SECRET

October 10, 1980

MEMORANDUM FOR THE PRIME MINISTER

Referendum Provision

The attached was prepared at the request of Mr. Pitfield and is based on the points he set out. He has not seen the paper, however, and, at his request, I have not circulated it. The basic points are covered, I believe, except for one -- the point that the principle in Section 42 was advanced in 1975 and set out in the 1979 election campaign.

David

David Ablett

Attachment
/ld

SECRET

October 10, 1980

# REFERENDUM PROVISION

## Purpose

This paper sets out a rationale for a referendum mechanism as an essential tie-breaker on constitutional matters.

## Background

Section 42 of the joint resolution, as drafted, has opened up two fundamental debates.

One is on the nature of the country, the two views problem revisited.

The second is on the nature of people and their appropriate relationship to the state in a democratic society, Hamilton versus Jefferson revisited.

The first is the eternal debate of Canadian federalism, the second is one that has not really been joined in terms of the fundamentals of the country.

To illustrate this last point, in the year of Confederation, the great English constitutional debate revolved around the Reform Act of the Disraeli government. In greatly expanding the franchise, the question was whether the people could be trusted with the people's business. Bagehot concluded that, by and large, they could not.

Disraeli, a Conservative disagreed. He argued in Vivian Grey "that all power is a trust; that we are accountable for its exercise; that from the people, all springs and all must exist."

Our great debate of that year was, of course, the relations among governments in the Canada being brought into being during the prime ministry of another Conservative, John A. Macdonald.

Sir John A. was sharply criticized by the Dorion Brothers in the Confederation Debates. It was not on the basis that he trusted people too little or too much. Rather,

.../2

he was criticized by Eric Dorion, because "all is strength and power in the federal government, all is weakness, insignificance and annihilation in the local government." And Antoine-Aimé Dorion declared it evident "that it is intended eventually to form a legislative union of all the provinces."

If one changes the words legislative union to unitary state, one has brought the Dorion Brothers fully in line with the position of Premier Lyon at the last First Ministers' Conference and since.

The argument over the federal/provincial relationship has returned to its origins.

The other argument, the one the English were having at Confederation, is one we have never really had as a central issue of political life, that is the argument over the place of the people. Can they be trusted?

Canadians have some sensitivity to the issues involved -- because of the literature of English politics that forms a critical aspect of our culture but also because of the huge effects of American debates around the same issues. The Americans, however, evolved from the idea of popular sovereignty, not toward it as the English have done and as we are trying to do.

As well, the strong and clear lines of the federal strategy through the summer, with its insistence on dividing people issues from power issues, has served to separate out the two arguments and place the people issues in greater prominence.

At the same time, this has not been in past a central Canadian argument, when compared to the federal/provincial relationship. And because most of our previous efforts to cement the place of the people into the constitution have been intertwined with power questions, the blurring of the two is likely to continue.

There are some Canadians who are genuinely fearful of changing what we have. That is, they have grown accustomed to protecting themselves, when they have felt the need of protection, through the device of balance. As a general thing, although it is more evident in some provinces than others, they do not want either level of government to be too strong because that destroys protective balance.

.../3

They have not been accustomed to turn to the courts, despite the American example, because without a charter establishing the paramountcy of rights the essential court defence rests in the division of powers, in the concept of ultra vires. Ultra vires is not a concept that inspires. It basically says that this level of government cannot do this to you because the other one can but probably will not because of this ruling.

So the government's position is one Canadians have some sensitivity to but not a great deal of experience with. The lack of experience with the concepts and the instruments of popular sovereignty may compound to a degree the government's task. If people come to believe that they have to give up one protection they know -- federal/provincial balance -- to get one they do not, the ultimate power of decision, they may choose the bird in the hand.

In fact, the joint resolution would add, not subtract, from the position and the protections of the people. Whether people continue to believe that is the operative concern.

Parliamentary arguments

Against this background, the parliamentary struggle around Section 42 has involved the effort of each side to gain control over the argument.

The government's preferred position is that the issue be argued on the ground that it seeks in the constitution the capacity for a future government to go to the people because the people are sovereign.

Opponents would prefer the argument to be cast in the terms that this government wants to go around the provinces and thus to destroy them (the Dorion Brothers argument).

On the outcome of this struggle for control of the argument a great deal may turn.

If the government can establish with the public that the essential question is whether the public should decide when governments cannot, the ground is likely to be solid. The government can argue the people can be trusted while opponents must either argue the people cannot be trusted because of the danger of "fever" or evade.

If, on the other hand, the question established as the critical one in the public's mind is whether the government should have the power to ignore the provinces and/or destroy the provinces, the argument may well be lost.

In brief, it is preferable for the government to argue for the people than to argue against the provinces.

It is better still, however, to be arguing for both the people and the provinces.

