SECRET
December 15, 1980

MEMORANDUM TO MINISTERS FROM MINISTER OF JUSTICE

RE: POSSIBLE AMENDMENTS TO PROPOSED RESOLUTION ON CONSTITUTION OF CANADA

I PURPOSE

This memorandum addresses a number of issues respecting possible amendments to the Proposed Resolution on the Constitution of Canada that were raised by Ministers at the Cabinet meeting of December 11, 1980 when the Memorandum to Ministers dated November 25, 1980 was considered.

It also raises several additional issues that have emerged during the Joint Committee hearings since November 25 on which the direction of Ministers is sought in order that other possible amendments to the Proposed Resolution may be finalized.

II ISSUES FOR DETERMINATION

A. CHARTER OF RIGHTS AND FREEDOMS

1. Section 1 - Limits on Rights and Freedoms

Two questions have been raised by Ministers. First, is it necessary to include a "limitation clause" in the Charter? Second, if it is, what should be the wording of such a clause?

(a) Need for Limitation Clause

Views before the Joint Committee on this issue have been very divided. Many have argued that no limitation clause is necessary, since the courts will (as they have in the United States) imply reasonable limits on rights even in the absence of an express clause. Others have contended that a limitation clause is desirable as a signal to the public, the courts and the legislators as to the general parameters within which rights may be exercised and limited.

Dropping the clause would no doubt lessen the debate about the meaning of whatever limitative wording is used, and would appease those who see any explicit limit as an essential denial of the guaranteed rights. Equally, it can be argued that, on the basis of past history, Canadian courts will be fully capable of construing the rights as subject to reasonable limits.

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On the other hand, it may be argued that there are possible risks inherent in omitting reference to any general limitation clause. First, since certain of the rights contain built-in limits (eg. the right to vote, extension of parliamentary terms, mobility rights, minority language education rights) it is possible that the courts might view other rights as without limits. Thus, without such a clause, it is more difficult to predict how the courts may interpret limits.

Second, certain briefs to the Joint Committee have argued for even more stringent limits as, for example, specifying that freedom of expression is subject to laws on hate propaganda or that freedom of religion does not undermine the right to have denominational schools.

Third, including a limitation clause provides a benchmark against which rights may be tested. Thus, it is not necessary to prove in each case that there are limits; the only question is whether they are reasonable and justifiable.

In addition, it must be remembered that the provinces feel very strongly about inclusion of a limitation clause, and will be opposed even to the one that is now being considered since it does not refer to limits generally accepted under a parliamentary system of government.

In sum, it is difficult to make a compelling argument either for the retention or the deletion of a limitation clause. On balance, however, it is likely that a clause such as that now proposed would be a desirable guide to include in the Charter, and would satisfy most critics of the wording contained in the Proposed Resolution.

(b) Wording of Limitation Clause

Ministers have raised several questions about the proposed new wording of the clause.

First, it has been suggested that the clause might better read: "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" rather than "subject only to such reasonable limits prescribed by law as are demonstrably justifiable in a free and democratic society".

An analysis of this change indicates that it would not alter the substance of the test involved, namely that the limits imposed must be both reasonable and demonstrated, by those asserting them, to be justified in the circumstances.

Second, it has been suggested that, drawing from the French text, the expression "manifestly justifiable" might be stronger than "demonstrably justifiable". On consideration, it would appear that demonstrably is likely a stronger term since it implies the necessity of showing that the limit is justified whereas manifestly leaves the issue to judicial inference.

Finally, it has been suggested that the clause might refer to "a pluralistic free and democratic society", thus recognizing that Canadian society is a mosaic of many cultures and values.

While this is no doubt a correct perception of our society, injection of the concept of "pluralism" into the key interpretive provision of the Charter might tend to limit rather than broaden the scope of certain rights, such as freedom of speech and minority language rights. Equally, it could raise questions as to whether limits on rights in a free and democratic society are different from those in one which is also "pluralistic".

