SECRET
November 25, 1980

MEMORANDUM TO MINISTERS FROM MINISTER OF JUSTICE

RE: POSSIBLE AMENDMENTS TO PROPOSED RESOLUTION ON CONSTITUTION OF CANADA

I PURPOSE

A number of possible amendments to the Proposed Resolution on the Constitution of Canada have been suggested, some by the Government itself, some by provincial governments, some by Members of the Special Joint Committee and some by witnesses who have or will appear before the Committee or make written submissions to it.

Some of the proposed changes are substantive in nature, others are technical in nature. Those of a substantive nature are set out in part II, while those of a technical nature are found in part III. The purpose of this memorandum is to outline the possible amendments and to obtain Ministers' direction on which of the changes should be incorporated in the Resolution, whether moved by government members or other members of the Committee.

II SUBSTANTIVE AMENDMENTS

A. CHARTER OF RIGHTS AND FREEDOMS

1. Section 1 - Limits on Rights and Freedoms

The general limitation clause: "such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government" has been severely criticized as being too broad, enabling the courts to find any limit imposed on a right to be permissible if it is "generally accepted" (ie. if it is a limit enacted by several legislatures). It is also contended that limits should only be imposable in wartime (and even then not be applicable to non-discrimination and certain legal rights), that limits should be more specifically defined for each category of rights, or that there be no limitation clause included at all since the courts will themselves imply reasonable limits on the various rights recognizing that no right is absolute.

While the criticisms appear to overlook the fact that section 1 speaks of reasonable limits, there may be some merit in considering alternatives to the present provision of section 1 in order to defuse criticism of it.

Option 1: Drop the limitation provision entirely.

The U.S. Bill of Rights contains no general limitation clause and yet the courts in that country have implied reasonable limits on the various rights in many cases. On the other hand, it would seem of some importance

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that the public and the courts be aware that no right is absolute in an organized society, and the provinces feel strongly that any Charter must reflect this principle. Including a general limitative rule would give greater certainty to the law and would guide the courts as to the standard to be applied in testing the validity of limitations on rights.

In addition, since the Charter as drafted makes reference to certain limits in specific clauses (eg. the right to vote, the extension of the life of Parliament and legislatures, mobility rights, minority language education rights), the omission of any reference to limits on other rights could imply that they were to be guaranteed without any limits. Thus, it could be necessary to insert specific limits in a number of other sections to avoid this possible result.

Option 2: Modify the language of the limitation clause.

This might be done in one of several ways. (1) Specify that the rights and freedoms are subject only to such limits established by law as are reasonably justifiable in a free and democratic society with a parliamentary system of government. (2) Specify that the rights and freedoms are subject only to such reasonable limits established by law as are demonstrably justifiable in a free and democratic society with a parliamentary system of government. (3) Specify that the rights and freedoms are subject only to such reasonable limits established by law as are demonstrably justifiable in a free and democratic society.

These alternatives would overcome the ambiguities caused by the words "generally accepted" and make it clear that any limits must be founded on a law, whether legislated or judge-made. The first alternative would place some onus on the government to show that a limit was justified in a particular case. The second alternative would create a heavier onus on the government to show the need for any limit. The third alternative would eliminate the concerns that "supremacy of parliament" would still govern in interpreting the Charter and remove doubts about the courts' ability to consider human rights jurisprudence of the U.S. courts. At the same time, elimination of the phrase "parliamentary system of government" would engender further opposition from the provinces who all wanted this qualification included, and could create suspicions that the government was embarking on the road to republicanism. Government members of the Committee do not feel this latter point is one of any real concern, and witnesses before the Committee have urged its deletion.

Option 3: Provide specific limits for each category of rights.

This approach, spelling out grounds such as national security, public order, safety, health, morals, etc. for limiting the rights in each category of rights, was attempted in earlier drafts including the one published by the government during the July negotiations. This was severely criticized by the press

and the provinces as negating the rights and drawing arbitrary distinctions among limits on different rights. It also creates an unwieldly document, difficult for laymen to understand and difficult to defend publicly.

Recommendation: That the government agree to propose an amendment to section 1 that makes the rights and freedoms subject only to such reasonable limits established by law as are demonstrably justifiable in a free and democratic society. (This would meet the concerns of Gordon Fairweather and Walter Tarnopolsky who have been the most credible witnesses before the Committee on this point.)

(See Annex 1 for draft amendment.)

2. Sections 8, 9 and 11(d) - Legal Rights

As drafted, these rights (protection against search or seizure, detention or imprisonment and denial of bail) are guaranteed on the basis of lawful grounds and procedures.

This wording has been criticized, particularly by the Canadian Civil Liberties Association and the Canadian Jewish Congress, as offering no real constitutional guarantee since it could be interpreted as permitting, for example, any search or seizure, no matter how unreasonable or arbitrary, as long as it was done according to what the law provided. While it can be argued that section 7, which requires that one cannot be deprived of liberty and security except in accordance with principles of fundamental justice, injects a requirement of elemental fairness into the laws relating to the other specified legal rights, it is not beyond doubt that the courts would follow this reasoning.

In the federal drafts of Charter rights that were tabled during the CCMC meetings last summer, more stringent language was used:

- protection against unreasonable search and seizure
- protection against arbitrary detention or imprisonment
- not to be denied reasonable bail without just cause.

