

SECRET
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PROPOSED RESOLUTION FOR JOINT ADDRESS TO
HER MAJESTY THE QUEEN RESPECTING THE CONSTITUTION OF
CANADA

This document has been prepared to assist in understanding the constitutional proposals now being made. It sets out the various formal measures necessary to bring about the amendment and "patriation" of the Constitution of Canada. In addition to transferring all authority to legislate for Canada from the United Kingdom to Canada and providing for future amendments to the Constitution to be made in Canada, the measures contain new constitutional provisions, such as the *Canadian Charter of Rights and Freedoms*, and provisions relating to the implementation of the constitutional changes.

At present, while some amendments to the Constitution may be made by Parliament or a provincial legislature acting alone, others require more complex action. They require the approval, by both Houses of the Parliament of Canada, of a resolution to amend the Constitution of Canada. This resolution provides for a Joint Address of the Senate and House of Commons to be presented to the Queen asking her to forward the proposals to the Parliament of the United Kingdom for enactment. Pursuant to the address, the amendments to the Canadian Constitution are enacted by the United Kingdom Parliament. In future, this procedure would not be necessary. The Constitution could be amended in Canada. The usual rule would be that an amendment would be made upon authorization by both Houses of Parliament and the legislative assemblies of all or most provinces. However, a number of special rules would cover particular circumstances. For example, amendments that apply to some but not all provinces could be approved by Parliament and those provinces. Similarly, in some circumstances, Parliament or a provincial legislature acting alone could effect a constitutional change. This document contains:

THE PROPOSED RESOLUTION OF THE SENATE AND HOUSE OF COMMONS OF
CANADA FOR A JOINT ADDRESS TO HER MAJESTY THE QUEEN

The preamble to the proposed Resolution states the

Constitution, the present status of Canada as an independent state and the desire for change that has led the Senate and House of Commons to put forward the resolution. The Address to the Queen, which is set out in the Resolution, is similar to previous addresses to the Monarch and asks the Queen to lay the *Canada Act* before the Parliament of the United Kingdom for enactment.

THE CANADA ACT

The *Canada Act* commences with the recitals of the action taken in Canada that makes it appropriate for the United Kingdom Parliament to enact the proposed statute. The Act is technical in nature. It provides for the enactment of Schedule A, which sets out the French version of the *Canada Act*, so far as it is not contained in Schedule B. The enactment of the French version in this manner is necessary because the laws of the United Kingdom are enacted only in English. As provided in the *Canada Act*, the French and English versions would have equal authority in Canada. This would be the first time that a United Kingdom Act, enacted for Canada, would have an official French version. The *Canada Act* also provides for the enactment of Schedule B, which contains the new constitutional provisions. Schedule B would apply only to Canada and hence can be enacted in both English and French. Finally the *Canada Act* provides that no future United Kingdom laws shall apply to Canada.

THE CONSTITUTION ACT, 1980

The *Constitution Act, 1980* is set out in Schedule B to the *Canada Act*. This statute contains important new provisions that, for the most part, are not closely linked to matters now provided for in the Constitution of Canada. It includes the *Canadian Charter of Rights and Freedoms* and provisions relating to equalization and regional disparities and constitutional conferences of first ministers as well as procedures whereby the Constitution could in future be amended in Canada. In addition, the Bill provides for the preparation of the first official French version of the Constitution of Canada and would change the titles of previous British

North America Acts so that they would in future be known as Constitution Acts. These name changes and other consequential amendments are set out in Schedule I to the *Constitution Act, 1980*.

Upon the adoption of the *Canada Act* by the United Kingdom Parliament, Canada would have a revised Constitution that would form part of the body of laws of Canada. It would be exclusively Canadian because, in future, it could be amended only in Canada.

ABBREVIATIONS

In the explanatory notes that follow, a number of abbreviations have been used to facilitate reading and to avoid repetition.

1. References to sections, subsections, etc., are abbreviated. For example, "sp. 41(1)(b)(i)" means subparagraph (1) of paragraph (b) of subsection (1) of section 41.
2. References in the explanatory notes to "present" provisions or to "the B.N.A. Act, 1867" are, unless otherwise indicated, references to present provisions of the *British North America Act, 1867*.
3. The *Constitution Act, 1980*, being Schedule B to the *Canada Act*, is referred to as Schedule B.
4. The *Canadian Charter of Rights and Freedoms*, which is set out as Part I of the *Constitution Act, 1980*, is referred to as the Charter.
5. Sections are indicated to be "new" if they do not now appear in the written Constitution (i.e. the B.N.A. Act, 1867, as amended, or any subsequent constitutional enactment).
 - (1) In some cases, a "new" provision is substantially already law as an unwritten constitutional or legal principle (e.g. some aspects of the rights and freedoms contained in the Charter).

