SECRET
December 17, 1980

MEMORANDUM TO MINISTERS FROM MINISTER OF JUSTICE

RE: POSSIBLE AMENDMENTS TO PROPOSED RESOLUTION ON CONSTITUTION OF CANADA

I PURPOSE

This Memorandum addresses those issues still outstanding concerning a number of possible amendments to the Proposed Resolution on the Constitution.

II ISSUES FOR CONSIDERATION AND DETERMINATION

A. CHARTER OF RIGHTS AND FREEDOMS

1. Section 15 - Non-Discrimination Rights (Equality Rights)

Ministers agreed to a new formulation of an "Equality Rights" clause along the following lines:

> "15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on sex, race, national or ethnic origin, colour, religion (or age).
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of sex, race, national or ethnic origin, colour, religion (or age)."

However, Ministers had doubts about two aspects of this clause, and wished further consideration to be given them. The first was that "age" not be included as a specified ground of non-discrimination. The second was that the concluding words of section 15(2) "including those that are disadvantaged because of sex, race, national or ethnic origin, colour, religion (or age)" be retained.

(1) Deletion of "Age"

age is not deleted

"Age" is now included in the Proposed Resolution as a ground of non-discrimination but, for the reasons that follow, it is proposed that Ministers give further consideration to its deletion as a specified ground of non-discrimination.

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First, the specified grounds, other than "age", are now recognized as almost never being a justified basis for drawing distinctions among people in terms of equality in law. In other words, nearly all distinctions on these grounds will be found to constitute discrimination unless a compelling interest can be shown (eg. separate washrooms for men and women in the interests of public decency).

"Age", on the other hand, remains an extremely common basis for distinguishing among groups in our society. This is so at both the lower and upper ranges of the spectrum, whether one is speaking of minimum ages for marriage, custody, drivers licences or criminal responsibility, for example, or maximum ages for retirement, pensions, free medicare or insurance eligibility. It is thus evident that "age" is very different from other "core" grounds in having no discrete character or identity.

Because "age" is only now emerging as a distinction which may constitute a discriminatory practice in some instances (it is not a ground recognized in the UN Covenant on Civil and Political Rights), it is very difficult to predict how the courts would assess age-based laws if "age" were specified as a ground. This is especially problematic in the draft clause mentioned above, where the specified grounds are particularized as non-discrimination bases. However, it seems fair to predict that mandatory retirement ages, for example, would likely be considered as arbitrary, and thus discriminatory.

While such a conclusion may be viewed as a desired result, it would result in chaos with respect to pension plans and business management. This was recognized as a serious problem by the recent Senate Committee Report on Aging, which recommended that there be a gradual phasing out of mandatory retirement ages.

Second, as the Advisory Council on the Status of Women has pointed out, specifying "age" along with the other non-discrimination grounds could well result in the courts developing a less rigorous test for assessing the validity of distinctions based on the other grounds, where they should be subjecting such distinctions to a "compelling interest" test. This could result if the courts approach age-based distinctions on a simple "reasonableness" test (as they should), and decide that this test is the one to be applied to all specified grounds.

Finally, with the new phraseology of section 15(1), which adopts the "non-exhaustive" listing of non-discrimination grounds, it becomes less compelling to specify "age" among the "core" group. The new section 15(1) prohibits discrimination generally (and particularly in relation to certain grounds which, except for "age", are those recognized since 1960 in the Bill of Rights). Thus, as other grounds of distinction evolve over time as ones which society views as being discriminatory, the courts will be able to to assess these as discriminatory in particular circumstances and declare the offending laws to be invalid. This would apply

equally to age-based laws as to laws drawing unacceptable distinctions based on handicap, political belief, marital status, etc. This would seem to be the preferable approach since, as long as "age" is included as a specified ground, it is very difficult to argue against inclusion of further grounds which, like "age", carry inherent limits.

Recommendation: That, for the reasons outlined above, "age" be dropped as a specified ground of non-discrimination, it being left to be subsumed under the general prohibition against discrimination.

(2) Retention of Grounds for Affirmative Action Programs

Section 15(2) is included to make it clear that a prohibition against discrimination in section 15(1) does not result in the invalidity of laws or programs directed to assisting those who are or have been disadvantaged as a result of discrimination. In other words, we want to ensure that programs, mounted to generate a greater measure of equality in areas where past or present discriminatory practices have resulted in inequality, will not be struck down because section 15(1) forbids discriminatory laws.

