CONFIDENTIAL

September 5, 1980

FIRST MINISTERS CONFERENCE
September 8-12, 1980

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ORGANIZATION OF THIS BRIEFING BOOK

Briefing materials are arranged in the same order as the agenda proposed in the Prime Minister's August 25 letter to the Premiers.

The reports of the Continuing Committee of Ministers on the Constitution to First Ministers are found under TAB E of each of the twelve items.

The Status Reports and Negotiating Positions (TAB D under each item) are taken from the August 30 report to Cabinet.

The C.I.C.S. has circulated the report of the CCMC to First Ministers which reflects the discussions that took place over the summer months. A copy of the Preface, Colour-code scheme and Table of Contents is attached for reference purposes. The report is available in the Federal Delegation Office.

Colour Scheme for this book

Buff - Talking Points

Blue - Status Reports and Negotiating Positions

Pink - Reports of the CCMC

Green - Background

White - All other items

P R E F A C E

At the First Ministers' Meeting on June 9, 1980, federal and provincial ministers on the Continuing Committee of Ministers on the Constitution were instructed to attempt to reach consensus on twelve subject areas relative to a revised Constitution.

The Continuing Committee of Ministers on the Constitution (CCMC) respectfully submits the following report to First Ministers, which reflects discussions that took place at meetings held at Montreal, July 8-11, 1980, Toronto, July 15-18, 1980, Vancouver, July 22-24, 1980 and Ottawa, August 26-29, 1980.

The Honourable Jean Chrétien
Minister of Justice and
Attorney General of Canada

(Federal Co-chairman)

The Honourable Roy Romanow
Deputy Premier, Attorney General
and Minister of Intergovernmental
Affairs of Saskatchewan

(Provincial Co-chairman)

NOTICE

Documents are colour-coded to reflect their status as follows:

WHITE	-	Report
PINK	-	"Best Effort" Draft Proposals with joint government input
GREEN	-	Provincial Draft Proposals
YELLOW	-	Federal Draft Proposals

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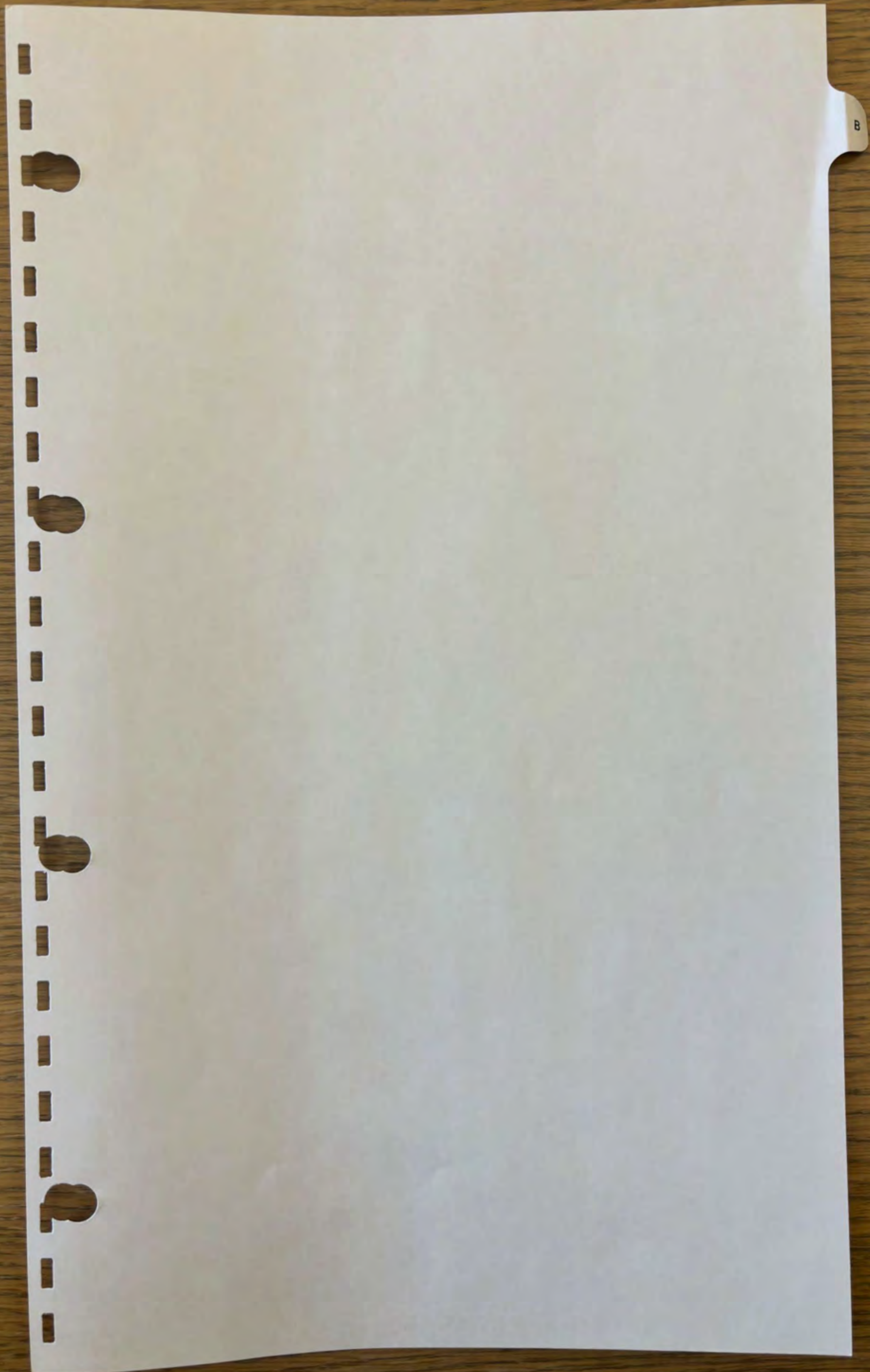
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BRIEFING

