S E C R E T

February 25, 1981

MEMORANDUM FOR MINISTERS

Re: The Constitutional Resolution:

A. Background Procedural Considerations
B. The Constitutional Resolution: An amendment to incorporate a reference to a divine sanction

A. Background Procedural Considerations

What the House of Commons is currently considering is a motion that an Address be presented to Her Majesty. The rules that apply to the debate are those that govern debate on an ordinary substantive motion, not a bill. Thus, the Rules of the House providing for time allocation (Standing Orders 75A to 75C) do not apply. There is no limit on the number of amendments that may be proposed, but only one amendment and one sub-amendment can be before the House at any time.

Only one device is available to force a vote on any amendment or sub-amendment and that is Standing Order 33 (Closure). It is a very imperfect device because once invoked, it not only results in termination of debate on the amendment or sub-amendment to which it is directly applied but also in termination of debate on the main motion. Thus, if the Government has more than one amendment to make or support, it cannot force termination of debate on the first or any subsequent such amendment, or indeed on any opposition amendment, without forsaking the opportunity to gain consideration and adoption of any other or others. Forced termination of the debate on any one amendment will terminate debate on the main motion.

To summarize, an amendment or sub-amendment can only be disposed of in one of two ways:

(1) allow the debate to run its course; or

(2) invoke S.O. 33.

The first leaves the decision entirely to the Opposition, who, if they are in a mood to obstruct, can delay the moving of a government or government-supported amendment for weeks by prolonging debate on an opposition amendment or on another government amendment. The

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second will not only terminate debate on the amendment then before the House, but will also terminate debate on the main motion, thus absolutely precluding an opportunity for consideration of any further amendments.

In the Senate, there is no time allocation rule or closure rule. It is unlikely, however, that the Senate would unduly prolong debate on an amendment that has already been adopted by the House. The only real danger is that the Senate might approve the Address before an amendment moved or supported by the Government is made in the House. This must be avoided by careful coordination.

B. An amendment to incorporate a reference to a divine sanction

1. Background

During the course of consideration of the proposed resolution by the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, a member of the Official Opposition proposed that Clause 1 of the Charter of Rights and Freedoms that forms part of the Canada Act, 1981 be modified to incorporate an affirmation that the Canadian nation is founded upon principles that acknowledge the supremacy of God.

Under the proposed amendment, Clause 1 of the Charter of Rights and Freedoms would have read as follows:

> "Affirming that the Canadian nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free individuals and free institutions,
>
> Affirming also that individuals and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law,
>
> The Canadian charter of rights and freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.".

The two "Affirmations" are extracted verbatim from the Preamble to the Diefenbaker Bill of Rights. The balance of the text is Section 1 of the Charter of Rights and Freedoms as it appears in the Resolution now before the Senate and House of Commons.

The amendment was defeated in the Committee. The reasons given by government members of the Committee for voting against the amendment were generally along the following lines: firstly, however appropriate the affirmations in question may have been for the Diefenbaker Bill of Rights, the Charter of Rights and Freedoms is substantially broader in its scope and therefore the affirmations in the proposed form are limiting; secondly, the concept of a Statement of Principles for the Canadian Constitution was a matter that was discussed at length during the constitutional conferences last summer and it is clear from those conferences that further federal-provincial discussions would be of use in this area. The affirmations in question would be more appropriate within the framework of a Statement of Principles for a renewed constitution as a whole rather than within the context of the Charter of Rights and Freedoms.

The Honourable Jake Epp, as leading speaker for the Official Opposition in the Constitution debate last week, suggested that the government starts from the premise that "... the government will grant us rights. That is where the charter starts from and that is where the charter is wrong". He contrasted the Diefenbaker Bill of Rights in the following terms: "What it did was to say that every human being created in the image of God has certain inalienable rights". Mr. Epp's comments on this subject in the form of an extract from Hansard are attached as Annex I. He concluded that portion of his remarks with the assertion "If hon. members want to laugh about God, go ahead, that is their choice".

This theme has been picked up by other spokesmen for the official opposition.

The Honourable John Roberts replied and an extract from Hansard setting out his reply is attached as Annex II. Mr. Roberts quoted into the record the "Statement of Principles for a New Constitution" that the Prime Minister tabled in the House of Commons on June 10th last, that formed part of his July 1st message and that was the starting point for the discussion on a statement of principles or preamble during the FMC meetings. The statement commences "We, the people of Canada, proudly proclaim that we are and shall always be, with the help of God, a free and self-governing people". The statement is set out in the extract from Hansard, Annex II, and also separately as Annex III. You will note that Mr. Roberts' comments on this point ended with interjections suggesting that the government should put the statement into the Resolution "... right now".