These provisions were opposed by most of the provinces as being too stringent, and they insisted that the lesser test of "according to lawful grounds and procedures" be used.

The present wording of these provisions will be difficult to defend before the Committee, both in light of the briefs that have been presented and in light of the language of the Canadian Bill of Rights which is the same as that contained in the earlier federal drafts. In addition, it is likely that Premier Hatfield will be arguing that the original wording of these provisions be restored when he appears before the Committee.

On the other hand, it is understood that Ontario's Deputy Attorney General will be seeking to appear before the Committee this week to argue in support of the present wording of these legal rights. In the event that he does not succeed in convincing Committee members of the validity of the present wording, strong pressure will continue to have the wording of the earlier federal drafts reinstated.

Recommendation: That the government agree to propose amendments to sections 8, 9 and 11(d) which would restore the language used in the earlier federal drafts, unless the Ontario Deputy Attorney General convinces the Committee that the present wording provides adequate protection for these legal rights.

(See Annexes 2 and 3 for draft amendments.)

3. Section 11 - Legal Rights

(1) Coverage of "War Crimes" in Sections 11(e) and (f)

The Canadian Jewish Congress, the North American Jewish Students Network and Mr. Crombie on the Committee have proposed amendments to sections 11(e) and (f) (dealing with protection against retroactive penal laws and double jeopardy for the same offence) to ensure that prosecution and punishment of Nazi war criminals in Canada is not precluded.

The concern with section 11(e) is that unless "offence" is changed to read "offence under domestic or international law", the section could be construed as excluding "crimes against humanity" committed by Nazis during the Second World War.

The concern with section 11(f) is that unless it is amended, it could be construed to preclude the re-trial and punishment in Canada of war criminals who were tried and convicted in absentia in European countries but never punished.

It is not clear that amendments to these provisions of the Charter would ensure Canada's legal ability to enact laws providing for trial and punishment of Nazi war criminals. This, because such laws could be viewed as being retroactive, dealing with actions that were not necessarily crimes under international law at the time of their commission.

On the other hand, the International Covenant on Civil and Political Rights does recognize the right of a country to try and punish a person for an offence that was, at the time of its commission, recognized as such under international law. Equally the Covenant permits the trial and punishment of a person for an offence of which he has not been tried and punished in another country.

Consequently, appropriate amendments could be made to these sections to ensure that Canada was able to enact laws covering future war crimes at least.

This would take the form of amendments along the following lines:

"11. Anyone charged with an offence has the right

(e) not to be found guilty on account of any act or omission that at the time of the act or omission did not constitute an offence under domestic or international law;

(f) not to be tried or punished more than once for an offence of which that person has, in Canada, been finally convicted or acquitted."

Recommendation: That the government agree to propose the foregoing amendments to sections 11(e) and (f).

(See Annex 4 for draft amendments.)

(2) Addition of Right to Trial by Jury

The NDP members of the Committee have proposed that the right to a trial by jury be included in the legal rights of a person charged with an offence. This proposition stems from the inclusion of such a right in the U.S. Constitution and the fact that Magna Carta provides that no man shall be imprisoned "except by lawful judgment of his equals".

The provision in the U.S. Bill of Rights granting a jury trial in "all criminal prosecutions" has caused many problems in the United States. The courts have interpreted this to mean a right to a jury trial only in "serious" cases, and this has generally meant cases where the penalty is imprisonment for six months or more. However, the courts continue to interpret what is a "serious" offence regardless of the penalty provided, thus leaving much uncertainty in particular cases as to whether a jury trial is required. This uncertainty plus the low threshold for "serious offence" have led to many delays in court proceedings in the United States.

In Canada, there is no express constitutional guarantee to trial by jury, although one might be implied by application of the Magna Carta provision. Nevertheless, trial by jury is firmly embedded in our criminal law. The Criminal Code now provides a right to a jury trial for most indictable offences where the penalty exceeds five years imprisonment (there are some exceptions) and, indeed, makes a jury trial mandatory in certain cases (such as murder and treason). At the same time, there is no requirement for a jury trial in prosecutions under the Code of Military Discipline, where serious offences are heard before a panel of military officers. This has been a long-standing practice which would be difficult to change, and is similar to a provision of the U.S. Bill of Rights which excludes jury trials in court-martial cases.

Consequently, while a provision for the right to a jury trial could be incorporated in section 11 of the Charter, it would have to be limited very clearly, eg. to offences where the penalty provided for imprisonment in excess of five years or a more severe penalty, and there would likely have to be an exemption for court-martial proceedings.

Recommendation: That the government agree to propose an amendment which would grant the right to a jury trial for offences with a penalty of five years imprisonment or a greater penalty, but exclude offences under military law.

(See Annex 5 for draft amendment.)

4. Section 15 - Non-Discrimination Rights

A number of strong representations are being made in Committee for changes to clarify and extend the provisions on non-discrimination rights. The Advisory Council on the Status of Women urges that the clauses be modified in a manner that will clearly ensure equal rights in law and equal protection and benefit of the law, and direct the courts to a "strict scrutiny" test for any distinction in law based on sex, race, colour, national or ethnic origin or religion (ie. these grounds could virtually never be a valid basis for distinction). In addition, the Council would spell out the specific grounds for affirmative action programs, and limit such programs to those authorized by a law.

