any Act of the legislature of a province made under sub-section (1).

*Possible deletion

(3) The matters referred to in sub-section (1) are:

(a) fixing standards for and implementing different areas of scientific and other forms of research;

(b) fixing parameters for the total allowable catch for stocks;

(c) the allocation of quotas to foreign countries and the licensing of foreign vessels, subject to 4 (a) below;

(d) inspection for export;

(e) conservation of fish stocks;

(f) matters incidental or pertaining to the foregoing.

(4) The matters referred to in sub-section (2) are:

(a) fixing the level of catch within the parameters referred to in sub-section (3) (b) and the issuance of quotas up to the level so fixed, including a cumulative quota to the government of Canada for allocation by it to foreign countries;

(b) licensing of fishing vessels other than foreign vessels taking fish from the residual quota;

(c) all matters not referred to in this sub-section and sub-section (3).

(5)

(a) The delineation of the fish stocks adjacent to each Province shall as between Provinces which traditionally have fished these stocks, be determined by agreement between the provinces in accordance with equitable principles taking account of all relevant information.

(b) If no agreement can be reached within a reasonable period of time, the Provinces concerned shall refer the matter in dispute to the Governor-in-Council for final determination.

Excerpt from sub-committee report entitled "The Federal Spending Power, Equalization: Revised Report of the Committee of Officials on Indirect Taxation, the Spending Power and Equalization" (document 840-153/028)

Unconditional Payments to Provinces, Including Equalization

17. The Committee agreed (with the exception of the Quebec and British Columbia representatives) that the federal government should have an unfettered right to make unconditional payments to the provincial governments. Such a right would include the right to make equalization payments and would therefore make unnecessary a specific federal power to make equalization payments as had been contemplated in the proposed section 96(3).

18. The British Columbia representative expressed the view that federal unconditional payments to the provinces should have to undergo the same approval process as is contemplated for conditional payments to the provinces.

19. The Quebec representative indicated that Quebec was only prepared to see a specific federal power to make equalization payments.

DOCUMENT: 840-153/017

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

Agenda Item on Equalization

Regional Disparities

Committee of Officials on Equalization

Ottawa
January 11-12, 1979

CONFIDENTIAL

January 10, 1979.

Regional Disparities

Commitment to promote equal opportunities, etc.

96.(1) Without altering the legislative authority of Parliament or of the legislatures or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the governments of the provinces, are committed to

(a) promoting equal opportunities for the well-being of all Canadians;

(b) furthering economic development to reduce disparities in opportunity; and

(c) providing essential public services of reasonable quality to all Canadians.

Commitment to principle of equalization payments

(2) Parliament and the government of Canada are further committed to the principle of making equalization payments to provinces that are unable to provide essential public services of reasonable quality without imposing an undue burden of taxation.

Legislative jurisdiction

(3) The legislative authority of Parliament extends to the making of laws for the purpose of making equalization payments.

Consideration of equalization and regional development by First Ministers

(4) The Prime Minister of Canada and the First Ministers of the Provinces shall review together the questions of equalization and regional development at least once every five years at a meeting convened pursuant to section 97.

DOCUMENT: 840-153/031

CONFIDENTIAL

REVISED

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

REPORT OF THE COMMITTEE OF OFFICIALS ON CHARTER OF RIGHTS

Ottawa
January 11-12, 1979

CONFIDENTIAL

REPORT OF MEETING OF FEDERAL AND PROVINCIAL OFFICIALS ON CHARTER OF RIGHTS
January 11 & 12, 1979
OTTAWA

Chairman: Roger Tassé

I Introduction

Pursuant to the decision of the Continuing Committee of Ministers on the Constitution taken at Toronto on December 16, 1978, federal and provincial officials met in Ottawa on January 11 and 12, 1979 to discuss further the possible contents of a Charter of Rights for entrenchment in the Constitution. The federal government and all provincial governments except for Newfoundland and Prince Edward Island were represented.

Initially there were doubts expressed by a number of provincial representatives respecting the mandate of the meeting, some feeling that, given the reservations of several provinces about the idea of any entrenchment of rights in the Constitution, it was not useful to be discussing the specific draft provisions of a proposed Charter.

However, it was ultimately agreed to proceed with detailed examination of a revised draft of a possible Charter which had been prepared by federal officials (for discussion purposes only), which sought to incorporate a number of concerns and proposals raised by provincial representatives at the Toronto meeting. It was fully understood by all that these discussions were without prejudice to the positions of those provinces which continued to view an entrenched Charter as an undesirable objective either at the present time or at any time in the future.

II Charter Provisions

1. "Preamble" Section (Section 5)

It was felt by some provinces that this revised provision should not make reference to the United Nations human rights instruments since they might become an integral element in the interpretation of the Charter. It was agreed to review this provision with a view to modification or deletion.

2. Fundamental Freedoms (Section 6)

Most provinces were agreed that, if there was to be a Charter, the fundamental freedoms could be entrenched for both levels of government without any over-ride clause.

It was agreed that certain modifications should be made respecting the freedom of the press and other media to avoid giving the impression that they enjoyed any special freedom of expression. It was also agreed that the limitation clause could be improved by referring to "such limitations prescribed by law which are reasonably justifiable..."

3. Democratic Rights (Sections 7-9)

A majority of provinces agreed that, if there was to be a Charter, democratic rights could be entrenched for both levels of government without any over-ride clause.

Provinces made several suggestions for modifications in the draft wording (especially in Section 8(1)) which it was agreed would be considered in a new draft. Two provinces felt it was not appropriate in Section 8(2) to allow for provincial legislatures to determine when a state of real or apprehended war exists, as the basis for extending a legislature's life.

4. Legal Rights (Section 10)

All provinces expressed serious concerns about a number of the provisions in this section, and provided a series of helpful suggestions for redrafting some of them. However, no province, except New Brunswick, felt prepared to accept legal rights for entrenchment in the Constitution, even with an over-ride clause. The prevailing concern was that too many of the proposed rights were cast too vaguely and that, in any case, the rights should be left as they are presently defined by the courts or by ordinary legislation. Equally, most felt that the rights should generally be confined to the criminal law and procedure domain to the extent they might be spelled out. The provinces foresaw grave dangers in any attempt to spell out legal rights in a constitutional Charter, given the uncertainty as to how the rights might be construed by the courts.

5. Non-Discrimination Rights (Section 11)

Nearly all provinces felt that this would be a dangerous provision to place in an entrenched Charter since the language of the draft would leave too much power in the hands of the courts to determine what was a fair and reasonable distinction or limitation. Some felt that the affirmative action exception was too broad and would have to be limited in some manner. No province, with the possible exception of New Brunswick, indicated that it would opt-in to these rights, even with an over-ride clause and a number urged that the provision be dropped because of the inability to predict how it might be construed by the courts

6. Mobility Rights (Section 12)

While there was some support for the principles contained in this section, no province, with the possible exception of New Brunswick, was prepared to accept these rights for entrenchment either because of the concern

over how the courts would interpret such novel provisions or because it was felt that there is no need for these rights. Several useful suggestions were made for modifications in the draft provisions, but the provinces doubted that even with changes this provision would be desirable and felt it would lead to endless litigation.

7. Property Rights (Section 13)

All provinces had serious reservations about placing any protection of these rights in an entrenched Charter, believing the issue of expropriation and control of property rights to be a subject more properly determined by the legislatures rather than the courts. In consequence, no province, with the possible exception of New Brunswick, was prepared to see these rights placed in an entrenched Charter and felt that they should be dropped. It was also felt by some that what rights were guaranteed by Section 13(1) were effectively negated by the limitations permitted under Section 13(2) & (3).

8. Language Rights (Sections 14-22)

Some provinces were unable to comment on the revised language rights provisions either because they had not

had time to review them yet or because they had no ministerial mandate on the matter. Other provinces reiterated the positions which they had expressed at earlier meetings with only one province indicating a preparedness to accept language rights for entrenchment along the general lines of the federal proposals. Concern was expressed by one province about the new provisions, eg. sections 16(4) and 17(3) which seek to give guidance to the legislatures on determining the extent of the language rights to be provided, it being felt that the legislatures should not be so fettered. Another province raised concerns about providing a right to use French or English in legislative debates, about the obligations respecting the use of either language in criminal and penal proceedings and about the courts having power to review provincial laws concerning minority language education rights.

9. Enforcement Provisions (Sections 24 & 25)

Only two provinces expressed views on these provisions. Both expressed concern over the scope of the remedies which a court would be able to grant under section 25, it being felt that the remedies should be confined to those now recognized by law rather than permitting the courts to create new remedies.

10. Over-ride Clause (Section 131(5))

One province felt that if property and mobility rights were ultimately to be included in the Charter, the over-ride clause should extend to them as well as to legal and non-discrimination rights.

11. General

With respect to the federal power of reservation and disallowance, all provinces felt it should be abolished outright and not retained in relation to any province which enacted laws under the over-ride clause.

One province expressed the view that the Charter implementation mechanism should be modified to permit a province to opt-in to some parts of the Charter rather than being required to adopt the whole or nothing.

Conclusion

In general, it was the feeling of most provinces that there should be no entrenched Charter at all, or at most one which was confined solely to fundamental freedoms and democratic rights. This would not necessarily exclude the possibility of some provisions being made for language rights, but the extent and nature of these remains undefined.

As noted at the outset, all the foregoing was discussed and views were expressed subject to the general and specific reservations and caveats about an entrenched Charter of Rights which had been stated earlier by a number of the provinces.

DOCUMENT: 840-153/004

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

Canadian Charter of Rights and Freedoms

Federal

Ottawa
January 11-12, 1979

CONFIDENTIAL
January 8, 1979
FEG:ahb:go

DIVISION III

Rights and Freedoms Within The Canadian Federation

General

Canadian Charter of Rights and Freedoms

5. The provisions of this division, which may be cited as the Canadian Charter of Rights and Freedoms, set forth rights and freedoms that, in a free and democratic society, must be assured to the people and that are consistent with Canada's recognition of the standards proclaimed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Fundamental Freedoms

Fundamental freedoms

6. (1) Everyone has the right to the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, opinion and expression including freedom of the press and other media for the dissemination of news and the expression of opinion and belief; and

(c) freedom of peaceful assembly and of association.

Just[illegible] limitations

(2) The manifestation or exercise of the freedoms declared by this section may be made subject only to such limitations as are reasonably justifiable in a free and democratic society in the interests of national security, public safety, order, health or morals or the rights and freedoms of others.

Democratic Rights

Democratic rights of citizens

7. Consistent with the principles of free and democratic elections to the House of Commons and to the legislative assemblies, and of universal suffrage for that purpose, every citizen of Canada shall, without unreasonable distinction or limitation, have the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Duration of elected legislative bodies

8. (1) Every House of Commons and legislative assembly of a province shall continue for five years, or in the case of a legislative assembly for five or such lesser number of years as is provided for by the constitution of the province, from the date of the return of the writs for the choosing of its members and no longer, subject to its being sooner dissolved in accordance with law.

Continuation in special circumstances

(2) Notwithstanding subsection (1), in time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly of a province may be continued by the legislature thereof beyond the time limited

therefor by or under subsection (1), if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Annual sitting of elected legislative bodies

9. There shall be a sitting of Parliament and of each legislature at least once in every year and not more than twelve months shall intervene between sittings.

Legal Rights

Legal rights

10. (1) Everyone has the right to life, liberty and security of his or her person and the right not to be deprived thereof except by due process of law, which process encompasses the following:

(a) the right to be secure against unreasonable searches and seizures;

(b) the right to protection against arbitrary or unlawful interference with privacy;

(c) the right not to be arbitrarily detained or imprisoned;

(d) the right on arrest or detention

(i) to be informed promptly of the reason for the arrest or detention,

(ii) to be provided with the opportunity to retain and consult counsel without delay, and

(iii) to the remedy by way of habeas corpus for the determination of the validity of his or her detention and for release if the detention is not lawful;

(e) the right as an accused person

(i) to be informed of the specific charge,

(ii) to be tried within a reasonable time,

(iii) to be presumed innocent until proven guilty in a fair and public hearing by an independent and impartial tribunal,

(iv) not to be denied reasonable bail without just cause having been established, and

(v) not to be found guilty on account of any act or omission that at the time of the act or omission did not constitute an offence;

(f) the right not to be tried or punished more than once for an offence of which he or she has been finally convicted or acquitted;

(g) the right to the benefit of the lesser punishment where the punishment for an offence of which he or she has been convicted has been varied between the time of commission and the time of conviction;

(h) the right not to be subjected to any cruel or inhuman treatment or punishment;

(i) the right not to give evidence before any court, tribunal, commission,

board or other authority, if unreasonably denied counsel or if denied protection against self-crimination or other constitutional safeguard;

(j) the right to the assistance of an interpreter in any proceedings before a court, tribunal, commission, board or other authority, if the party or witness does not understand or speak the language in which the proceedings are conducted; and

(k) the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his or her rights or obligations.

