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THE REFORM OF NATIONAL INSTITUTIONS

SECRET

August 27, 1981
7th Draft (C)

I. OBJECT

The object of this memorandum is to outline the direction concerning the reform of national political institutions that might be considered or proposed by the federal government during the next phase of constitutional renewal.

II. SCOPE AND PURPOSE

The responses of Ministers are sought to questions posed in the first section of this memorandum. The purpose of these responses is to assist in developing goals and a strategy for the reform of national institutions. Some of the considerations on which such responses should be based are outlined in the preceding sections of the memorandum and in the accompanying discussion.

MEMORANDUM TO MINISTERS (DRAFT)

THE REFORM OF NATIONAL INSTITUTIONS

Since 1960, the Government has repeatedly expressed its willingness to proceed with reforms which would give federal political institutions more representative of regional realities. The White Paper of 1969 and Bill C-60 of 1976 suggested various ways to translate these intentions into concrete reforms. In the present

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process of reform, it is not enough to participate but to deal with the substance of institutions and powers. In recent speeches, the Prime Minister has reiterated his concern to improve regional representation in national political institutions and the priority he attaches to reform for this purpose. This memorandum is intended to assist Ministers from various areas in the region following publication.

III. NATIONALITY

From the point of view of the federal government, the aim is to consider means for improved regional representation in national institutions. The following have been suggested by various factors, including:

- the growth of regional/provincial identities and of a feeling of "alienation" from the national government;
- the loss of interprovincial dialogue represented in the federal political system;
- the loss of elected Ministers' experience for various regions, depending on which party is in power.

THE REFORM OF NATIONAL INSTITUTIONS

I. OBJECT

The object of this memorandum is to obtain Cabinet direction concerning the reforms to national political institutions that might be considered or proposed by the federal government during the next phase of constitutional renewal.

II. DECISION REQUIRED

The responses of Ministers are sought to questions posed in the last section of this memorandum. The purpose of these responses is to assist in developing goals and a strategy for the reform of national institutions. Some of the considerations on which such responses should be based are outlined in the preceding sections of the memorandum and in the accompanying Discussion Paper.

III. BACKGROUND

Since 1969, the Government has repeatedly expressed its willingness to proceed with reforms which would make federal political institutions more representative of regional outlooks. The White Paper of 1969 and Bill C-60 of 1978 suggested various ways to translate these intentions into concrete reforms. In the present phase of constitutional renewal since June 1980, repeated assurances have been given that the process of renewal would not cease with patriation but would go on to deal with the substance of institutions and powers. In recent speeches, the Prime Minister has reiterated his concern to improve regional representation in national political institutions and the priority he attaches to reforms for this purpose. This memorandum is intended to elicit direction from Ministers about the course to be pursued in this area in the period following patriation.

IV. RATIONALE

From the point of view of the federal government, the need to consider means for improved regional representation in national institutions has been suggested by numerous factors, including:

- the growth of regional/provincial identities and of a feeling of "alienation" from the national government;
- the loss of Canada-wide elected representation in all federal political parties;
- the lack of elected Cabinet spokesmen for certain regions, depending on which party is in power;

- the consequent absence of perceived legitimacy for leadership by the federal government, especially in Western Canada;
- the increasing claims of the provincial governments to act as regional spokesmen in areas of federal jurisdiction or to provide checks and balances to the national government on matters of national interest;
- the growth of "executive federalism", a style of government based on direct relations between the executives of federal and provincial governments;
- the growing tendency of the federal-provincial forum to overshadow the legislative institutions of the federal government as the primary locus for the resolution of regional tensions and issues;
- the obvious desirability of establishing national political institutions which would be seen to introduce a variety of regional viewpoints into the federal political process, hence providing a more solid basis for effective and legitimate action by the national government and returning some of the responsibilities from the federal-provincial forum to the national legislative institutions;
- the mutual involvement of both levels of government in a broad range of policy issues, and the possible need for mechanisms to manage this interdependence;
- the importance attached by provincial governments to the reform of central institutions in the recent constitutional negotiations.

V. Relationship to other elements of the government's programme

The reform of national political institutions is closely linked to other elements of the government's current programme and proceeds from a common underlying belief that the over-all political and economic strength of the national government must be reinforced within the federation as a whole:

- The constitutional resolution is intended, among other things, to solidify Canadian nationhood and to provide a common basis of citizenship across the country, and a corresponding sense of community.
- The National Energy Programme has among its aims to provide a better sharing of oil revenues between the provincial governments

and the national government and to provide the national government with increased ability to plan and manage the development of energy in the national interest.

- The government's approach to the renegotiation of the fiscal arrangements with the provinces aims at greater political and fiscal strength for the federal government and a halt to the erosion of its ability to provide the necessary leadership to the federation.
- The improvement of regional representation in national institutions complements the other elements because it provides the political basis from which strong national leadership may be exercised. It is a lynchpin of any strategy designed to reassert the role of the national government and to knit up the fabric of the country.
- For the same reason, it seems likely that any western strategy would give importance to the reform of national institutions as a means of strengthening the western voice and image in the national parliament and government, and thereby moderating "western alienation".
- The strengthening of regional representation in national institutions would also reduce the credibility of claims for greater constitutional powers which are made by some provincial governments on the ground that they are more representative of, and more responsive to, regional and community interests. It should therefore precede or parallel any discussion of the distribution of powers.

VI. Goals

The foregoing factors suggest the goals at which the federal government should aim in the reform of national institutions during the next phase of constitutional renewal:

1. To strengthen the legitimacy of the national government and its ability to speak and act authoritatively on behalf of all parts of Canada, by:
 - i) providing adequate means for the effective expression of regional concerns within national political institutions, thereby improving the effectiveness and the perceived fairness of the decision-making process of the national government;
 - ii) strengthening Canadian political parties and their capacity to represent and reconcile the views of all regions of the country;

- iii) increasing the sense of identification of all Canadians with the national government and with the federation;
- iv) shifting some of the responsibility for resolving regional tensions and issues from the federal-provincial forum to the legislative institutions of the national government; converting inter-institutional conflict to intra-institutional conflict;
- v) reducing the claims of the provincial governments to act as regional spokesmen in areas of federal jurisdiction or to provide checks and balances to the national government on matters of national interest.