The Canadian Human Rights Commission contends that there should be no specific enumeration of non-discrimination grounds, and has the support of the Canadian Civil Liberties Association and the Canadian Jewish Congress on this point. In the alternative, the Commission contends that the grounds should be expanded to include marital status, physical or mental handicap, political belief and sexual orientation. The Commission would permit distinctions to be made in laws only where "justifiably necessary for reasons of compelling state interest."

The Canadian Association for the Disabled is pressing for inclusion of "disability" (presumably broader than physical and mental handicap) as a ground of non-discrimination.

Finally, there is concern within the federal government and among the provincial governments about the financial and other implications of including "age" in the non-discrimination grounds. The Advisory Council on the Status of Women also urge deletion of "age", fearing that its inclusion might weaken the strictness of the test that the courts would apply when judging discrimination on other grounds.

It may be possible to meet some of the foregoing concerns, but responding to all of them would be very difficult.

With respect to the proposals of the Advisory Council, some of these could be accommodated in part by rewording section 15. First, section 15(1) could be modified to state clearly that everyone is equal under the law, followed by the right to the equal protection and equal benefit of the law. This would demonstrate that there is a positive principle of equality in the general sense, and in addition, a right to laws which assure equal protection and benefits without discrimination on specified grounds. Second, section 15(2) could be modified to indicate that affirmative action programs are related at least to the specified grounds of non-discrimination.

These modifications would not, however, meet the Council's argument for a specific direction to the courts that any distinction based on the specified grounds is never to be considered reasonable. This, of course, would be too rigid a test in any case, but the Council may still argue that a clause is necessary which would state that any distinction in law based on a prohibited ground of discrimination was to be presumed unjustifiable unless the contrary was demonstrated. Thus, if a law distinguished between men and women (eg. the law permitting only women to deduct child care benefits from income or the law denying Indian status to women who marry non-Indians) it would be presumed by the courts to be prohibited discrimination unless the government could demonstrate that it was a distinction drawn for justifiable state interest. If the stricter test for imposing limits on rights, proposed under section 1, is adopted, however, this should go a considerable distance to meet the Council's argument on this point. Thus it is not felt necessary to include the provision urged by the Council.

As for the Human Rights Commission's argument that there be either no specified grounds of non-discrimination or an expansion of the listed grounds, the following factors militate against these approaches. If no grounds are listed, then it is left entirely to the courts to decide what they are to be. In an area which involves a gradual evolution of social and economic values, it would not be appropriate to leave such major decisions to the courts. As for expanding the specific grounds, consideration has to be given to how best different claims to protection against discrimination can be effected. Certain grounds have long been recognized as prohibited (race, national or ethnic origin, colour, religion and sex are all found in the Canadian Bill of Rights). They are "core" grounds which are capable of ready definition, do not require many, if any, qualifications on their protection and do not entail financial burdens to ensure their effectiveness.

Other grounds do not readily meet all of these conditions. Handicap (or disability) encompasses many things and thus requires a definition of some detail. It also requires certain qualifications, such as meeting bona fide requirements for employment. Equally, guaranteeing equality for handicapped persons often entails expenditure of money to provide such persons with equal access to services and accommodation. Marital status requires definition (does it include common law relationships, homosexual relationships, etc?) and carries financial implications under tax and pension laws. Sexual orientation may be capable of ready definition but it is a controversial ground of non-discrimination which has not yet gained significant public acceptance. Political belief, is also very difficult to define. Many views can be characterized as a political belief as, for example, the "white supremacist" position of the Ku Klux Klan. Equally, it can be argued that political belief can be a legitimate basis for refusing a person employment in sensitive government jobs.

Consequently, it can be argued that all of these grounds are much better left, at the present time, to be protected by ordinary human rights legislation where they can be defined, the qualifications spelled out and the measures for protective action specified, where necessary, in a manner that does not impose undue financial burden on those providing services and accommodation.

Turning to the question of age, this grounds was included in the Charter in the belief that it was sufficiently clear that the courts would view most distinctions based on age as reasonable limits generally accepted. However, on further reflection, it would appear that this ground could cause serious problems of interpretation, particularly if the limitation clause is to be restricted as proposed and any presumption of discrimination is introduced in section 15.

Age is, of course, a common ground of distinction in much legislation, both federal and provincial. Provisions relating to age range from age of criminal responsibility to age of majority and to the age of retirement. They are found in laws relating to such diverse matters as juvenile delinquency and eligibility for social welfare, pension benefits, tax credits, etc. In many instances the courts would likely find that such distinctions are valid, but there are certain important areas where this is not so clear. Recent cases under provincial human rights laws have held a mandatory retirement age to be discriminatory. If this were to be the conclusion under the Charter (and it is not an untenable view), it could cause serious problems for employers and employees alike in relation to pension contributions and retirement benefits. If a mandatory retirement age is to be abolished, it would be much better done under a legislative scheme which provides for an orderly transition period than by an instant court-ordered fiat. Similarly, it is possible that the courts might hold that differential pension and insurance premiums based on age are discriminatory.

Premier Blakeney, through his officials, has indicated that he is very concerned about the inclusion of age in the non-discrimination rights. He feels that it could have serious negative implications for many provincial age-based laws.

Given the foregoing concerns, it would seem prudent to withdraw "age" from the grounds of non-discrimination, leaving it to be dealt with in a more predictable manner by human rights laws. Anticipating objections to withdrawal of this ground by the elderly, it could be pointed out that some of the social benefits which they enjoy by virtue of age could be brought into question by including age as a ground of non-discrimination.