FOR

THE DELEGATION OF THE GOVERNMENT OF CANADA

NOTES

À L'USAGE DE

LA DÉLÉGATION DU GOUVERNEMENT DU CANADA

FEDERAL-PROVINCIAL CONFERENCE OF
FIRST MINISTERS ON THE CONSTITUTION

CONFÉRENCE FÉDÉRALE-PROVINCIALE DES
PREMIERS MINISTRES SUR LA CONSTITUTION

SEPTEMBER 8 - 12, 1980

DU 8 AU 12 SEPTEMBRE 1980

SECRET

NOTES TO ASSIST IN HANDLING THE FMC MEETING

Strategic Considerations at the Meeting

1. Introduction

While you have the legal right to act unilaterally to patriate the Constitution and to entrench a charter of rights, the passage of the Resolution through Parliament will take less time and be less contentious if you can proceed by agreement.

No agreement reached can be total since there are deep-seated differences in interests that will remain. It is not so much agreement as consent that you should be seeking. Consent may be taken to imply a measure of support by some of the provinces, and acquiescence by most of the rest.

Consent must include acquiescence on the people's items.

The kind of consent that is being sought is a very delicate thing indeed. If it is to be found, it will be found when you declare publicly that it exists and define it in careful terms, sufficiently precisely to be credible, but without nailing anybody to the cross.

Sensing the precise moment to declare consensus is a matter of your personal perception, and probably the trickiest task facing you.

3. The Conduct of the Meeting

The Agenda

Presumably the agenda will be hammered out at the dinner on Sunday evening. A separate memo on this subject has been prepared and will be sent to you with these notes.

Opening Statements

There isn't much to be done with the opening statements since no doubt they have all been written by now and will be delivered regardless. You do, however, have an opportunity to set the tone and at least the first few Premiers' statements will be measured against yours. This is not unimportant since you are followed by Ontario and Quebec. It is perhaps well to remember that whoever is speaking you remain at centre stage and the cameras will be alert to your reactions.

The Twelve Items

Putting opening positions on all 12 items on the table will take 2 days. There are two dangers here.

- public interest is likely to sag,
- the mood and tone of the meeting could deteriorate if the players become increasingly fractious.

Three possibilities suggest themselves:

(i) Your first statement on each item will include a clear statement of the extent to which you have moved toward the provincial position, and, where possible, indicate that you may be able to move a little further.

(ii) You could help maintain public interest by putting a number of sharp, but not hostile, questions to the Premiers, directed to clarification of their respective positions.

(iii) At the end of the statements on each item you should give a pithy, even-handed summing up.

The third of these could be particularly useful. It gives you a measure of control of the unfolding of events. The public will appreciate it, they will have a better sense of what is happening. It is also likely to be appreciated by the Premiers, even if they are unlikely to admit it. It may serve to sketch in the first broad outlines of a consensus. Above all, it will give you a first-class opportunity to influence the press, who always like to have their work done for them.

The next step

The 12-item exercise will be followed by first, a break in the proceedings Wednesday afternoon to allow delegations to caucus and second, your working dinner with the Premiers.

Depending upon circumstances, you may wish to float the idea of an emerging consensus at the dinner or you may decide it would better be in public.

4. What if there is no possible consensus?

The trick then is to get out of the meeting with the public on your side, expecting and requiring you to move ahead with patriation and entrenchment of the Charter of Rights.

To avoid challenges in the Courts, obstruction in Parliament and possible embarrassment in London, it would be of first importance to have at least the grudging acquiescence of most of the Premiers.

Two considerations could help to achieve acquiescence:

- the Premiers will be very conscious of the public mood and expectation;
- a firm commitment on your part to an immediate second round, with a starting date, process and schedule would make denial of acquiescence appear less than justified.

5. Public Acceptance of Unilateral Action

While the conditions are ripe for the emergence of public understanding of and support for unilateral federal action, should that be necessary, they are not yet established. Whether Canadians will believe that the federal government is entitled to act unilaterally on the Constitution will depend on the way in which the federal government handles itself during the First Ministers Conference.

If Canadians receive the impression that the federal government is spoiling for a fight, or that it is unwilling to negotiate seriously with their provincial government representatives, then they will be less likely to concede to the federal government the right of unilateral action at the end of the Conference, should it fail to produce a usable consensus.

If on the other hand, they observe their Prime Minister bending every effort to the goal of reaching agreement and being thwarted in the attempt, it is more likely that support for unilateral measures will follow, since citizens by and large do not object to tough action, but to unfair action.

Willingness on the part of citizens to accept firm leadership is the more likely when their material interests are not directly assualted, which is the case with the issue of constitutional reform.

6. Strategic Considerations at the mid-week point

In the first part of the week, you should be there to negotiate, clearly seeking a consensus on constitutional reform on terms acceptable to you. You should be tough-minded, but operating in a clear negotiating style, and should neither provoke the Premiers nor permit yourself to be provoked by them.