In other words, if this term is inserted in the clause it will have to be given some meaning. That meaning can only be to restrict the otherwise broader scope of "a free and democratic society".

Recommendation: That if Ministers decide to retain the limitation clause, it is recommended that it be worded as set out in Annex 1.

(See Annex 1 for proposed amendment.)

2. Section 2 - Freedom of Peaceful Assembly and of Association

The Canadian Bar Association submission argues that in not separating peaceful assembly and association as two distinct freedoms, they could be interpreted as being freedoms to be enjoyed only in combination.

This is rather speculative since the present wording makes it quite clear that they are not conjunctive rights although they may occur in certain cases in conjunction.

However, if there is any real doubt, the two could be separated to read "(c) freedom of peaceful assembly; and (d) freedom of association".

Recommendation: That the government not propose any amendment, but be prepared to accept it if such a proposal is moved in Committee.
(See Annex 2 for draft amendment.)

3. Section 10 - Right to Retain and Instruct Counsel

The Canadian Bar Association and some other witnesses have urged that the right of an arrested or detained person to retain and instruct counsel without delay be amended to include a right to be informed of this right.

It is considered unnecessary to get into this sort of detail in the Charter. However, if pressed it is an amendment which probably should be accepted.

Recommendation: That the government not propose any amendment, but be prepared to accept it if such a proposal is moved in Committee.

(See Annex 3 for draft amendment.)

4. Section 11 - Right of Accused Not to Testify

The Canadian Bar Association and some other witnesses have submitted that the right of an accused not to be compelled to testify against himself in criminal proceedings should be included in the Charter.

This is a long recognized right against self-crimination which should be made explicit in the Charter.

Recommendation: That section 11 be amended to include the right not to be compelled to testify against oneself.

(See Annex 4 for proposed amendment.)

5. Section 13 - Protection Against Self-Crimination

As presently drafted, section 13 offers protection against self-crimination only to witnesses who are compelled to testify; it does not extend such protection to an accused or other witness who testifies voluntarily.

Thus, section 13 should be amended to bring it in line with the rules of evidence which protect any witness giving evidence on his own behalf from having incriminating evidence so given used against him in subsequent proceedings.

Recommendation: That section 13 be amended to extend the protection against self-crimination to any witness testifying.

(See Annex 5 for proposed amendment.)

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

Cabinet has agreed that certain changes, proposed in the Memorandum to Ministers, be made in the wording of the "equality rights" provisions, although it has decided that "age" should not be dropped as a prohibited ground of non-discrimination, and questions the desirability of referring to grounds with respect to "affirmative action" programs.

Since the Memorandum to Ministers was prepared on November 25, the Joint Committee has received numerous briefs and heard a number of additional witnesses on the non-discrimination rights. An analysis of these submissions suggests that further consideration should be given to an appropriate wording for section 15.

Basically, three major criticisms have been directed at the present wording, and these are not fully met by the proposed revised wording.

First, it is argued that the "closed category" of non-discrimination grounds does not allow for evolution over time in an area where attitudes and values are gradually changing (eg. "handicap" may not be an accepted ground of non-discrimination in all respects today, but it is increasingly gaining acceptance.)

Second, it is remarked that, as drafted, the first clause does not allow for more stringent tests to be applied by the courts in cases where discrimination is now virtually never acceptable (eg. race, colour, religion, national or ethnic origin and sex), and cases where there remain legitimate grounds for reasonable distinctions to be drawn (eg. age, marital status, handicap, political belief, etc.).

Third, it is contended that the "affirmative action" exception is unduly broad in that "disadvantaged groups or persons" does not relate back to any grounds of non-discrimination.

Each of these is a legitimate criticism, and they warrant further consideration in an effort to find a wording to meet the concerns to the extent possible.

There are basically three alternatives which Ministers might consider in this regard.