Justifiable derogation

(2) In time of serious public emergency, the existence of which is officially proclaimed through the invocation of the War Measures Act or by specific reference to this subsection, the rights mentioned in this section other than the right to life and those mentioned in subparagraphs (d)(ii) and (e)(v) and paragraphs (h),(i) and (j) may be derogated from to the extent strictly required by the circumstances of the emergency.

Idem

(3) Nothing in this section shall be interpreted as precluding the enactment of or rendering invalid a law that authorizes the holding of all or part of a proceeding in camera

in the interests of national security, public safety or order or morality, in the interest of the privacy of one or more of the parties or where, in the opinion of the tribunal, publicity would prejudice the interests of justice.

Non-discrimination Rights

Equality before the law and equal protection of the law

11. (1) Everyone has the right to equality before the law and to equal protection of the law without distinction or restriction other than any distinction or restriction provided by law that is fair and reasonable having regard to the object of the law.

Affirmative action programs

(2) Nothing in this section shall be interpreted as precluding the enactment of or rendering invalid any affirmative action program on behalf of disadvantaged persons or groups.

Mobility Rights

Rights of citizens

12. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights of citizens and persons lawfully admitted for permanent residence

(2) Every citizen of Canada and every person who has been lawfully admitted to Canada for permanent residence and has not lost the status of a permanent resident has the right

(a) to move to and take up reisdence in any province or territory, and

(b) to pursue the gaining of a livelihood in any province or territory

without distinction based on province or territory of present or previous residence or domicile.

Justifiable limitations

(3) The rights declared by this section may be made subject only to such limitations as are reasonably justifiable in a free and democratic society in the interests of national security, public safety, order, health or morals or where there exist overriding economic or social considerations.

Property Rights

Property rights

13. (1) Everyone has the right to the use and enjoyment of property, individually or in association with others, and the right not to be deprived thereof except in accordance with law that is fair and just.

Justifiable limitations

(2) Nothing in this section shall be interpreted as precluding the enactment of or rendering invalid laws controlling or restricting the use of property in the public interest or securing against property the payment of taxes or other levies or penalties.

Idem

(3) The rights declared by this section may be made subject only to such limitations in addition to those referred to in subsection (2) as are reasonably justifiable in a free and democratic society in the interests of national security or public safety, order, health or morals.

CONFIDENTIAL

January 8, 1979.

PROPOSED CHANGES IN THE LANGUAGE AND GENERAL PROVISIONS OF THE CHARTER OF RIGHTS AND FREEDOMS AND IN SECTION 131

C-60 PROVISIONS	PROPOSED NEW PROVISIONS
(1) Official Languages and Language Rights	Official Languages
13. The English and French languages are the official languages of Canada for all purposes declared by the Parliament of Canada or the legislature of any province, acting within the legislative authority of each respectively.	14. (1) English and French are the official languages of Canada, having the status and protection set forth in this Charter.
20. Nothing in sections 13 to 19 shall be held to limit the right of the Parliament of Canada or the legislature of a province, acting within the authority of each respectively pursuant to law, to provide for more extensive use of both the English and French languages; and nothing in those sections shall be held to derogate from or diminish any right, based on language, that is assured by virtue of section 9 or 10, or to derogate from or diminish any legal or customary right or privilege acquired or enjoyed either before or after the commencement of this Act with respect to any language that is not English or French.	(2) Nothing in this Charter limits the authority of Parliament or of the legislature of a province to extend the status, protection or use of the English and French languages.
	Language Rights
14. (1) Any individual has the right to use English or French, as he or she may choose, in any of the debates or other proceedings of the Parliament of Canada.	15. (1) Everyone has the right to use English or French, as he or she may choose, in any of the debates or other proceedings of Parliament.
(2) Any individual has the right to use English or French, as he or she may choose, in any of the debates or other proceedings of the legislative assembly of any province.	(2) Everyone has the right to use English or French, as he or she may choose, in the debates of the legislative assembly of any province.
15. (1) The statutes and the records and journals of the Parliament of Canada shall be printed and published in English and French.	16. (1) The statutes and the records and journals of Parliament shall be printed and published in English and French.
(2) The statutes and the records and journals of the legislatures of Ontario, Quebec and New Brunswick shall be printed and published in English and French, and all or any of the statutes and the records and journals of the legislature of any other province shall be printed and published in both of those languages or in either of them, accordingly as its legislature may prescribe.	(2) The statutes and the records and journals of the legislatures of Quebec and New Brunswick shall be printed and published in English and French.

C-60 PROVISIONS	PROPOSED NEW PROVISIONS
(See 131(3)(b))	(3) The records and the journals of the legislature of Ontario, the statutes thereof enacted after such day as is fixed by the legislature and any revision or consolidation of the statutes thereof authorized to have effect after such day as is fixed by the legislature shall be printed and published in English and French
	(4) The statutes and the records and journals of the legislature of each province not referred to in subsection (2) or (3) shall be printed and published in English and French to the extent practicable accordingly as the legislature of the province prescribes.
(3) Where the statutes of any legislative body described in subsection (1) or (2) are printed and published in English and French, both language versions thereof shall be equally authoritative.	(5) Where the statutes any legislative body described in in any of subsections (1) to (4) ar printed and published in English and French, both language versions are equally authoritative.
16. (1) Either English or French may be used by any person in, or in any pleading or process in or issuing from, the Supreme Court of Canada or any court constituted by the Parliament of Canada.	17. (1) Either English or French may be used by any person in, or in any pleading or process in or issuing from, the Supreme Court of Canada or any court constituted by Parliament.
(2) Either English or French may be used by any person in, or in any pleading or process in or issuing from, any court of Ontario, Quebec or New Brunswick.	(2) Either English or French may be used by any person in or in any pleading or process in or issuing from, any court of Ontario Quebec or New Brunswick as soon as is practicable accordingly as the legislature of each such province respectively prescribes and, in any event, within five years after the time at which this Charter extends to matters coming within the legislative authority of each such province.
	(3) Either English or French may be used by any person in or in any pleading or process in or issuing from, any court of a provin not referred to in subsection (2), to the greatest extent possible accordingly as the legislature of the province prescribes.

C-60 PROVISIONS	PROPOSED NEW PROVISIONS
(3) In proceedings in any court in Canada —in which, in a criminal matter, the court is exercising any criminal jurisdiction conferred on it by or pursuant to an Act of the Parliament of Canada, or —in which, in a matter relating to an offence for which an individual charged with that offence is subject to be imprisoned if he or she is convicted thereof, the court is exercising any jurisdiction conferred on it by or pursuant to an Act of the legislature of any province, any individual giving evidence before the court has the right to be heard in English or French, as he or she may choose, and in being so heard, not to be placed at a disadvantage by not being heard, or being unable to be heard, in the other of those languages.	(4) In proceedings in any court in Canada relating to an offence (a) created by or pursuant to an Act of Parliament, or (b) created by or pursuant to an act of the legislature of a province if the punishment for the offence may be imprisonment, any person giving evidence before the court has the right to be heard in English or French, as he or she may choose, through the services of an interpreter where necessary, and the right not to be placed at a disadvantage in so being heard.
17. Nothing in section 16 shall be held to preclude the application, to or in respect of proceedings in any court described in subsection 16(2), or to or in respect of any proceedings described in subsection 16(3), of such rules for regulating the procedure in any such proceedings, including rules respecting the giving of notice, as may be prescribed by any competent body or authority in that behalf pursuant to law for the effectual execution and working of the provisions of either of those subsections.	18. Nothing in section 17 precludes the application of such rules for regulating procedure as may be prescribed by any competent body or authority for the effectual execution and working of subsections 17(2), (3) and (4).
19. (1) Any member of the public in Canada has the right to use English or French, as he or she may choose, in communicating with the head or central office of any department or agency of the executive government of and over Canada, or of any judicial, quasi-judicial or administrative body or Crown corporation established by or pursuant to a law of Canada, wherever that office is located, or in communicating with any other principal office of any such institution where that office is located within an area of Canada in which it is determined, in such manner as may be prescribed or authorized by the Parliament of Canada, that a substantial number of persons within the population use that language.	19. (1) Any member of the public in Canada has the right to communicate with and to receive services from any head or central office of an institution of government of Canada in English or French, as he or she may choose, and he or she has the same right with respect to any other principal office of any such institution where that office is located within an area of Canada in which it is determined, in such manner as may be prescribed or authorized by Parliament, that a substantial number of persons within the population use that language.
(2) Any member of the public in any province has the right to use English or French, as he or she may choose, in communicating with any principal office of a department or agency of the executive government of that province, or of a judicial, quasi-judicial or administrative body or Crown corporation established by or pursuant to a law of that province, where that office is located within an area of that province in which it is determined, in such manner as may be prescribed or authorized by the legislature of that province, that a substantial number of persons within the population use that language.	(2) Any member of the public in a province has the right to communicate with and to receive services from any head, central or other principal office of an institution of government of the province in English or French, as he or she may choose, to the extent to which and in the areas of the province in which it is determined, in such manner as may be prescribed or authorized by the legislature of the province, that

C-60 PROVISIONS	PROPOSED NEW PROVISIONS
	the right should pertain having regard to the practicability and necessity of providing such services.
20. Nothing in sections 13 to 19 shall be held to limit the right of the Parliament of Canada or the legislature of a province, acting within the authority of each respectively pursuant to law, to provide for more extensive use of both the English and French languages; and nothing in those sections shall be held to derogate from or diminish any right, based on language, that is assured by virtue of section 9 or 10, or to derogate from or diminish any legal or customary right or privilege acquired or enjoyed either before or after the commencement of this Act with respect to any language that is not English or French.	20. Nothing in sections 14 to 19 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the commencement of this Act with respect to any language that is not English or French.
21. (1) Where the number of children in any area of a province in respect of whom notice has been given as contemplated by this section, warrants the provision of the facilities required to give effect to the right provided for by this section, any parent who is a citizen of Canada resident within that area and whose primarily spoken language is not that of the numerically larger of the groups comprising those persons resident in that province whose primarily spoken languages are either English or French, has the right to have his or her children receive their schooling in the language of basic instruction that is the primarily spoken language of the numerically smaller of those groups, in or by means of facilities that are provided in that area out of public funds and that are suitable and adequate for that purpose.	21. (1) Citizens of Canada resident in a province who are members of an English-speaking or French-speaking minority population of that province have a right to have their children receive their educational instruction in their minority language at the primary and secondary school level wherever the number of children of such citizens resident in an area of the province is sufficient to warrant the provision of minority language education facilities in that area out of public funds.
(2) The exercise by any parent of the right provided for by this section shall be subject to such reasonable requirements respecting the giving of notice by that parent of his or her intended exercise thereof as may be prescribed by the law of the province in which that parent resides.	(2) In each province, the legislature may enact such provisions as are reasonable in the circumstances relating to
(3) Nothing in this section shall be held to limit the authority of the legislature of any province to make such provisions as are reasonable for determining, either generally or in any particular case or classes of cases, whether or not the number of children in any area of that province in respect of whom notice has been given as contemplated by this section, warrants the provision of the facilities required to give effect to the right provided for by this section.	(a) the giving of notice by citizens of Canada resident in the province of their desire to exercise the minority language education right conferred by subsection (1) in respect of their children; and
(4) Nothing in this section shall be held to derogate from or diminish any legal or customary right or privilege acquired or enjoyed in any province either before or after the commencement of this Act to have any child	(b) the determination of whether or not the number of children of citizens of Canada resident in an area of the province who have given notice as provided is sufficient to warrant the provision of minority language education facilities in that area.

