

MEMORANDUM TO MINISTERS FROM MINISTER OF JUSTICE

RE: POSSIBLE AMENDMENTS TO PROPOSED  
RESOLUTION ON CONSTITUTION OF CANADA

I PURPOSE

This Memorandum deals with four issues that were raised by Ministers at the Cabinet meeting of December 11 when the Memorandum to Ministers of November 25, 1980 on possible amendments to the Proposed Resolution was discussed.

II ISSUES FOR DETERMINATION

A. CHARTER OF RIGHTS AND FREEDOMS

1. 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.

Indications from New Brunswick are that it may be difficult to obtain such a resolution in time since the legislature is adjourned and will not be reconvened before March 1981.

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.

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 make some provision in the Charter for Ontario, there would appear to be two possible options for consideration:  
(1) to provide for institutional language rights in Ontario, with a delay period for implementation of the languages in the statutes and the courts, or  
(2) to provide for the opting in to institutional language rights by Ontario and any other province via the Charter.

This latter approach may have some merit, given the possibility that New Brunswick may not be in a position to adopt a resolution before next spring. Provision could thus be made for New Brunswick language rights in the Charter, with the provision to become constitutionally binding at such time as New Brunswick adopts the necessary resolution. Then a further provision could be inserted in the Charter enabling other provinces, by similar legislative resolution, to adhere constitutionally to any or all of the institutional language rights set forth for New Brunswick.

Recommendation: That the government not support the imposition of institutional language rights in Ontario, but that consideration be given to the inclusion of an opting in provision as described above.

## 2. Recognition of Multiculturalism in Charter

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 1 for possible alternative amendments.)

B. PROCEDURE FOR AMENDING CONSTITUTION

3. 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 by Ministers.

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 anomalous.

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 referendum 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 41(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 2 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.

4. Section 51 - Amendments to Abolish Senate

Cabinet agreed to the amendments, proposed in the November 25 Memorandum to Ministers, respecting special procedures that would be followed with respect to amendments affecting the Senate.

The Minister of Justice will be consulting with certain Senators to ascertain their reaction to these proposed amendments, and will report to Cabinet on the outcome of these consultations.

C. OTHER MATTERS

5. Technical Amendments

The Memorandum to Ministers of November 25, 1980 set out in Part III a number of technical amendments to the Resolution. (pp. 25-27)

Recommendation: That Ministers approve the inclusion of these technical amendments in the Resolution.

6. Additional Changes

An Addendum dated December 8, 1980 to the Memorandum to Ministers of November 25 set forth several additional amendments being proposed in the Resolution.

In summary, these are

CHARTER OF RIGHTS

- (a) That the government agree to an amendment that would entitle an arrested person to be informed of the right to retain and instruct counsel.
- (b) That the government agree to an amendment that would ensure that an accused is not required to testify against himself.
- (c) That the government agree to an amendment that would extend the protection against self-crimination to witnesses testifying voluntarily.
- (d) That the government agree to amend non-discrimination rights so that they would apply only to natural persons and to change "equality before the law" to "equal before and under the law".

PROCEDURE FOR AMENDING CONSTITUTION

- (e) That the government agree to an amendment to section 41(1)(b) that would remove any ambiguity as to the number of provinces and their population required for an amendment to the Constitution.

Recommendation: That the government agree to including these amendments in the Resolution.

7. Further Technical Amendments

It is recommended that the Minister of Justice be authorized to make such additional technical amendments to the Resolution as may be necessary to ensure its accuracy.

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Minister of Justice

ANNEX 1

December 12, 1980

ALTERNATIVE I

Moved that

The Proposed Resolution respecting the Constitution of Canada be amended by

(a) adding, immediately after section 25 of the proposed Constitution Act, 1980, the following section:

Interpretation of Charter | "26. This Charter shall be interpreted in a manner consistent with the object of promoting the preservation and enhancement of the diverse cultural heritages of Canadians."

; and

(b) renumbering the sections following thereafter accordingly.

ANNEXE 1

Le 12 décembre 1980

VARIANTE I

Il est proposé que le Projet de résolution concernant la Constitution du Canada soit modifié par:

a) insertion, après l'article 25 du projet de Loi constitutionnelle de 1980, de l'article suivant:

Interprétation de la Charte | «26. Toute interprétation de la présente charte doit être en concordance avec l'objectif de promouvoir le maintien et la valorisation des divers patrimoines culturels canadiens.» ;

b) les changements de numéros d'article qui en découlent.

