SECRET

MEMORANDUM FOR THE PRIME MINISTER

Refinements to the Resolution which may be Acceptable to the Federal Government

-- .The attached material suggests, for each subdivision of the Resolution, refinements which officials believe the federal government could find
-- acceptable. For your convenience I have also attached a copy of the Resolution.

This material could be used at the First Ministers Conference in two ways:

- First, during the early part of the meeting when the two sides are still sparing with each other and you want to show that the federal government is genuinely flexible on the substance of the measure;

- Second, during the middle or even the final stage of the meeting, when we are close to consensus or have put our final offer on the table, and you decide that some additional refinements are necessary in order to complete a deal or to round out your final offer. In other words, some of these refinements can be added to "middle ground" or "final" options proposed by us or the provinces to enlarge the set of acceptable packages.

for Michael J.L. Kirby

First Ministers Conference on the Constitution - 1981

LGE-5

SECRET

THE CHARTER

1. Official Languages of Canada

There is no need to make any change as these provisions apply only to Canada and New Brunswick. However, as you explained to Premier Davis, opposition to the Resolution in Quebec would be enormously undercut if Ontario were to also bind itself to these provisions either immediately or at a fixed future date.

2. Minority Language of Education

This is the most important part of the Charter. We could accept a change to make it coincide more closely with the substance of the St. Andrews and Montreal agreements. The "Universal clause" as now found in Section 23 (an anglophone no matter where he comes from, acquires the right to send his children to English speaking schools in Quebec when he becomes a Canadian citizen) would be changed to a "Canada clause" (anglophones born outside Canada would have no right under Section 23, even after becoming Canadian citizens and would be treated the same as anglophones). Such a change would alleviate a lot of the concerns that have been expressed by many francophones in Quebec in that regard but would not likely be too well received by Quebec anglophones. Attached is the text of the St. Andrews and Montreal agreements.

There is another change you might wish to consider. Section 23 now provides that one or two tests needs to be satisfied before the language of education rights can be exercised, the first being mother tongue; the second being language in which primary school instruction was received. The parent that meets one of these two tests is qualified under the section. The mother tongue test was added because the language of primary instruction test would have caused extreme difficulties for francophones outside Quebec because of the unavailability of French language education schools in many parts of Canada, outside Quebec. One possible option thus would be to have one test in Quebec (primary instruction received in English anywhere in Canada) and another test in other provinces (mother tongue of the parents).

Under Bill 101, a parent who has received his primary school education in English in Quebec has the right to send his children to English schools. The change would extend the right to all those parents who have received their primary school education in English anywhere in Canada. Such a change would have minimal impact on Bill 101 - the Quebec clause would become the Canada clause. Anglophone rights would be adequately protected. The mother tongue test, on the other hand, would adequately protect the right of francophones outside Quebec.

The difficulty with this approach is that there are different tests that apply depending on whether you are in or outside Quebec. On the other hand, our Constitution already recognizes, for example, differences in our basic systems of law, civil law in Quebec and common law in the other provinces.

3. Mobility Rights

This is the second most important part of the Charter. No change has been proposed by the provinces except complete abandonment. Note, however that Section 1 of the Charter permits reasonable limits to be placed on mobility rights where these limitations can be demonstrably justified. If we were to accept a proposal like that outlined to us by British Columbia officials, we would need to modify the mobility rights section to include a reasonable limitation condition.

4. Democratic Rights

This subdivision is acceptable to all eleven governments, except those who are opposed to a Charter in principle (e.g. Lyon). If a decision is made to move in the direction suggested by British Columbia officials, democratic rights should form part of the "Canadian Conventions" package rather than the Charter so that they would be applicable everywhere immediately.

5. Fundamental Freedoms

This subdivision, like the democratic rights subdivision, is acceptable to most governments, although some minor opposition to it has been expressed because of concerns about freedom of religion and freedom of association. It could be treated in the same way as

democratic rights, although it clearly does not deal with uniquely Canadian Conventions in the same way that minority language education rights, mobility rights and democratic rights do.