C-60 PROVISIONS	PROPOSED NEW PROVISIONS
receive his or her schooling in the language of basic instruction that is the primarily spoken language of the numerically larger of the groups referred to in subsection (1) within that province, or to limit any authority conferred or obligation imposed either before or after that time by the law of that province to require any child, during any period while that child is receiving his or her schooling in any language of basic instruction that is not that primarily spoken language, to be given instruction in the use of that primarily spoken language as part of his or her schooling in that province. (5) The expression "parent" in this section includes a person standing in the place of a parent.	
22. In furtherance of —the appreciation by Canadians that the preservation of both English and French as the principal spoken languages of Canadians is vital to the prospering of the Canadian federation within the larger North American society, and —the resolve of Canadians that none of the institutions of government of the Canadian federation, acting within the legislative authority of each individually pursuant to law, should act in such a manner as to affect adversely the preservation of either English or French as the language spoken or otherwise enjoyed by any group of individuals constituting an identifiable and substantial linguistic community in any area of Canada within its jurisdiction, it is hereby proclaimed that no law made by any such institution after this Charter extends to matters within its legislative authority shall apply or have effect so as to affect adversely the preservation of either English or French as the language spoken or otherwise enjoyed by any such group of individuals.	22. No law enacted by or under the authority of Parliament or a legislature of a province, after this Charter extends to matters within its legislative authority, applies or has effect so as to affect adversely the preservation of either English or French as the language spoken or otherwise enjoyed by any group of persons constituting an identifiable and substantial linguistic community in any area of Canada.
26. Nothing in this Charter shall be held to abrogate, abridge or derogate from any right or freedom not declared by it that may have existed in Canada at the commencement of this Act, including, without limiting the generality of the foregoing, any right or freedom that may have been acquired by any of the native peoples of Canada by virtue of the Royal Proclamation of October 7, 1763.	Undeclared Rights 23. Nothing in this Charter abrogates or derogates from any right or freedom not declared by it that may exist in Canada, including any right or freedom that may pertain to the native peoples of Canada.
(g) Generally Applicable Provisions **23.** To the end that full effect may be given to the individual rights and freedoms declared by this Charter, it is hereby further proclaimed that, in Canada, no law shall apply or have effect so as to abrogate, abridge or derogate from any such right or freedom.	General 24. To the end that the paramountcy of this Charter be recognized and that full effect be given to the rights and freedoms herein declared, any law and any administrative act that is inconsistent with any provision of

C-60 PROVISIONS	PROPOSED NEW PROVISIONS
	the Charter is, except as specifically otherwise provided, inoperative and of no force or effect to the extent of the inconsistency.
24. Where no other remedy is available or provided for by law, any individual may, in accordance with the applicable procedure of any court in Canada of competent jurisdiction, request the court to define or enforce any of the individual rights and freedoms declared by this Charter, as they extend or apply to him or her, by means of a declaration of the court or by means of an injunction or similar relief, accordingly as the circumstances require.	25. Where no other effective recourse or remedy is available or provided for by law, anyone whose rights or freedoms as declared by this Charter have been infringed or denied to his or her detriment has the right to apply to a court of competent jurisdiction to obtain such relief or remedy as the court deems appropriate and just in the circumstances.
25. Nothing in this Charter shall be held to prevent such limitations on the exercise or enjoyment of any of the individual rights and freedoms declared by this Charter as are justifiable in a free and democratic society in the interests of public safety or health, the interests of the peace and security of the public, or the interests of the rights and freedoms of others, whether such limitations are imposed by law or by virtue of the construction or application of any law.	No equivalent
27. For greater certainty for the purposes of this Charter, the individual rights and freedoms declared by this Charter are those assured by or by virtue of sections 6 to 10, 14, 16, 19 and 21.	No equivalent
28. A reference in any of sections 10 to 22 to a province or to the legislative assembly or legislature of a province shall be construed as including a reference to the Yukon Territory or the Northwest Territories or to the Council or Commissioner in Council thereof, as the case may be.	26. A reference in any of sections 7 to 9 and 14 to 22 to a province or to the legislative assembly or legislature of a province shall be construed as includi a reference to the Yukon Territory or the Northwest Territories or to the Council or Commissioner in Council thereof, as the case may be
29. Nothing in this Charter shall be held to confer any legislative authority on any competent body or authority in that behalf in Canada, except as expressly contemplated by this Charter.	27. Nothing in this Charter confers any legislative authority on any competent body or authority in that behalf in Canada, except as expressly contemplated by this Charter.

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C-60 PROVISIONS	PROPOSED NEW PROVISIONS
18. Nothing in sections 14 to 17 shall be held to abrogate, abridge or derogate from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.	131. (1) Nothing in sections 15 to 18 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.
131. (1) Until such time as this subsection is repealed by subsection (4), the provisions of the *Canadian Charter of Rights and Freedoms* as enacted by this Act shall be read and construed as extending only to matters coming within the legislative authority of the Parliament of Canada, except as otherwise provided by the legislature of any province acting under the authority conferred on it by the Constitution of Canada.	(2) Until such time as this subsection is repealed by subsection (4), the provisions of the Canadian Charter of Rights and Freedoms, in this section referred to as the "Charter", shall be read and construed as extending only to matters coming within the legislative authority of Parliament, except as otherwise provided by the legislature of any province acting under the authority conferred on it by the Constitution of Canada.
(2) In order that effect may be given as soon as may be to the extension of the Charter referred to in subsection (1) to matters coming within the legislative authority of the legislatures of all the provinces equally as to matters coming within the legislative authority of the Parliament of Canada, as part of the Constitution of Canada, it is hereby declared and directed that, on and after the commencement of this Act and by virtue of its enactment by the Parliament of Canada, both Houses of the Parliament of Canada shall be deemed to have approved of a resolution for the amendment of the Constitution of Canada in the form and to the effect of the Charter referred to in subsection (1), which resolution may be taken up and dealt with by action as on a joint address or by proclamation, as the case may be, as and when it may lawfully be so taken up and dealt with in accordance with the procedure for such amendment then recognized by accepted usage, if there is then no procedure for that purpose expressly provided for by the Constitution of Canada, or in accordance with the procedure for that purpose expressly so provided for, if there is then such a procedure.	(3) In order that effect may be given as soon as may be to the extension of the Charter to matters coming within the legislative authority of the legislatures of all the provinces equally as to matters coming within the legislative authority of Parliament as part of the Constitution of Canada, it is hereby declared and directed that, on and after the commencement of this Act and by virtue of its enactment by Parliament, both Houses of Parliament shall be deemed to have approved of a resolution for the amendment of the Constitution of Canada in the form and to the effect of the Charter and, subject to subsection (7), for the repeal of (a) sections 55 to 57 of the Act of 1867 respecting the reservation of assent to Bills, the disallowance of Acts and the signification of pleasure on Bills reserved, as those sections extended and were applicable immediately before the commencement of this Act to the legislatures of the several provinces by virtue of and in the manner provided in section 9 of the Act of 1867,

C-60 PROVISIONS

(4) At such time as the resolution deemed by subsection (2) to have been approved by both Houses of the Parliament of Canada has been taken up and dealt with as provided in that subsection and any further action required by law to give effect thereto has been taken,

(*a*) subsection (1) of this section is repealed;

(*b*) sections 20, 50, 55 to 57, 85 and 86 of the Act of 1867 are repealed;

(*c*) sections 55 to 57 of the Act of 1867 respecting the reservation of assent to Bills, the disallowance of Acts and the signification of pleasure on Bills reserved, as those sections extended and were applicable immediately before the commencement of this Act to the legislature of the several provinces by virtue of and in the manner provided in section 90 of the Act of 1867, cease to extend and apply thereto, and section 90 is repealed in so far as it relates to the matters provided for in this paragraph, and

(*d*) section 133 of the Act of 1867 and section 23 of the *Manitoba Act, 1870* are repealed.

PROPOSED NEW PROVISIONS

(b) sections 85 and 86 of the Act of 1867, section 90 thereof in so far as it relates to the matters provided for in paragraph (a), and section 133 thereof, and

(c) section 23 of the Manitoba Act, 1870

which resolution may be taken up and dealt with by action as on a joint address or by proclamation, as the case may be, as and when it may lawfully be so taken up and dealt with in accordance with the procedure for such amendment then recognized by accepted usage or expressly provided for by the Constitution of Canada.

(4) At such time as the resolution deemed by subsection (3) to have been approved by both Houses of Parliament has been taken up and dealt with as provided in that subsection and any further action required by law to give effect thereto has been taken,

(a) subsections (1) and (2) are repealed; and

(b) sections 20, 50 and 55 to 57 of the Act of 1867 are repealed.

(5) The legislature of any province, acting within the authority conferred on it by the Constitution of Canada, may at any time provide that the Charter extends to matters coming within its legislative authority

(a) without qualification; or

(b) with the following qualification only: "Section 24 of the Canadian Charter of Rights and Freedoms does not apply in respect of the rights declared by sections 10 and 11 thereof where it is expressly declared by an Act of the Legislature that such Act or a specified provision or provisions thereof operate and

C-60 PROVISIONS	PROPOSED NEW PROVISIONS
	have force and effect notwithstanding the provisions of the Canadian Charter of Rights and Freedoms."
(3) From and after such time as it is provided by the legislature of any province, acting within the authority conferred on it by the Constitution of Canada, that the provisions of the *Canadian Charter of Rights and Freedoms* as enacted by this Act extend to matters coming within its legislative authority, (*a*) the provisions of the Act of 1867 respecting the reservation of assent to Bills, the disallowance of Acts and the signification of pleasure on Bills reserved, as those provisions extend and are made applicable to the legislatures of the several provinces by virtue of and in the manner provided in section 90 of the Act of 1867, shall cease to extend and be applicable to the legislature of that province as if they were here repealed or made inapplicable in terms to that province and its legislature; and (*b*) where that province is Ontario, subsection 15(2) of this Act shall not apply so as to require the printing and publishing in English and French of any statutes of, or any revision or consolidation of statutes authorized by, the legislature of that province except any such statutes enacted after, or any such revision or consolidation authorized to have effect after, such day or days as that legislature shall have fixed therefor.	(6) From and after such time as it is provided by the legislature of any province, acting within the authority conferred on it by the Constitution of Canada, that the provisions of the Charter extend to matters coming within its legislative authority, either without qualification or with the qualification referred to in subsection (5), subject to subsection (7), the provisions of the Act of 1867 respecting the reservation of assent to Bills, the disallowance of Acts and the signification of pleasure on Bills reserved, as those provisions extend and are made applicable to the legislatures of the several provinces by virtue of and in the manner provided in section 90 of the Act of 1867, shall cease to extend and be applicable to the legislature of that province as if they were here repealed or made inapplicable in terms to that province and its legislature. (7) Notwithstanding subsections (3) and (6), where the legislature of a province has provided that the Charter extends to matters coming within its legislative authority with the qualification referred to in subsection (5), the provisions of the Act of 1867 respecting the reservation of assent to Bills, the disallowance of Acts and the signification of pleasure on Bills reserved, as those provisions extend and are made applicable to the legislatures of the several provinces by virtue of and in the manner provided in section 90 of the Act of 1867, continue to extend and be applicable in respect of provisions enacted by the legislature of that province to the effect that any Act of the legislature of the province or any provision or provisions thereof operate and have force and effect notwithstanding the provisions of the Canadian Charter of Rights and Freedoms.

C-60 PROVISIONS	PROPOSED NEW PROVISIONS
(5) Notwithstanding anything in subsection (1), for the purposes of that subsection the legislative authority of the Parliament of Canada shall be deemed not to extend to the Yukon Territory or the Northwest Territories in relation to any matter provided for in sections 13 to 21 of the *Canadian Charter of Rights and Freedoms* that would not, if those territories were provinces of Canada, come within the legislative authority of Parliament, and in relation to any such matter the reference in subsection (1) to the legislature of any province acting under the authority conferred on it by the Constitution of Canada shall be read as extending to the Commissioner in Council of any territory of Canada acting within the authority which is hereby conferred on the Commissioner in Council by the Parliament of Canada.	(8) Notwithstanding subsection (2), for the purposes of that subsection the legislative authority of Parliament shall be deemed not to extend to the Yukon Territory or the Northwest Territories in relation to any matter provided for in sections 1[illegible] to 21 of the Charter that would not, if those territories were provinces, come within the legislative authority of Parliament, and in relation to any such matter the reference in subsection (2) to the legislature of any province acting under the authority conferred on it by the Constitution of Canada shall be read as exte[illegible] to the Commissioner in Council any territory of Canada acting within the authority which is hereby conferred on the Commissione[illegible] in Council by Parliament.

DOCUMENT: 840-153/028

CONFIDENTIAL

REVISED

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

The Federal Spending Power

Equalization

Revised Report of the Committee of Officials on
Indirect Taxation, the
Spending Power and Equalization

Ottawa
January 11-12, 1979

THE FEDERAL SPENDING POWER

1. In discussing options for limiting the exercise of the federal spending power, the subcommittee reviewed two documents distributed at the last Ministers' Conference in Toronto:

- A discussion paper prepared by the federal government (Document 830-67-035)
- A discussion paper prepared by Manitoba (Document 830-67-042).

2. The subcommittee noted that no draft constitutional provisions had been circulated and discussed as yet. The federal government undertook to prepare such a draft for the next Ministers' meeting in Vancouver and, in so doing, to take into account the comments and concerns raised by members of the subcommittee.