Section 15(2) thus permits "reverse discrimination" programs designed to achieve equality. As such, it must be related back to grounds of non-discrimination, since otherwise it makes no sense in the context of section 15. The clause will not preclude other programs to assist the "disadvantaged" -- be it on grounds of handicap, age, marital status or other bases of discrimination identified by the courts. It is simply an assurance that an affirmative action program based on a recognized ground of non-discrimination will not be struck down only because it authorizes "reverse discrimination" for the purpose of achieving greater equality. At the same time, affirmative action programs must be shown to have the bona fide object of overcoming inequality, and thus may not be perpetuated after equality has been achieved.

Another reason for including the qualifying phrase is the strongly expressed concern of women's groups that women may not be viewed by the courts as a "disadvantaged" group unless specific mention is made in the non-inclusive listing of non-discrimination grounds.

agreed

Recommendation: That section 15(2) retain the qualifying words as proposed in the draft set out above.

2. Sections 16-20 and 23 - Provincial Language Rights

Two matters remain for consideration by Ministers in relation to language rights at the provincial level. The first relates to institutional minority language rights (in the legislature, statutes and courts) in Ontario. The second relates to maintaining the qualification of "where numbers warrant" in providing for minority language education rights.

(1) Institutional Language Rights - Ontario

There are very strong pressures, both within and outside the Joint Committee, for including in the Charter institutional language rights for Ontario. These pressures are intensified by the fact that such rights will be included for New Brunswick. It is almost certain that the NDP members of the Committee will propose an amendment to include Ontario, and they may be supported by some Conservatives. A great many government members of the Committee have stated clearly that they will not be able to vote against such an amendment, and some may well support it.

These pressures, and logic itself, would suggest that Ontario should be included (with a time delay for implementing language rights in the statutes and courts). In addition, bringing Ontario in would make it somewhat easier to sell the entrenchment of minority language education rights in Quebec.

On the other hand, Premier Davis remains adamant in his opposition to entrenched institutional language rights for Ontario, and would no doubt withdraw his present support for the Resolution if such rights were imposed.

At the same time, the federal government's position to date has been that, apart from minority language education rights where the provincial Premiers unanimously endorsed the principle in 1978, it will not impose institutional language rights on the provinces. It is simply maintaining the constitutional status quo with respect to Quebec and Manitoba, and adding rights for New Brunswick at that province's express request.

In light of these circumstances, it would appear unwise for the federal government to support any move in the Joint Committee to impose institutional language rights on Ontario.

On the other hand, if the government feels it is necessary to take action soon on this matter, there would appear to be two possible options: (1) to provide for institutional language rights in Ontario with a delay period for implementation of the languages of statutes and courts, or (2) to provide for opting in to institutional language rights for Ontario and any other province via the Charter.

Recommendation: That the government agree not to support imposition of institutional language rights on Ontario.

(2) Minority Language Education Rights

Cabinet agreed on December 11 to modify section 23 with respect to the qualifications for entitlement to minority language education rights, ie. by providing for alternative tests of either the "mother tongue" of one of the parents or where one of the parents had been educated in Canada in the minority language.

However, Cabinet also decided that the requirement of "where numbers warrant" should be retained, although most witnesses appearing before the Joint Committee have argued in favour of dropping this requirement on grounds that it is an unreasonable restriction which will make it difficult for francophone children in the western provinces to secure minority language instruction.

While this is an important consideration, it is equally important to remember that the government's main justification for imposing minority language education rights on the provinces rests on the February 1978 Montreal "Premiers Agreement" on this subject. (See attached Annex 1 for text of this agreement.) In it the Premiers clearly specified that minority language education rights were subject to "numbers warranting". It is thus considered desirable to maintain this qualification.

To maintain further consistency with the Montreal "Premiers Agreement", and to make the qualification of "where numbers warrant" somewhat more acceptable, it is suggested that some further wording modifications be made to section 23.

First, rather than referring to the provision of "educational facilities", it is proposed to refer only to "the provision out of public funds of minority language instruction". Second, it is proposed to drop any reference to parents residing in "an area of the province", referring simply to parents of the linguistic minority population in the province.

These changes, consistent with the principle of the "Premiers Agreement", will enable the courts (a) to imply that the obligation is not simply to provide physical facilities, but to provide whatever education services are appropriate, including the possibility of minority language school boards, and (b) to prevent provinces from frustrating the establishment of minority language schools by drawing school district boundaries in ways that preclude the number of students in a district being sufficient.

Recommendation: That the government agree to a revised section 23 along the following lines:

"23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction anywhere in Canada in the language, whether English or French, of the linguistic minority population of the province in which they reside,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom one child has received primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under this section to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province applies where the number of children of citizens who have such a right is sufficient to warrant the provision out of public funds of minority language instruction."

3. Recognition of Multiculturalism

Cabinet has indicated that a provision should be included in the Charter which reflects the multicultural nature of Canada while, at the same time, not giving rise to enforceable rights under the "remedies" section, such as the right to have third language schools or the right to have third language radio and television services at public expense.