2. To improve the conduct of federal-provincial relations, by:

- i) providing more effective means to promote federal-provincial cooperation and decision-making where these are required;
- ii) improving the climate of federal-provincial relations through symbolic and concrete gestures of cooperation (including the proposals themselves);
- iii) shifting responsibilities and reducing the claims of the provincial governments, as in iv) and v) above.

It is clear that the first goal is of primary importance to this government and forms a central element in its over-all strategy for the federation in the coming months. When the two goals are in conflict, as they may be from time to time, the second must give way to the first. But where the conduct of federal-provincial relations can be improved without jeopardizing the goal of strengthening the federal government, or where the two goals reinforce each other, then reforms or strategies should be adopted which make both possible.

VII. ALTERNATIVES

A basic choice

Before proceeding to consider options and strategies for the reform of national institutions, the government faces a basic choice:

- 1) to pursue reform on a broad front, including, for example, reform of the Supreme

Court, regional representation on federal boards and agencies, etc.; or,

2) to concentrate energies on one or two institutions, and to accomplish other reforms (e.g., the Court, boards and agencies) through them (e.g., the Senate), if necessary.

For the purpose of this memorandum, an initial assumption is made that the government should pursue the second course and should limit its attention to electoral reform in the House of Commons and to reform of the Senate. In considering options and strategies on the Senate, however, one is obliged to give some critical attention to the issue of an intergovernmental council which has been linked with the Senate in previous constitutional discussions.

The Electoral System

The present electoral system contributes to disunity because it presents an exaggerated image of regional polarization, thereby heightening unwarranted feelings of "alienation", robbing the federal government of strong spokesmen in every region, and casting doubt upon the federal government's capacity to speak authoritatively for the nation as a whole and for every region of it. Moreover the results of the elections of 1979 and 1980 provide an appropriate context for reform because of heightened public awareness of the defects of the electoral system.

As the Discussion Paper demonstrates, it is clearly possible to devise reforms to the electoral system in the House of Commons which would compensate for some of the distortions of the present plurality system yet would preserve the existing single-member constituencies intact and would not increase significantly the probability of minority government.

Nevertheless there will be considerable resistance to reform among M.P.'s: Conservatives will not be eager to allow the Liberal party representation in the west and Liberal M.P.'s from Quebec will not be keen to relax their hold on that province. Electoral reform could not be undertaken, therefore, without first allowing time for M.P.'s to study the matter thoroughly and to become convinced of the need for change, probably through the work of the Committee promised in the Speech from the Throne and again in the Prime Minister's recent speech in Fredericton.

In that case, electoral reform may be deferred as a matter of immediate action pending study and conclusions by a Committee of the House. Unless its role were widened to include study of Senate reform (see "Negotiating Strategy: Preparing for negotiations" below) the Committee's

mandate should be a narrow one (i.e. limited to electoral reform alone). If the Committee's mandate were widened to include other issues (such as redistribution), electoral reform is unlikely to receive serious or swift attention.

If it wished to give the Committee a lead, the government could give it a pointed mandate: e.g., to study one or more specific proposals for electoral reform and to recommend how they might be adapted or employed to improve regional representation in the House.

It is probably unrealistic to expect that, in the absence of a strong lead by the government, the Committee would tackle the question of electoral reform with great enthusiasm. There are simply too many reasons why sitting M.P.'s would not be strongly motivated to alter the rules by which they themselves were elected. It will thus be important for the government to decide what degree of importance it attaches to electoral reform and therefore how strong a lead it wishes to give to the Committee and to its own members thereof.

Even with a strong push by the government, however, one cannot be greatly optimistic about the likelihood of change in this area, especially in the short term, given the variety of vested interests ranged against it. It would probably be unwise, therefore, to expect electoral reform in the House of Commons alone to carry most or all of the burden of improved regional representation in national institutions. Even if some reform proves possible, it would probably be a modest reform of the "topping up" variety which will provide only marginal improvement of party representation in certain critical regions. It would still need to be supported and augmented by better regional representation elsewhere, especially in the Senate.

The Senate

While in the case of electoral reform the main constraint upon the government is the resistance of M.P.'s to change, in the case of the Senate the government is faced with a series of constraints. Within certain constitutional limits, and subject to its ability to rally its own caucus, the government may choose its own solution for the House of Commons. Unless it wishes to employ the referendum procedures of the constitutional resolution, however, the government can only establish an initial bargaining position in the case of the Senate, because:

1. the Supreme Court has determined that reform of the Senate requires a constitutional amendment;

2. under the terms of the constitutional resolution, unanimous provincial consent for change would be necessary for the initial two-year period or until a new amending formula is agreed upon; thereafter a degree of provincial consent would be required, according to the amending formula which comes into effect;
3. several provinces have well-developed views on Senate reform; and, as Premier Lougheed's recent speech in Newfoundland confirms, many can be expected to be hostile to changes which appear destined to undermine the Premiers' role in national affairs;
4. the Senate itself retains a power to veto changes to its own nature and Senators can be expected to be more open to certain reforms than to others. The Senate's Committee on Legal and Constitutional Affairs has produced its own report (the Goldenberg-Lamontagne report) on Senate reform in which certain options are endorsed and others rejected;
5. members of the House of Commons can be expected to look with greater favour upon certain types of Senate reform than others, and may be expected to be cooler to those which duplicate their own role or which appear to rival it in some way.

The main options for the Senate which follow should be considered within the above constraints.

Options for Reform of the Senate

1. Direct election

From the point of view of the federal government, a directly elected Senate based on proportional representation has several attractions:

- 1) Election would confer on Senators a legitimacy in the eyes of the public greater than any other means of selection;
- 2) Senators would therefore offer authoritative regional voices alternative to those of the provincial governments;
- 3) An elected Senate scores higher in opinion polls than any other proposal and would therefore be saleable to the Canadian public, over the heads of the provincial governments, if need be.

4) An elected Senate based on proportional representation would help to provide extra regional representation for political parties underrepresented in certain regions and would therefore:

- i) provide a source of elected Cabinet ministers from all regions;
- ii) strengthen the political parties, the party system, and their unifying role in the country;
- iii) supplement or substitute for electoral reform in the House of Commons if such reform proves modest, or even unobtainable.