3. In reviewing the federal paper, it was noted that the federal government apparently was prepared to accept limits on the exercise of its spending power both in areas of exclusive provincial jurisdiction and in areas beyond as well.

4. The Quebec representatives on the subcommittee noted that their Government would agree to a federal spending power limited to the areas of concurrent or exclusive federal jurisdiction.

5. Members of the subcommittee noted the wide variety of federal-provincial programs and mechanisms for financing them and agreed that, to be effective, a limit or limits on the federal spending power would have to be defined in such a way as to take this wide variety of arrangements and other possibilities into account, so far as possible.

For example, it was suggested that:

- "the spending power" be defined broadly enough to encompass programs delivered or financed through the taxation system, such as the recent "federal-provincial sales tax reduction" program;

- "Conditional payments" be defined broadly enough to cover any program where federal payments are contingent on provincial outlays, such as some forms of "block grants"; and

- "national programs" be defined broadly enough so as to include programming which is available to all provinces, but which may have varying features (such as cost-sharing formulae) from province to province.

6. Insofar as the approval process for relevant federal programs was concerned, it was agreed that a number of options were available, including:

- formal approval by provinces on the basis of a Consensus formula. (In this connection, it was generally agreed that such a formula probably should be the same as a general amending formula, if such a formula were established.)

- if a second chamber representing the provinces were established, approval by such a chamber on the basis of a voting formula to be determined.

7. It was generally agreed that provincial approval for the federal government to proceed with a particular program should not necessarily bind individual provinces to participating in such a program. It was noted that, in such circumstances, the federal discussion paper had proposed compensation payments to individuals residing in the non-participating province or provinces. Subcommittee members from two provinces indicated a preference for the federal suggestion, while the other provincial members expressed support for compensatory payment to be made directly to the relevant province or provinces.

8. It was noted that the question of compensation raised some other important difficulties as well, such as:

- the problem of calculating appropriate levels of compensation for a variety of programs, such as matching grants, where federal contributions vary in accordance with provincial outlays. In these circumstances it was pointed out that the uncertainty surrounding the implications of possible alternative compensation arrangements made it difficult to assess the significance of the overall limits suggested in the federal paper.

- the possibility that automatic compensation might serve as a major disincentive to provincial entry into federally-sponsored programming.

In response to the first concern, it was suggested that compensation be calculated in accordance with estimates of what the province would be entitled to receive if it were a participant in the program. Those provinces favouring compensation payments felt it would be incumbent on the federal government to suggest appropriate compensation arrangements as part of any general proposals with respect to new federal-provincial programs.

In response to the disincentive concern, one province suggested that the level of compensation be slightly lower than the amount of the province's entitlement if it were participating in the program (eg 90 per cent.)

9. The subcommittee generally did not favour a suggestion in the federal discussion draft that the approval mechanism, make a distinction for new programs between categories of programs, under which some would proceed with "consensus" endorsement while others could only proceed with unanimous approval. In this connection, the overall position of Quebec was also noted.

10. It was noted that the members of the subcommittee assumed that none of the proposed limits on the federal spending power would prevent bilateral agreements between the federal government and individual provinces.

11. A number of provinces suggested that a limit on the federal spending power should include some provisions to limit the unilateral alteration or termination of agreed-upon programing. It was noted by some members that Section 99 of Bill C-60 appeared to provide for the possibility of constitutionally-binding commitments which ccould be of relevance in providing certainty to the provinces in some of these program areas.

Payments to institutions and Persons

12. Turning to the matter of federal payments to institutions and persons, provincial members of the subcommittee generally agreed that the use of the general federal spending power should be the subject of a constitutional limitation which would provide that:

> whenever a province registered a formal objection to a proposed use of the power by the federal government, no further steps towards using the power would be taken (including steps in Parliament) until consultation had been held between federal and provincial ministers concerned.

13. Some members suggested consideration be given to a provision under which, in certain circumstances, federal action would be suspended pending negotiation.

14. In this connection, British Columbia felt that its proposals regarding the role of a reconstituted upper house, if implemented, would resolve many of the consultative concerns raised by the provinces.

15. A Federal member of the subcommittee confirmed that the definition of "institutions" was assumed to encompass a broad range of entities, including various agencies and groups, as well as local governments.

Unconditional Payments to Provinces, Including Equalization

16. The Committee agreed (with the exception of the Quebec and British Columbia representatives) that the federal government should have an unfettered right to make unconditional payments to the provincial governments. Such a right would include the right to make equalization payments and would therefore make unnecessary a specific federal power to make equalization payments as had been contemplated in the proposed section 96(3).

17. The British Columbia representative expressed the view that federal unconditional payments to the provinces should have to undergo the same approval process as is contemplated for conditional payments to the provinces.

18. The Quebec representative indicated that Quebec was only prepared to see a specific federal power to make equalization payments.

DECLARATORY POWER (CANADA)

Secretariat Note: This item was not discussed during the Meeting of Officials on the Constitution held in Ottawa January 11-12, 1979

DOCUMENT: 840-153/010

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

Patriation, and Amending Formula

Federal

Ottawa
January 11-12, 1979

CONFIDENTIAL

January 10, 1979

PATRIATION, AND AMENDING FORMULA

The purpose of this paper is to elaborate upon the general consensus reached by Ministers at the December 14-16, 1978 meeting of the Continuing Committee on the Constitution (see Annex 1 for the appropriate excerpt from the Record of Decisions for that meeting) in order to assist further discussion of the particulars of an amending formula.

What follows are notes (not a draft constitutional text) on the various possible component parts of an amending formula. Notes are also included on the question of legislative delegation, since it was agreed by Ministers that this subject should form part of the discussions on an amending formula.

A POSSIBLE AMENDING FORMULA

Six separate types of constitutional amendment would be covered by the formula. They are listed in abbreviated form below, together with an indication of whose approval would be required for amendments.

	Amendments regarding	To be approved by
1.	The amendment formula and natural resources.	Parliament, and all provincial legislatures.
2.	Provincial boundaries.	Parliament and legislatures of provinces concerned.
3.	Executive government of Canada, the Senate and House of Commons (but there are exceptions which would come under 6).	Parliament.
4.	Provincial constitutions.	Legislature of the province.
5.	Constitutional provisions that apply to one or more, but not all provinces.	Parliament, and legislatures of provinces concerned.
6.	Other constitutional provisions.	Parliament; and seven provincial legislatures covering 85 per cent of Canada's population.

Notes on each of these six types of amendment procedure now follow. For comparison, Part IX of the Victoria Charter is reproduced in Annex 2, and the Fulton-Favreau Amending Formula is reproduced in Annex 3.

.../2

1. The amendment formula and natural resources

Any future changes in this amendment formula, which is to be entrenched in a new Constitution, would require the unanimous consent of Parliament and all provincial legislatures, as would any future changes in constitutional provisions which affect the provinces' ownership of and jurisdiction over natural resources.

2. Provincial boundaries

Any change in a province's boundaries would require the approval of Parliament and of the legislature of the province in question.

It should be noted that a separate provision for amendments regarding provincial boundaries is desirable, because such changes are now specifically provided for in the BNA Act 1871 In the absence of a separate provision, such changes would probably be covered by procedure No. 5

With the inclusion of procedure No. 2 in the amendment formula, section 37 of the Constitutional Amendment Bill would be deleted. The relevant excerpt from the Bill is reproduced below.

***37.** The Parliament of Canada may from time to time, after consultation among the First Ministers of the Canadian federation at a meeting duly constituted for that purpose, and with the express consent of the legislature of any province affected thereby, increase, diminish or otherwise alter the territorial limits of any such province upon such terms as may be agreed to by that legislature, and may, after the like consultation and with the like consent, make provision respecting the effect and operation of any such increase, diminution or other alteration of territorial limits in relation to any province affected thereby.

37-40. These designated provisions relate to the alteration of the limits of provinces and territories, the laws for the territories and the creation of new provinces. They derive from the *British North America Act, 1871* (B.N.A. Act, 1871). (For coming into effect, see s. 125 and the Introduction hereto, categories 4 and 5.)

37. This section would modify s. 3 of the B.N.A. Act, 1871 by requiring the federal authority to call a meeting of first ministers for consultation prior to altering provincial territorial limits. At present, only the consent of the province affected is required.

3. Executive government of Canada

Amendments relating to the executive government of Canada, to the Senate and to the House of Commons would require only the approval of Parliament, with the provision that certain specified exceptions would be subject to procedure No. 6 (see below). Articles 53 and 55 of the Victoria Charter would have had a similar effect (see Annex 2).

4. Provincial constitutions

Amendments relating to the amendment from time to time of the Constitution of a Province, except as regards (a) the office of the Lieutenant-Governor, (b) the requirement of yearly sessions of legislatures, and (c) the limitation on the duration of legislative assemblies (see Procedure No. 6), would require the approval only of the provincial legislature. (Compare with Articles 54 and 55 (1) to (3) of the Victoria Charter.)

5. Constitutional provisions that apply to one or more, but not all, provinces

The approval of only Parliament and of the legislatures of the provinces to which the amendment applies would be required (see Article 50 of the Victoria Charter).

6. Other constitutional provisions

All other constitutional provisions would be subject to the general amending formula, which is that the approval of Parliament, and of the legislatures of at least seven provinces representing at least 85 per cent of Canada's population (including the population of the Territories) would be required.

It will probably be desirable to specify in the Constitution that this general amending formula will apply not only to all residual matters but also, for greater certainty, to the following specific matters. Items (1) to (7) parallel those in Article 55 of the Victoria Charter, with a slight modification in the case of (7).

(1) the office of the Queen, of the Governor General and of the Lieutenant-Governor;

(2) the requirements of the Constitution of Canada respecting yearly sessions of the Parliament of Canada and the Legislatures;

(3) the maximum period fixed by the Constitution of Canada for the duration of the House of Commons and the Legislative Assemblies;

(4) the powers of the Senate;

(5) the number of members by which a Province is entitled to be represented in the Senate, and the residence qualifications of Senators;

(6) the right of a Province to a number of members in the House of Commons not less than the number of Senators representing the Province;

(7) Section 74 of the Constitutional Amendment Bill. which reads as follows:

> 74. The total number of members of the House of Commons may be from time to time increased or decreased by the Parliament of Canada, but so that, as nearly as reasonably may be, the proportionate representation of the provinces therein that is prescribed by this Act is not thereby disturbed.

Note: The amendment procedure would thus continue to enable Parliament to change the number of members, but any change in "the proportionate representation of the provinces" would be subject to the general amending formula.

.../4

Items (2) and (3) above form part of the proposed Charter of Rights and Freedoms. The rest of the Charter, except for provisions that apply to one or more but not all provinces, would also be subject to the general amending formula. The reason for specifying (2) and (3) is for greater certainty, because otherwise they may be presumed to fall under procedures 3 and 4 relating to the Executive Government of Canada and Provincial Constitutions.

The general amending formula would also apply to any provisions which may be inserted in the Constitution regarding regional disparities and equalization.

THE ENACTMENT OF AMENDMENTS TO THE CONSTITUTION OF CANADA

Amendments to the Constitution of Canada (except those under procedure No. 3) would from time to time be made by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assembly of such provinces as are required to give their approval under the various amendment procedures described above. See for comparison Articles 49, 50 and 53 of the Victoria Charter.

THE ROLE OF THE SENATE

If the composition of the Senate is to remain as it is now, or will not be essentially different, it would be appropriate to ensure that the will of the House of Commons will prevail, as regards constitutional amendments, in the event of any conflict with the Upper House. Compare Article 51 of the Victoria Charter which provided for a Commons "override" with regard to amendments (but not with regard to the Senate's initiation of amendments under Article 52). The question of such an override would have to be reviewed if changes are made in the Senate that would warrant giving it a key role in constitutional amendment.

DELEGATION OF LEGISLATIVE POWERS

In the Fulton-Favreau formula there was provision for four or more provinces to

(a) authorize Parliament to enact specific laws, in relation to these provinces, within what would otherwise be a provincial field of jurisdiction under the following sections of the BNA Act. These sections covered much of the ground in which delegation to Parliament was likely to be desirable:

92(6)	Prisons
92(10)	Local Works and Undertakings
92(13)	Property and Civil Rights
92(16)	Generally all matters of a local or private nature.

(b) enact specific laws within a field that would otherwise be under federal jurisdiction.

There was to be no transfer of jurisdiction, but rather a revocable authorization, specific to each law in question, for the other order of government to legislate. With regard to delegation of federal powers to provincial legislatures (that is, (b) above), there was provision for fewer than four provinces to participate where the statute was shown to be of concern to fewer than four provinces. The text of the proposed amendment to the BNA Act is attached as Annex 4. The Annex includes the commentary which accompanied the draft text in The Hon. Guy Favreau, The Amendment of The Constitution of Canada, Ottawa, February 1965.

