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MEMORANDUM TO THE PRIME MINISTER

Constitutional Resolution

There are essentially three items which have come out of last week's Committee meetings which require decisions by you and the Minister of Justice.

I. Provincial Language Rights

The first relates to language rights in the provinces. The N.D.P. has given us good reason to believe that they will not propose any motion which would seek to impose official bilingualism on Ontario. Instead they will seek agreement of the Committee on a separate resolution proposed by Mr. Nystrom and seconded by Mr. Crombie and Mr. Mackassey which would ask the Legislature of Ontario to agree to official bilingualism at least in the area of the Courts and the legislature.

This idea is not a new one and has been mentioned in the Committee by Mr. Chrétien in the last few weeks and has been welcomed by Liberal members of the Committee. However, in order to ensure that there will be no negative reaction from Premier Davis, it would be appropriate to negotiate the wording of such a resolution with Mr. Nystrom so that it does not confine itself strictly to Ontario. One possibility would be to refer to the Victoria Charter and ask Ontario and other provinces to extend and give the appropriate constitutional status for the use of French within their jurisdiction. I would like your guidance on how to react to this proposal after you have discussed this with Mr. Chrétien.

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There is another decision on language which requires your attention. The Conservatives have introduced an amendment (see attached) which would provide for opting-in to all or part of Sections 16-20. The amendment is very similar to what you proposed in Victoria in 1971 (see attached), in C-60 (see attached) and; indeed last summer.

The Conservative amendment applies equally to all provinces and does not make any specific reference for Ontario. It does not set a precedent for opting-in to other parts of the Charter because it is predicated upon being part of a Charter which is binding on both levels of government.

When proposed in Committee, it will be very difficult for government members to reject the principle of opting-in to constitutional protection of language rights. There are few legitimate arguments against it although we have some concerns with the actual wording proposed.

I remain concerned about accepting the principle of opting-in, but I know that it is favoured both by Mr. Chrétien and by Mr. Tassé. You should discuss this with Mr. Chrétien.

II. Regional Majorities

The N.D.P. raised last week the possibility that Section 42 could permit a referendum to pass in either Atlantic Canada or Western Canada without the support of a majority of the population of the region. In essence, it is possible that a narrow majority in two provinces could be outweighed by a massive vote in the other two provinces. The N.D.P. will therefore propose an amendment which would provide that a referendum could only pass if in addition to a majority in two provinces in Western Canada with fifty per cent of the population of Western Canada, there is a majority of voters in Western Canada in favour, and similarly in Atlantic Canada, the requirement would be a majority in two provinces and a majority in the entire region.

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You will recall that this proposal has been rejected by Cabinet basically on the grounds that it is not in symmetry with the provisions of Section 41. Nonetheless, you may want to reconsider in view of the changes already made in the referendum procedures and in view of the fact that in simplifying the explanation of the referendum, many government spokesmen have talked about the requirement of a majority in Western Canada and in Atlantic Canada. It will be difficult to explain the rationale for a system which would permit the passing of a referendum where a majority in Western Canada and a majority in Atlantic Canada have actually voted against.

III. Denominational Schools

Schedule of enactments, etc., repealed or amended

128. (1) On the commencement of this Act, the portions of the enactments set out in column I of Schedule A to this Act are, in so far as they are part of the law of Canada, repealed or amended in the manner and to the extent specified in column II of that Schedule. 5

Idem

(2) The provisions of the Act of 1867, as amended by any subsequent constitutional enactment, set out in column I of Schedule B to this Act are, in so far as they are part of the law of Canada, repealed as of the day effect is given by law to the designated provisions of Part I of this Act set out in column II of that Schedule opposite those provisions 15 of the Act of 1867 as so amended.