- (2) In other cases, a "new" measure is derived from a non-constitutional statute, such as the *Canadian Bill of Rights*, referred to herein as the Bill of Rights.

If a "new" provision would replace another statutory provision, the explanatory note states the source from which it is derived.

8. Some sections are indicated as being present sections "modified". The term "modified" is used where a change from a present section is not so extensive as to warrant the description "new" but where a new idea is introduced into the present provision or where the modification is made for technical rather than substantive reasons.

EXPLANATORY NOTES

Resolution: The ^{proposed} Resolution states the historical position whereby it was necessary for certain amendments to the Canadian Constitution to be enacted by the United Kingdom Parliament, the present status of Canada as an independent state and the desire for change that has led the Senate and House of Commons to put forward the resolution.

The Address to the Queen: The address is similar to previous addresses to the Monarch and asks Her Majesty to lay the *Canada Act* before the Parliament of the United Kingdom for enactment.

Preamble: The preamble to the *Canada Act* recites the action taken in Canada that makes it appropriate for the United Kingdom Parliament to enact the proposed Bill.

Enacting Clause: This is the form used in enacting United Kingdom laws.

1. Section 1 would give the *Constitution Act, 1980*, set out in Schedule B, the force of law in Canada. Most of the Act would come into force on proclamation. (See ss. 57 and 58 of Schedule B.)

2. Section 2 would re-enact, in modified form, section 4 of the *Statute of Westminster, 1931*. By reason of this section and the repeal, in so far as they relate to Canada, of s. 4 and ss. 7(1) of that statute in item 16 of Schedule I to Schedule B, the United Kingdom Parliament would no longer be deemed to have authority to make laws for Canada.

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3. This section would, for the first time in respect of a United Kingdom Act applicable to Canada, give equal authority to the English and French versions of the Act. The French version of the Act, so far as it is not contained in Schedule B, is set out in Schedule A because laws of the United Kingdom are only enacted in English.

4. The short title of the Act would be the *Canada Act*.

PART I

1-30. The Charter. At present, a number of rights and freedoms are provided for by law. At the federal level, they are found in such statutes as the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, the *Official Languages Act* and the *Criminal Code*. At the provincial level, laws have been enacted relating to such matters as non-discrimination, political and legal rights and, in a few instances, language rights. However, with few and limited exceptions, the rights and freedoms are not constitutionally guaranteed. What protection has been legislated yesterday can be removed or limited by another enactment tomorrow. The entrenchment of the rights contained in this Charter would place those rights beyond the ordinary reach of Parliament or a single provincial legislature.

The Charter would assure basic protection with respect to several categories of rights and freedoms, some of which are drawn from existing federal and provincial laws and some of which

are new. The Charter provides for the following categories of rights: fundamental freedoms, democratic rights, mobility rights, legal rights, non-discrimination rights and language rights. The language rights relate to the use of English and French at the federal level in legislative proceedings, statutes, and courts and in the provision by federal institutions of services to the public. In addition, a limited right to minority language educational instruction in each province and territory would be recognized.

1. New. Section 1 expresses a constitutional guarantee of the rights and freedoms set out in the Charter while at the same time acknowledging that such rights may be subject to reasonable limits traditionally recognized by the courts in a democratic society with a parliamentary system of government.

2. Section 2 declares the fundamental freedoms of all people in Canada. They are, with some modifications, essentially the freedoms now found in s. 1 of the *Canadian Bill of Rights*. In s. 2

- Freedom of "religion" is expanded to include "conscience".
- Freedom of "thought", etc., enlarges the prior freedom of "speech" to encompass not only the right to express one's views but also the right to hold those views. It includes freedom of the press and modernizes that concept by expressly including other media of information.
- Freedom of "peaceful assembly", etc., adds the qualification "peaceful" to the previous freedom.

3-5. These sections declare certain rights that are fundamental to the continued existence of a free and democratic parliamentary system.