There were no provisions in the Victoria Charter relating to delegation of legislation.

The questions which arise in relation to the delegation of legislation at this time are:

1. Should a provision permitting such delegation be now inserted in the Constitution?

2. Should the possibility of delegation be confined to certain heads of jurisdiction and to revocable authorizations made in relation to specific statutes?

3. Should there be a requirement that a certain minimum number of provinces should participate?

CONFIDENTIAL

ANNEX I

Excerpt from Record of Decisions, December 14-16, 1978 meeting of the Continuing Committee of Ministers on the Constitution

Agenda Item 12: Patriation and Amending Formula (Canada)

Pursuant to a decision taken at Mont Ste-Marie, officials met to examine this question on December 13 and presented a report to the Conference on this matter (see document 830-67/032). Quebec was present but did not participate in discussions on this item. Ministers discussed this question in executive session and arrived at a general consensus on the following:

- that there should be a short list of matters requiring unanimity in an amending formula. This would include (a) amendments to the amending formula itself, and (b) amendments relating to the provincial ownership and jurisdiction over natural resources;

- that boundary changes could take place with the consent of the provinces involved. The consent of the Parliament of Canada could also be required;

- that all other matters could be amended by a formula which would require the consent of the Parliament of Canada and at least seven provinces, together comprising at least 85% of the population of Canada.

Note was also made that most members of the Continuing Committee of Ministers on the Constitition did not support the notion of referenda in respect of the amending formula.

Alberta stated that its position on this matter was described in the Resolution adopted by its Legislature (i.e. that the amending formula reflect the principle that existing rights, proprietary interests, and jurisdiction of a province cannot be taken away without the consent of that province). It also wished to point out that its position was not one requiring unanimity but rather the consent of the affected province. It agreed, however, to take the above consensus under consideration.

British Columbia indicated that its position remained that of requiring the approval of a reconstituted Senate for constitutional amendments.

Ministers agreed:

- that Ontario and Canada would jointly prepare a discussion draft on this matter elaborating upon the general consensus reached by Ministers at the meeting. Note was made that this draft should be distributed before January 11, 1979.

- that the officials' meeting on January 11 and 12 could perhaps examine the discussion draft to be prepared by Ontario and Canada.

Note was also made that the question of delegation of legislative powers could be part of the discussions regarding the amending formula.

ANNEX 2

EXCERPT FROM THE VICTORIA CHARTER (1971)

PART IX

AMENDMENTS TO THE CONSTITUTION

Art. 49. Amendments to the Constitution of Canada may from time to time be made by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assemblies of at least a majority of the Provinces that includes

(1) every Province that at any time before the issue of such proclamation had, according to any previous general census, a population of at least twenty-five per cent of the population of Canada;

(2) at least two of the Atlantic Provinces;

(3) at least two of the Western Provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Western Provinces.

Art. 50. Amendments to the Constitution of Canada in relation to any provision that applies to one or more, but not all, of the Provinces may from time to time be made by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assembly of each Province to which an amendment applies.

Art. 51. An amendment may be made by proclamation under Article 49 or 50 without a resolution of the Senate authorizing the issue of the proclamation if within ninety days of the passage of a resolution by the House of Commons authorizing its issue the Senate has not passed such a resolution and at any time after the expiration of the ninety days the House of Commons again passes the resolution, but any period when Parliament is prorogued or dissolved shall not be counted in computing the ninety days.

Art. 52. The following rules apply to the procedures for amendment described in Articles 49 and 50:

(1) either of these procedures may be initiated by the Senate or the House of Commons or the Legislative Assembly of a Province;

(2) a resolution made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Art. 53. The Parliament of Canada may exclusively make laws from time to time amending the Constitution of Canada, in relation to the executive Government of Canada and the Senate and House of Commons.

Art. 54. In each Province the Legislature may exclusively make laws in relation to the amendment from time to time of the Constitution of the Province.

Art. 55. Notwithstanding Articles 53 and 54, the following matters may be amended only in accordance with the procedure in Article 49:

(1) the office of the Queen, of the Governor General and of the Lieutenant-Governor;

(2) the requirements of the Constitution of Canada respecting yearly sessions of the Parliament of Canada and the Legislatures;

(3) the maximum period fixed by the Constitution of Canada for the duration of the House of Commons and the Legislative Assemblies;

(4) the powers of the Senate;

(5) the number of members by which a Province is entitled to be represented in the Senate, and the residence qualifications of Senators;

(6) the right of a Province to a number of members in the House of Commons not less than the number of Senators representing the Province;

(7) the principles of proportionate representation of the Provinces in the House of Commons prescribed by the Constitution of Canada; and

(8) except as provided in Article 16, the requirements of this Charter respecting the use of the English or French language.

Art. 56. The procedure prescribed in Article 49 may not be used to make an amendment when there is another provision for making such amendment in the Constitution of Canada, but that procedure may nonetheless be used to amend any provision for amending the Constitution, including this Article, or in making a general consolidation and revision of the Constitution.

Art. 57. In this Part, "Atlantic Provinces" means the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland, and "Western Provinces" means the Provinces of Manitoba, British Columbia, Saskatchewan and Alberta.

Annex 3

The Fulton-Favreau Amending Formula

What follows is an excerpt from The Canadian Constitution and Constitutional Amendment, released by the Government of Canada in August 1978.

NOTE - This excerpt does not reproduce the actual draft legal text of the formula: it is rather a paraphrased summary of the legal text.

A Proposed Act to Provide for the Amendment in Canada of the Constitution of Canada (1964)

Part I

(a) The power to amend, repeal or re-enact any provision of the Constitution of Canada is accorded to the Parliament of Canada, subject to the other provisions of Part I.

No amendment to the proposed 1964 Act, to Section 51A of the British North America Act of 1867 (a province's representation in the House of Commons shall not be less than the number of Senators for the province), or to any other provision of the Constitution of Canada relating to

i) the powers of the legislature of a province to make laws;

ii) the rights or privileges granted or secured by the Constitution of Canada to the legislature or the government of a province;

iii) the assets or property of the province; or

iv) the use of the English or French language

shall come into force unless it is concurred in by the legislatures of all the provinces.

The provisions of (b) do not apply to provisions of the Constitution of Canada which refer to one or more, but not all of the provinces, in which case only the approval of the provincial legislature concerned is required.

Provisions of the Constitution of Canada respecting education in any province other than Newfoundland can only be amended by the concurrence of all provincial legislatures, except Newfoundland, and similar provisions respecting Newfoundland require the approval of that province's legislature.

(e) For matters not otherwise provided for—including most of the exceptions to the exclusive power of amendment of Parliament—the consent of two-thirds of the provincial legislatures is required.

(f) The Parliament of Canada may exclusively make laws to amend the Constitution of Canada in relation to the executive Government of Canada, the Senate and the House of Commons, except as regards

i) the functions of the Queen and the Governor General in relation to the Parliament or Government of Canada;

ii) the requirements of the Constitution of Canada respecting a yearly session of Parliament;

iii) the maximum period fixed by the Constitution of Canada for the duration of the House of Commons, except that the Parliament of Canada, may in time of real or apprehended war, invasion or insurrection, continue a House of Commons beyond such maximum period, if such continuation is not opposed by the votes of more than one-third of the members of the House;

iv) the number of members by which a province is entitled to be represented in the Senate;

v) the residence qualifications of Senators and the requirements of the Constitution of Canada for the summoning of persons to the Senate by the Governor General in the Queen's name;

vi) the right of a province to a number of Members in the House of Commons not less than the number of Senators representing the province;

vii) the principles of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada; and

viii) the use of the English and French language.

For these matters, the amending formulae would be one of the preceding formulae—in most cases, (e).

(g) Provincial legislatures may amend their own Constitutions except as regards the Office of Lieutenant-Governor.

(h) Provisions not covered under the authority of (f) or (g) are subject to the procedures of (a) to (e) of the Act.

(i) Parliament and the legislatures retain any amending power they might possess under specific provisions of the Constitution.

(j) The expression "Constitution of Canada" is defined.

Part II

(k) Sections 91(1) and 92(1) are repealed.

(l) A section was added to permit four or more provinces to authorize Parliament to enact specific laws within what would otherwise be a provincial field of jurisdiction, and similarly to permit Parliament to authorize four or more provinces to enact specific laws within a field that would otherwise be under federal jurisdiction.

PART II

BRITISH NORTH AMERICA ACT, 1867, AMENDED

12. Class 1 of section 91 of the British North America Act, 1867, as enacted by the British North America (No. 2) Act, 1949, and class 1 of section 92 of the British North America Act, 1867, are repealed.

This clause expressly repeals sections 91(1) and 92(1) of the British North America Act, 1867, since their subject matter has been incorporated in the amending formula.

(This clause was not included in the 1960-61 formula.)

13. The British North America Act, 1867, is amended by renumbering section 94A thereof as 94B and by adding thereto, immediately after section 94 thereof, the following heading and section:

Delegation of Legislative Authority

"94A. (1) Notwithstanding anything in this or in any other Act, the Parliament of Canada may make laws in relation to any matters coming within the classes of subjects enumerated in classes (6), (10), (13) and (16) of section 92 of this Act, but no statute enacted under the authority of this subsection shall have effect in any province unless the legislature of that province has consented to the operation of such a statute in that province.

(2) The Parliament of Canada shall not have authority to enact a statute under subsection (1) of this section unless

(a) prior to the enactment thereof the legislatures of at least four of the provinces have consented to the operation of such a statute as provided in that subsection, or

(b) it is declared by the Parliament of Canada that the Government of Canada has consulted with the governments of all the provinces, and that the enactment of the statute is of concern to fewer than four of the provinces and the provinces so declared to be concerned have under the authority of their legislatures consented to the enactment of such a statute.

(3) Notwithstanding anything in this or in any other Act, the legislature of a province may make laws in the province in relation to any matter coming within the legislative jurisdiction of the Parliament of Canada.

(4) No statute enacted by a province under the authority of subsection (3) of this section shall have effect unless

(a) prior to the enactment thereof the Parliament of Canada has consented to the enactment of such a statute by the legislature of that province, and

(b) a similar statute has under the authority of subsection (3) of this section been enacted by the legislatures of at least three other provinces.

(5) The Parliament of Canada or the legislature of a province may make laws for the imposition of punishment by fine, penalty or imprisonment for enforcing any law made by it under the authority of this section.

(6) A consent given under this section may at any time be revoked, and

(a) if a consent given under subsection (1) or (2) of this section is revoked, any law made by the Parliament of Canada to which such consent relates that is operative in the province in which the consent is revoked shall thereupon cease to have effect in that province, but the revocation of the consent does not affect the operation of that law in any other province, and

(b) if a consent given under subsection (4) of this section is revoked, any law made by the legislature of a province to which the consent relates shall thereupon cease to have effect.

(7) The Parliament of Canada may repeal any law made by it under the authority of this section, in so far as it is part of the law of one or more provinces, but if any repeal under the authority of this subsection does not relate to all of the provinces in which that law is operative, the repeal does not affect the operation of that law in any province to which the repeal does not relate.

(8) The legislature of a province may repeal any law made by it under the authority of this section, but the repeal under the authority of this subsection of any law does not affect the operation in any other province of any law enacted by that province under the authority of this section."

This clause adds a new section to the British North America Act, 1867, providing for the delegation concept, which was first advanced in the 1950 Conference. It is the clause that was included in the 1960-61 formula, except for a few minor changes that in no way affect its substance.

The purpose of this clause is to permit four or more provinces to authorize Parliament to enact specific laws within what would otherwise be a provincial field of jurisdiction, and similarly to permit Parliament to authorize four or more provinces to enact specific laws within a field that would otherwise be under federal jurisdiction.

It should be noted that the delegation of any power under this clause does not in any way affect the jurisdiction of the delegating authority under the Constitution. Jurisdiction, whether federal or provincial, cannot be delegated; only the enactment of a specific law that has the approval of the delegating authority is provided for. The delegating authority may subsequently revoke this consent. If it does, the specific statute enacted by the other authority or authorities ceases to have effect.

A basic requirement in delegation is that a minimum of four provinces must participate, whether the delegation is granted to Parliament by the provincial legislatures, or to the provincial legislatures by Parliament. An exception to this minimum requirement is provided for in the case of delegation from Parliament to the provincial legislatures. This is because the powers of Parliament are by definition of

ANNEX 4

Excerpt from The Hon. Guy Favreau, The Amendment of the Constitution of Canada, Ottawa, February, 1965.