There is some problem with the drafting of Section 42 in this regard. While it suggests a preference for consulting the provinces prior to a referendum, it does not establish a requirement. Herein lies the opening that opponents are exploiting in the Opposition, the press and the provinces.

This particular drafting has had some effect, as well, on the legitimacy of Section 42 -- particularly when it is compared to Section 41 where little fire has been concentrated.

The reason perhaps is that Section 41 seems to impose nothing except the opportunity for the provinces to agree on their own amending formula and put it to the people, too. Section 42 holds out the possibility (if one assumes people blindly vote as told) of the government imposing something on the provinces without even asking them and this is not nearly so legitimate in a society accustomed to seeking security in balance.

The question at this point would not seem to be whether to introduce amendments. Rather it would seem to be how to concentrate the government's effort to argue for the people rather than against the provinces, without locking the government too closely to precise words. The principle -- the one set out by Disraeli that "from the people all springs and all must exist" -- is the all.

Getting to the principle in the context of Section 42 requires first that the government establish that a deadlock mechanism is necessary. If this can be established then the argument can turn on the nature of the tie-breaker and how sovereignty, like the word democracy itself, rests in the people.

.../5

SECRET

The need for a deadlock mechanism

The rationale for a future national government being able, should governments fail to agree on essential constitutional change, to break the deadlock rests primarily in past performance.

That is, future governments can fail because past governments have failed.

This was set out in the Prime Minister's television address, in his opening remarks to the First Ministers' Conference and on numerous occasions before that.

In brief, the evident paralysis which justifies and legitimizes the present initiative justifies future governments being provided with a similar device to be used when all else fails.

But there is a closer linkage. The government, by turning to Parliament, is in fact using the tie-breaker that has always been built into the constitution, the final appeal to Westminster.

The government's hope is that this will break the paralysis and produce a workable means of amending the constitution through agreement in future between the national and the provincial governments.

But doing so is destroying the last resort that now exists. Once Canadians can amend their own constitution, Westminster can no longer do so. Something must replace it. To use a sports metaphor, if the final game of the World Series is tied in the ninth, we need an umpire to decide if the last pitch is a ball or strike. Neither batter, nor pitcher, will take the other's word.

Apart from that, to leave future prime ministers and premiers without a final way of breaking a deadlock is to trust totally to the perfection of the present resolution and to the perfectability of future political leaders.

Constitutions are seldom perfectly suited, however, even to the time in which they are put together. They are the best that can be done and, if they are well done, they place in the hands of other leaders in other times a reasonable degree of flexibility, and a reasonable capacity to adapt what is set out to the needs of their time.

And future leaders, to paraphrase Laurier, may have immortal souls but their means are likely to be as limited by human nature as the means of a half century of Prime Ministers and Premiers.

.../6

But even assuming constitutional and human perfection, the interests that different premiers represent and must reconcile inevitably differ and may, in the end, not be reconcilable by negotiation.

To deny future leaders what now exists, a way to lift themselves from paralyzing disagreement by appeal to a higher authority, may be only to condemn them to repeat more than half a century of frustrating history and to leave them even fewer means than now exist to accommodate the country and its constitution to their times.

Finally, in a parliamentary system irreconcilable differences can usually be dealt with by a general election and a great deal of English constitutional evolution has taken place through this means. But Great Britain is a unitary state and Canada is a parliamentary federation.

In a federation a national party can receive a mandate for a particular kind of change and the same voters can give a provincial party a mandate for another. This, of course, is what has happened in the province of Quebec and it happens in other provinces. On most issues this simply means that each government can act to the limit of its powers as set out in the constitution, the basic rules of the game.

But when the issue is the rules themselves, the constitution, one government cannot impose rules and expect the others to accept them. It can only appeal to an authority accepted by all, as the government is doing in this case by seeking to go to Westminster. When Westminster is gone, where will this authority rest?

The nature of the deadlock mechanism

Here is where the two views of Canada problem is revisited.

The view of some of the provinces, as set out at the First Ministers' Conference, is that, in the case of federal provincial deadlock, the tie-breaker is the provincial governments. If they agree, the federal government must.

.../7

The logic of this is not one-country logic, but 10-country logic. That is, the provincial governments represent the people of the provinces. Period. When the nation and the province are in conflict, the province must prevail because the people of the province have expressed their will that it prevail.

The logic, too, is that when provinces cannot agree there can be no agreement. But agreement is not necessary when each province is sovereign.

The only problem with the logic is that it does not involve a country, only provinces.

The place of the people in such logic flows from the unitary, parliamentary concept that underpins it. The complete sovereignty of the people is manifest at a provincial election. When people vote, they automatically choose province over nation.

The most extreme expression of this reasoning has come from the premiers at the country's extremities -- Mr. Peckford with his "agent of the provinces" theory and Mr. Bennett, with his argument, vis-à-vis the joint resolution, that "I guess we would mount a line of defence the same any country would if forced by an intruder who did not have the same philosophy as the country."