Recommendation: That certain amendments be made to the non-discrimination rights to meet some of the concerns raised by the Advisory Council on the Status of Women and that "age" be withdrawn as a ground of non-discrimination.

(See Annex 6 for draft amendments.)

5. Section 20 - Language of Service to the Public

The latter part of section 20 (dealing with the right to receive services in English or French from federal offices other than head or central offices) has been criticized by the Commissioner for Official Languages on two grounds. First, as worded, the section would not require a regional office to provide services in both languages to persons living outside the area defined as "bilingual". Second, the section reintroduces the concept of "bilingual districts" which has never been implemented under the Official Languages Act.

These are legitimate concerns, and it would be desirable to amend the latter part of the section so that the right to communicate with and receive services from any other federal office in either official language would be based, not on the number of persons in an area using the languages, but on their being a significant demand for communications with and services from any office in both official languages. This would be a much more useful test than one based simply on the number of residents in an area who speak the minority language.

Recommendation: That section 20 be amended in accordance with the principle suggested above.

(See Annex 7 for draft amendment.)

6. Section 23 - Minority Language Education Rights

Several issues have arisen in relation to this section both in the Committee proceedings and in discussions within the Quebec caucus, and on some issues the positions advocated are diametrically opposite.

The principal issues relate to (1) the linguistic qualifications for entitlement to minority language education, (2) the national status of persons entitled to minority language education, (3) the continuity of education in the minority language, (4) the use of a "numbers warrant" test for minority language education and (5) the administration of minority language schools.

(1) Linguistic Qualifications for Minority Language Education

Section 23(1) now provides a single test for eligibility for minority language education: that one parent has as his "mother tongue" (first language learned and still understood) that of the English or French minority of the province where he resides.

While most witnesses before the Committee have not questioned this qualification (the Franco-manitoban Society favors a free choice for all), a number of members of the Quebec caucus strongly oppose it both because it creates a non-factually objective test and, more importantly, because it would exclude a large number of allophones in Québec (and perhaps elsewhere) who have received their education in Canada in the minority language from sending their children to school in that same language. This is an important problem in Quebec since Bill 101 permits a parent who has been educated at the primary school level in English in Quebec to have his children educated in English regardless of the parent's mother tongue.

It has thus been suggested that the "mother tongue" qualification be replaced with an objective test based upon the language in which the parent has been educated in Canada (ie. if one of the parents has received his primary education in Canada in the minority language of the province of residence, his children would be entitled to be educated in that language).

While this approach would be suitable for the English language minority in Quebec, it would not meet the needs of the francophone minorities in other provinces. In most other provinces the availability of French language education is a fairly recent development. Consequently, many parents whose mother tongue is French will (of necessity, not choice) have received their education in English, and would not have the right to send their children to French language schools.

In light of the foregoing, it is likely necessary to consider modifying section 23(1) to incorporate two alternate qualifications for the right to minority language education. The first qualification would be where a parent has received his primary education in Canada in the minority language of the province of residence. The second qualification would be where the mother tongue of the parent is that of the minority population of the province of residence.

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This approach would incorporate the test now used in Quebec (except it would apply to parents educated in Canada) while still permitting the test of mother tongue which is more appropriate in provinces other than Quebec.

(2) National Status for Minority Language Education

Section 23 now limits minority language education rights to parents who are Canadian citizens. This has been attacked as being either too restrictive or too broad.

The Commissioner for Official Languages, the Canadian Jewish Congress, the Positive Action Committee, the French Canadian Association of Ontario, the Council of Quebec Minorities and the Franco-manitoban Society have all contended that right should extend to all persons in Canada regardless of national status, pointing out that only Quebec (through its "educated in English in Quebec" clause) limits the right of minority education so as to effectively exclude not only immigrants but also citizens who do not meet that test.

On the other hand, there is considerable concern in Quebec and among members of the Quebec caucus that extension of the right to citizens will endanger the efforts to establish French as the principal language in that province by permitting English speaking immigrants, upon becoming citizens, to send their children to English schools. This, coupled with the fact that English speaking citizens moving to Quebec from other parts of Canada will be able to send their children to English schools, has generated a genuine concern about the impact of section 23 on the protection of the French language in Quebec. There is also a concern that the more section 23 deviates from the provisions of Bill 101, the more difficult it will be to gain acceptance for it in Quebec, since it will upset an educational regime now working well and generally accepted in that province.

While both arguments have some measure of validity, it is felt that on balance the best approach to this issue is to maintain the present qualification of citizenship. It provides some assurance to Quebec that immigrants and other non-citizens will have to send their children to French schools, and at the same time does not draw an invidious distinction between present and future citizens.

(3) Continuity of Minority Language Education

Under section 23(2) provision is made for children of the same family to be educated in the same language when a family moves from one province to another even though such children might not qualify for minority language education either under the "mother tongue" or "language of education" of the parents test.

While this provision has not been criticized as such, it has been noted that it is not broad enough to encompass the same situation where there is no interprovincial movement of a family. In other words, it does not provide for a case where, for example, English mother tongue parents, educated in English and resident in Ontario have one of their children enrolled in a French language school. In order to ensure that these parents would have a right to have all their children educated in French in Ontario, section 23(2) should be drawn more broadly to cover any situation involving continuity of education within a family in the same language.