About the middle of the week you will have a critical judgment to make. At that point it will be necessary to decide whether the makings of a consensus are there, or whether, realistically, it is inconceivable that an intergovernmental accord on constitutional reform on terms acceptable to the federal government can be worked out during the Conference. If you judge that consent is possible, then presumably your efforts to achieve it should be redoubled. If, on the other hand, you do not think a consensus can be reached, then your actions in the closing days of the FMC may lead you in a different direction. For example,

- you may want to get as many provinces as possible individually on record supporting various elements of the People's Package, and to force those provinces in opposition to state their case in a debating context on national television;

- you may want to expose to public view the dissension in provincial ranks on certain other items, such as fisheries

- you will have to assess the danger which broad provincial consensus on positions opposed by Ottawa poses for the Government of Canada, and consider how that can best be countered.

The general point here is that this judgment and the consequent tactical choices ought not to be made prior to the commencement of the conference, but only after it has got underway and one has had an opportunity to assess the way it has gone and the way it has been publicly perceived to have gone.

Further notes will be provided for you at this point in the proceedings.

7. The Communiqué

Rather than a release that papers over the cracks and gives an unjustified impression of accord and progress, there should be a clear and unequivocal report card, showing where the provinces and the Government of Canada stand on each of the 12 items. The following formulation is an example of one way the items might be dealt with in the communiqué:

> "Six provinces and the federal government reached agreement, Alberta, British Columbia, New Brunswick and Quebec dissented on the grounds that ..."

11. THE CONDUCT OF THE MEETING

September 8

Opening Session - Open - Main Conference Room Conference Centre

At a suitable opportunity (perhaps during your welcoming remarks, or before the detailed discussion of the twelve items begins), you might wish to acknowledge the presence of the observers, beginning with the Leader of the Opposition, Mr. Clarke, the Leader of the other main opposition party, Mr. Broadbent, and the other parliamentarians in attendance.

In view of the significant occasion, this is for the governments of the two territories, to have their elected leaders represent them as observers, for the first time (instead of being represented through the federally-appointed commissioners who acted as advisors to the federal delegation), it would seem appropriate to acknowledge their presence next. This might be followed by words of acknowledgement for the representatives of the native organizations. Your remarks for the territorial and native representatives could be along the lines of the following:

> "It is a pleasure to welcome as official observers the members of the territorial delegations led by the Honourable George Braden, leader of the executive committee of the government of the Northwest Territories, and by the Honourable Chris Pearson, leader of the government of the Yukon Territory.

"This is the first time that the elected leaders of the territorial governments have been invited to attend a First Ministers Conference as independent observers. Formerly, the people of the north were represented by the territorial commissioners, who served as advisors to the federal delegation.

"The presence of elected territorial government representatives at this conference is not only a recognition of the political evolution of the territories, but also an indication of our great desire to have northern Canadians [~~fully and democratically~~] involved in the process of constitutional renewal.

"I would also like to welcome representatives of the three national associations of native peoples, whom I have invited to be here as observers. I would like to mention in particular Mr. Del Riley of the National Indian Brotherhood, Mr. Charlie Watt and Mr. John Amagoalik, co-chairpersons of the Inuit Committee on National Issues, and Mr. Harry Daniels, president of the Native Council of Canada.

"I am happy that the native leaders were able to present their views on the twelve agenda items to the Continuing Committee of Ministers on the Constitution, whose report suggests they had a productive meeting with the native leaders.

" [~~I am well aware that the Indian, Inuit and Metis leaders would prefer to be at this table with us.~~] I can assure them that we will have their concerns in mind as we proceed through the agenda, and I expect that later in the week we will have an opportunity to consider the recommendations of the CCMC on the subject of Canada's Native Peoples and the Constitution."

Following this, you might acknowledge the observers from <u>the Federation of Canadian Municipalities, Mayor Dennis Flynn, President, and Mayor Jean Pelletier, First Vice-President of the Federation, and the other observers which have been invited by the provincial governments</u>.

ADDENDUM

From discussions with the Minister of Justice of the Government of the Yukon, it appears that the Yukon representatives at the FMC (Mr. Pearson, Government Leader and Mr. Graham, Minister of Justice) will be lobbying to have provincial Premiers propose:

(1) that the Government of Yukon be permitted to table its position on the constitutional agenda and to make a brief summary statement to the FMC; and

(2) that they be permitted to participate in subsequent federal-provincial constitutional discussions at the officials and ministerial levels.

They will therefore be informally seeking from you during the FMC, your assurance that you would not object, if this proposal is initiated by the provincial Premiers and agreeable to them.

- You might say that this is almost certainly the most important constitutional Conference held in Canada since the Quebec Conference of 1864. This is the one that must succeed and you could express the hope that the renewal of the Constitution will take a major step forward over the next few days.

- You might then ask Ed Watson,acting secretary of the Canadian Intergovernmental Conference Secretariat if he has any announcements to make.

- Given the warning in Mr. Lévesque's telegram to you this week (all the Premiers' messages in reply to yours of August 25 are at Tab D) it is not out of the question that he will raise your Lake Louise statement at the beginning of the FMC and seek "clarification". If he does this after the agenda is settled, he would be out of order, and could then be encouraged to deal with his concern under "other business". If he raises it before the agenda is agreed to -- which would be his best time -- you could say that you intend to cover the point in a general way in your opening statement and suggest that perhaps Mr. Lévesque would like to do the same. Other Premiers could join that debate, if they wished, in that way.

The Agenda

- The object is to obtain formal approval of the agenda and the order of discussion. This will have been discussed the previous evening, and you might wish to announce any agreement you have reached in regard to these matters, and request that the detailed agenda be released to the press.

- Once this is done, this might be the point at which the Report of the CCMC could be formally tabled, so that it could be referred to subsequently in the Conference.