Idem

(3) The portions of the enactments set out in column I of Schedule C to this Act are amended in the manner and to the extent specified in column II of that Schedule as of the day effect is given by law to the designated provisions of Part I of this Act set out in column III of that Schedule opposite the portions of those enactments so amended and set out in column II thereof. 25

Construction of English and French versions of Act

129. The English and French versions of this Act are equally authoritative and shall be construed together according to the ordinary rules applicable at the commencement of this Act for the construction of the English and French versions of the statutes of Canada, but to the extent that the English language version of any designated provision set out in sections 91 to 95 or sections 121 to 123 remains unchanged in its substance from the text of the constitutional enactment to which it corresponded immediately before its coming into effect as law, the French language version corresponding to that English language version shall, from and after its coming into effect as law, have the same force and effect as that English language version, and shall not be held to operate as new law. 30 40

II SPECIAL RULES AND PROVISIONS

Statement of aims of Canadian Federation: how initially construed

130. (1) On and after the commencement of this Act, the statement of aims of the Canadian federation set out in section 4 of 45

128. Section 128 sets up three schedules for the repeal in phases of existing provisions of the Act of 1867 and other Acts. Schedule A contains the provisions that would be repealed immediately and Schedules B and C relate to those to be repealed as the designated provisions come into effect by entrenchment.

129. This section provides rules relating to the construction of the English and French versions of the Bill.

130. This section provides for the constitutionalization and entrenchment of the statement of aims of the Canadian federation. (See the Introduction hereto, category 3.)

this Act shall be read and construed as a statement subscribed to by the Parliament and government of Canada, by which they are bound and to which they are committed pursuant to the Constitution of Canada. 5

Approval of additional measures to be taken when agreed

(2) In order that effect may be given as soon as may be to the statement referred to in subsection (1) as one subscribed to by and binding on the legislatures and governments of all the provinces in common with the Parliament and government 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 statement 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, at any time after an amendment to the Constitution of Canada in like form and to the like effect has been approved by the legislatures of all of the provinces, 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. 10 15 20 25 30

Initial application of Canadian Charter of Rights and Freedoms

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. 35 40

Approval of additional measures to be taken when agreed

(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 author- 45 50

131. Where a province adopts the Charter, the federal government would have to be able to disallow certain of that province's laws. This, however, upon adoption of the Charter, Quebec would be required by s. 92(1) to publish its laws in French as well as English. The situation thus would gradually result in giving up to the government of this province.

131. This section provides for the constitution- alization and entrenchment of the *Canadian Charter of Rights and Freedoms* and for matters consequential thereto. (See the Introduction hereto, category 2.)

(1) By virtue of subsection (1), the Charter would apply only to federal matters until such time as a province adopts it.

(2) Subsection (2) would authorize the taking of the steps necessary to secure the entrenchment of the Charter.

ity 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, 5 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), 10 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 15 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 20 so provided for, if there is then such a procedure.

Provisions applicable when Charter extended to matters within provincial legislative authority

(3) From and after such time as it is provided by the legislature of any province, acting within the authority conferred on it by 25 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, 30

(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 35 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 40 were herein 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 45 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 50

(3) Where a province adopts the Charter, the federal government would cease to be able to disallow statutes of that province. Also, because, upon adoption of the Charter, Ontario would be required by s. 15(2) to publish its statutes in French, as well as English, for the first time, some flexibility would be given as to the commencement of this requirement.

after, or any such revision or consolidation authorized to have effect after, such day or days as that legislature shall have fixed therefor.

Full application of Charter

(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.

Matters reserved for determination by territorial governments

(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.

(4) When the Charter is entrenched, it would apply throughout Canada and s. (1), which limits it to federal matters, would be repealed. Also provisions of the Act of 1867 that relate to matters covered by the Charter, to the disallowance of federal and provincial legislation and to certain specified language rights in Quebec and Manitoba would be repealed.

(5) Pursuant to this subsection, the Commissioner in Council of the Yukon Territory or Northwest Territories would be given the same rights as a provincial legislature with respect to the adoption of the Charter.