(4) Minority Language Education "Where Numbers Warrant"

Section 23 now assures the right to minority language education only where the number of minority language students in any area of the province is sufficient to warrant provision of educational facilities out of public funds.

Most of the witnesses before the Committee have argued against the desirability and necessity of this qualification. It is contended that the provision imposes a limit on the minority not imposed on the majority, regardless of how few majority language students there may be in a given area. (This, of course, ignores the point that section 23 guarantees no rights for the majority.) In addition, it is argued that with the ability to bus or board children, or to provide education by correspondence or closed-circuit television, there is really no situation in which any minority language student need be denied education in the minority language. This is perhaps a better argument.

In any case the qualification of "where numbers warrant" will cause problems of interpretation and will enable provinces to continue to limit access of minority language students to educational facilities. It has been demonstrated by Quebec and New Brunswick that the necessary means can be found for providing minority language education to all who qualify for it. Thus, it would likely be desirable to consider dropping the "numbers warrant" provision, closing off a loophole which could take many years for the courts to resolve.

Militating against this modification is the fact that the government has justified including minority language education rights in the Charter on the basis of the 1978 "Premiers Agreement" that such rights should be provided "where numbers warrant". To eliminate this qualification would undermine the legitimacy of the government's position, and would likely bring criticism from those provinces that do specify minimum numbers for allowing minority language instruction. On the other hand, it can be pointed out that section 1 of the Charter as modified would still enable provinces to impose reasonable limits on the right to minority language education where it could be demonstrated that to provide the right was unjustified in particular cases.

Based on the arguments by witnesses before the Committee and on Premier Hatfield's position that this qualification should be dropped, it is felt that the government should consider dropping the qualification.

(5) Administration of Minority Language Schools

Section 23 as presently drafted does not provide for minority language schools to be administered by school boards composed of members of the minority language community.

Many witnesses before the Committee have urged that such a provision must be included if the right to minority language education is to be made effective.

While there is validity to this argument, to place such a provision in section 23 would be viewed by the provinces as a further unwarranted invasion into a field of clear provincial jurisdiction. It is thus considered unwise to contemplate a provision of this nature. What the Charter is guaranteeing is simply the right to minority language education. It cannot spell out the details of the manner in which the right is to be implemented.

Recommendation: That the government agree to propose amendments to section 23 that would

(a) provide two alternative qualifications for minority language education rights: the first qualification would be that one of the parents had received his primary education in Canada in the minority language of the province of residence, and the second qualification would be that the "mother tongue" of one of the parents was that of the minority population of the province of residence;

(b) provide for all children of any family to receive their education in the minority language in which any one of the children has commenced his education, even though the parents did not qualify under the tests set out in (a) above; and

(c) eliminate the qualification of "where numbers warrant" for minority language education.

That the government not propose any amendments enabling minority language school boards to administer minority language schools, or changing the qualification of citizenship.

(See Annex 7A for draft amendments.)

7. Section 24 - Undeclared Rights and Freedoms

The native peoples groups are pressing for expansion of section 24 so that it would become a guarantee of specific native rights such as aboriginal rights, treaty rights and control by native people over their cultural, economic and educational interests.

Such modification would convert section 24 from a "non-prejudice" clause (ie. one which simply states that the rights enumerated in the Charter are not to be interpreted as depriving the native peoples of any particular rights they have) into a constitutional confirmation of certain native rights. This, as the government has indicated to the native peoples leaders recently, would be premature since discussions are now proceeding with a view to determining what native rights should be constitutionally guaranteed. There has been no agreement on these rights yet (even among the native groups themselves), and consequently it would be inappropriate and dangerous to attempt to specify them in the constitution now.

If section 24 were to make any reference to specific native rights, such as aboriginal rights or treaty rights, this would have the effect of entrenching them without knowing the import of what was being entrenched. It would thus be left to the courts to decide what aboriginal rights means -- does it mean, as some native groups contend, a right to self-government, to separate nations, to control over education? Equally, if reference to treaty rights were included, this would make them unalterable by Parliament in the future. In addition, mention of treaty rights would meet none of the concerns of those native people not covered by treaties.

In conclusion, any attempt to be specific with respect to native rights in the Charter would seriously prejudice the future ability of the federal government to negotiate with the native peoples the rights which might legitimately be placed in the constitution.

Recommendation: That no alterations be made to section 24 of the Charter.

8. Section 25 - Primacy of Charter

(1) Relationship of Charter rights to other Provisions of Constitution

A question has been raised as to whether the wording of section 25, making any law that is inconsistent with the Charter inoperative, might be construed so as to render inoperative a provision of the Constitution itself. For example, would the provisions respecting succession to the Throne (giving precedence to males and requiring the Monarch to be of the Protestant faith) be found to be in conflict with the non-discrimination rights?

It would seem evident that the Charter, as a part of the Constitution, would not operate to invalidate other provisions of the Constitution. The intended purpose of section 25 is to invalidate laws made pursuant to the Constitution, whether by legislation or common law, and this is likely the meaning that would be given to the section.

However, to remove any doubt on this matter, it would be desirable to reword section 25 to make it clear that the Constitution of Canada is the supreme law, and that any law inconsistent with its provisions is, to the extent of the inconsistency, of no force and effect.

This section, which would become section 52, would thus give primacy to all provisions of the Constitution including those in the Charter, while at the same time removing any question as to conflict between Charter rights and other provisions of the Constitution.