December 12, 1980

ALTERNATIVE II

Moved that

The Proposed Resolution respecting the Constitution of Canada be amended by deleting section 22 of the proposed Constitution Act, 1980 and by substituting therefor the following:

Rights and privileges preserved

"22. To ensure the continued preservation and enhancement of the diverse cultural heritages of Canadians, nothing in sections 16 to 20 shall be construed as abrogating or derogating from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language."

VARIANTE II

ANNEXE 1

12 décembre 1980

Il est proposé que le Projet de résolution concernant la Constitution du Canada soit modifié par substitution, à l'article 22 du projet de Loi constitutionnelle de 1980, de l'article suivant :

Maintien de certains droits et privilèges

«22. Il est entendu, compte tenu de l'objectif de maintenir et de valoriser les divers patrimoines culturels canadiens, que les articles 16 à 20 n'ont pas pour effet de porter atteinte aux droits et privilèges, antérieurs ou postérieurs à l'entrée en vigueur de la présente charte, attachés à une langue quelconque.»

Section 22 of the proposed Constitution Act, 1980 at present reads as follows:

Texte actuel de l'article 22:

Rights and privileges preserved

" 22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French."

" 22. Les articles 16 à 20 n'ont pas pour effet de porter atteinte aux droits et privilèges, antérieurs ou postérieurs à l'entrée en vigueur de la présente charte et decoulant de la loi ou de la coutume, des langues autre que le français ou l'anglais."

November 21, 1980

Moved that

REVISED

December 10, 1980  
ANNEX 2

The Proposed Resolution respecting the Constitution of Canada be amended by deleting subsection 42(2) of the proposed Constitution Act, 1980 and by substituting therefor the following:

Authorization of referendum

"(2) A referendum referred to in subsection (1) shall be held where directed by proclamation issued by the Governor General under the Great Seal of Canada, which proclamation may be issued where

(a) an amendment to the Constitution of Canada has been authorized under paragraph 41(1)(a) by resolutions of the Senate and House of Commons;

(b) the requirements of paragraph 41(1)(b) in respect of the proposed amendment have not been satisfied within twelve months after the passage of the resolutions of the Senate and House of Commons; and

(c) the issue of the proclamation has been authorized by the Governor General in Council.

Time limit for referendum

(3) A proclamation issued under subsection (2) in respect of a referendum shall provide for the referendum to be held within two years after the expiration of the twelve month period referred to in paragraph (b) of that subsection."

ANNEXE 2

VARIANTE I

MODIFIÉ Le 21 novembre 1980  
le 12 décembre 1980

Il est proposé que le Projet de résolution concernant la Constitution du Canada soit modifié par substitution, au paragraphe 42(2) du projet de Loi constitutionnelle de 1980, du paragraphe suivant :

Autorisation de référendum

"(2) L'ordre de tenue du référendum visé au paragraphe (1) est donné par proclamation du gouverneur général sous le grand sceau du Canada, autorisée aux conditions suivantes :

a) le Sénat et la Chambre des communes ont, conformément à l'alinéa 41(1)a), adopté des résolutions autorisant la modification de la Constitution du Canada;

b) les dispositions de l'alinéa 41(1)b) applicables au projet de modification n'ont pas été observées dans les douze mois suivant l'adoption des résolutions du Sénat et de la Chambre des communes;

c) le gouverneur général en conseil a autorisé la proclamation.

Délai de tenue du référendum

(3) La proclamation visée au paragraphe (2) fixe la tenue du référendum à une date postérieure d'au plus deux ans à l'expiration du délai de douze mois mentionné à l'alinéa b) de ce paragraphe."

Subsection 42(2) of the proposed Constitution Act, 1980 at present reads as follows:

Texte actuel du paragraphe 42(2):

Authorization of referendum

"(2) A referendum referred to in subsection (1) shall be held where directed by proclamation issued by the Governor General under the Great Seal of Canada authorized by resolutions of the Senate and House of Commons."

"(2) L'ordre de tenue d'un référendum mentionné au paragraphe (1) est donné par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par les résolutions du Sénat et de la Chambre des communes."