(1) The first alternative is the so-called "closed category" approach which entails a specified list of non-discrimination grounds. This approach was set out in the Memorandum to Ministers of November 25. Its main problem is that it does not meet either of the first two criticisms mentioned above.

While it likely is capable of being interpreted to enable the courts to identify grounds of non-discrimination other than those listed, this is not clear. It does not permit the courts to apply more stringent tests to laws that make distinctions based on race, for example, than to laws distinguishing on the basis of age.

In consequence, it is an approach that provides little comfort to those persons who are discriminated against on unlisted grounds, or to those who feel that discriminatory practices based on sex or colour should receive closer scrutiny by the courts than distinctions based on age.

(2) The second alternative is the so-called "open list" approach where individual equality and equal protection and benefit of the law are assured generally without discrimination and, in particular, "core" grounds of non-discrimination are identified.

This approach goes some distance to meet the first two criticisms. First, it acknowledges that the "core" list of grounds (eg. race, colour, religion, national or ethnic origin and sex) is not exhaustive, enabling other grounds to be identified by the courts where discrimination can be shown. Second, it acknowledges the point that distinctions on certain grounds are more invidious than on other grounds.

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(3) The third alternative is the so-called "reverse onus" approach. Like the second alternative equality, protection and benefit of law are assured generally without discrimination. Then the "core" grounds are specified and every distinction based on one of those grounds is presumed to be discriminatory unless the contrary can be shown by the alleged discriminator.

This approach obviously goes somewhat farther than the second in placing a preliminary burden of proof on the alleged discriminator. However, he may discharge this burden by showing that the claimed discrimination is in fact a reasonable distinction.

The second and third approaches evidently go some distance to meet the first two criticisms, and they would provide some response to groups such as the handicap who are pressing for protection under section 15.

At the same time they may carry some problems. The first is what grounds of non-discrimination belong in the "core" group. No one would seriously question the eligibility of race, religion, colour, national or ethnic origin, or sex. However, the matter of "age" poses serious problems which pertain with respect to all approaches, but are more difficult in the second and third approaches. This is so simply because "age" is such a common distinction in so many laws and practices. If it were to be included in the "core" category, it is very difficult to assess the extent of its impact on invalidating laws, but it is obvious that much litigation would be generated. Under the third approach, it would be virtually impossible to justify the inclusion of "age" as a presumed basis of discrimination. It is thus proposed that Ministers reconsider the wisdom of retaining it as a specified ground, whichever approach is chosen.

The second concern is that the second and third approaches might broaden the powers of the courts to incorporate "new" grounds of non-discrimination. This could be a problem if the courts were to adopt an activist stance, but both in Canada and the United States the evidence would suggest that the reverse has more often been the case.

The third concern is the provincial reaction to a broadening of the non-discrimination rights. This is the one area where the provinces were almost unanimously opposed to entrenching rights, and they will no doubt be very critical of any expansion in this area.

The other aspect of non-discrimination rights is the affirmative action programs. As noted earlier, one of the criticisms has been directed to the fact that "disadvantaged individuals or groups" is not tied back to the discrimination grounds.

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That is one of the reasons why the change was proposed in the November 25 memorandum, since the amelioration of conditions of disadvantaged persons must relate back to some form of discrimination. In addition, the women's groups before the Joint Committee have expressed concern that they may not be considered as disadvantaged if express reference is not made to grounds.

As for not limiting the affirmative action programs to the specified grounds, this is deliberately done so that, if the courts over time identify additional grounds of discrimination, these will be included in the affirmative action programs.

It is considered that whichever approach is adopted in respect of grounds, the formula for affirmative action programs should be retained as proposed.

In conclusion, it is recommended that alternative two -- the "open list" approach -- be adopted as that best suited to entrenchment of non-discrimination rights, and the one which will meet many concerns of the witnesses before the Committee without leaving the courts with unlimited discretion.