Recommendation: That the government propose the amendment indicated above.

(See Annex 8 for draft amendment.)

(2) Remedies for Breach of Charter Rights

Doubts have been raised in Committee by the Canadian Jewish Congress and the Canadian Civil Liberties Association that, in the absence of an express provision, the courts would not be able to order any specific remedies for a breach of Charter rights. This is particularly relevant where the breach in question is not that occasioned by a conflicting law, but rather by the action of an official where such action is not pursuant to any law as, for example, a police officer who denies a detained suspect the right to obtain counsel.

While it is arguable that the courts would, in such instances, create the necessary remedy, this is not entirely certain. Therefore, it would be prudent to include in the Charter an express provision enabling the courts to grant an appropriate remedy in cases where no other legal recourse is available.

Such a provision was contained in the federal drafts of the Charter tabled during the course of the summer, but was deleted after arguments by the provinces that such a provision was unnecessary and might give the courts the power to invent new remedies. However, it is felt that ensuring effectiveness of the Charter rights is sufficient justification for including a "remedies" section.

Recommendation: That the government propose an amendment that would add a "remedies" section to the Charter, empowering the courts to grant certain remedies for breach of Charter rights where no other legal recourse is available. The new provision would be inserted as section 25.

(See Annex 9 for draft amendment.)

B. EQUALIZATION AND REGIONAL DISPARITIES

9. Section 31 - Equalization and Regional Disparities

A number of representations have been made respecting section 31, particularly by Saskatchewan and New Brunswick. Premier Hatfield plans to appear before the Committee to propose *inter alia* an amendment to this section.

Several alternatives for an equalization and regional disparities provision were considered at the various meetings of the continuing committee of Ministers on the Constitution (C.C.M.C.). Each alternative draft contained the provision set out in the Resolution as subsection 31(1). Subsection 31(2) differed in the various drafts as follows:

(a) February 1979 Best Efforts Draft:

> "(2) Parliament and the government of Canada are further committed to the principle of making equalization payments to provinces that are unable to provide essential public services of reasonable quality without imposing an undue burden of taxation, or to the principle of making arrangements equivalent to equalization payments to meet the commitment specified in section 96(1)(c)." (i.e. 31(1)(c))

(b) Government of Quebec Proposal:

> "(2) Parliament and the government of Canada are further committed to the principle of making equalization payments to provincial governments that are unable to provide essential public services of reasonable quality without imposing an undue burden of taxation."

(c) Governments of Manitoba and Saskatchewan Proposal (including Quebec's Proposal):

> "(2) Parliament and the government of Canada are further committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

Subsection 31(2) of the Resolution reflects the language of a proposal put forward by British Columbia. Premier Hatfield plans to put forward the Quebec proposal to the Committee when he appears before it. It has been indicated to New Brunswick that the federal government would have no difficulty with a proposal to change the formula set out in subsection 31(2) so as to adopt the Quebec proposal.

Recommendation: That an amendment to subsection 31(2) along the lines of the Quebec proposal be approved for submission to the Committee if it appears that Premier Hatfield or others wish to press for such an amendment.

(See Annex 10 for draft amendment.)

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C. INTERIM AMENDING PROCEDURE AND RULES FOR ITS REPLACEMENT

10. Section 38 - Provincial Alternative Proposal for Amending Procedure

(1) Subsection 38(1): Suggestions have been made that a provincial proposal for the amending procedure should be submitted to the people by the referendum procedure if seven provinces having eighty per cent of the population approve the procedure. The draft resolution requires approval by eight provinces having eighty per cent of the population, which would make it more difficult for the provinces to acquire the support necessary to trigger the referendum requirement.

Recommendation: That no amendment be submitted to the Committee as a change approved by the government, but that approval of an amendment be given to the effect that, if a member of the Committee moves an amendment along the lines indicated above, the government would not oppose the amendment.

(2) Subsection 38(3): Subsection 38(3) has been criticized for two reasons:

(a) It is seen as being anomalous that, after Parliament has approved one amending procedure in the Resolution, the government could put forward a different amending procedure for approval in the amending procedure referendum without reference to Parliament; and

(b) It is considered to be unfair that the government should be able to put forward changes at the last minute after the provinces have made their proposal.

These concerns appear to be legitimate ones and the provision has been under severe attack in Committee as leaving the federal government with a "blank cheque". Under paragraph 38(3)(a), the federal government could, without recourse to Parliament, put forward an unbalanced amending procedure or one that would, for example, remove the veto of Quebec. Further, the power to put forward a different amending procedure gives the appearance of an intended lack of good faith on the part of the federal government.

The options for consideration are:

(a) to leave paragraph 38(3)(a) unchanged;

(b) to amend paragraph 38(3)(a) to substitute for the words "proposed by the government of Canada by depositing a copy thereof with" the words "proposed by resolution of the Senate and House of Commons and filed with"; or

(c) to amend paragraph 38(3)(a) to delete all references to an alternative amendment to be proposed by the government or Parliament of Canada. (If this were done, however, the federal government would be precluded from putting forward the "Toronto consensus" formula as an alternative to any formula proposed by the provinces.)

Recommendation: That an amendment be put forward to the Committee to amend paragraph 38(3)(a) to delete all references to an alternative amendment to be proposed by the government or Parliament of Canada. If this recommendation is not acceptable, then it is recommended that an amendment be proposed that would require any federal alternative put forward to be first approved by resolutions of Parliament.