Nevertheless a proposal for an elected Senate based on proportional representation would encounter the following obstacles:

- i) the provinces would probably be lukewarm or opposed to the reform for the same reasons it is attractive to the federal government, and because they have other reforms in mind in which they would play a greater role;
- ii) the Senate would not find the proposal as attractive as other alternatives and has already received a report of its own in which an elected Senate is rejected;
- iii) members of the House of Commons can be expected to have reservations about a second chamber which, because elected, might become a potential rival to the authority of the Commons;
- iv) criticism of an elected Senate can be anticipated from political elites in English-speaking Canada on the ground of incompatibility with parliamentary institutions (despite, or because of, Australian experience), and this criticism will no doubt be echoed by the provincial governments as well as by critics in the Senate and the Commons. Charges will be made that an elected Senate would confuse the question of confidence and non-confidence, would render ambiguous the locus of responsible government, and might lead to deadlock between the two houses of parliament over the question of supply, as in Australia. The federal government's own previous statements on these issues would no doubt be used against it. (See the Discussion Paper, pp. 58-9).

On the other hand, the simplicity and popular appeal of an elected Senate would make such a proposal difficult to oppose in the court of public opinion. The government's experience

with the Charter of Rights is instructive on this score: the high level of popular support it received made it very awkward to oppose and put opponents at both federal and provincial levels in a very difficult position. In the Senate itself, appointed Senators would find it exceedingly awkward to veto the principle of popular election. In the provincial governments, the knowledge that the federal government might be able to appeal successfully to a referendum on the matter might have a sobering influence on those who would otherwise be tempted to indulge in opposition for its own sake.

In the House of Commons, an elected Senate might gain greater favour in the wake of proposals for electoral reform. Faced with the prospect of electoral reform in the Commons, M.P.'s might find an elected Senate a more palatable alternative.

It is important to point out that an elected Senate would serve the purposes of the federal government only if it were based on proportional representation. A Senate elected according to the plurality system would only produce the same electoral result as the House of Commons. It would not ensure regional representation for the major parties in areas where they now lack it. And, if combined with equality of representation for the provinces, it would lead in the present circumstances to control of the Senate by a party other than the majority party in the House of Commons. The potential for conflict, and deadlock, is obvious.

Whatever the final outcome of negotiations with the provincial governments, an elected Senate based on proportional representation would be an appropriate opening bargaining position for the federal government. As the proposal farthest removed from the first choice of many provinces, it would leave considerable room for compromise on an alternative more acceptable to both, if compromise seems desirable.

It should be noted that an elected Senate by itself would serve only the first of the two main goals described above (strengthening the legitimacy of the national government) and would do little for the second (improving the conduct of federal-provincial relations) except to the degree that it reduces the claims of the provincial governments. If the government wishes to pursue the second through the reform of national institutions, it could do so by pairing an elected Senate with an intergovernmental body of some kind, or by reaching a compromise on the Senate.

2. Indirect Election (without proportional representation)

From the federal government's point of view, the compromise which may ultimately be closest to a directly elected Senate - though, for tactical reasons, not necessarily the one which should be offered next in negotiations - is indirect election (election by the legislatures instead of directly by the people) without a constitutional requirement for proportional representation: power of appointment would be given to the provincial legislatures (not governments) and to the House of Commons, and the mode of appointment (within certain limits) would be left to their discretion.

This option would have the advantage of short-term attraction to the provincial governments - and would therefore offer the prospect of early agreement. On the surface, it would resemble the option preferred by most provincial governments (provincial government appointments), but it would also leave a door open for the federal government to influence the provincial mode of appointment over the long term.

If the federal government chose eventually to have its own share of members directly elected, for example, great public pressure would be put on the provincial governments to follow suit. In the normal course of political struggle in the provinces, provincial parties would ultimately find themselves committed to such a change.

Similarly a move toward proportional representation on the part of the federal government would be difficult for the provincial governments to resist in the long run. Alternatively, proportional representation could be stipulated as a condition from the beginning - thereby ensuring proportional indirect election as in the following option - but this initial condition would greatly reduce its short-term attractiveness to provincial governments. As suggested below in comments on negotiating strategy, it may be advisable to propose proportional indirect election first and then to drop the requirement for proportional representation, if so warranted by the negotiating process.

In any case, indirect election would present certain potential complexities against which other safeguards should be included from the beginning. It would be necessary to require, for example, that Senators represent an entire province, not any subdivisions thereof. Otherwise the future shift to direct election made possible by this option might produce overlapping and conflicting Senate constituencies as defined independently by the federal and provincial governments. And these constituencies would contrast again with those employed in the House of Commons.

3. Proportional Indirect election

The compromise next in line - though, for tactical reasons, perhaps offered earlier in negotiations - would be a proposal for proportional indirect election similar to that contained in Bill C-60. The difference between this option and the preceding one is that proportional representation (either on the basis of popular vote or party standings) would be made a constitutional requirement, thereby ensuring that a portion of provincial appointments were removed from the hands of the provincial governments and that Senators would represent a wider variety of political outlooks in any province.

From the point of view of the federal government, this option would have several attractions: it would create a respectable second chamber with authentic regional roots; it would represent a variety of regional outlooks other than those of the provincial governments; and it would provide some of the party-building potential offered by electoral reform in the Commons.

However proportional indirect election (as in Bill C-60) appears to be anathema to the provincial governments for the time being and it has not fared much better among the public, where it was subject to much ridicule by the press. Its apparent complexity would render it more difficult to sell in a referendum than direct election; and if a decision is made to go to the people over the heads of the provincial governments, it might be wise to choose the more popular option, and the one more easily explained.

Despite current provincial hostility to proportional indirect election, it is not impossible that, in the course of the negotiating process, it might become an acceptable compromise offering gains to both sides: the provincial governments would gain some representation in the Senate, yet the federal government would achieve the representation of regional outlooks other than those of the provincial governments alone. In order to secure such agreement, however, the federal government might have to make concessions on other negotiating points, such as the share of federal appointments. In any case, a proposal for proportional indirect election should be used as a second negotiating position to fall back on from direct election, and to lead toward something else, if necessary (e.g., indirect election without proportional representation).

4. Provincial Appointment: Representatives

The option which will garner the greatest initial support from the provinces and from present Senators is the granting of a share of appointments to the provincial governments.

