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MEMORANDUM/NOTE DE SERVICE

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TO/A: Mr. M. Kirby
Secretary to the Cabinet
for Federal-Provincial Relations

FROM/DE: Deputy Minister of Justice

SUBJECT/OBJET: Permissible Provincial Alternatives for Amending Formula

Comments/Remarques

While the federal government has frequently argued that the provinces are free to put forward an alternative to the amending formula for choice by the people in a referendum, this argument is vulnerable. In fact, the provisions in the resolution, in particular s. 43(1), only allow the provinces (i.e. seven provinces with at least 80% of the population) to put forward an alternative to s. 46(1)(b). That is, the provinces would only have the right to propose an alternative number, or combination, of provinces, or possibly of provincial populations, required for the expression of provincial consent to amendments coming within the general amending formula of section 46. The remainder of Part VI (ss. 46-56) could not be altered on provincial initiative in such a referendum. This means that the provinces could not, in putting forward an alternative for consideration in a referendum, propose amendments in respect of:

(a) the various categories of amendments assigned to each of the amending procedures (by ss. 48, 49, 52, 53, 54 and 55);

(b) the use of a "deadlock-breaking" referendum as prescribed by s. 47 or the rules therefor as provided for in s. 51;

(c) opting out, financial compensation where a province opts out, etc.

The provincial Accord does not provide for a deadlock-breaking mechanism but does provide for provincial opting-out and financial compensation.

The provincial alternative could not either provide for a system of delegation of legislative authority as provided for in the provincial Accord.

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To meet some of the criticism that has been made and will probably continue to be made of this limited choice of alternatives left open to the provinces, it would be possible to make changes along one of the following lines:

(1) Broaden the scope of what the provinces may propose by way of change to the amending provisions.

This would require an amendment to the measure to allow provinces to propose all or some of the elements in the April Accord such as opting-out and financial compensation.

It would not allow for amendments in respect of:

(a) the requirement that both Houses of Parliament approve any amendment other than an amendment to a provincial constitution;

(b) the possibility of a deadlock-breaking referendum;

(c) the delegation of legislative authority.

This would have the advantage of more freedom of choice for the provinces. The preservation of the deadlock-breaking referendum would continue to attract the criticism that it is inequitable because it can only be initiated by federal authorities.

(2) Substitute the April 1981 Premiers' Accord for Part VI.

Under this option, the Accord would be placed in the measure, perhaps in an Annex, as the authorized provincial alternative, should there not be, after two years of negotiations, an agreement and should the requisite number of provinces request a referendum to be held.

This would preserve the veto of the two Houses of Parliament but eliminate the deadlock-breaking referendum as it is not part of the provincial Accord. This alternative would at least be predictable and known at the time the Joint Address is adopted.

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Option #2 is more clear-cut and would be perceived as the fairest and most straightforward of the two. If a referendum were to be held on the amending formula, an amending formula containing a procedure for breaking a deadlock by a call to the people would have more appeal to the people than one that would not provide such a procedure. In other words, the inclusion of such a procedure would give the edge to the federal alternative. In the result, my own preference would be for option #2.

I would appreciate it if you could discuss this matter.

R.T.

Roger Tassé