- You could then start in on the first item of the agenda.

- The following Ministers will be in attendance for certain items, in addition to the "core Ministers" (Messrs. Chrétien and Roberts) who will be present or available for every item.

FMC - PARTICIPATION OF MINISTERS

Item	At the table	Supporting Ministers
Monday A.M.		
- Opening Statements	Chrétien MacEachen	Roberts, Fleming, MacGuigan
Monday P.M.		
- Charter of Rights	Chrétien Roberts	Fleming, MacGuigan, Bégin, Kaplan
- Equalization	Chrétien MacEachen	Roberts, Debané, MacDonald
- Powers over the Economy	Chrétien MacEachen	Roberts, Gray, Olson, Lumley
Tuesday A.M.		
- Resources	Chrétien Lalonde	Olson, Axworthy, Gray, Rompkey, Erola, Roberts
- The Senate	Perrault Roberts	Chrétien, Argue, Olson
- Fisheries	Leblanc Rompkey	Chrétien, Roberts, Perrault, Regan, MacDonald
Tuesday P.M.		
- Offshore Resources	Chrétien Lalonde	Roberts, Regan, Rompkey
- Communications	Roberts Fox	Fleming, Pinard, Chrétien
- Family Law	Chrétien Bégin	Axworthy, Munro, Roberts
Wednesday A.M.		
- Supreme Court	Chrétien MacGuigan	Roberts, Blais, Pinard
- Patriation and Amending Formula	Chrétien Axworthy	Fox, Pinard, MacGuigan, Ouellet
- Preamble/ Principles	Roberts MacGuigan	Chrétien, Fox, Fleming, Munro

Agenda Item 1. - Opening Statements

- You might announce that the first agenda item is Opening Statements and the order of speaking, following your statement, would be the traditional one, namely the order of entry of each Province into Confederation. You might then give your statement (Tab H).
- Following that you would call on Mr. Davis to give his opening statement.
- This process should last until some time between 12 and 12:30 p.m. at which time you could break for lunch, rather than start immediately into a discussion of the Charter of Rights.

Agenda Item 2. - The Twelve Items

- At this point the meeting will turn to government statements on the twelve items.
- Specific notes for handling each item now follow, starting with notes on the first item, the Charter of Rights.

1. CHARTER OF RIGHTS

After your introduction of the issue as Chairman (see Tab 1B), you might want to turn to Premier Lyon and ask him for his comments. Following Premier Lyon, you might ask Premier Buchanan to speak. After Premier Buckanan, you might enter the debate yourself. Notes for your speech are found at Tab 1B.

The issues for resolution identified in the CCMC report are:

1. Should there be an entrenched Charter of Rights?
2. If there is to be an entrenched Charter, which of the following categories of rights should be included?
   - (a) fundamental freedoms
   - (b) democratic rights
   - (c) legal rights
   - (d) non-discrimination rights
   - (e) mobility rights
   - (f) language rights at the federal level
   - (g) language rights at the provincial level
   - (h) minority language education rights.
3. If there is to be an entrenched Charter, should an override clause be included to enable enactment of laws expressly overriding entrenched rights, and if so, to what categories of rights might an override apply?

The federal objectives should be:

(a) to firm up the "consent" (or agreement) which the Canadian people seem to have given to the entrenchment of basic rights and freedoms, and to avoid putting this support in jeopardy. (No item is more clearly a "Peoples" item.)

(b) to the extent possible, to gain provincial support for entrenchment of a comprehensive Charter.

In 1979, the objective was to "establish a consensus" with the provinces and progress was made at that time. Provincial attitudes have hardened even while public support for entrenchment has grown. This is no doubt due in part to the comprehensive scope of the Charter, and the federal government's inclusion of mobility rights and mobility language education rights.

There is little prospect that the ratio of 7-against: 3-for entrenchment will be changed much until the provinces see that the federal government is bargaining on the "powers" items. However, Premiers are not likely to admit publicly to any such link.

Suggested federal tactics:

Since the issue of entrenchment itself seems to have become the major stumbling block to progress on a Charter, it is suggested that you respond to some of the key points that may be raised against it, noting, en passant, the fact that over 90% of the people want basic rights entrenched. Equally worth mentioning is that the people do not want a half-way house (e.g. entrenched rights only at the federal level), but rights entrenched at both levels of government.

You will undoubtedly meet resistance from such Premiers as Lyon, Lougheed, Bennett and perhaps Buchanan who remain attached to the view that entrenching rights is inimical to the parliamentary system and will introduce the practice of "tyranny of judiciary" which they believe (erroneously) epitomizes the American system. (Responses to these concerns are suggested in your Opening Remarks under Tab 1.B and in the Talking Points Tab 1.C.

After discussion on the issue of entrenchment you will likely want to avoid a vote on it at the early stage, since if it is largely negative, it will be difficult to go on to a discussion of the rights themselves.

The next step would be to turn to the Specific categories of rights which it is proposed to entrench. It should not be necessary to spend much time on fundamental freedoms and democratic rights though it is probably worth reading them aloud so that the public will know what they are (and what provinces are opposing when objecting to entrenchment!)

Some progress has been made in narrowing the differences between federal and provincial officials on legal rights. You could note that the federal government has already agreed to some important technical modifications in this category to meet provincial concerns in clarifying the

text and the nature of the rights. However, you may want to stress that these rights are vital to the people in their relations with the legal system and it is clearly essential that they be enunciated for all to know, and that they not be unduly limited, protecting as they do the individuals from arbitrary actions by the State.