December 12, 1980

Moved that

The Proposed Resolution respecting the Constitution of Canada be amended by deleting subsection 41(2) of the proposed Constitution Act, 1980 and by substituting therefor the following:

Definitions

"(2) In this Part,

"Atlantic provinces"

"Atlantic provinces" means the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland;

"region"

"region" means

- (i) every province that at any time had, according to any previous general census, a population of at least twenty-five per cent of the population of Canada,
- (ii) the Atlantic provinces, and
- (iii) the Western provinces;

"Western provinces"

"Western provinces" means the provinces of Manitoba, British Columbia, Saskatchewan and Alberta."

Subsection 41(2) of the proposed Constitution Act, 1980 at present reads as follows:

Definitions

"(2) In this section,

"Atlantic provinces"

"Atlantic provinces" means the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland;

"Western provinces"

"Western provinces" means the provinces of Manitoba, British Columbia, Saskatchewan and Alberta."

Moved that

The Proposed Resolution respecting the Constitution of Canada be amended by deleting subsection 42(1) of the proposed Constitution Act, 1980 and by substituting therefor the following:

Amendment authorized by referendum

"42. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by a referendum held throughout Canada under subsection (2) at which the making of the amendment has been approved by

- (a) a majority of persons voting thereat, and
- (b) a majority of persons voting thereat in each region including a majority of persons voting thereat in
  - (i) two or more of the Atlantic provinces, and
  - (ii) two or more Western provinces that have in the aggregate, according to the then latest general census, a combined population of at least fifty per cent of the population of all the Western provinces."

Subsection 42(1) of the proposed Constitution Act, 1980  
at present reads as follows:

*Amendment  
authorized by  
referendum*

" 42. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by a referendum held throughout Canada under subsection (2) at which

(a) a majority of persons voting thereat, and

(b) a majority of persons voting thereat in each of the provinces, resolutions of the legislative assemblies of which would be sufficient, together with resolutions of the Senate and House of Commons, to authorize the issue of a proclamation under subsection 41(1).

have approved the making of the amendment.

Le 12 décembre 1980

Il est proposé que le Projet de résolution concernant la Constitution du Canada soit modifié par substitution, au paragraphe 41(2) du projet de Loi constitutionnelle de 1980, du paragraphe suivant:

«(2) Les définitions qui suivent s'appliquent à la présente partie.

Définitions

«provinces de l'Atlantique»

•provinces de l'Atlantique. Les provinces de la Nouvelle-Écosse, du Nouveau-Brunswick, de l'Île-du-Prince-Édouard et de Terre-Neuve.

«provinces de l'Ouest»

•provinces de l'Ouest. Les provinces du Manitoba, de la Colombie-Britannique, de la Saskatchewan et de l'Alberta.

«région»

«région»

(i) chaque province dont la population représentait, selon un recensement général antérieur quelconque, au moins vingt-cinq pour cent de la population du Canada,

(ii) les provinces de l'Atlantique,

(iii) les provinces de l'Ouest.»

Texte actuel du paragraphe 41(2):

«(2) Les définitions qui suivent s'appliquent au présent article.

•provinces de l'Atlantique. Les provinces de la Nouvelle-Écosse, du Nouveau-Brunswick, de l'Île-du-Prince-Édouard et de Terre-Neuve.

•provinces de l'Ouest. Les provinces du Manitoba, de la Colombie-Britannique, de la Saskatchewan et de l'Alberta.»

Il est proposé que le Projet de résolution concernant la Constitution du Canada soit modifié par substitution, au paragraphe 42(1) du projet de Loi constitutionnelle de 1980, du paragraphe suivant:

Modifica-  
tion auto-  
risée par  
référendum

«42. (1) La Constitution du Canada peut être modifiée par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par un référendum tenu dans tout le pays conformément au paragraphe (2) et lors duquel la modification a été approuvée:

a) d'une part, à la majorité des votants;

b) d'autre part, à la majorité des votants de chacune des régions, y compris la majorité des votants

(i) d'au moins deux des provinces de l'Atlantique,  
(ii) d'au moins deux des provinces de l'Ouest dont la population confondue représente, selon le recensement général le plus récent de l'époque, au moins cinquante pour cent de la population de l'ensemble des provinces de l'Ouest.»