This option will have less appeal than any of the preceding ones to the federal government because an appointed chamber will suffer from the same handicap in public opinion as the present Senate: it will not be looked upon as an authentic expression of the popular will and will not achieve the credibility necessary to shift some of the responsibility for resolving regional tensions from the federal-provincial forum to the legislative institutions of the national parliament.

Nevertheless an upper house appointed partially or predominantly by the provincial governments would not be entirely without usefulness. It would enjoy greater credibility than the present Senate and would therefore be an improvement upon it. It would continue to play the current Senate's role in legislative review, with perhaps even greater effectiveness. It would be consistent with previous federal proposals (the White Paper of 1969) and with the Senate's own ideas on reform of the upper house (Goldenberg-Lamontagne). It would be acceptable to a majority of the provinces and would therefore permit agreement both with the provincial governments and within the federal parliament. It would allow easier solution of other problems such as the representation of native peoples and other minorities, through the federal government's power of appointment.

If the negotiating process were to lead the federal government back to this option it should not be regarded as accomplishing nothing. But the federal government might wish, in this instance, to seek a longer term of tenure for Senators in order to encourage independence and to separate them as far as possible from the continuing control of the provincial governments. It might also be possible to phase in a reform of this nature in order to adjust the system slowly and to avoid any inclination to excessive partisanship and hence short-term blockage of the system.

One issue that would have to be faced in this option (and in either form of indirect election) is the presence of separatist members of the federal second chamber. Their presence might create certain problems, but might also offer certain opportunities to influence the long-term evolution of the P.Q.

5. Provincial Appointment: Delegates
(A House of the Provinces)

The B.C. government, perhaps supported by Ontario, will continue to press for an upper house composed in whole or in part of instructed delegates of the provincial governments. While this option would accomplish the goal of converting inter-institutional conflict to

intra-institutional conflict, it do would so at the cost of confirming the provincial governments as the major spokesmen for regional interests, even in national affairs. It would therefore conflict with one of the federal government's main goals in reform of the Senate.

The tensions inherent in such a proposal led in last summer's CCMC to a B.C. proposal for a hybrid upper house which would present perhaps even more complexities than the original proposal. Therefore if intergovernmental issues are to be provided for in any manner, it may be advisable to do so in a forum distinct from the second chamber of the federal parliament.

An Intergovernmental Council

A proposal for an intergovernmental council distinct from parliament was prominent in the CCMC discussions on the Senate last summer and was recommended in the Senate's recent Goldenberg-Lamontagne report and in the Quebec Liberal party's Beige Paper. Because the proposal emerged from discussion of Senate reform, it remains surrounded by a number of ambiguities. If it were restricted, as in some proposals, to ratification of the federal government's "extraordinary powers" it would have little to do and might meet only rarely. If its mandate were widened, as in some proposals, to a vague mission to "coordinate" or "harmonize" federal and provincial policies, it might meet more frequently, but it is difficult to foretell how it would undertake this role or in what manner it would function.

From the point of view of the federal government, the proposal has several drawbacks. In all of the current proposals, it would impose a limitation on the federal government's power, if only on the "extraordinary" powers. If the council's mandate were enlarged to include ratification of certain provincial powers, as the Goldenberg-Lamontagne report recommends, it might become a device for approving provincial intrusions in federal jurisdictions unless this role were carefully circumscribed. Furthermore, a council of this kind would formalize and solidify a system of federal-provincial relations which has exalted the role of the provincial governments in national affairs. It would confirm them as the spokesmen for their regions in a national forum, and it would do so outside the framework of the national parliament, which the federal government prefers to strengthen as the broker of regional interests.

On the other hand, the provincial governments can probably be expected to attach importance to the creation of some formal mechanism for the representation of the provincial governments in national affairs. If the federal

government shows no inclination to move on this front, it can probably expect little cooperation on related matters such as Senate reform, especially if the federal government's preferred solution is an elected Senate, from which the provincial governments would gain nothing, and would probably lose.

Furthermore, public opinion in certain parts of the country, particularly in western Canada, is closely tied to, and influenced by, the views of provincial governments. In the short term, therefore, the battle for public opinion may be more difficult to win, especially in the west, if the federal government's proposals for the reform of national institutions are seen to be too nakedly designed to by-pass the provincial governments and contain nothing of potential interest to them.

Therefore if the federal government wishes or needs to secure a more flexible provincial outlook on Senate reform, it could indicate willingness to consider a partial, temporary, or experimental version of an intergovernmental council. This approach would have the advantage of appearing conciliatory, yet it would not commit the federal government to any permanent arrangement. It would also provide an opportunity for the federal government to determine whether a formal mechanism of this kind can indeed contribute to harmonizing relations between the federal and provincial governments. In any event, the federal government could ensure, if necessary, that the negotiation process watered down the role and powers of such a Council so that it was almost entirely innocuous, was purely advisory, or was little more than the traditional FMC under a different name.

The federal government also has its own policy priorities for which provincial cooperation will be required (powers over the economy) or where it wishes to exercise more influence in areas of provincial jurisdiction (higher education, health policy, etc). It could choose to determine whether negotiations over the council - or the operation of the council itself - can help to attain those goals. For example, in the CCMC discussions last summer, the provincial governments were reluctant to consider means of strengthening S.121 of the constitution (strengthened safeguards for the economic union) without a non-judicial mechanism to oversee its application. It has been suggested that an intergovernmental council could provide such a mechanism.

Nevertheless, from the point of view of the national government, the concept of an intergovernmental council suffers from the drawbacks noted above, including the vagueness of many current proposals. Moreover Ministers may

feel that, even if certain gestures were to be made to the provinces in order to gain support for Senate reform, the proposed council is not the area in which to do so. Since it is certain that such a proposal will be on the table in connection with Senate reform, Ministers should determine at this time whether the concept ought to be explored further by officials or whether it should be ruled out a priori.

VIII. NEGOTIATING STRATEGY

1. Timing

The timing and scope of future constitutional negotiations will be addressed in a separate document. It is here assumed that an agenda and timetable for future constitutional discussions will be established shortly after patriation; that negotiations on national institutions will then be conducted through the CCMC; and that a report will be made to a First Ministers Conference sometime in 1982.