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The issue was discussed at an informal meeting of the government caucus on Thursday evening, February 19th. Apparently it is not an issue that deeply concerns government members from Quebec. On the other hand, it is an issue of great concern to Ontario members and it is likely of significant concern in the West.

Apart from any amendment that might flow from the foregoing, the Government is committed to at least one amendment to the Resolution during the current and final stage of the constitutional debate here in Canada. Assurances have been given both to Mr. Broadbent and to the natives peoples that an amendment will be made to include a reference to section 33, the section recognizing and confirming aboriginal and Treaty rights, in section 54 so that the affirmation of aboriginal and treaty rights will only be amendable under the general amending formula.

2. Alternative formulations for an amendment to incorporate a reference to a divine sanction

(1) An amendment in the form proposed by the Official Opposition in Committee (See Page 2)

The reasons given by Government members of the Committee for refusing to support such an amendment are valid and appropriate. On the other hand, they are technical and difficult to sell in the face of criticism that the real motivation of the Government is an unwillingness to acknowledge the supremacy of God as a founding principle of Canada.

(2) An amendment to insert the June 10/July 1, 1980 Statement of Principles as a preamble to the Charter or to the Constitution Act, 1981 (See Annex III)

Mr. Roberts asserted during the debate in the House of Commons on February 18th that "The government still wants that preamble in the Constitution". Such an amendment would be more difficult to resist if proposed by the Opposition although several provinces had significant difficulty with the Statement. By the end of the summer's CCMC meetings, the "Best Efforts Draft" (which was not released during the FMC in September) varied significantly from the June 10/July 1 statement. In particular, having regard to the focus of the current debate, all reference to God had been dropped. The reference to God in the Statement is not as strong as that set out in the Diefenbaker preamble.

(3) An adaptation of the first two assertions of the Diefenbaker Preamble as a preamble to the Constitution Act, 1981

Such an adaptation, which would not involve substantive change except for the substitution of a reference to "Canada" for a reference to "The Canadian nation", might read as follows:

> "It is hereby affirmed that Canada is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free individuals and free institutions,
>
> It is further affirmed that individuals and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law.".

Such an amendment would not form part of the Charter and thus would not be subject to the objections raised in Committee to the Official Opposition amendment. It would rather constitute a preamble to the whole of the Constitution Act, 1981 (a rather subtle, but real, distinction) and as such would be subject to review in future constitutional discussions in the same manner as the preamble to the BNA Act of 1867.

3. Procedural alternatives if an amendment to incorporate a reference to a divine sanction should be supported

Before considering specific alternatives, there are several factors emerging from the debate to this time that should be borne in mind.

(a) The Official Opposition has indicated that it wishes to move several amendments. This may be a tactical ploy but that appears unlikely. The first such amendment was moved by Mr. Epp on the first day of debate and it is likely that the debate will have run for at least two calendar weeks before the amendment comes to a cote.

(b) Since the first amendment was moved, debate has in no way been restricted to the scope of the amendment; all parties, including the government, have debated the whole resolution, not just the amendment.

(c) Members of the NDP party will likely wish to move one or more amendments.

The implications of the foregoing for the future of the debate are at least two-fold; firstly, there will be competition to get the floor in order to move amendments; secondly, with no direct means of limiting debate on an individual amendment, it is likely that there will not be an opportunity for all or even most amendments that are presently in contemplation to be moved, let alone voted on.

The specific alternatives open to the Government are:

(1) A government amendment

- This option would allow the Government to control the form and timing of the amendment and would best demonstrate flexibility and a proactive rather than a reactive role for the Government;

- Assuming a primary commitment to the natives amendment, this option would require government members to secure the floor immediately following two successive votes on amendments in the House i.e., after the vote on the Conservative amendment currently before the House to move the natives rights amendment (unless an absolutely secure agreement can be reached to have a member of the NDP move this amendment as the first priority amendment of that Party), and again after the vote on the native rights amendment to move the "divine sanction" amendment. This tactic would risk conveying the impression that the Government is dominating opportunities to move amendments during this stage;

- If the impression were conveyed that the Government is dominating opportunities to move amendments, that impression would provide strong ammunication for the opposition in the event that the Government is forced to move closure before the opposition parties have had an opportunity to move a number of amendments that they now contemplate moving.