Recommendation: That an amendment to section 15 be approved consistent with the "open list" approach described above.

(See Annex 6 for alternative draft amendments.)

7. Sections 16-20 - Provincial Institutional Language Rights

Cabinet has agreed to include in these sections institutional language rights (official languages, languages in the legislature, statutes and courts and in services to the public) for New Brunswick, largely paralleling those at the federal level. This was made subject to Premier Hatfield being agreeable to obtaining a resolution of his legislature making a formal request for including the rights.

Including language rights for New Brunswick has intensified the already strong pressures, both within and outside the Joint Committee, for including institutional language rights for Ontario as well. It is almost certain that the opposition members of the Committee will propose such an amendment.

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.

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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.

8. Section 20 - Language of Services to Public

Cabinet agreed to the modifications proposed for section 20 including deletion of the provision whereby Parliament would determine where services would be provided in both languages from offices that are not head or central. However, it was also decided that the constitutional test for determining when such services should be available should be based not on "significant demand" but rather on where there was a "reasonable requirement" for such services.

The reason for this modification is to ensure that bilingual services are available not only where there are significant concentrations of minority language populations, but also where the office is of a type such that the availability of bilingual service is a reasonable requirement even though the actual demand for such service may not be significant, eg. a customs office or an airport.

In light of this, it would be suitable to amend the latter part of section 20 to ensure that services are available in both languages either where there is a significant demand or where it is reasonable to require that such services be provided.

Recommendation: That section 20 be amended to incorporate the foregoing proposal.

(See Annex 7 for proposed amendment.)

9. Section 23 - Minority Language Education Rights

Cabinet agreed that certain changes, proposed in the Memorandum to Ministers, be made in this section respecting the qualifications for entitlement to minority language education, but that the requirement of "where numbers warrant" should be retained to maintain consistency with the 1978 Montreal Agreement of Provincial Premiers.

It is suggested that, to maintain further consistency with the Premiers' agreement, the revised clause not make reference to provision of "educational facilities", but only to "the provision out of public funds of minority language instruction". Such wording will also have the additional benefit of not implying that the obligation is limited to physical facilities, but extends more generally to whatever educational services are appropriate, including the possibility of minority language school boards.

Recommendation: That section 23 be further amended as indicated above.

(See Annex 8 for proposed amendment.)

10. Section 26 - Admissibility of Evidence

This section provides that Charter rights, other than protection against self-crimination, do not affect laws relating to admissibility of evidence or legislative power to make such laws.

Its purpose is to prevent Canadian courts from following the American approach where evidence, obtained in violation of the constitutional right against unreasonable search and seizure or the right to counsel, is ruled inadmissible as the only effective remedy against such police activities.

In Canada, evidence obtained in such circumstances is normally admissible if it is relevant.

It was felt that neither of these extreme positions should be entrenched in the Charter, but there is no agreement on what a middle ground should be. Consequently, section 26 was adopted as a means of leaving open to Parliament and the legislatures the ability to legislate a better balanced rule on admissibility of evidence once the Task Force on the Evidence Code has completed its work.

This provision has come under considerable criticism from many witnesses before the Joint Committee, some arguing that the U.S. exclusionary rule should be incorporated into the Charter, some contending that the provision should be dropped, leaving it to the courts to develop appropriate rules, and others arguing that a rule should be specified allowing courts to exclude improperly obtained evidence where to admit it would bring the administration of justice into disrepute.

To make any significant alteration in this provision would generate considerable opposition from the provinces who feel very strongly that the present rule in Canada should not be modified. Consequently, any change will have to be weighed against this consideration, particularly in respect to Ontario.

On the other hand, the provision is difficult to defend, particularly since, as the Canadian Bar pointed out, it could enable Parliament to impair legal rights under the Charter by, for example, enacting a law permitting evidence to be adduced at a trial in the absence of the accused. Thus, as a minimum it will have to be amended to prevent infringement of other legal rights.