The opposite of this argument would be that the sovereignty of the people could only be expressed in a federal election. If the federal government were taking this position -- that is, the position that Canada is a unitary parliamentary state like Britain -- it would not be necessary to have a deadlock mechanism, only a federal election.

It is the fact that we have a federal system, in which the sovereignty of the people can be expressed at both federal and provincial elections, that forces the government inevitably back to the people in seeking some way to leave future governments a last resort.

If the mechanism to break deadlock is no longer at Westminster, if it cannot be with one level of government or another in a federal state, if it cannot be the courts because that cannot make but only interpret the constitution, there is no other place.

.../8

In Canada, the people express their sovereignty in two ways. A national government is accountable to the people for their national concerns. A provincial government is accountable to the people for their provincial concerns.

When the two expressions conflict on the basic rules affecting each, neither has been given the authority to resolve the conflict. Only the people can, once Westminster is out of the picture.

This is where the two views of people come in. Can they be trusted? Or are they, as Bagehot argued after Disraeli expanded the franchise to working people, capable only of judging between men of ideas, not between the ideas themselves.

Are they, in the current language, too susceptible to political fever, to manipulation? Where one stands on this often turns on where one sits. Our most recent experience with a referendum was in Quebec. From the federal perspective, it seems eminently clear that the judgment of Quebecers was sound. Mr. Lévesque took the view, initially at least, that federal propaganda had manipulated the result.

It is very difficult to attack the manipulator without demeaning the manipulatee and he has not been on this tack recently. Rather he is claiming the people of Quebec have been betrayed by the Joint Resolution.

In the end, however, it comes down to a matter of philosophy and belief. The joint resolution implicitly places its faith in the people to do the sensible thing, whatever a government of the future might wish to do.

If one does not believe the people can be trusted then one is left only with a belief in government, that those who are elected are somehow more capable of knowing the people's interests than the people.

That is an ancient line of political thought. It was Bagehot's line. But Bagehot did not live in a federal state.

.../9

Nor did he live in a state approaching the 21st century in which education and experience and the constant pummeling of unexpected change have produced a people of high sophistication but also considerable skepticism to all authority.

Bagehot could afford the luxury of his argument. It was not necessary to place any trust in the people because people were prepared to place their trust in government. In this time, it seems clear that people put much greater faith in themselves and are unprepared to put their faith in governments unless governments put faith in them.

In its essence, this is what Section 42 does and, as such, its principle is the cornerstone of the joint resolution. It is in Section 41, in which the people would decide the process by which the constitution would be amended in future. It is in the charter, which arms people to protect themselves. It is in the act of bringing the constitution to Canada.

If one says that the people should not decide where all else has failed then one must deny that the people are in fact sovereign, deny Disraeli's words, that "all power is a trust" and accept that, in Canada, constitutions are only for governments. One must accept, finally, the proposition that the people, incapable of knowing their own interest, are nonetheless capable of electing perfect politicians.

The section 42 mechanism

There are a number of protections inherent in Section 42 as it is drafted.

One is that a government that wished to conduct a referendum would have to pass both the Commons and the Senate. The Senate, in this regard, would have its primary role as representing the regional/provincial interest.

(For the same reason, Section 44 allows the Senate to be bypassed if it does not act within 90 days of a House resolution in recognition of the fact that the provinces are fully recognized as representing provincial interests and so as to prevent inaction by the Senate thwarting an agreement made by the Victoria (or other) amending formula.

.../10

(If, as a result of future negotiation made possible as a result of the amending formula, the Senate should be strengthened in terms of its capacity to represent regional/ provincial interests, then its role would be augmented in the case of a Section 42 referendum.)

The second level of protection lies in the fact that two kinds of majority would be required to pass a constitutional amendment according to Section 42.

One is a national majority. The second is a majority in each of the regions according to the amendment formula. Under the Victoria formula, for example, two provinces of the West containing at least 50 per cent of the West's population would have to vote in favor of any change in the status of the West's resources before there could be any change -- even if the rest of the country was unanimous.

By the 1976 census, the Victoria formula would require the agreement of B.C. plus either Alberta, Saskatchewan or Manitoba. If B.C. did not agree, it would take a majority in the three other provinces to win a referendum under Section 42.

The final level of protection to the provinces lies in their claim to speak for provincial populations.

If that is truly the case, provincial governments need not be concerned that the views of the people of their provinces differ from what they have said. If they are concerned that the views of the people differ from the view they have set out, perhaps it is their claim that bears questioning.

In any case, the degree of protection the premiers perceive at this level turns on how they view the people, as Disraeli did, on as Bagehot did. Do they trust the people to decide what is ultimately the interest of the people as both provincial residents and Canadians? Or do they not?

ablett