If these assumptions are correct, it will be necessary for federal delegates to the CCMC to have clear instructions about negotiating positions and strategy prior to the resumption of its work. It is therefore essential for Cabinet to reach decisions about its goals and negotiating strategy within the next few months. The following suggestions about negotiating strategy are intended to assist that process.

Ministers should note a number of the constraints which will influence the timing and conduct of any future negotiations:

- 1) Senate reform requires a constitutional amendment.
- 2) After patriation, constitutional amendment will require the unanimous agreement of provincial governments until:
 - i) a new amending formula has been unanimously agreed upon (in less than two years); or
 - ii) two years have elapsed and sufficient provincial governments have not demanded a referendum on the amending formula; or
 - iii) up to four and a half years have elapsed, if the provincial governments do require a referendum on the amending formula.

- 3) After a permanent amending formula is in place, constitutional amendments may be obtained through less than unanimous agreement with and between the provincial governments. If sufficient agreement is still not forthcoming, the process of constitutional amendment by referendum provided in the Constitution Act will require a minimum of 1½ to 2 years for its use. This time must be added to any of the three alternative scenarios described in 2) above.
- 4) A new federal election must be held no later than February 1985 and will probably be held in the preceding year - or within three years from now.

In light of the foregoing considerations, it seems highly unlikely that reform of the Senate could be achieved before the next federal election. To do so would require either:

- 1) early, unanimous agreement with and between the provincial governments on the amending formula or on the design of a new Senate; or
- 2) the coming into effect of the Victoria amending formula after the elapse of two years (without a national referendum on the amending formula) and the subsequent holding of a referendum on the federal government's preferred Senate option almost simultaneously with the next federal election. The broader issues raised in the context of an impending election might, however, confuse the debate on Senate reform.

Ministers may therefore wish to consider how best to use the period preceding the next election. There seem to be three main options:

- 1) Intensive effort to achieve early, unanimous agreement on an amending formula (which seems most improbable because of the conflicting requirements of various governments);
- 2) Intensive effort to achieve early, unanimous agreement on the design of a new Senate (with the federal government therefore choosing options and a strategy consciously designed to win provincial agreement);
- 3) Concentration in the short term on the preparation of a suitable climate of opinion which would permit the federal government to achieve Senate reform in the years immediately following the next election, either through agreement with the provinces or through a national referendum, if necessary. A programme

to develop popular awareness of and support for a Senate option acceptable to the federal government could be undertaken parallel to formal negotiations with the provincial governments, or in place of them for the time being.

2. Preparing for negotiations

As noted in the preceding section, the federal government might find it helpful to develop popular awareness of and popular support for the option (s) it favours for the reform of national institutions prior to, or simultaneously with, formal negotiations. If this could be done successfully, the federal government's hand would be greatly strengthened in negotiations with the provincial governments, or in any future referendum, should one prove necessary.

Preparation of popular opinion would be especially important if the federal government decided that its strong preference is for an elected Senate based on proportional representation and that it is unlikely to obtain agreement for such a Senate from the provinces. In this case, the government may have to consider carefully whether it would be prepared to employ the referendum procedure as an ultimate resort. If so, it should begin immediately to design a strategy for building the level of popular support for an elected Senate that would eventually permit the government to use the referendum procedure successfully.

A strategy to develop public awareness and support might take several forms. It might include the publication of a White Paper or a discussion paper on national institutions. It might include an intensive speaking campaign by ministers and M.P.'s.

It might also include the appointment of a committee or task force to hold public hearings and prepare a report on Senate reform. The mandate of the proposed parliamentary committee on the electoral system, for example, could be widened to include study of Senate reform. The latter route might have the advantage of focusing public attention on the issue in a sustained way; of highlighting widely held views in support of the course of action favourable to the federal government; of impressing Senators with the degree of support for an elected Senate; of developing support for an elected Senate among members of the House of Commons; of putting pressure on provincial politicians; and of creating a direct link between the federal parliament and Canadian citizens generally, as in the case of the Special Joint Committee on the Constitution or the Parliamentary Task Force on Fiscal Arrangements.

However, the linking of Senate and electoral reform in one parliamentary committee would also have the disadvantage that the process would not be subject to control; that it might slow down progress on both fronts and delay the start of constitutional discussions with the provinces; that the question of electoral reform would be overshadowed and submerged by Senate reform; that Senators would be called on to play a potentially inappropriate role in determining the electoral system for the House of Commons; that the committee might pronounce in favour of a mode of Senate reform other than that favoured by the Cabinet; and that it would inevitably include Senators whose vested interests might limit their potential support for an elected Senate, or any other form of Senate significantly different from the present one.

3. First Approaches and Responses

- 1) The federal government might open negotiations on the Senate by expressing interest in studying the potential of an elected Senate.
- 2) The provinces will then counter by expressing preferences for options in which they play a larger role, and perhaps for an intergovernmental council of some kind. They may wish to pick up where negotiations left off in the CCMC last summer and revive the "best efforts" draft submitted to the First Ministers Conference.
- 3) In this case, the federal government could indicate that it wishes to separate discussion of the Senate from discussion of mechanisms for intergovernmental relations (it can probably expect support from several provinces on this point) and that, as far as the Senate alone is concerned, it prefers a solution in which the people of the provinces are more involved, either directly or indirectly, in the selection of members of the second chamber.
- 4) If the federal government decides not to use the referendum provision to obtain an elected Senate, and cannot secure sufficient support among the provinces for an elected Senate through negotiation on other items (such as an intergovernmental council), then it should fall back on the following options in this order:
 - i) proportional indirect election by provincial legislatures and by the federal House of Commons (Bill C-60): the provinces seem unlikely to agree to this at the moment, but it might prove to be an eventual

compromise that would allow both the federal and provincial governments some gains. In any case, it should be used as a second negotiating position, if only as a way to get to something else.

ii) indirect election (without proportional representation): if the provincial governments hold out against both direct and indirect election, federal negotiators could indicate at an appropriate moment that they were prepared, as a concession, to consider waiving the requirement for proportional representation, thereby leaving the mode of appointment to the respective legislatures (not governments). This would seem like a concession from the previous position and would be difficult for the provincial governments to reject, since it would give them a de facto power of appointment (through their legislative majorities). Yet the federal government's control over the mode of selection of a portion of Senators would enable it to apply pressure to the provincial governments at some future time to lead back toward direct or proportional indirect election.

iii) provincial appointment: If the provinces cannot agree to any of the preceding three options, the only remaining position (other than a House of the Provinces or the status quo) would be a share of Senate appointments for the provincial governments, either directly (White Paper) or indirectly through nomination to the federal government (Goldenberg-Lamontagne).