Of the alternatives discussed above, the preferred approach would be to drop the provision. Given the position of the Supreme Court to date under the Canadian Bill of Rights, it is not highly likely that it will rush to follow the American approach. On the other hand, it would remain open to the courts (or Parliament) to adopt a middle ground of excluding evidence obtained in violation of Charter rights in appropriate cases.

It is therefore proposed that consideration be given to the deletion of this provision, subject to an assessment of the likely Ontario reaction.

Recommendation: That section 26 be considered for deletion, subject to an assessment of Ontario's reaction.
(See Annex 9 for proposed amendment.)

11. Other Charter Matters

A number of other issues have been raised in relation to the Charter, and they are outlined below.

(a) Recognition of Multiculturalism

Cabinet has indicated that a provision should be included in the Charter reflecting the multicultural nature of Canada.

Given the structure of the Charter it is very difficult to find an appropriate location for any separate provision that could speak of the multicultural heritage of Canada without giving it the characterization of an enforceable right.

One possibility might be to place it in the "general" provisions at the end of the Charter in terms that would require the Charter to be interpreted in a manner consistent with the objective of promoting the preservation and enhancement of the diverse cultural heritages of Canadians.

This would not appear to create any legal problems, and could be construed as enhancing the importance of such Charter rights as providing interpreters in proceedings covered by section 14, and of justifying affirmative action programs for national and ethnic minorities under section 15(2).

Another approach might be to amend section 22 in a manner that would ensure the continued preservation and enhancement of the diverse cultural heritages of Canadians through the protection of languages.

This approach is, however, rather negative in tone and is, of course, confined only to the ambit of language rights. Consequently it would not appear to be an appropriate approach.

Recommendation: That consideration be given to including a provision along the lines suggested in the first alternative above.

(See Annex 10 for possible alternative amendments.)

(b) Language of Criminal Trials

Representations have been made to the Joint Committee by the Canadian Bar and several language groups that provision be made in the Charter guaranteeing a person charged with a criminal offence the right to be tried in his official language, be it English or French.

Adopting this proposal would be to transpose from the Criminal Code to the Charter those provisions which provide for this right, but on a negotiated, phased-in basis. The policy, when the Code provisions were adopted in 1978, was to enable the Minister of Justice to negotiate with his provincial counterparts agreed dates upon which the provisions would come into force in each province.

To date, the provisions are in force only in New Brunswick, Ontario and the Territories. To place this right in the Charter would be to create unfulfilled expectations in most other provinces since they do not yet have the lawyers, judges or other court personnel to conduct a trial in French.

In addition, such a provision would be viewed by the provinces as bringing in one aspect of institutional language rights via the back door.

It is considered preferable, since Parliament has jurisdiction in this matter in any case, to leave it to be dealt with under the Criminal Code.

Recommendation: That no amendment respecting language of criminal trials be proposed.

(c) Property Rights

A number of submissions to the Joint Committee (and members of the Committee as well) have criticized the absence of any right to the enjoyment of property and the right not to be deprived thereof except by due process of law (as provided in the Canadian Bill of Rights).

While the federal government has never been opposed to protection of property rights in the Charter, the provinces were strenuously opposed to any such provision.

Their concern was quite legitimate and focussed on situations involving what might be called "indirect expropriation". There are many provincial laws that zone property, authorize highway systems, freeze sale of agricultural lands, condemn dangerous buildings, etc. where the consequence is to lower the value of property or to prevent persons from making a more economic use of it.

These kinds of laws would be challengeable in the courts as a deprivation of the enjoyment of property, and would probably be invalid if adequate compensation was not afforded.

It is difficult to contest the provinces' point of view, since the issues involved are ones of great social and economic importance.

On the other hand, there may be considerable pressure in Committee to include some provision for property rights, and the government may feel that it has to respond to this pressure. If that be the case, it may be possible to consider accepting a wording that would ensure at least procedural fairness in the deprivation of property.