With respect to non-discrimination rights, you could indicate that the federal government has already modified its proposals since July to specify the grounds on which discrimination would be prohibited. (You are aware that grounds proposed are considerably narrower than those found in the UN Covenant on Civil and Political Rights to which Canada is a party.)

In response to arguments that this is a developing area of human rights better left to federal and provincial human rights legislation, you might note that this legislation is generally narrowly based, dealing mainly with non-discrimination in employment, public accommodation and services. The time has come to eliminate unreasonable discrimination more broadly than this. These rights are particularly important and require positive constitutional support, given the pluralism of our society, which is likely to be reinforced in the years to come. Different origins, different languages and different customs and traditions need the protection and assurance of a comprehensive Charter. The requirement was much less obvious when Canada was more homogenous.

On mobility rights, it should be emphasized that these go hand-in-hand with the principles for the economic union set out in the proposed amendments to section 121 of the BNA Act. (See Tab 3) At the same time it should be made plain that the rights to take up residence, to acquire and hold property and to seek employment, without discrimination based on province of residence, are independent rights that must pertain to all Canadians in a united country. (In other words, regardless of what happens to section 121, mobility rights would be provided for in the Charter.) In response to criticism that these rights will strike down certain provincial land ownership laws and employment regulations, you might ask if such discriminatory practices are compatible with their concept of a united Canada.

Language rights are difficult to handle. The important point to stress is that what is being proposed at the provincial level are some minimal guarantees for the English and French-speaking minorities in each of the provinces, to ensure that these people may enjoy some basic public services in their own language.

With respect to languages of the laws and in the courts it is important to stress that it is only in the four provinces with the largest minority populations (Quebec, Ontario, New Brunswick and Manitoba) that specific rights are being guaranteed. (And in two of these - Quebec and Manitoba - they are already constitutionally - guaranteed. New Brunswick has already assured the rights by statute and wants them entrenched.) New Brunswick will be the staunchest supporter on this matter. Ontario might be willing to go some of the way. As a minimum, it will require delays to

give effect to the rights. Quebec, of course, maintains that language rights are matters for provincial determination and Manitoba argues the francophones of that province would rather have money spent on highways than on translation of statutes! The response to these points is that simple justice dictates that the minority populations in these provinces have their basic language rights recognized.

On the question of minority language education rights, the best strategy here would seem to be to refer to the unanimous agreement reached by the Premiers in Montreal in February 1978 to ensure educational facilities for minority language students. The Premiers did qualify this assurance by asserting that each province would determine how best to implement the undertaking, and they now rely on the Pepin-Robarts report to support their position. However, this overlooks a passage in the report (at page 109) which suggests that in light of the Montreal Agreement the principle accepted there should be entrenched. Considerable stress could be laid on this point. The indications are that Ontario will accept entrenchment of this right, along with Newfoundland and New Brunswick.

Quebec is vehemently opposed to entrenchment of this right, viewing it as an effort to "rebilingualize" the province. In light of this opposition you may wish to consider a position along the lines suggested in the "Negotiating Position" under Tab 1 which proposes a modified section based on mother tongue with some qualifications to protect children in school who move from one province to another. It comes closer to the Bill 101 concept without adapting its discriminatory features. This will be the time for you to sum up and suggest the best way to proceed on this issue.

2. EQUALIZATION

After your introduction of the issue as Chairman, (See Tab 2B), you might want to call on Premier Buchanan to lead off. He may be followed by Premiers Bennett. You might then enter the discussion with your speech. Notes for your speech are found at Tab 2B.

The remarks suggested for your use (Tab 2B) are brief and positive in tone. Their purpose is to express satisfaction with the unanimous support for collective commitment to broad principles of sharing, and confidence that agreement can be reached on the remaining issues. These issues are:

- i) how to express the further commitment of the federal government to assist needy provinces in the provision of basic public services; and possibly,
- ii) whether the text should include a requirement for First Ministers to meet every five years.

The federal objectives should be:

- i) to nail down a consensus on one draft as expeditiously as possible, while

ii) providing a reasonable hearing for B.C.'s recent proposal, with an indication of federal acceptance if it can draw broad support.

Tactics

As the B.C. proposal appears to be a sincere attempt to reconcile that province's long-standing opposition to the entrenchment of equalization payments per se with the general support for the provisions of previous drafts, you might want to speak immediately after Premier Bennett. You could then ask for comments, which would allow you to gauge the extent of the support attracted by it. If this support is broad, hesitant provinces could perhaps be coaxed along in the interests of finally resolving this issue. If it is not (i.e., if a number of provinces remain insistent on specific reference to equalization payments), you could turn promptly to seek a clear choice between the other two versions, both of which include this specific reference.

The federal position on each of the three proposals is summarized in the equalization negotiating position (Tab 2B) and they are described in more detail under background (2F)

It is not clear whether there will be any interest in pursuing the other possible issue (the need for a periodic review), which was raised almost casually on the last day of the CCMC. Again, the federal aim is to obtain quick resolution.

Finally, because of the large measure of agreement, there is a risk that Premiers will attempt to eliminate remaining issues by redrafting at the table. If this occurs it may be necessary to direct an officials' committee to prepare a consolidated draft, but this would be useful only if a substantive basis for consensus becomes apparent.

3. POWERS OVER THE ECONOMY

After your introduction of the issue as Chairman (see Tab 3B), you might ask Premier Blakeney to speak. He might be followed by Premier Buchanan. At this stage you might want to speak. Your speech is at Tab 3B.