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(2) Support an Opposition Amendment

- This option would involve a loss of control over the form and timing of the amendment. The Government would appear to be reactive rather than proactive;

- The Opposition Parties, by giving the motion on this subject relatively low priority on their lists of possible amendments, could put the Government in a position where it is forced to use closure and in so doing forecloses the possibility of an amendment on this subject;

- An advantage of this option is that it would maximize the number of Opposition amendments and would demonstrate flexibility on the part of the Government in accepting an Opposition amendment. This flexibility could be protrayed as lack of decisiveness if, by following this alternative, the Government ended up supporting an amendment identical to one which was defeated in Committee.

(3) Move a sub-amendment on an Opposition amendment dealing with this subject

- This option would allow the Government to regain control of the form of the amendment, but not of the timing;

- The Government might appear to be excessively concerned with the technical detail of the amendment i.e. its drafting and its location within the measure rather than with the substance;

- The moving of a sub-amendment might provide the Opposition with an argument for prolonging debate. The only impact of this would be in any subsequent debate on the legitimacy of closure;

- Since this option would be dependent upon an Opposition motion, the ordering of motions would once again allow the Opposition to control whether or not an amendment came forward for debate prior to the Government being forced to use closure.

(4) Negotiate an agreement as to the form and timing of an amendment including, if possible, an agreement to strictly limit debating time on the amendment

- This would have the advantage of allowing the Government to control the form and timing of the amendment without appearing to dominate the opportunities to make amendments;

- It would have to be recognized that the Government's leverage in seeking such an agreement would not be high;

- If the Government attempted to reach an agreement without success, in any subsequent debate on domination by the Government of the opportunity to move amendments, on closure or on failure to make an amendment on this subject, the Government would be in a position to make public the fact that it had attempted in good faith to make a special arrangement for an amendment on this subject.

4. Conclusion

Several factors combine to produce significant difficulty for the Government in securing any amendments other than the native rights amendment. Indeed, even the native rights amendment is somewhat less than certain of accomplishment. Those factors include:

(a) The nature of the debate, i.e. a debate on a resolution and not on report stage of a bill;

(b) The likelihood that both opposition parties will wish to move and debate a number of amendments;

(c) The fact that debate on amendments is not being restricted to the scope of the amendment before the House; and

(d) The likely tactic of the Official Opposition to force the Government to invoke closure.

The degree of difficulty increases dramatically with each additional amendment that the Government wishes to achieve. The following questions therefore require the attention of Ministers:

(a) Are there other amendments which Ministers wish to consider? Some consideration has been given by Justice Officials to an amendment that would provide that the rights and freedoms guaranteed by the Charter shall be enjoyed equally by men and women.

(b) Are Ministers prepared to commit themselves at this stage of the debate to ranking an amendment incorporating a reference to a divine sanction as second in priority after the native rights amendment?

In the event that passage of an amendment incorporating a reference to a divine sanction is not secured, a political strategy for dealing with the issue may be required.

ANNEX III

AS TABLED IN THE HOUSE OF COMMONS JUNE 10, 1980

A Statement of Principles For A New Constitution

We, the people of Canada, proudly proclaim that we are and shall always be, with the help of God, a free and self-governing people.

Born of a meeting of the English and French presence on North American soil which had long been the home of our native peoples, and enriched by the contribution of millions of people from the four corners of the earth, we have chosen to create a life together which transcends the differences of blood relationships, language and religion, and willingly accept the experience of sharing our wealth and cultures, while respecting our diversity.

We have chosen to live together in one sovereign country, a true federation, conceived as a constitutional monarchy and founded on democratic principles.

Faithful to our history, and united by a common desire to give new life and strength to our federation, we are resolved to create together a new Constitution which:

shall be conceived and adopted in Canada,
shall reaffirm the official status of the French and English languages in Canada, and the diversity of cultures within Canadian society,
shall enshrine our fundamental freedoms, our basic civil, human and language rights, including the right to be educated in one's own language, French or English, where numbers warrant, and the rights of our native peoples, and
shall define the authority of Parliament and of the Legislative Assemblies of our several Provinces.

We further declare that our Parliament and provincial legislatures, our various governments and their agencies shall have no other purpose than to strive for the happiness and fulfillment of each and all of us.
