

S E C R E T

October 29, 1981

MEMORANDUM TO THE MINISTER

Charter of Rights

Further to our meeting yesterday, you wanted a list of options on dealing with the Charter. There are four major options of which some can be subdivided.

I. No basic change - binding on both levels of government

The advantage of this approach is clear in terms of having a Charter applying in the same manner across the country. The major disadvantage is that it is the approach which is least likely to achieve agreement or consensus next week.

II. Opting-in on the Charter

The advantage of this approach is that it would produce full agreement next week. The disadvantages are obvious. However, this option can be refined in different ways.

First, it could apply only if a majority of the provinces with a majority of the population opt-in immediately. The advantage would be that the Charter would actually apply at the Federal level and in most provinces. The disadvantage is that the checkerboard would remain.

Another variant would be for parts of the Charter i.e., democratic rights and fundamental freedoms,

language and mobility to apply across the board with general opting-in for legal rights and equality rights or opting-in only if a majority of provinces agree to opt-in immediately. The advantage of this option is that political pressures would in a short period of time force all provinces to opt-in. The disadvantages of this approach are, first, that some parts of the Charter will still be imposed on those who refuse to agree; second, that there will be opposition from the federal N.D.P. and special interest groups who will not want a checkerboard with respect to equality rights; and, third, that it is very difficult to choose rationally which parts of the Charter should be applicable everywhere and which should be subject to opting-in.

### III. Opting-out on the Charter

This approach can be used in exactly the same way as opting-in. The only real difference is that it would create greater political difficulties for those provincial governments which do not want to be bound by the Charter. The opting-out option could have the same variants as the opting-in option. An additional variant would be to require a two-thirds majority of a legislature for opting-out.

The advantages and disadvantages of opting-out are basically similar to those of opting-in apart from the added pressure on recalcitrant provinces.

### IV. A Non Obstante Clause

A final option is to provide a means whereby Parliament or a legislature could enact a law contrary to the Charter by specifically declaring the intention to override. The mechanism could be restricted by requiring adoption by a two-thirds majority in a legislature and further providing that the law would automatically expire after five years.

The advantage of this approach (which is found in the Diefenbaker Bill of Rights and many provincial human rights statutes) is that it removes the element of compulsion from the imposition of the Charter; it would be supported by Saskatchewan; and it would provide flexibility for governments in the case of obviously bad court decisions.

The disadvantage of this approach is that it potentially removes the protection a Charter provides for unpopular minorities. For those who argue that the override clause will rarely be used, there is the counter-argument that the real need for a Charter may be exactly in those circumstances.

A variant of a general non-obstante clause would be to limit it to Section 15 which guarantees rights some of which remain subject to considerable evolution. This approach would probably satisfy Premier Blakeney and would be more acceptable than opting-out of Section 15. At the same time, the question should be asked whether an override clause should apply to discrimination based on race, religion, national or ethnic origin. The real worry which Premier Blakeney has, and which many others share, is how courts will interpret discrimination based on sex, age, or disability.

Amending Formula

Another issue which we discussed yesterday dealt with the deadlock-breaking mechanism with respect to the choice of an amending formula. You should be aware that the present provision does not allow the entire provincial option to be put forward nor does it permit a different deadlock-breaking mechanism from being proposed.

Consensus

Another issue on which you will have to focus is what constitutes a consensus. If agreement is reached with all provinces except Quebec, Alberta and Manitoba, will you be able to argue in Quebec that there is a true consensus?

Opening Statement

Finally, you will want to discuss with the Prime Minister the nature of his opening statement. He really has two options. The first is to make a short statement explaining the nature of the conference and stating that he will be flexible in private meetings. In this way, he would encourage negotiations in private and could reserve for his closing statement a public explanation of his offers.

The second option would be to put some of his offers on the table immediately and to challenge the Premiers to demonstrate their flexibility. The advantage of this approach is that the Prime Minister would immediately take the initiative; the disadvantage is that he would begin negotiating in public and would make it more difficult to turn to private sessions.

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