Given the prominent role played by Saskatchewan in CCMC discussions on Section 121, we expect Premier Blakeney to make an important intervention. An indication that Saskatchewan would accept not only the constitutional entrenchment of the principle of economic union, but also a political mechanism to enforce it, would likely influence the positions of several other Premiers. Mr. Buchanan is likely to support explicitly the federal position and any reasonable compromise on enforcement. The notes prepared for you are structured as follows:

- why the economic union should be better safeguarded in the Constitution;
- what the federal government has proposed to that end;
- the areas of agreement emerging from CCMC meetings;
- issues to be resolved;

- on Section 121, an indication that the federal government is willing to consider a political mechanism to govern in part implementation of the new provisions.

You might then seek a first round of general comments, after which the conference would consider in greater detail the two elements under discussion:

- revision of Section 121, and,
- revision of Section 91 regarding trade and commerce, competition and product standards.

You will find talking points on Section 121 under Tab 3C. At this stage in the discussion, we expect Premiers to question mostly the need for an anti-discrimination provision in the light of prevailing circumstances ("things are not so bad"), the role of the courts in enforcing it, the restrictions it would place upon provincial ability to implement differentiated economic and social policies, and the allegedly greater burden which federal proposals would place upon provincial governments. You will find talking points on these issues under Tab 3C , as well as more detailed notes on the potential effects of a revised Section 121 on various types of provincial initiatives.

Regarding proposed revisions to Section 91, we expect several Premiers to admit that "something should be done" about product standards and competition, but to question the need for constitutional change, as well as the necessity of proceeding immediately and without "adequate consideration" of the long-term implications of federal proposals. They are most likely to express their concern about the possible erosion of provincial jurisdiction over matters such as the regulation of professions and local industry, and the establishment of standards applicable to goods circulating only within a province, or going beyond federal requirements.

Premiers may be expected to take a much more negative position on the extension of the federal trade and commerce power to services and capital. Some may be expected to question the need for it, while others might take the position that the proposed change could lead to "massive federal intrusion" in areas under provincial jurisdiction such as labour relations, the regulation of credit unions, financial transaction of provincial governments and their agencies, etc.

Talking points on these various issues are available under Tab 3C . Also available are excerpts from Mr. Parizeau's comments at Quebec's mid-August parliamentary commission supporting the federal position on trade and commerce with respect to services and competition (only). Should you decide to use this material, you should bear in mind that Mr. Parizeau has also vehemently opposed federal proposals on Section 121.

You may consider it appropriate at some point in the discussion to table a new legislative draft of Section 121. You will find the suggested draft under Tab 3F . It reflects a number of suggestions made by provincial representatives (mainly Ontario, Saskatchewan and Nova Scotia) during CCMC meetings. The statement of principle (subsection 1) in particular borrows heavily from an Ontario draft, while subsection 2 is lifted from the draft submitted by Saskatchewan. We draw your attention to the following features of the draft:

- The interpretative clause ("... unduly impedes the operation of the economic union") which was included in the first text tabled by Mr. Chrétien has been deleted from the text we suggest you table. Provinces objected to such a clause on the grounds that it gave too much discretion to the courts; but while many of them upon reflection have come to recognize the merit of such a formulation, we now believe that it would create too much uncertainty. Should some Premiers raise this question, you could point out that the new political mechanism (subsection 6) makes such a clause unnecessary.

- The political mechanism proposed in subsection 6 is quite rigorous, since, for a discriminatory law to be valid, it would have to be approved by six provinces other than the one legislating <u>and</u> by the federal government which, in effect, would have a veto. Premiers will almost certainly protest that this is too stringent, but with such a strong starting position you would have some room for manoeuvre. Alternative decision rules which you might consider are:

  a) approval by six of the provinces, or by 3(4? 5?) provinces <u>and</u> the Government of Canada;

  b) approval by six or more of the provinces, the federal government being completely excluded. We remind you that in the minds of Premiers, this "political mechanism" is linked to the new intergovernmental council envisaged in the item on Senate reform.

- Premiers may also object to the five-year sunset clause provided for in subsection 6, which has not been discussed before with the provinces.

Also, the provinces may have interpreted some of Mr. Chrétien's comments at the August CCMC meeting as an indication that the federal government would not insist on being a voting member in the new political mechanism envisaged to allow provincial derogations beyond what would be explicitly provided for by the new Section 121. Some Premiers may therefore protest when they see the new legislative draft, which provides in the version to be tabled for mandatory federal approval of such provincial derogations, and may even accuse Mr. Chrétien and you of negotiating in "bad faith".

It is also possible that Premier Lévesque will oppose an enforceable Section 121 even with a political mechanism on the ground that Quebec's linguistic and cultural needs are different from those of other provinces and that it is unacceptable that any Quebec legislation be subject to approval by the federal and other provincial governments. This, he could claim, would constitutionally "entrench" the minority status of Quebec francophones within Canada. Should the need arise, you will find brief notes on the issue among the talking points included under Tab 3C.

At the August CCMC meeting, provincial officials have suggested that additional specific grounds for derogations be added to Section 121: residency requirements for receipt of publicly provided goods and services, the establishment of provincial monopolies. The disposition

of provincially-owned assets, etc. We are strongly of the view that such specific derogations could create loop-holes which would easily make the new Section 121 meaningless, and that to accept one specific ground for derogation would lead to demands for more. Should Premiers make this request, we therefore recommend that you resist it and argue that the addition of a political mechanism for the control of derogations makes it unnecessary, since any reasonable proposal by a province could be approved by the required number of governments.