Recommendation: That the government resist strongly any move to include property rights, but be prepared to accept if necessary a provision for procedural fairness.

(See Annex 11 for possible draft amendment.)

(d) Right to Privacy and Access to Government Information

The Canadian Bar and some other submissions have been pressing for inclusion of these rights.

Both rights (even as the Canadian Bar admits) are evolving areas of the law where the parameters are ill-defined. To place them in the Charter without some specific definitions of what was intended would be to invite the courts to engage in law-making out of whole cloth.

Recommendation: That the government resist any efforts to have these rights included.

(e) Legal Aid in Criminal Cases

The Canadian Bar and some civil liberties groups have been pressing for inclusion of a right to legal aid in criminal cases where a defendant cannot afford a lawyer.

While all provinces now have legal aid plans, the determination of who qualifies is made by provincial agencies, each with differing financial eligibility tests. To make legal aid a Charter right would leave to the courts the final determination of when an accused did not have sufficient means to afford a lawyer. This could result in substantial additional financial burdens being imposed on the provinces.

Recommendation: That the government oppose efforts to have a right to legal aid included.

B. EQUALIZATION AND REGIONAL DISPARITIES

12. Section 31 - Equalization and Regional Disparities

Cabinet has decided to retain the present wording of section 31(2) (the B.C. proposal) rather than replacing it with the wording of the Quebec proposal as suggested by Premier Hatfield in his appearance before the Committee.

Contact is being made with Premier Hatfield to assess his reaction to retention of the original wording in the Resolution.

C. INTERIM AMENDING PROCEDURE

13. Section 38 - Alternative Federal Amending Formula

Cabinet has decided that, with respect to the right of the federal government to put forward an alternative amending formula under section 38(3)(a) to any formula that might be proposed by the provisions under section 38(1), it is prepared to initiate such an alternative on the same basis as the provinces.

In other words, if the Committee decides that it should be the legislatures of the provinces rather than the governments that advance an alternative amending formula, then the same rule will apply at the federal level, and the federal alternative will be proposed by Parliament. However, if it is decided that provincial governments may initiate the alternative formula, then the federal alternative will originate with the federal government.

These two alternatives will be placed before the Committee to make a choice.

(See Annex 12 for alternate proposed amendments.)

14. Sections 40/46 - Referenda Rules Commissions

Cabinet agreed that provision should be made, where referenda are to be held either on a permanent amending formula under section 38 or on a proposed constitutional amendment under section 42, for a joint federal-provincial rules commission to be established to recommend, for enactment by Parliament, rules governing such referenda.

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This may work satisfactorily for the one-time referendum under section 38, but it could cause problems under section 42 where there may be a series of referenda over the years.

Since the Act adopted by Parliament for a first referendum under section 42 may, in light of experience, require changes for a subsequent referendum, it is necessary to consider whether there should be an on-going rules commission under section 46 or an ad hoc body to be convened prior to each referendum.

The ad hoc body is no doubt preferable (to minimize the impression that referenda are to be the normal amending route), and a technique might be adopted whereby Parliament would be obliged not to make any changes in the referendum law without resort first being had to the advice of the joint commission.

It would also be necessary to impose a very short deadline on the period for establishing a commission and on the period in which it must make its recommendations in order to avoid delay in holding the referendum. (Perhaps a 60 day period for its establishment and a 60 day period in which it must report its recommendations.)

Recommendation: That the foregoing proposals be approved as the basis for amendments to sections 40 and 46.

(See Annexes 13 and 14 for proposed amendments.)

D. PROCEDURE FOR AMENDING CONSTITUTION

15. Section 41 - General Amending Procedure

The Canadian Bar has noted a latent ambiguity in 41(1)(b)(ii) and (iii) in describing the Atlantic and Western provinces that must consent to an amendment. It could be argued that where three Atlantic or Western provinces consent, it would not be sufficient unless two of these three comprise 50% of the population.