(See Annex 11 for draft amendment.)

11. Section 40 - Rules for Holding Referendum on Amending Procedure

There has been some criticism by Saskatchewan and members of the opposition that rules respecting a referendum are to be made by Parliament. The suggestion has been made that the rules should be approved by an independent committee with both federal and provincial representation. The suggested change relates both to the possible referendum respecting the amending procedure that may be held under section 38 and to referenda to amend the Constitution that may be held under section 42.

It is recommended that the criticisms be met by amending sections 40 and 46. The proposed amendment to section 40 would create a commission to propose rules for the referendum respecting the amending procedure. The proposed amendment to section 46 would provide for the creation of a commission that would propose rules applicable to referenda respecting amendments to the Constitution. It is recommended that the bodies be called "commissions" rather than committees because commissions are more formal bodies than committees and are usually regulatory in nature, which is the intended function of these committees. Further, the issuance of commissions establishing the bodies would provide evidence, in court proceedings to challenge the rules, that the prerequisites to the making of the rules had been met.

The amendment to section 40 would create an independent rules commission consisting of the Chief Electoral Officer of Canada as Chairman and a federal and provincial representative. If a majority of provinces do not agree on a representative, a person would be chosen by the Chief Justice of Canada from among the persons recommended by provincial governments. If no names are put forward by the provincial governments, the Chief Justice would choose a nominee from among such persons as he considers fit.

The commission would recommend rules to the Governor General and the rules would be made by proclamation issued by the Governor General. The rules would have the force of law and would have primacy over other laws of Parliament and the legislatures.

Recommendation: That an amendment to section 40 be approved along the lines outlined above.

(See Annex 12 for draft amendment.)

D. PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

12. Section 41 - Provinces Sufficient to Approve Amendments to Constitution

Subparagraph 41(1)(b)(ii) relates to the number of Atlantic provinces sufficient to approve an amendment to the Constitution. There has been very confused criticism of this subparagraph from opposition members centering around the fact that Prince Edward Island could never join with one other province to approve a constitutional amendment. This is because Prince Edward Island cannot, together with any other Atlantic province, make up the fifty per cent of the population necessary to approve an amendment. The opposition notes that the Victoria Formula did not have such a population requirement for the Atlantic provinces and requests that the population requirement be dropped from subparagraph 41(1)(b)(ii).

A similar population requirement is contained in subparagraph 41(1)(b)(iii) in respect of the Western provinces. However, this requirement was contained in the Victoria Charter and represents a British Columbia desire for a stronger influence in the western vote. To keep the population requirement gives a stronger veto power whereas to drop the population requirement makes it easier to secure amendments. The suggestion that the population requirement be dropped in respect of the Atlantic provinces has been paralleled by suggestions from Committee members (some western) that the population requirement be dropped in respect of the Western provinces because Manitoba and Saskatchewan lack the population to together approve an amendment on behalf of the Western provinces. There is no indication, at the time of the writing of this memorandum, as to the position of the Western provinces in respect of this proposal.

Recommendation: That

(a) The Victoria Charter be strictly adhered to and an amendment to subparagraph 41(1)(b)(ii) be introduced to delete the population requirement for the Atlantic provinces; and

(b) No amendment to subparagraph 41(1)(b)(iii) to delete the population requirement in respect of the Western provinces be put forward

(See Annex 13 for draft amendment to subparagraph 41(1)(b)(ii).)

Recommendation: That an amendment to section 40 be approved along the lines outlined above.

(See Annex 12 for draft amendment.)

D. PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

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A similar population requirement is contained in subparagraph 41(1)(b)(iii) in respect of the Western provinces. However, this requirement was contained in the Victoria Charter and represents a British Columbia desire for a stronger influence in the western vote. To keep the population requirement gives a stronger veto power whereas to drop the population requirement makes it easier to secure amendments. The suggestion that the population requirement be dropped in respect of the Atlantic provinces has been paralleled by suggestions from Committee members (some western) that the population requirement be dropped in respect of the Western provinces because Manitoba and Saskatchewan lack the population to together approve an amendment on behalf of the Western provinces. There is no indication, at the time of the writing of this memorandum, as to the position of the Western provinces in respect of this proposal.

Recommendation: That

(a) The Victoria Charter be strictly adhered to and an amendment to subparagraph 41(1)(b)(ii) be introduced to delete the population requirement for the Atlantic provinces; and

(b) No amendment to subparagraph 41(1)(b)(iii) to delete the population requirement in respect of the Western provinces be put forward

(See Annex 13 for draft amendment to subparagraph 41(1)(b)(ii).)

13. Section 42 - Authorization of Referendum to Amend the Constitution

There has been considerable criticism, particularly by Saskatchewan and Newfoundland, of subsection 42. Section 42 is seen as an alternative to section 41 and there is fear that a referendum to approve an amendment to the Constitution might be authorized by the Senate and House of Commons without prior recourse to seek the views of provincial legislative assemblies. The argument is that section 42 should only be used as a deadlock-breaking mechanism and should not be called into play unless the provinces have failed to approve an amendment. Ontario suggested a twelve month waiting period after the Senate and House of Commons have approved an amendment before the deadlock-breaking mechanism could be utilized. Saskatchewan supports the twelve month waiting period. That province further argues that there should be an outer time limit within which the federal government could call a referendum, and would also like it to be possible for the provinces, as well as the federal government, to be able to trigger the referendum mechanism.