3. New. Section 3 states the right of citizens to vote and become members of legislative bodies.

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4. Section 4 would modify s. 50 of the B.N.A. Act, 1867 and similar provisions in provincial constitutions in respect of the duration of the House of Commons and the legislative assemblies and would combine the substance of those provisions with part of the present s. 91 class 1. It would guarantee federal and provincial elections at least once every five years (except in time of real or apprehended war, invasion or insurrection). (The present s. 91, class 1 would be repealed by s. 51 of Schedule B.)

5. Section 5 would modify s. 20 of the B.N.A. Act, 1867 and similar provisions in provincial constitutions in respect of sittings of Parliament and the legislatures. It would require at least one sitting of those bodies very twelve months. (For repeals, see items 1(2) and 2(2) in Schedule I to Schedule B.)

6. Section 6 would recognize three rights. The first right is that of a citizen to enter, remain in and leave Canada. The second two rights are those of a citizen or permanent resident, firstly, to move to and to take up residence in any province, and, secondly, to seek a livelihood in any province, without discrimination based on provincial boundaries. These last two rights would be subject to the same general laws as are applicable to residents of that province (e.g. laws respecting the payment of taxes and the terms and conditions of employment) and to laws specifying reasonable residence requirements for newcomers as a condition for receiving public social services.

7-14. These sections set out basic legal rights in Canada. Some of these rights were recognized in the Bill of Rights and other would be recognized for the first time in this Act. Of the latter, some now find expression in the *International Covenant on Civil and Political Rights* (the U.N. Covenant) to which Canada became a party in 1976. These rights would not initially be entrenched in the constitution in respect of matters within provincial jurisdiction. However, a province would be able to have them made binding on it. (See the explanatory note for s. 29.)

7. This provision derives from s. 1 of the Bill of Rights with some modification in wording.

8. New. This provision derives in part from the U.N. Covenant.

9. This provision derives from p. 2(a) of the Bill of Rights.

10. The provisions on arrest and detention are in essence the same as those set out in p. 2(c) of the Bill of Rights.

11. Paragraphs 11(c) and (d) would assure rights of an accused in criminal and penal proceeding at present found in pp. 2(e) and (f) of the Bill of Rights. Paragraphs 11(a), (b), (e), (f) and (g) would assure new rights of accused in such proceedings and are drawn from similar provisions now found in the U.N. Covenant.

12. This provision derives from p. 2(b) of the Bill of Rights.

13. The protection against self crimination is an elaboration of the right now provided in p. 2(d) of the Bill of Rights.

14. This provision derives from p. 2(g) of the Bill of Rights.

15. The guarantee of the right to equality before the law and to the equal protection of the law without discrimination based on race, national or ethnic origin, colour, religion, age or sex derives essentially from s. 1 of the Bill of Rights except for ethnic origin and age which are new. Subsection (2) would ensure that "affirmative action" programs for disadvantaged groups will not be prohibited even though such programs may discriminate among persons. Section 15 would not apply on the coming into force of this Act to matters within provincial jurisdiction but a province could choose to have it entrenched for that province. (See the explanatory note for s. 29.)

16. (1) New. Subsection 16(1) declares English and French to be the official languages of Canada and would recognize their equality of status and use in all institutions of the Parliament and government of Canada. It derives from s. 2 of the *Official Languages Act* of Canada.

(2) New. Subsection (2) anticipates legislation by Parliament and the legislatures to extend the status of English and French beyond that specified in the Charter.

17. The right to use English and French in debates of Parliament is provided for in the present s. 133. The Charter would extend the right to cover other proceedings (e.g. Parliamentary committees).

18. The requirement in s. 18 to print and publish federal statutes, etc., in English and French derives from the present s. 133. The section would also ensure that both language versions are equally authoritative.

19. This section would confirm the right to use both English and French in all courts established by Parliament. It derives from the present s. 133.

20. Section 20 would assure to members of the public the right, in specified circumstances, to use either English or French in communications with, and in receiving services from, institutions of the Parliament and government of Canada. The section derives in part from ss. 9 and 10 of the *Official Languages Act* of Canada.

21. By s. 21, existing language protection provided for by the present Constitution (e.g. those set out in the present s. 133 and s. 23 of the *Manitoba Act, 1870*) would be continued.

22. New. This section would preserve existing rights and privileges relating to languages other than English and French.

23. New. Subsection (1) would establish a right for Canadian citizens whose first language learned and still understood is English or French to have their children educated in that language.