6. Legal Rights

Many provinces will want this subdivision dropped entirely, even if there were to be a Charter. At the very least some will want many changes in it. It will not be possible to negotiate them at the November 2nd meeting. We could agree to up to a three-year delay provision as now exists in the equality of rights section. During this delay period, we could agree to negotiate changes in wording.

7. Equality Rights

This subdivision already has a three-year delay provision in it. We should not accept any changes now, but could agree to negotiate the wording during this three-year period.

8. Enforcement and General Provisions of the Charter

Some provinces may well propose changes to these provisions, especially Section 24 which deals with illegally obtained evidence. Our response to any such suggestion should be the same as with respect to legal rights.

THE AMENDING FORMULA

1. Victoria Formula

The "Toronto consensus" formula of 1978-79 would have provided for unanimity on changes in the unanimity provisions of the formula and in provisions which affect provincial ownership of or jurisdiction over natural resources. This formula would have required the consent of at least seven provincial legislatures representing at least 85 per cent of Canada's population for all other entrenched matters. Implicitly, the "Toronto consensus" gave a veto to both Quebec and Ontario (85% of the population) and to at least one province in each of the four regions (7 provinces). It gave explicit recognition to Alberta's concern (unanimity for amendments respecting natural resources).

We know that, as a final compromise, Ontario would agree to lowering the percentage of the population requirement from 85% to 60%, thus effectively eliminating its veto (and Quebec's as well). Moreover Ontario would not oppose (but would not itself put forward) a further amendment which would require that one of the seven provinces whose support is required must be Quebec, thus giving Quebec a veto even with the lower population requirement.

Such a formula might be acceptable to a consensus of the provinces, although Hatfield would be less happy with it than the Victoria Formula because the small population base of the Atlantic provinces means that only one rather than two provinces from the region would have to agree to an amendment, and some of the Western provinces may object to an explicit veto for Quebec alone. Nevertheless, we would find this modified Toronto consensus formula acceptable if it were offered.

On another issue concerning the final amending formula, we could agree to a change which would require that the federal government stick to the Victoria Formula and not be allowed to propose changes to Victoria or to propose a different formula once the provinces have decided to put their alternative amending formula to a referendum (Section 43 (3)(a)). Such a change could be accepted if it were requested by the provinces. It would in any event bring the whole process that will lead to an acceptable amending formula more in line with what the Supreme Court had to say on conventionality because, in our view, there is not much doubt that the Victoria Formula would meet the test of what the Supreme Court said on conventionality. In contrast, it would not be possible to say whether the eventual formula proposed by Parliament just before the referendum would meet the conventionality test for the simple reason that that formula is not known.

2. Referendum Provision

As a matter of principle, we should not agree to drop this provision. Neither should we agree to giving the provinces reciprocal use of (or access to) the referendum.

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However, we could agree to the provision we offered Blakeney: a referendum could be prevented if a majority of provincial legislatures (i.e. six or more) representing a majority of Canadians (i.e. 50% or more) pass resolutions stating that they do not want the referendum held.

3. The Provincial Alternative Formula

At the present time, in order for there to be a referendum on the final amending formula, seven provinces representing 80% of the population must agree to a formula other than Victoria. This effectively precludes a referendum as long as Ontario (35% of the population) continues to support Victoria. We could agree to lower the conditions to "a formula supported by any six provinces". This would ensure that the Vancouver formula, supported by the group of eight, could get on a referendum ballot.

By agreeing to this change we would eliminate Quebec's veto on the design of an alternative amending formula and would thus open up the possibility that the provincial alternative might not give a veto to Quebec and yet would go into effect if a national majority voted for it in a referendum. We should accept a suggestion made by the provinces (but not put forward as such by ourselves) that Quebec must be one of the six provinces proposing the provincial alternative formula.