This lack of reciprocity in the triggering of a referendum has been the subject of severe criticism not only by the provinces but also by opposition members in the Committee. While it is recognized that the provincial governments should not have the power to initiate a referendum on their own, it is not so evident that they should not have some ability to limit the power of Parliament to authorize a referendum on constitutional amendment.

It is suggested that consideration be given to making a further change to section 42 which would ensure that a referendum was clearly a deadlock-breaking mechanism when an amendment under section 41 had failed. Such a provision would specify that Parliament might only initiate a referendum where three provincial legislatures had passed resolutions approving an amendment proposed under section 41. This would ensure that there was some provincial government support for the amendment in issue.

Recommendation: That the government propose amendments to section 42 that would

(a) make the referendum procedure a clear deadlock-breaking mechanism where an amendment cannot be achieved under the section 41 procedure;

(b) enable the referendum procedure to be invoked only when twelve months had elapsed after Parliament had approved an amendment under section 41 and the requisite number of provinces had not approved the amendment during that period;

(c) ensure that a referendum be held within three years after the amendment had initially been approved by Parliament; and

(d) preclude Parliament initiating a referendum unless any three provincial legislatures had concurred in an amendment proposed under section 41.

(See Annex 14 for draft amendment.)

14. Section 44 - Amendments without Senate Approval

Concern has been expressed by some Senators that, under the amending procedure, the Senate could easily be abolished by the House of Commons using the amending procedure. If the House of Commons and provinces reach agreement on a new Upper House, the Senate could be abolished using the procedure now set out in sections 41 and 44. Also the Senators object to any procedure whereby they can be by-passed. It is thought that these objections might be overcome if amendments relating to the Senate (or possibly only amendments relating to the bicameral structure of Parliament) are subjected to the further test of a referendum to seek the views of the people. It would be difficult to argue that provincial interests are being by-passed if an amendment relating to the Senate must be approved not only by the House of Commons but also by the provincial legislative assemblies and by the people through a referendum.

Recommendation: That, if it is considered essential in order to meet the concerns of Senators, to amend the proposed Resolution in respect of the power to by-pass the Senate the matter be handled as follows:

(a) in the case of amendments to the Constitution, other than amendments relating to matters referred to in the paragraphs of section 50 which relate to the Senate, the Resolution continue to provide that the amendments may be made without reference to the Senate where they are approved by the provinces and approved twice by the House of Commons; and

(b) in the case of amendments relating to matters referred to in the paragraphs of section 50 relating to the Senate, the Resolution be amended to provide that the Senate can be by-passed if the Resolution is approved by the House of Commons and the provinces, the House of Commons approves the amendment a second time by directing that a referendum be held to seek approval of the amendment, and the amendment is approved at the referendum.

(See Annex 15 for draft amendment.)

15. Section 46 - Rules for Holding Referendum on Amendments to the Constitution

See the comments on section 40. The Referendum Rules Commission contemplated by the amendment to section 46 would be established whenever a referendum was to be held on an amendment, to recommend rules for that referendum. It would operate on the same basis as a commission established under section 40.

Recommendation: That an amendment to authorize the establishment of a rules commission to recommend to the Governor General rules for a referendum to amend the Constitution be approved.

(See Annex 16 for draft amendment.)

16. Section 47 - Limitation on Use of General Amending Procedure

Premier Peckford of Newfoundland has alleged that sections 41 and 42 could be used to make amendments contemplated in section 43 (i.e. amendments to provisions of the Constitution that apply to one or more, but not all, provinces) without the consent of the provinces to which the amendment applies. On this hypothesis, he argues that the Newfoundland religious school system and the boundaries between Labrador and Quebec could be changed without the consent of Newfoundland. He has made a similar criticism in respect of the interim amending procedure. So far as the interim amending procedure is concerned, his alleged eventuality is impossible as the general amending procedure requires unanimous consent. So far as the relationship between sections 41 and 43 is concerned, under the rules of statutory interpretation, it is highly unlikely that a court would find that an amendment relating to one or more but not all provinces could be made under section 41 or 42 without the consent of the provinces concerned. However, the matter can be put beyond doubt by a technical amendment to section 47 that sets out the limitations on the use of the general amending procedure.

Premier Peckford contends that there should be a provision in the Constitution making it impossible to amend, without unanimous consent, amendment procedures of the Constitution (i.e. section 43 and the B.N.A. Act, 1871 respecting provincial boundaries) that require the approval of a province to an amendment that applies particularly to that province.

While this concern would not seem justified, given the requirements for amendments under sections 41 and 42, it is nevertheless strongly felt by Newfoundland that other provinces and Parliament could "gang up" on one province to change the amending procedure under which the consent of that province is now required.

Consequently, to meet this concern, it would likely be advisable to include an amendment to section 43 that would provide that amendments to amending procedures in the Constitution relating to one or more but not all provinces can be made only with unanimous consent of all the legislatures and Parliament.

Recommendation: That approval be given to a technical amendment to section 47 to put it beyond doubt that the procedures prescribed in section 41 or 42 do not apply in respect of an amendment referred to in section 43 and that section 47 be further amended to require unanimity for amendments to amending procedures relating to one or more but not all provinces.