At some stage, you may wish to suggest more detailed discussion of federal proposals regarding Section 91. We remind you that, in the provincial perspective, the federal positions which are easiest to accept are those regarding product standards and competition. By contrast the provinces come close to considering our position on the regulation of trade and commerce in services and capital as a "power grab". The latter position is also the most difficult to defend on practical grounds, since to do so effectively one would almost have to declare a federal intention to legislate on matters such as security trading, computer services and extra -- provincial investment by provincial agencies -- thus further raising provincial hackles.

Accordingly, you might agree, at the appropriate time, to postpone consideration of the services and capital item until the second round of constitutional renewal, provided Premiers agree to an enforceable Section 121.

Once the issues have been discussed, you might wish to use your prerogative as Chairman to sum up and if possible to determine areas of agreement. You might also identify those issues which remain to be resolved during the week.

This will be an appropriate time for adjourn for the day and to remind delegates that they are invited to a Chairman's Reception in the Delegates Lounge immediately after the reunion is over. You might also remind the delegates that the session resumes at 9h30 on Tuesday morning.

4) RESOURCE OWNERSHIP AND INTERPROVINCIAL TRADE

The session resumes at 9:30 on Tuesday morning with the first item being Resource Ownership and Interprovincial Trade.

In order to set the tone for the discussion of this issue, you should lead off yourself rather than ask one of the Premiers to speak first. Your speech (see Tab 4B) sets out very clearly that the federal government recognizes the legitimate needs of the producing provinces and is prepared to go to considerable lengths in giving new jurisdiction to the provinces in order to meet these needs. (These "lengths" are nevertheless considerably short of what was offered in February 1979.)

The report of the CCMC has very much narrowed the issues in dispute. These issues as set out in the report are:

(1) Should the proposed concurrent power with respect to the export of resources (non-renewable natural resources, forestry and electricity) from the province extend to interprovincial trade only or should it extend to international trade as well?

(2) Are the provisions on federal paramountcy found in subsection (4) of the attached draft appropriate or should federal jurisdiction be more limited in the area of interprovincial trade and commerce?

(3) Are the non-discrimination provisions necessary if section 121 (the economic union) is revised?

(4) Should the non-discrimination provisions in subsection (3.1) of the attached draft extend to discrimination between the province of production and other provinces?

(5) Should uranium and thorium be specifically identified in the schedule?

(6) Should the underlined portion in subsection (2) be retained?

The federal objectives should be:

(1) To reach an agreement with all producing provinces but if it is not possible to reach an agreement with Alberta, to split Saskatchewan from Alberta.

(2) To meet Saskatchewan's perceived needs as a result of the CIGOL and Central Canada Potash cases.

(3) To keep jurisdiction over all essential aspects of international trade but to be flexible in those areas which touch only incidentally international trade and which may prove to need adjustment if objective (2) above is to be attained.

Tactics

The only way to ensure that the producing provinces will have an incentive to agree to proposals acceptable to the federal government is to maintain the negotiating link between resources and powers over the economy. It is essential to ensure that Alberta and Saskatchewan understand beyond any doubt that they have the choice between acceptance of a constitutionally entrenched and enforceable economic union plus the federal offers on resources or the status quo on resources. The choice is not between the present federal offer and last year's Best Efforts Draft.

As a general point, it is useful to bear in mind that Alberta will have the most extreme view, and will be supported all the way by Quebec. Newfoundland may well join the "extremists" if it is completely frustrated on the offshore and fisheries.

After your opening statement, you might want to ask for general comments around the table. You should call first on Premier Lougheed and then on Premier Blakeney. There is no question but that Premier Lougheed will be tough and will make two important points. First, he will come back to last year's Best Efforts Draft (which he did not accept) and will take you to task because you have taken parts of it off the table. In doing so, he will stress the need to give producing provinces better protection against the arbitrary use of the federal trade and commerce power to set prices, and the arbitrary use of the

federal declaratory power to take over resource jurisdiction. Second, he will probably refer to the issue of energy pricing and revenue sharing, and use the occasion to restate the merits of his case.

Premier Blakeney will not be quite as tough as Premier Lougheed but will come close. He may state, as he has in the past, that "resources are as important to Western Canada as language and culture are to French Canada". He will likely decry the federal "retreat" from last year's aspects of exports to other countries. Premier Bennett will take a similar stand probably stressing his interest in water as a resource and in avoiding federal export taxes.

You might call on Ontario after Alberta and Saskatchewan have had their say. Only Ontario is likely to defend the federal view with any vigour, though the Maritime provinces are not unsympathetic.

At this point, you may want to answer briefly some of the points which have been made before proceeding to a discussion of each of the specific issues for consideration. The contents of your own statement and Talking Points at Tab 4C may be useful in that connection.

You may want to assure Premier Blakeney that it is precisely because the federal government recognizes the importance of resources to Western Canada that it is making precise offers which meet the needs and aspirations of Saskatchewan in particular because the problems raised by CIGOL will be resolved. You will already have indicated in your statement an interest in finding an answer to the problem posed for Saskatchewan by the Central Canada Potash case. Here you may want to indicate that you have a draft legal text ready for tabling. (See Tab 4D). This text resolves the problem posed by Central Canada Potash by giving provinces a very limited concurrency in some matters which touch only incidentally on international trade. It does not open up all of international trade to the provincial jurisdiction.

As for Premier Lougheed, you may want to tell him clearly that the question of pricing and of revenue sharing is not part of the constitutional negotiations. He may not be easy to shake off, however, as the federal capacity to set prices and to use its declaratory power give it considerable leverage on revenue sharing and the Premier knows this only too well. Several of the Talking Points at Tab 4C are pertinent.