5. At some point, the federal government may wish to cease serious negotiations, rather than make further concessions, and may prefer to live with the status quo or to return to an earlier option, such as direct election, taking its chances with popular approval through a referendum. This will depend in part on its other objectives in constitutional negotiation and the effect on them of failing to reach agreement on the Senate. It will also depend on whether the government wishes to put the country to the test of a referendum or whether

it is willing to live with the status quo. If the referendum route is chosen, a separate strategy for building popular support will be required.

IX. MAIN NEGOTIATING POINTS

1. The Senate

1) Distribution

The issue of the distribution of Senate seats has two sides: i) the share of seats assigned to the federal and to the provincial governments; ii) the proportion of seats distributed among provinces or regions. The first issue does not arise in cases such as direct election where governments do not participate in the appointment process (though even in this case the federal government might wish to retain a small share of appointments in order to represent minorities such as the native peoples).

i) In cases other than immediate direct election, if the federal government wishes to give the reformed Senate any real legitimacy, the maximum proportion of appointments it could retain for itself is 50%. This proportion would still be far higher than in other federations: most do not give the central government any power of appointment to the federal upper house, though a very few reserve a small proportion of seats (e.g. 10%) for the central government for the purpose of representing minorities.

It could be argued, in the Canadian case, that because the federal government has traditionally controlled all appointments to the Senate, granting 50% to the provinces would be a major and sufficient concession. But the higher the proportion of federal appointments, the less likely it is that the new second chamber would accomplish the goals the federal government hopes to achieve.

In any event, the federal and provincial share of appointments would be a major bargaining tool. The federal government should perhaps start with an offer of 50% and only agree to reduce its own share in return for satisfactory progress on other issues.

ii) Equality of representation for provinces has immediate appeal: it would make the Senate a regional chamber in a more dramatic and visible way than any other mode of representation. And it would be in harmony with the current inclination of the provincial governments to emphasize provincial equality in such matters as the amending formula. It might be tempting for the federal government to consent to, or propose, equality of provincial representation in the

Senate, knowing full well the difficulties such a formula would create for the Quebec government, in particular.

However, it can be argued on the other side that the federal government must be, and must be seen to be, sensitive to the very same difficulties. Chief among these would be the position of francophone Canadians. Both for symbolic reasons, and for reasons of power, there may be drawbacks to a Canadian federal legislative chamber in which only some 10% of Senators would be French-speaking.

If this consideration were regarded as decisive, it would then appear advisable to follow the precedent established by the present Senate and to base representation on a formula which takes some account of population but increases the share of the smaller provinces. At the CCMC last summer, the so-called "Manitoba compromise" received wide support and would seem to be a useful starting point for discussion. In this formula Newfoundland, Nova Scotia, New Brunswick, Manitoba and Saskatchewan received 8 seats each; P.E.I. and the Territories, 4 each; Alberta 10; B.C. 12; Quebec and Ontario 16 each. In this formula, the proportion for Quebec and Ontario may still be somewhat low: Ontario and Quebec could perhaps be raised to 20 or so. Whatever the proportion for each province, the total number of Senate seats should be high enough to ensure adequate representation to the minority party in each province through proportional representation.

2) Tenure

In the case of direct or indirect election the tenure of Senators should terminate with the dissolution of the federal parliament or provincial legislature, as appropriate.

In the case of appointments by the provincial and federal governments the issue is more complicated. If the federal government wishes to encourage the independence of Senators and to separate them as much as possible from the appointing governments, it should bargain for longer terms (up to ten years). If it wishes them to reflect more accurately the current political mood of the province it should favour shorter terms (4-6 years).

3) Powers

With the exception of a forthcoming paper on Senate reform sponsored by the Canada West Foundation (which argues that an elected Senate should be entitled to retain almost a full veto), there seems to be general agreement that the formal legislative power of the Senate should be reduced from its present wide latitude, virtually equal to the House of Commons. Although

it might be appropriate to retain a full Senate veto on a very few matters (e.g., constitutional amendment), a suspensive veto would normally seem more in keeping with the complementary and advisory role of a second chamber in a parliamentary system.

However, the length of the suspensive veto to be held by the Senate will be a major point of negotiation. The federal government might perhaps start with Bill C-60's proposal for a suspensive veto of 60 days but, for reasons suggested in the Discussion Paper, it should be prepared to extend this veto to six months in return for satisfactory progress on other points.

The federal government should be prepared to negotiate a role for the Senate in approving certain kinds of federal appointments, as suggested in the White Paper of 1969 and in Bill C-60, including possibly senior appointments to important crown corporations, regulatory agencies and the Supreme Court. The latitude of this power could be used as a bargaining tool in return for agreement on other points.

In the absence of any form of intergovernmental council, the federal government could consider a role for a reformed Senate in ratifying the use of the federal government's "extraordinary" powers, though this role might be considered less appropriate for some options (an elected Senate) than for others, and would suffer from the same drawbacks noted in the case of an intergovernmental council.

A role for the Senate in ratifying regulatory and statutory instruments might also be employed as a bargaining tool by the federal government.

4) Decision-making

The federal government should favour decision-making by simple majority in the Senate rather than by some formula (similar to the Victoria or Vancouver formulas) except in special cases, such as constitutional amendment. It has also been suggested that in the case of legislation affecting language a 2/3 requirement might be proposed, but one should anticipate that a proposal of this kind might elicit similar proposals for natural resources, fisheries, etc.

2. Intergovernmental Council

The establishment of some form of intergovernmental council may be considered both as an issue of substance in itself and as a negotiating tool. It also entails a further subset of bargaining issues of its own.

1) The Council as a bargaining tool

As a bargaining tool, an intergovernmental council could be used to obtain agreement on the matter of the Senate and/or it could be employed in the context of negotiation over powers, i.e. in return for sufficient federal powers over the economy and/or a voice in such areas as higher education and health policy.