A means to achieve this objective would be to include in the "general" provisions at the end of the Charter an interpretive provision along the following lines:

"This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

Such a provision is most unlikely to give rise to a claim to any specific legal rights. For example, the freedom of expression would not include a right to have state funds provided to enable the freedom to express oneself in a particular language. Again, equality against discrimination based on race or national or ethnic origin does not imply state aid to ensure such protection. As for schooling, the only Charter obligation relates to providing minority language education in English or French.

On the other hand, to provide in section 2 for a "freedom to enjoy one's cultural heritage in a multicultural society" could well give rise to arguments that such a guarantee implied some obligation on the state to ensure some protection for third languages and cultures. For example, would the CBC's legal duty to provide services in English and French not be violative of a Ukranian's freedom to enjoy his cultural heritage equally?

Recommendation: That if a provision on multiculturalism is to be included in the Charter, it be along the lines of the interpretive clause indicated above.

B. PROCEDURE FOR AMENDING CONSTITUTION

4. Sections 43/47 - Amendments Affecting One or More but not All Provinces

Premier Peckford has been arguing that, by virtue of section 47, the general amending formula (section 41) and the referendum formula (section 42) could be used to alter amending procedures that apply to provisions affecting one or more but not all provinces without the consent of the affected province.

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To illustrate this he has pointed to section 43, as it may be amended by sections 41 and 42, arguing correctly that amendments could be made under these provisions that would alter the Newfoundland Terms of Union or section 3 of the BNA Act, 1871 (respecting changes in provincial boundaries) without the consent of Newfoundland.

This argument has had considerable impact in Newfoundland, and has engendered some sympathy among members of the Joint Committee, particularly as it relates to protection of denominational schools in Newfoundland and the boundary between Newfoundland and Quebec.

In its reference to the Court of Appeal of certain questions respecting the constitutionality of the Proposed Resolution, Newfoundland has specifically asked whether the general amending and referendum procedures would enable amending procedures respecting Newfoundland's Terms of Union and the BNA Act, 1871 to be altered without the consent of that province. (See Annex 2 for Newfoundland's questions.)

The Court will undoubtedly answer this question in the affirmative. Psychologically, an affirmative answer could have an adverse impact on the federal government's position both here and in the UK. Premier Peckford has launched a vigorous campaign against the Resolution, and an affirmative response from the Court will no doubt give further political credence to his campaign by demonstrating that the Resolution will impact on the existing balance of federal-provincial powers. This in turn could generate further doubts in the United Kingdom about the wisdom of the Canadian Parliament presenting such a controversial measure to the UK Parliament. It is an issue that would be very popular in the UK press. In addition, an affirmative answer to this question could lend weight to the arguments that Newfoundland will be submitting to the Court on its other questions.

Cabinet decided on December 11 not to amend section 47 in order to accommodate Premier Peckford's concerns on this matter. However now that Newfoundland's questions have been made public, it may wish to reconsider this decision in light of the recent developments, and move to forestall an adverse decision in the Newfoundland reference. An additional advantage of making the amendment urged by Newfoundland would be to assure the Prairie provinces that their resources ownership cannot be altered in future except by unanimity since these rights are covered by the section 43 amending formula.

Recommendation: That Cabinet reconsider the possibility of an amendment to section 47 that would require unanimous consent of the provinces for a change in any amending procedure relating to a provision in the Constitution applying to one or more but not all provinces. Such an amendment would be along the following lines:

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"An amendment to section 43, (section 47) or section 3 of the Constitution Act, 1871 may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and the legislative assembly of each province."

5. Sections 44/50/51 - Amendments Respecting the Senate

Cabinet on December 11 and the Priorities and Planning Committee on December 16 had for consideration certain amendments that might engender greater support for the Resolution in the Senate. In particular, it might make Senators more amenable to the provisions of section 44 whereby amendments to the Constitution may be secured under the general amending formula without the consent of the Senate where the House passes a second resolution following a Senate veto.

Since then, on the basis of further discussions with Senators, the following arrangement would appear to be acceptable to them.

(1) The delay period in section 44, before which the House could pass a second resolution following a rejection by the Senate, would be extended from 90 to 180 days.

(2) Section 50 would be amended to include two matters which could be amended under sections 41 or 42 only with the consent of the Senate (ie. the section 44 "override" would not apply):

- the bicameral structure of Parliament
- the office of the Queen, the Governor General and the Lieutenant Governor of a province.

(This would not give the Senate a veto with respect to the composition or powers of the Senate.)

(3) Section 51 would be added to include the balance of the items now in section 50, and with respect to amendment of these matters the normal amending procedures under sections 41 or 42 would apply, including the "override" provision of section 44 (ie. there would be no Senate veto).