Texte actuel du paragraphe 42(1):

.../2

« 42. (1) La Constitution du Canada peut être modifiée par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par un référendum tenu dans tout le pays conformément au paragraphe (2) et lors duquel la modification a été approuvée:

- a) d'une part, à la majorité des votants;
- b) d'autre part, à la majorité des votants de chacune des provinces dont les résolutions de leurs assemblées législatives suffiraient, avec les résolutions du Sénat et de la Chambre des communes, à autoriser la proclamation mentionnée au paragraphe 41(1) »

December 12, 1980

ALTERNATIVE III

Moved that

The Proposed Resolution respecting the Constitution of Canada be amended by deleting subsection 41(2) of the proposed Constitution Act, 1980 and by substituting therefor the following:

Definitions	"(2) In this Part,
"Atlantic provinces"	"Atlantic provinces" means the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland;
"region"	"region" means (i) every province that at any time had, according to any previous general census, a population of at least twenty-five per cent of the population of Canada, (ii) the Atlantic provinces, and (iii) the Western provinces;
"Western provinces"	"Western provinces" means the provinces of Manitoba, British Columbia, Saskatchewan and Alberta."

Subsection 41(2) of the proposed Constitution Act, 1980 at present reads as follows:

Definitions	"(2) In this section,
"Atlantic provinces"	"Atlantic provinces" means the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland;
"Western provinces"	"Western provinces" means the provinces of Manitoba, British Columbia, Saskatchewan and Alberta."

Moved that

The Proposed Resolution respecting the Constitution of Canada be amended by deleting subsection 42(1) of the proposed Constitution Act, 1980 and by substituting therefor the following:

Amendment authorized by referendum	"42. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by a referendum held throughout Canada under subsection (2) at which the making of the amendment has been approved by  (a) a majority of persons voting thereat, and (b) a majority of persons voting thereat in each region."
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Subsection 42(1) of the proposed Constitution Act, 1980 at present reads as follows:

Amendment authorized by referendum	"42. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by a referendum held throughout Canada under subsection (2) at which  (a) a majority of persons voting thereat, and and (b) a majority of persons voting thereat in each of the provinces, resolutions of the legislative assemblies of which would be sufficient, together with resolutions of the Senate and House of Commons, to authorise the amendment."
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Le 12 décembre 1980

Il est proposé que le Projet de résolution concernant la Constitution du Canada soit modifié par substitution, au paragraphe 41(2) du projet de Loi constitutionnelle de 1980, du paragraphe suivant:

«(2) Les définitions qui suivent s'appliquent à la présente partie.

«provinces de l'Atlantique»

«provinces de l'Atlantique» Les provinces de la Nouvelle-Écosse, du Nouveau-Brunswick, de l'Île-du-Prince-Édouard et de Terre-Neuve.

«provinces de l'Ouest»

«provinces de l'Ouest» Les provinces du Manitoba, de la Colombie-Britannique, de la Saskatchewan et de l'Alberta.

«région»

«région»

(i) chaque province dont la population représentait, selon un recensement général antérieur quelconque, au moins vingt-cinq pour cent de la population du Canada,

(ii) les provinces de l'Atlantique,

(iii) les provinces de l'Ouest.»

Texte actuel du paragraphe 41(2):

«(2) Les définitions qui suivent s'appliquent au présent article

«provinces de l'Atlantique» Les provinces de la Nouvelle-Écosse, du Nouveau-Brunswick, de l'Île-du-Prince-Édouard et de Terre-Neuve.

«provinces de l'Ouest» Les provinces du Manitoba, de la Colombie-Britannique, de la Saskatchewan et de l'Alberta.»

Il est proposé que le Projet de résolution concernant la Constitution du Canada soit modifié par substitution, au paragraphe 42(1) du projet de Loi constitutionnelle de 1980, du paragraphe suivant:

«Modification autorisée par référendum»

«42. (1) La Constitution du Canada peut être modifiée par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par un référendum tenu dans tout le pays conformément au paragraphe (2) et lors duquel la modification a été approuvée:

a) d'une part, à la majorité des votants;

b) d'autre part, à la majorité des votants de chacune des régions.»

Texte actuel du paragraphe 42(1):

« 42. (1) La Constitution du Canada peut être modifiée par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par un référendum tenu dans tout le pays conformément au paragraphe (2) et lors duquel la modification a été approuvée.

- a) d'une part, à la majorité des votants;
- b) d'autre part, à la majorité des votants de chacune des provinces dont les résolutions de leurs assemblées législatives suffiraient, avec les résolutions du Sénat et de la Chambre des communes, à autoriser la proclamation mentionnée au paragraphe 41(1) »