The federal government should not therefore propose such a council but should determine in advance how it intends to respond to such a proposal when it arises in the course of the negotiating process on the Senate.

Ministers should determine whether the concept of an intergovernmental council ought to be explored further by officials in order to prepare such a response, or whether it should be ruled out a priori. Even in the latter case, it would remain to be decided whether to reject the proposal outright from the start or whether to go through the motions of discussing it in order not to jeopardize negotiations on the Senate too early in the process.

If the government were to authorize discussion of a partial, a temporary, or a purely advisory version of the Council in the short term in order to assist the bargaining process elsewhere, it could still delay any permanent agreement until i) experience has demonstrated the usefulness of such a body; and/or ii) the federal government has been able to obtain sufficient powers over the economy, education, health policy, etc. As noted above, it has been suggested that, in one form, the Council could be the instrument through which such powers were exercised.

2) Composition

In an intergovernmental body of this kind, equality of provincial representation (one vote per province) seems appropriate and this principle was accepted by the CCMC last summer. The federal government's voting strength in the Council would be an important bargaining tool. The initial federal position should propose sufficient votes for the federal government (i.e. four votes plus a casting vote) to allow compromise at a level which would leave it with sufficient weight in the council (i.e. two votes plus a casting vote). This would enable it to form a majority with the support of only four provinces.

Decision-making

The discussion paper considers five different proposals for the manner in which votes might be taken in such a council. For the council's normal advisory and ratification roles,

the most attractive alternative from the federal government's point of view would appear to be a simple majority of votes cast, especially if the federal government were able to obtain a weighted vote in the Council. If the council were to have a role in constitutional amendment, the amending formula in the constitution should apply.

Powers

It is beyond the scope of this paper to consider in detail the powers of an intergovernmental council. If Cabinet decides that this matter should be pursued, the potential powers of such a council would have to be carefully evaluated before and during any future constitutional negotiations. Obviously the federal government will have to view with extreme caution any ratification power which would limit its sphere of action. The federal government has, for example, little incentive to allow provincial controls on its spending power. It should also look very critically at any proposals to give the council a role in ratifying the use of certain provincial powers lest this power become a device to approve provincial intrusions in areas of federal jurisdiction.

If discussion of this item proceeds, the federal government should perhaps minimize the ratification function and emphasize instead the roles such a council might play which would allow the federal government to enlarge the scope of its own powers over the economy, higher education, health policy or any other areas which may be among the federal government's policy priorities, yet where the provinces wield substantial or predominant authority.

ESSENTIAL QUESTIONS FOR MINISTERS

The following are the essential questions to which responses are required in order to give broad direction to officials for the reform of national institutions in the next phase of constitutional renewal. More detailed questions on substance and strategy are suggested in Annex A.

The Basic Choice

1. Do Ministers agree that in the next phase of constitutional renewal the federal government should limit its attention to one or two institutions and should accomplish other reforms through them, where necessary, rather than pursuing reform on a broad institutional front?

Electoral System

2. Do ministers favour appointment of a House Committee on the electoral system, as suggested in the Speech from the Throne?

3. Should the government leave the Committee free to approach the subject of electoral reform as it wishes? Or should the government give the Committee a stronger lead by giving it a more pointed mandate (e.g., to study one or more specific proposals)?
4. Should the Committee's mandate be restricted to electoral reform in the House of Commons? Or should it be expanded to include other matters such as redistribution or Senate reform (see "Preparing for negotiations" below)?

The Senate

5. Do Ministers favour reform of the Senate to improve regional representation in the Canadian parliament?
6. If so, which of the following broad options for the Senate do Ministers favour as an ultimate goal?
 1. Direct election
 2. Indirect Election without proportional representation (Discretion over mode of appointments given to provincial legislatures and to the House of Commons)
 3. Proportional Indirect Election (election of Senators on a proportional basis by the legislatures and by the House of Commons, as in Bill C-60)
 4. A Share of Senate Appointments for Provincial Governments (White Paper of 1969)
7. Should any of the foregoing options be excluded as unacceptable?
8. Should provinces be represented in the Senate on the basis of a weighted formula (such as the "Manitoba Compromise") or on the basis of equality?

Intergovernmental Council

9. Do Ministers agree that the federal government should not propose an intergovernmental council but should determine in advance how to respond to such a proposal in the course of the negotiating process on the Senate?
10. Do Ministers wish officials to explore the concept of an intergovernmental council further as a possible bargaining tool to obtain agreement on the Senate or in the context of negotiation over powers (i.e., in return for sufficient federal powers over the economy)? Or should it be ruled out a priori?

Timing

11. Given the timing constraints outlined above and the difficulty of achieving a reformed Senate prior to the next federal election, what is the best way to employ the period before then:
 - i) Intensive effort to achieve early, unanimous agreement on an amending formula?
 - ii) Intensive effort to achieve early, unanimous agreement on the design of a new Senate?
 - iii) Concentration in the short term on the preparation of a suitable climate of opinion which would permit the federal government to achieve Senate reform in the years immediately following the next election, either through agreement with the provincial governments or through a national referendum, if necessary?

Preparing for negotiations

12. Do ministers favour a programme to develop popular awareness and support of federal proposals prior to negotiations with the provinces?
13. If so, should such a programme include:
 - i) release of a White Paper, or other discussion paper?
 - ii) an intensive speaking campaign by the P.M., Ministers, and M.P.'s?
 - iii) a parliamentary committee or other committee of enquiry?
 - iv) other?
14. Should the mandate of the proposed House Committee on the electoral system be widened to include Senate reform - in which case the Committee itself would be expanded to become a Joint Senate - House Committee?

ANNEX A

MORE DETAILED QUESTIONS FOR MINISTERS

Electoral System

1. Do ministers favour appointment of a House Committee on the electoral system, as suggested in the Speech from the Throne?
2. Should the government leave the Committee free to approach the subject of electoral reform as it wishes? Or should the government give the Committee a stronger lead by giving it a more pointed mandate?
3. Should the Committee be appointed during the fall session or should its appointment be deferred?
4. Should the Committee be given a short deadline for its report (4 months) or an extended mandate (6 months to a year)?
5. Should the Committee's mandate be restricted to electoral reform in the House of Commons? Or should it be expanded to include other matters such as redistribution or Senate reform (see "Preparing for negotiations" below)?