The provinces may suggest that in order to go into effect, an amending formula would have to carry regionally as well as nationally. In other words, the amending formula referendum results would themselves have to meet the same test that any future referendum would have to meet once the winning amending formula were in effect. If the referendum results did not meet this test, unanimity would continue for another two years when again a referendum would be held.

While this proposal seems reasonable on the surface, it opens up the danger of unanimity being the amending formula for a very long time to come. Hence the proposal should be strongly resisted, but perhaps not entirely rejected.

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4. Newfoundland Amendment

Premier Peckford has been basing his entire attack on the package on the fact that the Newfoundland Terms of Union could be changed without the consent of Newfoundland. While Peckford recognizes that, under Section 48, the Terms of Union could be changed only with the consent of Newfoundland, he goes on to argue that Section 48 itself could be changed (or eliminated) by a national and regional majority of Canadians voting in a referendum or by federal-provincial agreement under the Victoria amending formula. His concern could be met by a provision which states that Section 48 itself can be changed only with the unanimous agreement of the provinces. Officials would have no objection to such a change.

5. Senate Veto

As the final item required to get a consensus, you could agree to drop the Senate Veto provision and replace it by a ninety-day suspensive veto. While this would lead to a major fight in the Senate, these points are worth noting: first, there would be enormous public pressure on the Senate to agree to the change if it were made as part of a consensus package; second, Coutts always argued that, given the government majority, the Senate would not defeat the measure even with a suspensive veto; third, the opportunity for filibuster in the Senate is much less than in the House because we can keep the Senate sitting around the clock for days on end and there are a limited number of opposition Senators.

6. Unanimity - Natural Resources

We note above under the heading "1. Victoria Formula" that the "Toronto consensus" gave explicit recognition to Alberta's concern that unanimity should be the rule for amendments respecting natural resources. There are real hazzards in opening a list of items on which unanimity would be the rule - once started such a list tends to grow like topsy. But under the heading "4. Newfoundland Amendment" above, we open this Pandora's Box, though only a little since that is really a unique case. It would be feasible to accept a change that would make unanimity the rule for amendments respecting natural resources. Such a rule would be distinctly preferable to opting-out.

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OTHER PARTS OF THE RESOLUTION

1. Native Rights

We could agree to treat this subdivision, section 34, like the equality rights clause (three-year delay with negotiations in the meantime). It should be included with any portion of the package which is made subject to opting-in/out or a referendum.

2. Natural Resources

We could agree to the changes that we had offered Blakeney, although we do not recommend it. The change would explicitly confirm the right of a province to develop and control natural resources notwithstanding the fact that such resources might at some point be exported from the provinces. Any other request for change should be rejected.

This subdivision of the Resolution should be made part of any package that is put to a referendum. However, this will have to be cleared with Broadbent as failure to implement it upon proclamation could result in his claiming that we have reneged on our agreement and hence the NDP abandoning us on the final vote in the House.

With opting-in/out options, this subdivision should come into force immediately on proclamation. To drop it altogether from the measure could impact significantly on support from the NDP.

3. Equalization Clause

We should reject any change. With opting-in/out options, this subdivision should come into force immediately on proclamation. To drop it altogether from the measure would impact significantly on support from Hatfield. On the other hand, with the referendum option, it should be part of the package that would be subject to the referendum provided that this would not cost us Premier Hatfield's support.

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.

ST. ANDREWS PREMIERS' CONFERENCE (1977)

STATEMENT ON LANGUAGE

Recognizing our concern for the maintenance and, where indicated, development of minority language rights in Canada; and

Recognizing that education is the foundation on which language and culture rest:

The Premiers agree that they will make their best efforts to provide instruction in education in English and French wherever numbers warrant.

The Premiers direct the Council of Education Ministers to meet as soon as possible to review the state of minority language education in each province.

The Premiers ask further that the Council of Education Ministers report to each Premier within six months. Following this, each Province would undertake to ensure such provision of Canadian minority language education, and would then make a declaration of the policy plan and programme to be adopted by the Government of that Province, in this respect.