THE DELEGATION OF LEGISLATIVE AUTHORITY

general interest and concern. On the other hand, delegation from provincial legislatures to Parliament by fewer than four provinces may take place provided Parliament declares, after consultation with the governments of all the provinces, that fewer than four provinces are in fact concerned with the proposed enactment. Provision has been made for such an exception because certain provincial powers are by their nature so local that in some cases they may be of concern to fewer than four provinces.

Clause (1) of the proposed new section 94A specifies only four classes of subjects within section 92 concerning which authority to enact a specific law may be delegated to Parliament. Examination of section 92 suggests, however, that these four subjects are the only ones on which the desirability of enactments by Parliament is likely to arise. The remaining subjects relate to resources belonging to a province, in respect of which delegation is not a serious possibility, to matters so local in character that they would not be appropriate for legislation by Parliament, or to matters over which Parliament has its own jurisdiction for federal purposes under section 91.

Clause (3) does not similarly restrict the subjects in section 91 concerning which authority to enact a specific law may be delegated to the provinces. Clause (4) requires, however, that before any province can pass a statute having to do with a matter coming within federal jurisdiction, Parliament itself must give consent.

Either Parliament or the provincial legislatures may repeal any law made under any authority they have delegated. Each jurisdiction thus retains complete control in the fields assigned to it by the British North America Act.

(This clause, as noted, is the same as the one that was included in the 1960-61 formula, except for a few minor changes which in no way affect its substance and a requirement under paragraph 2(b) to consult all provinces before a declaration that fewer than four are concerned with a matter that might come under that provision.)

The proposal for delegation of legislative authority first emerged in the Conferences of 1950. It had become clear that agreement was not likely on any formula not providing for unanimous provincial consent to changes affecting their legislative powers. Such a provision, however, could make it possible for a single legislature to stand in the way of a change in the distribution of legislative powers, even though such a change might be wanted by the country generally and by most or all of the other provinces. Such a possibility may be remote, but it could occur. It was primarily for this reason that the concept of delegation was proposed. Its purpose was to overcome rigidity by a practical arrangement through which provinces wanting to effect a change could do so without amending the Constitution as such.

This provision, now that it has been developed and refined, has been criticized both as "centralizing" and "decentralizing". It was contained, however, in the amending formula of 1960-61. It has

ANNEX 4 (Cont.)

been included without change in substance in the 1964 proposal, and the federal government does not believe that it embodies any bias or tendency towards either centralization or decentralization of legislative powers or functions.

While delegation from provincial legislatures to Parliament is restricted to four classes of subjects within section 92, these are the only classes in respect of which it might be desirable in practice for Parliament to pass an enactment. They are comprehensive, and they represent the generality of powers that provincial legislatures exercise. On the other hand, the provision governing delegation from Parliament to the provincial legislatures does not specify particular classes of subjects within section 91. This is because it is more difficult—in the absence of precedents and of clearly identifiable needs in this field—to anticipate the situations in which such delegation might take place in practice, and to specify therefore the subjects on which delegation from Parliament might be both desirable and agreeable. In any event, delegation from Parliament to provincial legislatures could not take place without the specific consent of Parliament in each case.

It should be emphasized that the delegation section does not permit Parliament or the provinces to delegate or confer any constitutional responsibility for, or jurisdiction over, a given area; only the power to enact a specific statute pursuant to such jurisdiction can be delegated. Finally, Parliament or the provinces, as the case may be, have the right to revoke any assent they may have given for a law whereupon it ceases to have effect, either generally or in the province concerned. In effect, therefore, each jurisdiction retains continuing and complete control over the classes of subjects for which it has legislative authority under the Canadian Constitution.

In one sense, the use of the term "delegation" is not entirely accurate. There is no provision to delegate "powers" as such. What the provision does, and all it does, is enable Parliament or provincial legislatures, subject to certain conditions, to pass specific enactments if consent has been accorded for each such enactment. The resulting statute continues to be valid only so long as the jurisdiction to which the power rightfully belongs permits it to continue.

Those who see in the delegation section a bias towards centralization point to the provision that makes it possible for a provincial power to be "delegated" to Parliament by agreement of less than four provinces, whereas in no case can a power of Parliament be delegated to less than four provinces. This difference does not, however, reflect any

intent to make delegation to the central government easier than delegation from it. It arises very simply from the difference in the powers that could be involved.

The basic requirement in both types of delegation—that a minimum of four provinces participate—was adopted as insurance against fragmentation of legislation of general interest in Canada. In respect to the powers of Parliament—which are by definition of general interest and concern—any delegation to one or two provinces would concern all provinces to some degree. On the other hand, because provincial powers are in varying degree local by nature, there could be legislation in a provincial field that would not concern all provinces. It might concern only the province involved; it might concern only that province and one or two others. It is in recognition of this fact that provision is made for delegation from the provinces to operate in respect of the powers of less than four of them.

In summary, the delegation provision would permit some flexibility with respect to the exercise of powers that the amending formula protects, in keeping with Canadian constitutional practices and discussions reaching over many years. Delegation is neither centralist nor decentralist. It is a practical means of adapting the exercise of legislative authority to changing conditions while maintaining ultimate control where the Constitution has placed it.

Finally, concern has been expressed that the delegation provision could make it possible for any province that so desired to change its own position within Confederation—to acquire a status completely different from that of the other provinces. Close examination of the delegation provision will show that it presents no such possibility.

If a province wished to pass an Act not within the provincial field, it could not acquire the right to do so alone; nor could it do so of its own volition in association with other provinces. The formula does not permit the granting of even a specific legislative authority by Parliament to one province; the authority cannot be given to fewer than four provinces. Moreover, each grant of specific authority requires in advance the express consent of Parliament, and each is subject to revocation by Parliament. Finally, as has been pointed out, there cannot be a delegation of powers as such; all there can be is consent for the enactment of a specific piece of legislation.

The other way—in theory at least—by which a province might emerge into a special position would be by declining to permit Parliament to legislate in a provincial field at a time when other provinces were permitting that to be done. Thus, if nine provinces were prepared

to authorize the exercise of certain legislative authority by Parliament, it could be given the right to act in respect of those provinces, and the tenth province could in theory emerge in a special position by declining to do so. This would not be because of any action on its part, but because of action by the other provinces, in which it declined to join. What would emerge, even in this improbable situation, would not be a special constitutional position for a single province. It would be a different administrative situation. A change in the constitutional positon could be brought about only by appropriate amendments of substance to the Constitution itself.

DOCUMENT: 840-153/029
REVISED

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

REVISED REPORT OF THE COMMITTEE OF OFFICIALS ON THE MONARCHY AND BILL C-60

Ottawa
January 11-12, 1979

CONFIDENTIAL
DRAFT

January 12, 1979

COMMITTEE OF OFFICIALS ON THE CONSTITUTION
CANADIAN INTERGOVERNMENTAL CONFERENCE CENTRE
Ottawa, January 11-12, 1979

Report of the Committee of Officials on the Monarchy and Bill C-60

The Sub-Committee on the Monarchy and Bill C-60 met in Room 207 of the Canadian Intergovernmental Conference Centre at 11:30 a.m. on January 11, 1979, to discuss the provisions of Bill C-60 relating to the monarchy and, in general, all other provisions of Bill C-60. The meeting was chaired by a federal official. Preparatory discussions for this meeting occurred at a meeting in Toronto on January 5, attended by the federal government, Ontario, Alberta and Manitoba.

There was a brief discussion of the mandate of the Sub-Committee. Quebec was of the view that the First Ministers had referred only the matter of the monarchy to Ministers and officials for study. Other officials maintained that the final communiqué of the First Ministers' Conference, November 1, 1978, provided a broad mandate and that the Honourable Marc Lalonde had made it clear at Mont Ste-Marie that all of Bill C-60 potentially was under review. It was agreed, however, that examination of the provisions of Bill C-60 relating to the monarchy should be reported separately from that of all other provisions of Bill C-60. It was also agreed that the discussion and report would be restricted to key outstanding matters of particular concern.

PART A

Provisions of Bill C-60 relating to the Monarchy

1. Monarchy

There was a discussion of the statement in Section 42 that the Governor General shall exercise the prerogatives, functions and authority of the Queen. Ontario expressed the view that use of "shall" in effect divested the Queen of these matters and should be replaced by may. A middle ground proposal according to which the prerogatives, functions and authority shall ordinarily be exercised by the Governor General gained little support. Federal officials noted that the revised text would continue to vest executive authority in the Queen and to make clear that the Governor General, as a component of Parliament, acts on behalf of the Queen. Federal officials felt that they could go no further. The Chairman stated that if certain provisions relating to the monarchy continued to be a source of strong disagreement among governments, the federal government might have to consider reverting to or simply leaving in place existing constitutional provisions, and deleting all provisions of Bill C-60 on this subject which continue to be a source of controversy. It was agreed that Ministers be informed that the shall/may debate goes beyond a drafting problem.

2. Conventions

It was generally agreed that the revised Section 35(2) respecting constitutional conventions, customs and usages satisfied those governments that had been concerned about the possible freezing of conventions and usages in the original Section 35.

There was also a discussion of Section 53(2) (b) concerning advice to be tendered by the Prime Minister to the Governor General. British Columbia felt that the provisions of Section 53 only went half-way: the right of the Prime Minister to tender advice was clarified, but the right of the Governor General, in certain circumstances, to refuse such advice or to seek independent advice was not. The Chairman said that the use of the word "tender" was intended to indicate that the Governor General was not obliged to accept the advice. This point is also covered by Section 46 which recognizes the reserve powers of the Governor General.

The Chairman noted that the controversy occasioned by the Byng-King dispute in 1926 underlined the need to clarify the conventions of the Constitution with respect to the dissolution of Parliament. It would be impossible, however, to codify all conventions of the Constitution. Rather, the government of Canada sought to codify those conventions and customs that would strengthen the position of the Governor General who, as an appointee, does not enjoy the permanence and prestige of the monarch. Other conventions not codified would continue by virtue of subsection 35(2). Some provincial officials however felt that the partial codification of the conventions and customs of the Constitution might give rise to implications that the uncodified parts have been dropped.

3. Lieutenant-Governors

There was also a discussion of Lieutenant-Governors. Manitoba wished to see Lieutenant-Governors named by the Queen on the advice of Premiers. Saskatchewan supports this position. Ontario proposed that the executive authority of and over the government of each province be declared to continue and be vested in the Queen and that the Queen be represented in the province by a Lieutenant-Governor appointed by the Governor General in Council. This would be a provincial equivalent for Section 9

of the B.N.A. Act. The Chairman noted that the provisions proposed by Ontario did not appear in the B.N.A. Act in the same form. Furthermore, the concerns raised by the Ontario proposals had been covered by Section 78.1 of the revised federal draft. Ontario agreed, but said that Section 78.1 was a backhanded way of meeting the concern. No other province entered the discussion in support of the Ontario position and the Chairman said he felt that the federal government's inclination would be to steer away from this matter.

Part B

Other provisions of Bill C-60

1. Preamble

In the discussion of the Preamble and Statement of Aims of Bill C-60, a general view developed that the two elements should be combined in a single preambular statement that should be short and inspirational and that would have force in judicial interpretation only in the event of ambiguity in the substance of the Constitution. The preamble put forward by Ontario in 1971 during the period of constitutional review was circulated by the federal officials as a possible substitute for the Preamble and Statement of Aims in Bill C-60. British Columbia, which had expressed some concern about having a preamble, expressed satisfaction with the 1971 document which was well rounded. It was noted, however, that the preamble would suggest that some form of Charter of Rights would have to be included in a revised Bill. Manitoba preferred no preamble, but if one was to be included, the 1971 document was preferable to the Preamble and Statement of Aims in Bill C-60.

There were a few criticisms of minor aspects of the language of the 1971 document and one province wondered whether the preamble should appear to deal with the objectives of social policy rather than simply the structure of government.

2. Territorial Limits

British Columbia asked whether it was necessary to include Section 32 respecting the territorial limits of Canada which, it was felt, were covered by common law and international law. The Chairman said that Section 32 was designed to cover the geographic aspects of Canada, such as Hudson's Bay, which might otherwise appear to be excluded from Canada by Section 31 (institutional elements of the Canadian federation).

Newfoundland has reservations about the possible impact of this section if the provincial claim with respect to the seabed is not resolved.