The Senate

6. Do Ministers favour reform of the Senate to improve regional representation in the Canadian parliament?
7. If so, which of the following broad options for the Senate do Ministers favour as an ultimate goal?
 1. Direct election
 2. Indirect Election, without proportional representation (Discretion over mode of appointments given to provincial legislatures and to the House of Commons)
 3. Proportional Indirect Election (election of Senators on a proportional basis by the legislatures and by the House of Commons, as in Bill C-60)
 4. A Share of Senate Appointments for Provincial Governments (White Paper of 1969)
8. Should any of the foregoing options be excluded as unacceptable?

9. Regardless of the final outcome, do Ministers agree that direct election would be an appropriate opening bargaining position for the federal government (since, as the proposal farthest removed from the first choice of many provincial governments, it would leave considerable room for compromise on an alternative more acceptable to both, if compromise seems desirable)?
10. In cases other than immediate direct election, do Ministers agree that:
 - i) the maximum share of Senate appointments to be retained by the federal government (or House of Commons) should be 50%?
 - ii) the federal government should be prepared to reduce its share below 50% in return for satisfactory progress on other issues?
11. If so, what is the minimum share of Senate appointments which the federal government should seek to retain?
12. Should provinces be represented in the Senate on the basis of a weighted formula (such as the "Manitoba Compromise") or on the basis of equality?
13. If the former, would the "Manitoba Compromise" be an acceptable starting point for discussion? In this formula Newfoundland, Nova Scotia, New Brunswick, Manitoba and Saskatchewan received 8 seats each; P.E.I and the Territories, 4 each; Alberta 10; B.C. 12; Quebec and Ontario 16 each. Should the proportion for Quebec and Ontario be raised to 20 or so?
14. Do Ministers agree that, in the case of direct or indirect election, the tenure of Senators should terminate with the dissolution of the federal parliament or provincial legislature (as appropriate)?
15. In the case of appointments by provincial and federal governments, should the federal government bargain for longer terms (up to ten years) in order to encourage the independence of Senators and to distance them as much as possible from the appointing governments? Or should it favour shorter terms (4-6 years) in order to ensure that Senators reflect more accurately the current political mood of their provinces?
16. In the case of provincial appointments to the Senate, should reforms be phased in over a period of time, in order to reduce inclinations to excessive partisanship and avoid short-term blockage of the system?

17. Do ministers agree that on most items of legislation, the Senate's formal power of veto should be reduced to a suspensive veto?
18. Should the federal be prepared to consider a suspensive veto of up to six months, in return for satisfactory progress on other points; or should it favour a suspensive veto limited to 60 days, as proposed in Bill C-60?
19. On what items, if any, should the Senate retain an absolute veto? Constitutional amendments? Language legislation? Any other?
20. Should legislation defeated in the Senate be required to be reintroduced in the House of Commons and approved there before receiving royal assent?
21. Should the federal government be prepared to negotiate a role for the Senate in approving certain kinds of federal appointments, as suggested in the White Paper and in Bill C-60, including possibly senior appointments to important crown corporations, regulatory agencies and the Supreme Court? Should the latitude of this power be used as a bargaining tool in return for agreement on other points?
22. Should the federal government consider a role for a reformed Senate in ratifying the use of the federal government's "extraordinary" powers?
23. Should the federal government consider employing a role for the Senate in ratifying regulatory and statutory instruments as a bargaining tool in constitutional negotiations?
24. Should the federal government favour decision-making by simple majority in the Senate rather than by some formula, except in special cases such as constitutional amendment or language legislation?
25. In the exceptional cases (such as legislation affecting language) should a 2/3 requirement be proposed?

Intergovernmental Council

26. Do Ministers agree that the federal government should not propose an intergovernmental council but should determine in advance how to respond to such a proposal in the course of the negotiating process on the Senate?
27. Do Ministers wish officials to explore the concept of an intergovernmental council further as a possible bargaining tool to

obtain agreement on the Senate or in the context of negotiation over powers (i.e., in return for sufficient federal powers over the economy)? Or should it be ruled out a priori?

28. If the latter, should the proposal be rejected outright? Or should federal negotiators participate in discussing it none the less in order not to jeopardize negotiations on the Senate too early in the process?
29. If the Council is to be discussed, should the federal government favour equal provincial representation in such a council?
30. Do Ministers agree that the federal government should seek a voting power high enough (i.e., four votes plus a casting vote) to allow compromise at a level which would leave it with sufficient weight in the council (i.e., two votes plus a casting vote)?
31. Do Ministers agree that federal strategy should seek to minimize any ratification function for the Council which would limit federal power and to emphasize instead the roles such a council might play which would allow the federal government to enlarge the scope of its own powers over the economy and its role in higher education, health policy, or any other areas which are among the federal government's policy priorities, yet where the provinces yield substantial or predominant authority?
32. Should officials be instructed to begin careful evaluation of the ratification powers discussed at the CCMC last summer in order to determine the potential impact of such powers, and the areas, if any, in which the federal government might be able to offer concessions in the course of the negotiating process without unacceptable cost to itself?

Timing

33. Given the timing constraints outlined above and the difficulty of achieving a reformed Senate prior to the next federal election, what is the best way to employ the period before then:
 - i) Intensive effort to achieve early, unanimous agreement on an amending formula?
 - ii) Intensive effort to achieve early, unanimous agreement on the design of a new Senate?

- iii) Concentration in the short term on the preparation of a suitable climate of opinion which would permit the federal government to achieve Senate reform in the years immediately following the next election, either through agreement with the provincial governments or through a national referendum, if necessary?

Preparing for negotiations

- 34. Do ministers favour a programme to develop popular awareness and support of federal proposals prior to negotiations with the provinces?
- 35. If so, should such a programme include:
 - i) release of a White Paper, or other discussion paper?
 - ii) an intensive speaking campaign by the P.M., Ministers, and M.P.'s?
 - iii) a parliamentary committee or other committee of enquiry?
 - iv) other?
- 36. Should the mandate of the proposed House Committee on the electoral system be widened to include Senate reform - in which case the Committee itself would be expanded to become a Joint Senate - House Committee?