Subsection (2) would enable citizens who move from one province to another to have their children educated in English or French if any of their children started their studies in such language. In both cases the right would be subject to there being a sufficient number of students in a given area to warrant the provision there of minority language educational facilities.

24. New. Section 24 would make it clear that the Charter is not intended to affect any rights and freedoms not specified in it, such as those of the native peoples.

25-30. These sections are all new and would provide guidance as to how the rights and freedoms declared by the Charter would apply.

25. Section 25 provides that any law that is inconsistent with the Charter is inoperative. This would establish the supremacy of the Charter over all other laws.

26. Section 26 would make it clear that no provision of the Charter other than the section respecting self-crimination (s. 13) would affect existing or future laws respecting the admissibility of evidence.

27. This section, together with ss. 29(1), makes it clear that the Charter, where relevant, would apply in its entirety to the Yukon Territory and the Northwest Territories.

28. The Charter would not extend any legislative powers.

29. Upon the coming into force of the Charter, it would be entrenched in the Constitution and would apply in its entirety at the federal level and to the Yukon Territory and Northwest Territories. It would also apply at the provincial level, with the exception of the legal and non-discrimination rights. For the most part, it could only be amended by the general amending procedure. Provinces could subsequently opt into legal or non-discrimination rights or both of these classes of rights and thus become bound by them as they would be to the other classes of rights. Once those rights become binding on a province, they could only be changed by following the appropriate procedures for amending the Charter as set out in ss. 29, 36 and 50.

30. New. This section would give the Charter the title of the *Canadian Charter of Rights and Freedoms*.

31. (1) New. Subsection (1) would affirm the commitment by Parliament and the provincial legislatures to promote equal opportunities, further economic development and provide essential public services.

(2) New. Subsection (2) would affirm the commitment of the Parliament and government of Canada to the provision of essential public services at reasonable levels of provincial taxation.

PART III

32. This section would introduce a new obligation for federal-provincial discussions on the Constitution. A constitutional conference of first ministers would be convened annually until a general procedure for amending the Constitution of Canada has come into force under Part V.

PART IV

33-40. New. This Part would provide an interim procedure for amending the Constitution that would apply until such time as the general procedure comes into force. Part IV would also provide a mechanism whereby the Senate and House of Commons and the provincial legislative assemblies could choose to adopt the general amending procedure set out in Part V or some other amending procedure prior to the day on which the procedure set out in Part V would come into force automatically (i.e. two years after the rest of the Act comes into force). Finally it would provide in effect that, in the event of a lack of agreement as to an appropriate general amending procedure, upon provincial request, the people would, by means of a referendum, choose between a procedure proposed by the government of Canada and one proposed by the provinces.

33. This section sets out the general rule that, in the interim period, constitutional amendments would require the unanimous consent of both Houses of Parliament and the legislative assemblies or governments of all provinces.

34. This section provides a special rule whereby some amendments that would not apply to all provinces, such as the Terms of Union with certain provinces, could be made upon authorization

by both Houses of Parliament and the legislative assemblies of the provinces concerned.

35. The interim amending procedure could be initiated by the Senate, the House of Commons or a provincial legislative assembly or government and the authorization of an amendment could be withdrawn before the amendment becomes law.

36. This section would provide a limitation on the use of the interim amending procedure. If there is another procedure for amending the Constitution, such as the present s. 91 class 1 or s. 92 class 1 of the B.N.A. Act, 1867, during the interim period it would, with some exceptions relating to the Charter, apply rather than the unanimity rules set out in ss. 33 and 34.

37. The interim amending procedure would be replaced by the general amending procedure, with or without amendments, two years after the rest of the Act comes into force or earlier if unanimous agreement should be reached. If agreement is not reached and the provinces propose another procedure, the interim procedure would remain in effect until after a referendum is held under s. 38.

38. Section 38 provides that if seven or more provinces having eighty per cent of the population of all provinces wish to propose an alternative general amending procedure they could do so within two years after the rest of the Act comes into force. A referendum would then be held to decide whether the procedure proposed by the provinces or the procedure set out in p. 41(1)(b) (or another procedure proposed by the government of Canada) should be adopted as the general procedure for amending the Constitution.

39. Where a referendum is held, Part V, with any amendments necessary to reflect the choice of the voters, would come into force on proclamation issued within six months after the referendum.

40. Section 40 would enable rules for the holding of a referendum to be made and would create a right of citizens to vote in a referendum.