3. Administration of Laws

Questions were also raised concerning Section 36 (administration and enforcement of respective laws). British Columbia said that Section 36 might tip the scales in favour of the federal government in matters such as the administration of criminal law. Furthermore, Section 36 might make it impossible, in the future, for one order of government to pass laws that would be administered by the other, as in West Germany. Alberta went on record as being opposed to Section 36, as had Ontario. The Chairman said that no such effect was intended by the Section nor did he think it capable of that interpretation: it was designed to make clear how the Canadian system of government now operates. If it caused concern, he said that consideration could be given to removing it.

4. Representation in House of Commons

Ontario asked why it was deemed necessary to include in Bill C-60 the present detailed provisions respecting representation in the House of Commons (Sections 71-72). British Columbia was particularly concerned about the inclusion of the 1974 amendment with regard to the rising floor for Members for Quebec with a proportionately diminishing population: it would result in an inordinately large House of Commons over time.

There was a general feeling that such detailed provisions need not be included in the main body of the Bill. Rather, the Bill might include some general provisions governing representation in the House of Commons, leaving it to Parliament to deal with the matter from time to time subject to such principles as that of proportional representation and the requirement that a province's representation in the House not be less than its representation in the Senate.

5. Establishment of Courts by Parliament

There was also a discussion of Section 116 (constitution of courts for the better administration of Canada). British Columbia expressed concern about the possible evolution of a dual system of courts and noted that, despite promises to act, the federal government had not yet amended the Federal Court Act to reduce the jurisdiction of that court. The Chairman said that this matter was related to the distribution of powers and that he doubted that Parliament would wish to forego the right to confer exclusive jurisdiction on the Federal Court in matters such as the judicial review of federal tribunals. Section 116 merely would continue existing federal powers under Section 101 of the B.N.A. Act.

6. Procedure

The method of adopting constitutional amendments respecting the Charter of Rights under Section 131 was also raised. British Columbia felt that Section 131 touches

property and civil rights in a province and that the Parliament of Canada does not have the power to adopt an act respecting areas of provincial competence, subject to provincial opting-in. Ontario expressed the view that the section, particularly Section 131(3), was ultra vires the Parliament of Canada. The Chairman noted that there were many areas of the Charter of Rights that were within federal jurisdiction. The real legal question, he maintained, was that of severability. He added that according to Bill C-60 certain consequences for which Parliament can provide would flow from provincial adoption of the provisions, such as the repeal of disallowance and reservation. Finally, he said that when Parliament enacts the Bill, it will be deemed to be, in certain respects, a resolution for constitutional amendment; when and if the provinces also approve appropriate resolutions by the existing accepted amendment process, a resolution could be sent to the U.K. unless by that time we had a new amending process.

New Draft Bill

The provinces requested the opportunity of commenting on a revised federal draft before it is finalized. The Chairman said that the federal government, in preparing a new draft, would have to bear in mind many views expressed in different forums, such as the Special Joint Committee of the Senate and the House of Commons, as well as the views of the provinces. The various procedural and time constraints under which the federal government will have to work in the coming months might make it impossible for a new federal draft Bill to be submitted to the provinces for comment before being introduced in Parliament.

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CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

Draft of Possible Revisions of Clauses in Bill C-60 Concerning the Queen and the Governor General

Federal

Ottawa
January 11-12, 1979

CANADA WORKING PAPER CONFIDENTIAL

DRAFT OF POSSIBLE REVISIONS OF CLAUSES IN BILL C-60 CONCERNING THE QUEEN AND THE GOVERNOR GENERAL

BILL C-60	POSSIBLE REVISION
30. The sovereign head of Canada is Her Majesty the Queen, who shall be styled the Queen of Canada and whose sovereignty as such shall pass to her heirs and successors in accordance with law.	30. The head of state of Canada is [shall continue to be] Her Majesty the Queen, who shall be styled the Queen of Canada and whose sovereignty as such shall pass to her heirs and successors in accordance with law.
***35.** The Constitution of Canada shall be the supreme law of the Canadian federation, and all of the institutions of the Canadian federation shall be governed by it and by the conventions, customs and usages hallowed by it, as shall all of the people of Canada.	*35. (1) The Constitution of Canada shall be the supreme law of the the Canadian federation. (2) Except where otherwise expressly provided in this Act, this Act does not abrogate or alter any constitutional conventions, customs or usages.
42. There shall be an officer for Canada styled the Governor General of Canada, who shall be appointed by the Queen by letters patent under the Great Seal of Canada on the advice of the Council of State of Canada, and who shall represent the Queen in Canada and exercise for her the prerogatives, functions and authority belonging to her in respect of Canada by the Constitution of Canada or otherwise pursuant to law.	42. (1) There shall be an officer for Canada styled the Governor General of Canada and Commander-in-Chief of the Canadian Forces who shall be appointed as such by the Queen by commission under the Great Seal of Canada, on the advice of the Council of State of Canada. (2) The Governor General of Canada shall represent the Queen in Canada and exercise for her the prerogatives, authorities and functions, belonging to her in respect of Canada by the Constitution of Canada or otherwise pursuant to law, other than those belonging to her under subsection (1) of this section and subsections 45(1) and 48(3).

BILL C-60

43. The executive government of and over Canada shall be vested in the Governor General of Canada, on behalf and in the name of the Queen.

44. The Governor General of Canada shall have precedence as the First Canadian, and the office of the Governor General shall stand above and apart from any other public office in Canada.

45. (1) The tenure of office of the Governor General of Canada shall be at the pleasure of the Queen, expressed by her on the advice of the Council of State of Canada, but unless so expressed the Governor General shall hold office for a period of five years from the time of his or her appointment, subject to his or her re-appointment to such office for a further period not exceeding three years.

(2) Appointments to the office of Governor General of Canada shall be made from among those citizens of Canada having the stature in Canada adjudged to be suitable to that office.

(3) The salary, allowances and pension of the Governor General of Canada shall be fixed and provided by the Parliament of Canada.

POSSIBLE REVISION

43. The executive government of and over Canada shall continue to be vested in the Queen and shall be carried on by the Governor General of Canada on behalf of the Queen.

44. The Governor General of Canada shall have precedence after the Queen and the office of Governor General shall stand above and apart from any other public office in Canada.

45. (1) The tenure of office of the Governor General of Canada shall be at the pleasure of the Queen, expressed by her on the advice of the Council of State of Canada, but, unless otherwise expressed, the Governor General shall hold office during pleasure for a period of five years from the effective date of his or her appointment subject to his or her re-appointment to such office for a further period not exceeding three years.

(2) Appointments to the office of Governor General shall be made from among citizens of Canada except that no member of the Cabinet or of either of the Houses of Parliament is eligible to be appointed to that office.

(3) The salary, allowances and pension of the Governor General of Canada shall be fixed and provided by the Parliament of Canada.

BILL C-60

48. (2) For greater certainty, nothing in this Act respecting the Governor General of Canada or the office of Governor General shall be construed as precluding the Queen, on the advice of the Council of State of Canada, from exercising while in Canada **any of the powers, authorities or functions of the Governor General under this Act; and it**

54. The qualifications of persons to be members of the Cabinet and their continuation as such members shall, subject to this Act and except as otherwise regulated by law, be governed by accepted usage, except that no person is eligible to be a member of the Cabinet unless he or she is a member of one of the Houses of the Parliament of Canada or is qualified to be a candidate for election to the House of Commons of Canada.

56. There shall be one Parliament for Canada, consisting of the Governor General of Canada, an upper house styled the House of the Federation, and the House of Commons.

POSSIBLE REVISION

48. (2) Nothing in this Act respecting the Governor General of Canada or the office of Governor General shall be construed as precluding the Queen, on the advice of the Council of State of Canada, from exercising while in Canada any of the powers, authorities or functions vested in her or the Governor General and exercisable by the Governor General under this Act.

54. (1) No person is eligible to be a member of the Cabinet unless he or she is a member of the Houses of the Parliament of Canada or is qualified to be a candidate for election to the House of Commons of Canada.

(2) A person is not qualified to be a member of the Cabinet for more than six months during which he or she is not a member of one of the Houses of Parliament.

56. There shall be one Parliament for Canada, consisting of the Governor General of Canada acting on behalf of the Queen, an upper house styled the House of the Federation, and the House of Commons.

78.1 Nothing in this Division shall be held to derogate from the status of the Lieutenant Governor of any province or from the rights or privileges granted or secured by the Constitution of Canada to the Lieutenant Governor, the legislature or the government of any province.

DOCUMENT: 840-153/013

CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

British Columbia's Comments on Aspects of Bill C-60 Not Yet Considered by the Continuing Committee of Ministers on the Constitution

British Columbia

Ottawa
January 11-12, 1979

British Columbia's Comments on Aspects of Bill C-60 Not Yet Considered by the Continuing Committee of Ministers on the Constitution

This document contains some of the concerns of the Province of British Columbia with respect to certain of the provisions of Bill C-60, the Constitutional Amendment Act, 1978. It does not include the Province's views on the subjects of the Monarchy, a Charter of Rights, the Senate of Canada, or the Supreme Court of Canada. The Province's position on these latter issues are contained within British Columbia's proposals for Constitutional change previously made public.

Some of British Columbia's concerns with respect to certain of the provisions of Bill C-60 include the following:

(1) The Preamble

British Columbia questions the need for both a Preamble and a Statement of Aims in the Constitution. A preamble is always read as a part of an Act intended to assist in explaining its purport and object. The proposed preamble however points to "aims" to be enacted as part of the body of the statute (ss. 3 & 4) which are to be binding on both orders of Government and their Legislatures. The "aims" should be deleted altogether so that the preamble stands on its own as an aid in interpretation.

British Columbia is concerned with the preamble's emphasis on "enduring communities of distinctive origins" and

"English-speaking and French-speaking communities" and asks that the wording of the preamble be carefully re-examined line by line bearing in mind that the preamble will be used as a guide to the interpretation of the substantive provisions of the proposed Constitution.

(2) The Statement of Aims (ss. 3 & 4)

It is British Columbia's position that the proposed Statement of Aims should be removed from the Draft Constitution.

The proposed Statement of Aims would not only be used by the Courts in the interpretation of the remaining provisions of the Constitution but would be read as binding on the legislatures and governments of the provinces as well as on the Parliament and government of Canada (s. 130) therefore imposing serious limitations on the legislative authority of both orders of government whose powers would be interpreted in light of the Statement of Aims.

By including certain customary principles and traditions of Parliamentary Democracy in the Statement of Aims there is the danger that other customary principles are by implication excluded. As well, important aims of the Federation such as the effective accommodation of diverse regional interests in the national decision-making process, are omitted from the Statement of Aims.

The substantive provisions of the statute should be left to speak for themselves without the constricting gloss of a Statement of Aims. British Columbia supports Ontario in its insistence that the Statement of Aims be deleted from the Draft Constitution (see Ontario Document 830-67/015).

(3) Territories of Canada (s.32)

Section 32, which provides that Canada includes some territory that is not included in any province or territory, is unacceptable to British Columbia which believes that this matter is better left to common and International law.

(4) Constitution the Supreme Law (s.35)

Section 35 provides that the Constitution is the supreme law of Canada and that the institutions and people of the Canadian federation shall also be governed by constitutional conventions, customs and usages. It is unecessary to put such a basic and self-evident principle in the Constitution that it is the supreme law of Canada; however, far more serious is the reference to conventions, customs and usages which gives these hitherto legally unenforceable rules the force of law and may well hinder the future development of further conventions. British Columbia agrees with Ontario that section 35 be deleted (see Ontario Document 830-67/015).

(5) Administration & Enforcement of Laws (s.36)

Section 36 which provides for the administration and enforcement of laws by the federal or provincial authority responsible for making them seriously undercuts present provincial authority respecting the enforcement of the criminal law. Section 36 is not acceptable to British Columbia and we concur with Ontario's call for the section's removal from Bill C-60 (see Ontario Document 830-67/015).

(6) The Council of State of Canada (ss. 49 & 50)

If Canada is to remain a Constitutional Monarchy the name of the Queen's Privy Council for Canada should not be changed as sections 49 and 50 provide.

(7) The Cabinet (ss. 53 & 54)

If the rich inheritance of constitutional convention surrounding Cabinet government in our Parliamentary system must be included in the written constitution care should be taken that in doing so important conventions are not omitted. Section 53 of Bill C-60 is deficient in that while it speaks of the Prime Minister's advice to the Governor General it does not make clear that where the government does not enjoy the confidence of the House of Commons the Governor General may refuse to follow the advise which is tendered to him by the Prime Minister but may exercise an independent discretion.

The last phrase in section 54 "or is qualified to be a candidate for election to the House of Commons of Canada" should be deleted as these words would enable almost any person to be eligible to be a member of the Cabinet.