Recommendation: That this possible ambiguity be rectified.

(See Annex 15 for proposed amendment.)

16. Sections 41/42 - Amendments by Referendum

Cabinet has agreed to amend section 41 to drop the population requirement for the Atlantic provinces (thus returning to the Victoria formula), and to introduce a "deadlock breaking" element into section 42, permitting the provinces one year in which to act on an amendment under section 41 before a referendum could be called. In addition, a referendum would have to be held within three years of adoption of the initial resolution by Parliament.

However, there are several further issues requiring consideration.

First, there is the question of the intended parallelism between sections 41 and 42. While an amendment under section 41 would require the consent of any two Atlantic provincial legislatures, a referendum under section 42 could carry in the Atlantic region by a bare majority vote in the two smallest provinces (PEI and New Brunswick), with the other two provinces voting overwhelmingly against it. The question is whether this is a desirable result. Can one realistically equate votes by provincial legislatures with votes by provincial populations? Presumably size is conceptually the same whether it be measured by a vote of the legislature or a vote of the people, but a result such as suggested in a referendum may appear somewhat anomolous.

In such circumstances, it is by no means evident that section 42 is necessarily a suitable referendum formula for all occasions. Yet, there is no authority to modify it under section 39 in the event that a formula other than Victoria is finally adopted.

In these circumstances there would appear to be three possible alternatives for consideration.

(1) Leave the formula in section 42 as it is.

(2) Amend section 42 to provide that for a referencum to succeed there must be a national majority vote plus a majority in each of the four regions including (as required in section 42(1)(b)) majorities from at least two of the Atlantic provinces and at least two of the Western provinces representing over 50% of the population.

(3) Amend section 42 to provide simply that a referendum to succeed must have a national majority plus a majority in each of the four regions without regard to individual provincial majorities in the Atlantic and Western regions.

In the case of options (1) and (2), the (b) part of section 42(1) would have to be modified to accord with whatever formula might be adopted to replace Victoria. This would not be necessary under option (3).

While option (3) has the virtue of simplicity, it would be very difficult to sell to the Committee or to the provinces, especially the smaller provinces.

Recommendation: That alternative two above be adopted.

(See Annex 16 for proposed amendment.)

Other issues requiring further consideration in relation to section 42 concern the "deadlock breaking" mechanism. Two suggestions have been raised for discussion.

First, it has been suggested that an element of reciprocity might be introduced by allowing a national referendum to be required by the decision of, say, a majority of the provinces (representing 70% of the population).

While the principle of reciprocity looks attractive at first glance, it could lead to situations in which a group of provinces might "gang-up" on another on some particular amendment. It would also be a bad precedent to recognize that a group of provinces could generate a national referendum. That should be the prerogative of the national government. Provincial governments are elected to deal with local, not national issues.

Second, it has been suggested that, in order to clearly demonstrate that a deadlock has occurred under section 41, a First Ministers Conference would be called after the one year delay period, where agreement would be sought on the proposed amendment. If this failed, this would then be ample evidence of a deadlock.

Such a procedure should not be necessary under section 42. If the provinces are given 12 months in which to take action on the proposed amendment and the requisite number fail to do so, this is ample evidence of a deadlock. Further, such a procedure would only serve to institutionalize executive federalism. If there is to be First Ministers consultation on proposed amendments, this should take place prior to the implementation of resolutions in the legislatures or Parliament, not after the failure has occurred.

Finally, given the frequent inconclusiveness of First Ministers meetings, it may be difficult to prove there was deadlock -- or who was causing it -- afterward.

17. Section 47 - Amendments Affecting One or More but not All Provinces

Cabinet agreed that an amendment would be made to section 47 to ensure that amendments to the constitution affecting one or more but not all provinces may be made only under the procedure in section 43 requiring the consent of any affected province.