PART V

41-51. These new sections would provide a general procedure whereby the Constitution of Canada could be amended in Canada. Under the procedure, amendments would be made by proclamation issued by the Governor General after specified prior authorization has been obtained. Except where otherwise indicated, the procedure derives from the proposed *Canadian Constitutional Charter, 1971*, known as the Victoria Charter. As set out in Part IV, the general amending procedure would come into force after most of the other provisions of the *Canada Act*. This would leave time for further discussion and for changes in the procedure to be made before it has effect. (For coming into force and repeals, see also ss. 51 and 58.)

41. The proposed general procedure for amending most constitutional provisions, other than those that relate only to Parliament or a province and those for which the Constitution provides another amendment procedure, derives from the Victoria Charter and is set out in ss. 41(1). For an amendment to be made, it would be necessary to have the approval of the Senate and House of Commons and the legislative assemblies of a majority of provinces, including majority representation from the provinces forming each region of Canada. (See ss. (2) for definitions.)

42. This provision, which is not found in earlier proposals, would permit an amendment to the Constitution to be made upon authorization by a national referendum initiated by the government of Canada. For an amendment to be authorized by a referendum, a double majority would be needed; a majority of all votes cast and a majority of the votes cast in the provinces forming each region of Canada.

43. This section provides a special rule whereby amendments that would not apply to all provinces, such as Terms of Union with certain provinces, could be made upon authorization by the Senate and House of Commons and the provinces concerned.

44. Where the Senate does not approve a constitutional amendment approved by the House of Commons, the amendment could nevertheless be made if, after a delay period, the House of Commons approves the amendment a second time.

45. The procedures for amendment set out in ss. 41 and 43 could be initiated at the national or provincial level and an authorization could be withdrawn prior to the making of the authorized amendment.

46. This section would enable rules for the holding of a referendum to be established and would create a right of citizens to vote in a referendum.

47. This section would make it clear that the general procedure for amendment does not usually apply where the Constitution contains another procedure for making an amendment such as the procedure set out in s. 48 or 49. (But see also s. 50.)

48. This section would, together with section 50, clarify and limit the existing power of Parliament pursuant to the present s. 91 class 1 to amend the Constitution and class 91.1 would be repealed when Part V comes into force. (See also s. 51.)

49. This section would, together with p. 50(a), restate the power of the provinces to amend their own constitutions. It would replace the present s. 92 class 1 which would be repealed when Part V comes into force. (See also s. 51.)

50. Section 50 would make it clear that certain provisions of particular importance in the Constitution, or that might appear to come within another amending procedure, could only be amended under the procedure set out in s. 41 or 42 which involves either both the two Houses of Parliament and the provincial legislative assemblies or a national referendum. For example, a province could not change the office of Lieutenant Governor under its power to amend the provincial constitution. Similarly Parliament could not alter the role of the Governor General under its power to amend the Constitution in relation to the executive government of Canada. These changes could only be made under the general amending procedure.

51. When Part V comes into effect, two present provisions that contain authority to amend the Constitution would be repealed together with the provisions respecting interim amendments and constitutional conferences.

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PART VI

52. (1) New. This subsection would specify for the first time that certain constitutional Acts and Orders are to be included in the expression "Constitution of Canada". These documents are listed in Schedule I to Schedule B. The subsection does not exclude other Acts and orders from also being a part of the Constitution.

(2) New. Subsection (2) expresses the general rule that amendments to the Constitution may henceforth only be made by the Canadian procedure provided in the Constitution.

53. New. This section would repeal or amend various Acts and Orders forming the Constitution of Canada consequential to the adoption of the *Canada Act*, would rename the British North America Acts to be Constitution Acts and modernize certain other titles of constitutional documents. It would also continue those Acts and Orders as law in Canada, whether or not they are repealed as law in the United Kingdom, and amend other enactments by reference to reflect the new titles.

54. New. Many of the documents comprising the Constitution of Canada were enacted by the United Kingdom Parliament, which enacted them only in English. While unofficial French versions appear in the Statutes of Canada, they do not have legal effect. This section would provide for the enactment of official French versions of these documents.

55-56. Where any part of the Constitution of Canada is enacted in English and French, both language versions would be equally authoritative as would both language versions of Schedule B.

57-58. Schedule B would come into force on proclamation except for Part V which would come into force as set out in sections 33 to 40.

59. This section would provide a short title for Schedule B.