(8) Membership of the House of Commons (ss. 71 & 72)

British Columbia does not favour the retention in sections 71 and 72 of the 1974 amendments to the B.N.A. Act which provide for a decennial increase in the membership of the House of Commons based on a rising floor for members from Quebec.

The principle of representation by population can be preserved without unduely increasing membership in the House of Commons. The automatic increase of Quebec representation by 4 members every 10 years and the determination of membership from other provinces in light of this automatic increase means that there may well be an inordinate number of members of the Commons in the future, especially should the population of Quebec decrease in proportion to that of the whole country. Such an increasing membership is not only undesirable from the point of view of the effective operation of the Commons but also requires serious reconsideration when the unecessary cost to the taxpayer is also born in mind.

(9) Federal Courts (s. 116)

The growing purported jurisdiction of the Federal Court of Canada remains of concern to British Columbia. We are opposed to 2 levels of the judiciary being enshrined in the Constitution under s. 116. Section 116 should make it clear that any jurisidiction given to any federally created Court does not derogate from the jurisdiction of the superior, district, and county courts of each province and that the provincial superior Courts may have concurrent jurisdiction with any federally created Court.

(10) The Implementation Provisions (ss. 125-133)

The Government of the Province of British Columbia cannot accept the implementation provisions of the Bill C-60 (ss. 125 to 133).

Sections 125 and 126, while stating that the designated provisions are not enacted by the Act, deem them to have been approved by a resolution of both Houses of Parliament which may be taken up as on a joint address or by proclamation. These sections ignore the limitations of s.91(1) of the present B.N.A. Act and are repugnant to the established constitutional convention that requires provincial consent to such provisions before asking Parliament to adopt a joint address.

Section 127 purports to give Bill C-60 prevalence over the B.N.A. Act in the event of conflict or inconsistency.

Even if this section was to be applied only to certain of the undesignated provisions of the Bill it assumes incorrectly that the Parliament of Canada could enact such a blanket provision with respect to those provisions.

As mentioned above British Columbia does not agree with the inclusion of the Statement of Aims in the Bill especially in view of section 130 which speaks of them as being binding on the legislatures and governments of the provinces.

Section 131 (1) purports to enact the provisions of the Canadian Charter of Rights and Freedoms and then to have them read as extending only to federal matters. The Parliament of Canada does not possess the legislative authority to enact the provisions of the Charter touching on provincial matters and therefore possesses no authority to enact them and then purport to have them read as extending only to non-provincial matters.

Not only is s.131(1) ultra vires but s.131 (2) is beyond the authority of the Parliament of Canada which cannot alter the conventional method of securing amendments to the Constitution through enactment of a measure, then deeming it a resolution which may be taken up as on a joint address.

The Parliament of Canada cannot unilaterally enact that section 90 and the disallowance provisions of the B.N.A. Act no longer apply to a province or provinces any more than it could enact that such provisions apply to a province or the provinces in the first place (s.131(3) and (4)).

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CONFIDENTIAL

MEETING OF OFFICIALS ON THE CONSTITUTION

(Draft for Discussion Purposes Only)

Preamble

Ontario

Ottawa
January 11-12, 1979

PREAMBLE

Proud of our heritage

Confident of our future

Acting of our sovereign will

We, the people of Canada, declare our common purposes:

To cherish the right of each individual
to develop his full potential

To honour each sex, race, colour
and creed as equal

To establish just laws

To manage our resources

To seek the reduction of social and
economic disparities among our regions

To strive always to eliminate poverty from our land

To maintain the beauty of our environment

To dedicate the efforts of our country
to the attainment of peace in the world.

In recognition of these purposes

We therefore

Reaffirm our belief in federalism
as the system of government best suited
to the achievement of unity through diversity

Recognize our country as one whose
official languages are English and French
and whose culture is an inheritance from many lands

And

Proclaim our Constitution:

DOCUMENT: 840-153/009

DIFFUSION RESTREINTE

RESTRICTED

MEETING OF OFFICIALS ON THE CONSTITUTION

REUNION DE FONCTIONNAIRES SUR LA CONSTITUTION

Liste définitive des délégués

Final List of Delegates

Ottawa
les 11 et 12 janvier 1979

Ottawa
January 11-12, 1979

MEETING OF OFFICIALS ON THE CONSTITUTION

REUNION DE FONCTIONNAIRES SUR LA CONSTITUTION

Ottawa

January 11-12, 1979 les 11 et 12 janvier 1979

Final List of Delegates
Liste définitive des délégués

CANADA

Federal-Provincial Relations Office

R.G. Robertson
Secretary to the Cabinet for
Federal-Provincial Relations (Co-chairman)

F.A.G. Carter
Special Advisor

John Hayes
Special Advisor

N.R.J. Gwyn
Assistant Secretary to the Cabinet
for Federal-Provincial Relations
(Studies and Research)

S.G. MacKinnon
Justice Liaison Officer

B.J. Reed
Constitutional Advisor

J.R. Hurley
Advisor

B.L. Hodgins
Federal-Provincial Relations Officer

P.C. Skippon
Federal-Provincial Relations Officer

R.J. Taylor
Federal-Provincial Relations Officer

Privy Council Office

R. Rabinovitch
Assistant Secretary to the Cabinet
(Priorities and Planning)

L. Tousignant
Assistant Secretary to the Cabinet
(Social Policy)

Department of Justice

R. Tassé
Deputy Minister and
Deputy Attorney General

B.L. Strayer
Assistant Deputy Minister (Public Law)
and Special Counsel on the Constitution

Gérard Bertrand
Associate Chief Legislative Counsel

F.J.E. Jordan
Director, Constitutional, Administrative
and International Law Section

A. Desjardins
Director, Advisory and Research Services

E.I. MacDonald
Senior Counsel

D.A. Kubesch
Legal Officer

L.A. Willis
Legal Officer

Department of Communications

Jean T. Fournier
Senior Assistant Deputy Minister
(Policy)

K.T. Hepburn
Director General
National Telecommunications

M. Dolgin
Director General
Federal-Provincial Relations

Department of Finance

G. Veilleux
Director General
Tax Policy

R.A. Short
Director
Tax Policy Legislation

Fisheries and Environment Canada

D.D. Tansley
Chairman
Fisheries Research Board

D.J. McEachran
Assistant Deputy Minister
Pacific and Freshwater Fisheries

Department of Energy, Mines and Resources

G.W. Tough
Director General
Energy Strategy

Secretary of State

P. Juneau
Under-Secretary

Peter Grant
Consultant

SASKATCHEWAN

Howard Leeson (Co-chairman)
Deputy Minister to the Premier
for Intergovernmental Affairs

Richard Gosse
Deputy Attorney General

Robert Weese
Director, Intergovernmental Affairs
Executive Council

Patrick McDonald
Co-ordinator, Constitutional Law
Department of the Attorney General

Philippe Doré
Research Officer
Office of Intergovernmental Affairs
Executive Council

George Taylor
Constitutional Consultant

Richard Simpson
Communications Consultant
Communications Secretariat

George Peacock
Constitutional Consultant

Roy Meldrum
Constitutional Advisor to Cabinet

ONTARIO

H. Allan Leal
Deputy Attorney General

D.W. Stevenson
Deputy Minister
Ministry of Intergovernmental Affairs

A.N. Stone
Senior Legislative Counsel
Ministry of the Attorney General

E.D. Greathed
Executive Director, Intergovernmental Affairs
Ministry of Intergovernmental Affairs

David Hobbs
Executive Director
Communications Division
Ministry of Transportation and Communications

D.W. Mundell
Director, Constitutional Law
Ministry of the Attorney General

G.S. Posen
Director, Federal-Provincial and
Interprovincial Affairs Secretariat
Ministry of Intergovernmental Affairs

M. Fordyce
Director, External Activities
Coordination Secretariat
Ministry of Intergovernmental Affairs

J. Cavarzan
Senior Crown Counsel
Ministry of the Attorney General

L. Weinrib
Counsel, Constitutional Law
Ministry of the Attorney General

Tony Salerno
Ministry of Treasury and Economics

QUEBEC

Robert Normand
Sous-ministre
Ministère des Affaires intergouvernementales

René Dussault
Sous-ministre
Ministère de la Justice

Pierre Le François
Sous-ministre adjoint
Ministère des Affaires intergouvernementales

Jean-K. Samson
Directeur du Service juridique
Ministère des Affaires intergouvernementales

Gilbert L'Ecuyer
Conseiller auprès du Sous-ministre adjoint
Direction générale des Affaires canadiennes au
Ministère des Affaires intergouvernementales

Gil Rémillard
Directeur A.I. du Service juridique
Ministère des Communications

Louis Lecours
Directeur A.I. des Affaires institutionnelles
Direction générale des Affaires canadiennes au
Ministère des Affaires intergouvernementales

NOVA SCOTIA - NOUVELLE-ECOSSE

Gordon F. Coles
Deputy Attorney General

John Mullally
Deputy Minister
Department of Fisheries

Innis G. MacLeod
Constitutional Advisor
Office of the Premier

Duncan Fraser
Constitutional Advisor
Office of the Premier

NEW BRUNSWICK - NOUVEAU-BRUNSWICK

Barry Toole
Secretary
Cabinet Committee on Policy and Priorities

Alan Reid
Director, Legal Research
Department of Justice

Don Dennison
Co-ordinator
Intergovernmental Affairs Cabinet Secretariat

Francis McGuire
Council of Maritimes Premiers'

Walter Steeves
Department of Transportation

MANITOBA

D.R.C. Bedson
Clerk of the Executive Council

R.H. Tallin
Legislative Counsel
Department of the Attorney General

A. Kerr Twaddle
Legal Counsel

Brian F. Squair
Departmental Solicitor
Department of the Attorney General

C.A. Perry
Assistant Deputy Minister
Taxation Division
Department of Finance

J.R. Eldridge
Assistant Deputy Minister
Federal-Provincial Relations
Department of Finance

Doug Smith
Assistant Deputy Minister
Communications Division
Department of Consumer and Corporate Affairs

D.M. Sanders
Assistant Deputy Minister
Department of Municipal and Urban Affairs

Ian Haugh
Assistant Deputy Minister
Mineral Resources Division
Department of Mines, Natural Resources
and Environment

Gordon Backhouse
Director of Marketing and Administrative Services
Manitoba Telephone System

K.H. Doan
Director of Fish and Wildlife
Department of Mines, Natural Resources
and Environment

BRITISH COLUMBIA - COLOMBIE-BRITANNIQUE

Melvin H. Smith
Deputy Minister
Constitutional Affairs
Office of the Premier

Richard Vogel
Deputy Attorney General

Harold Page
Assistant Deputy Minister
Ministry of Energy, Transport and Communications

Alan Murray
Assistant Deputy Minister (Conservation)
Ministry of the Environment

Tony Stark
Policy Co-ordinator
Ministry of the Environment

Paul Pearlman
Solicitor on the Constitutional and Administrative Law Section
Ministry of the Attorney General

PRINCE EDWARD ISLAND - ILE-DU-PRINCE-EDOUARD

Douglas B. Boylan
Secretary to the Cabinet
Office of the Premier

ALBERTA

J. Peter Meekison
Deputy Minister
Department of Federal and Intergovernmental Affairs

W. Henkel
Assistant Deputy Attorney General
Constitutional Law and Energy Law
Department of the Attorney General

Gordon Haase
Assistant Deputy Minister
Finance and Planning
Department of Utilities and Telephones

Graham Reid
Chief Legislative Counsel
Department of the Attorney General

Oryssia J. Lennie
Director, Research and Planning
Department of Federal and Intergovernmental Affairs

Jim Cummings
Solicitor, Constitutional Law
Department of the Attorney General

Judy Wish
Director, Ottawa Office
Department of Federal and Intergovernmental Affairs

Jack O'Neill
Co-ordinator of Special Events
Office of the Premier

Joan Speakman
Senior Intergovernmental Officer
Research and Planning
Department of Federal and Intergovernmental Affairs

Gail Armitage
Senior Intergovernmental Officer
Research and Planning
Department of Federal and Intergovernmental Affairs

NEWFOUNDLAND - TERRE-NEUVE

Cyril J. Abery
Deputy Minister
Intergovernmental Affairs Secretariat

Gordon Slade
Deputy Minister
Department of Fisheries

John Fitzgerald
Assistant Executive Director
Intergovernmental Affairs Secretariat

Tom Grandy
Director of Communications
Department of Transportation and Communications

Leo Barry
Constitutional Advisor

Barbara Knight
Intergovernmental Affairs Secretariat

CANADIAN INTERGOVERNMENTAL CONFERENCE SECRETARIAT
SECRETARIAT DES CONFERENCES INTERGOUVERNEMENTALES CANADIENNES

Penny Shafto
Secretary