This would seem to be a reasonable approach, since one can argue that the bicameral structure of Parliament and the offices of the Queen, Governor General and Lieutenant Governor are all institutional aspects of the federal system which should only be altered with the consent of both Houses of Parliament plus agreement of the requisite number of provinces.

This arrangement should not draw any criticism from the provinces, although it may be objected to by the NDP opposition.

In addition, with respect to extending the delay period from 90 to 180 days, this is consistent with the recommendation in the Lamontagne Committee Report on Senate Reform, which proposed a "suspensive veto" of 180 days for Senate action on legislation.

Further, this amending formula is less complicated than others that have been considered to deal with the "Senate problem".

Recommendation: That the government approve amendments along the lines described above, which would appear as follows in draft form:

"44. (1) An amendment to the Constitution of Canada, other than an amendment in relation to a matter referred to in section 50, may be made by proclamation under subsection 41(1) or section 43, as appropriate, without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the passage by the House of Commons of a resolution authorizing its issue, the Senate has not passed such a resolution and if, at any time after the expiration of those one hundred and eighty days, the House of Commons again passes the resolution.

(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1)."

"50. An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with a procedure prescribed by section 41 or 42:

(a) the office of the Queen, the Governor General and the Lieutenant Governor of a province; and
(b) the bicameral structure of Parliament.

51. An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with a procedure prescribed by section 41, as modified by section 44, or by section 42:

(a) the *Canadian Charter of Rights and Freedoms*;
(b) the commitments relating to equalization and regional disparities set out in section 31;
(c) the powers of the Senate;
(d) the number of members by which a province is entitled to be represented in the Senate, the method of selecting Senators and the residence qualifications of Senators;
(e) 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; and
(f) the principles of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada."

Minister of Justice

ANNEX I

PREMIERS' CONFERENCE, MONTREAL, FEBRUARY 1978

Recognizing their concern for the maintenance and development of minority language education rights throughout Canada as expressed in St. Andrews and recognizing that education is the foundation on which language and culture rest;

The Premiers took note of the significant progress accomplished during the last years, as highlighted in the Ministers' of Education's report and further recognize the need for continued progress.

The Premiers reaffirm their intention to make their best efforts to provide education to their English or French speaking minorities, and in order to ensure appropriate levels of services, they also agree that the following principles should govern the availability of, as well as the accessibility to, such services;

(i) Each child of the French-speaking or English-speaking minority is entitled to an education in his or her language in the primary or the secondary schools in each province wherever numbers warrant

(ii) It is understood, due to exclusive jurisdiction of provincial governments in the field of education, and due also to wide cultural and demographic differences, that the implementation of the foregoing principle would be as defined by each province.

The Premiers requested the Council of Ministers of Education to assume the responsibility to suggest ways and means of achieving further progress in minority language education and second language instruction consistent with the progress thus far made.

ANNEX II

IN THE MATTER of Section 6 of The Judicature Act, Chapter 187 of The Revised Statutes of Newfoundland, 1970, as amended,

AND IN THE MATTER of a Reference by the Lieutenant-Governor in Council of certain questions to the Court of Appeal of the Supreme Court of Newfoundland for hearing and consideration.

WHEREAS, it is desirable that the opinion of the Court of Appeal of the Supreme Court of Newfoundland be obtained in relation to the questions hereinafter set forth;

NOW THEREFORE BE His Honour the Lieutenant-Governor in Council, under and by virtue of the authority conferred by Section 6(1) of The Judicature Act, Chapter 187 of The Revised Statutes of Newfoundland, 1970, as amended by Section 4(a) of The Judicature (Amendment) Act, 1974, the Act No. 57 of 1974, moved to refer and he doth hereby refer the following:

1. If the amendments to the Constitution of Canada sought in the 'Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada', or any of them were enacted, would federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments be affected and, if so, in what respect or respects?

2. Is it constitutional convention that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament of the United Kingdom of Great Britian and Northern Ireland a measure to amend the Constitution of Canada affecting federal-provincial relationships

or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments without first obtaining the agreement of the provinces?

3. Is the agreement of the provinces of Canada constitutionally required for amendment to the Constitution of Canada where such amendment affects federal-provincial relationships or alters the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments?

4. If Part V of the proposed resolution referred to in question 1 is enacted and proclaimed into force could

   (a) the Terms of Union, including terms 2 and 17 thereof contained in the Schedule to the British North America Act 1949 (12 - 13 George VI; c. 22 (U.K.)), or

   (b) section 3 of the British North America Act, 1871 (34-35 Victoria, c. 28 (U.K.))

be amended directly or indirectly pursuant to Part V without the consent of the Government, Legislature or a majority of the people of the Province of Newfoundland voting in a referendum held pursuant to Part V?