At the same time, it was agreed that section 47 should not be amended to require unanimous consent of the provinces for a change in any amending procedure relating to a provision of the constitution applying to one or more but not all provinces.

On this latter point, it should be noted that one of the questions Newfoundland has put before its Court of Appeal, in its reference on the Proposed Resolution, is that of whether the amending and referendum formulas would enable amending procedures respecting Newfoundland's Terms of Union to be changed without that province's consent. As matters now stand, the federal government will have no choice but to answer this question in the affirmative.

(See Annex 17 for revised draft amendment.)

E. NATURAL RESOURCES JURISDICTION

18. Section 52 - Provincial Jurisdiction over Resources

Three questions have been raised with respect to the NDP draft proposal relating to provincial jurisdiction over certain natural resources.

(1) Provincial Indirect Taxation Power

Section 92A(4) empowers a province to levy indirect taxes (including export taxes) on the specified resources whether or not the production is exported from the province in whole or in part, but prohibits the levying of such taxes in a discriminatory manner as between production sold in the province and that sold in other parts of Canada.

In other words, Quebec would be empowered to impose indirect taxes on asbestos production whether sold in Quebec, Ontario or United States. However, while it could levy a higher (or lower) tax on production sold to the U.S., it could not impose a different rate on production sold in Quebec and Ontario.

The whole purpose of this provision is to grant provinces access to indirect taxation on resources (a power they now do not have), but to preclude them from applying such taxes in a discriminatory manner within Canada.

The proposal to change the wording to preclude differential taxation on "production exported from the province and production not exported from the province" would have the result of denying them the ability to levy higher or lower taxes on production exported out of Canada.

(2) Provincial Jurisdiction over "Rate of Primary Production"

Section 92A(1)(b) would give the provinces exclusive legislative jurisdiction over "development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom".

The question has been raised whether provincial jurisdiction over rate of primary production might have the effect of enabling a province to effectively regulate the export of resources from the province, thus impinging on existing federal jurisdiction under the "Trade and Commerce" power to regulate the marketing of resources in interprovincial trade.

This matter has been carefully examined by the Department of Justice. Some concern has been expressed that granting the provinces express power over rate of production could be interpreted in a manner that

could make it more difficult to attack such provincial laws as a colourable device designed to regulate interprovincial or international trade. At the same time, it is acknowledged that the provinces already have the jurisdiction over rate of production respecting resources, as long as such jurisdiction is not employed indirectly to regulate extra-provincial trade.

While it is, of course, impossible to say with absolute certainty how the courts may construe this provision, it is the view of the Department of Justice that confirmation of the provincial jurisdiction will not impair the scope of the federal power over Trade and Commerce. The provinces will, as now, have the power to regulate rate of production, but where the purpose of a law is not to serve a valid provincial objective (eg. development, management and conservation) but rather a colourable attempt to regulate extra-provincial trade in the resource, the courts will still, as they have in the past, conclude that the provincial law is not one primarily directed to matters within provincial jurisdiction.

Such an interpretation would be bolstered by the fact that section 92A(2) would grant to the provinces concurrent jurisdiction over export of resources from the provinces. In light of this, it would be difficult to contend that the exclusive jurisdiction over rate of production could properly be construed to include the regulation of export of resources from the provinces. Otherwise, the concurrent jurisdiction under 92A(2) would not have meaning.

Thus, while including "rate of primary production" as an exclusive provincial power may provide some scope for argument that it gives the provinces a lever over extra-provincial marketing of resources, the better view is that such an argument would not succeed before the courts.

(3) Federal Jurisdiction over Forestry Management

The question has been raised whether the confirmation of provincial jurisdiction over the development, conservation and management of forestry resources would in any way impinge on existing federal powers respecting research and development of forest resources.

Since federal jurisdiction in this area derives exclusively from the "spending power" (except on federal lands), the proposed provisions would have no impact on existing federal jurisdiction.

Minister of Justice