With respect to last year's Best Efforts Draft, you may want to remind Premier Lougheed that at the time it was not acceptable to his government. Since then, we have studied it very carefully and have come to the conclusion that certain aspects of it would not be in the best interests of the people of Canada.

Restrictions on federal paramountcy would create uncertainty and would place critical decisions of immense potential importance to the whole country in the hands of the courts. You could note, however, that the federal government remains committed to large parts of the principle of the old Best Efforts Draft, i.e., indirect taxation, some concurrency in interprovincial trade, some way of meeting Saskatchewan's problem with the Potash case. If Premier Lougheed wants to solve practical problems, then he should not have serious difficulties with the current federal proposals.

At this time, you can turn to the six issues in the report of the CCMC. You might want to state that, while there are six questions, in fact there seem to be two major items to discuss:

(1) Restrictions on federal paramountcy in interprovincial trade.

(2) The question of international trade.

Alberta or some other province may at this point call attention to the footnote on page 1 of the CCMC report concerning the declaratory power and ask that it be treated as an issue. You should respond by stating that you are not prepared to limit the declaratory power as it applies to resources, but that, as in the CCMC, you are prepared to talk about declaratory power in the context of Upper Chamber reform.

At this point, you may want to ask for comments from around the table. You can listen and then give the federal position (see notes at Tab 4B).

With respect to the four other issues for consideration, none need take up much time. You might want to state that if the major items can be resolved, the other items will fall into place easily and that we can come back to them later in the Conference. (Notes on each of these and on the declaratory power are at Tab 4B).

Once the issues have been discussed, you might wish to use your prerogative as chairman to sum up, and if possible to try to determine areas of consensus. If there are issues remaining which will require the further attention of First Ministers, you could explore at this stage what arrangements should be made in that regard.

Note - a handy comparison of the federal position of February 1979 and the current position is set out under Tab section D, page 7.

5) UPPER CHAMBER

We recommend that you make the first opening statement. A speaking note for your use appears under Tab 5B.

After your own comments, we would suggest you call on Premier Bennett, who has been the strongest advocate of upper-chamber reform, followed by Premier Lougheed, whose government has been non-committal on this subject.

The CCMC report on upper-chamber reform identified two sets of functions.

(1) The function of ratifying federal action on a limited list of specified matters of joint federal-provincial concern.

(2) A general parliamentary review function.

The report sets forth a detailed draft proposal for an interim institutional framework for dealing with the first of these functions, and identifies several specific issues that remain to be resolved. It does so on the explicit understanding that the next stage of constitutional discussion would examine the institutional framework for the second of these functions, as well the interrelationship between the two.

The federal objective should be:

(1) To seek provincial agreement to the federal proposal as outlined in your opening statement.

(2) To ensure that B.C. is not so alienated in the process that it is unwilling to lend its support to other items of interest to the federal government.

(3) If necessary, to hold the issue of the precise nature of the proposed Council in reserve, as a factor which might be of some importance in putting together a package of reforms later in the week.

Tactics

Unless the dynamics of the FMC produce an unsual change of mood, it is likely that the federal statement will attract sharp negative reactions from many of the Premiers. (The reasons for this and the likely effect are discussed in Status Report and Negotiating Position, Tab 5D. Anticipated questions and possible answers are provided in Talking Points, Tab 5C.) We have suggested the federal governement go first on this item, because on balance it seems preferable to state publicly at the outset what will seem to be a reasonable position, and force the provinces to react to that rather than put the federal government on the defensive, having to respond to provincial statements.

Perhaps the greatest challenge for the federal government will be to try to keep B.C. on side. Not only has it been the most steadfast advocate of Senate reform, but it has made major concessions at the CCMC in an effort to work towards a collectively satisfactory outcome. You might consider finding an opportunity to acknowledge these facts in the course of the discussion, perhaps in your remarks inviting Premier Bennett to speak.

Premier Bennett will follow you, if the order is adhered to, and he can be expected to voice his disquiet at the fact that the federal government has backed away from the CCMC consensus, modest though that already is in his view.

This may be counterbalanced to some extent by what Premier Lougheed has to say next, since Alberta has never been keen on upper-chamber reform. However, it should be noted that the interim CCMC proposal is not incompatible with Premier Lougheed's commitment to executive federalism and to the First Ministers Conference as an institution.

In view of the opening which this item provides for the provinces to criticize the federal government position and negotiating style, it may be as well to terminate general discussion of upper-chamber reform at the first opportunity.

6) FISHERIES

Your speech (see Tab 6B) should be given first. It says clearly that the government sees only disadvantages for the industry and the fishermen if jurisdiction were to be divided between the federal government and the provinces on seacoast and marine, and on salmon. It offers, on the other hand, the transfer to provincial jurisdiction of the inland fisheries (except salmon), aquaculture, and certain immobile coastline species such as oysters, subject to native rights and to a continuing federal control of salmon habitat in interprovincial and international waters.

The issues identified in the CCMC report are:

Inland Fisheries, Marine Plants, Aquaculture and Sedentary Species

1. Should the federal government continue to exercise exclusive jurisdiction over all aspects of inland fisheries for an anadromous species (e.g., salmon)?
2. Is it necessary for conservation purposes for the federal government to continue to exercise exclusive jurisdiction over marine plants?
3. To what extent is it necessary for the federal government to exercise jurisdiction for the protection of fish habitat?
4. What is the appropriate way for provision to be made for native peoples' fisheries?

Sea Coast Fisheries

1. Should there be concurrent jurisdiction over sea coast fisheries or should exclusive federal jurisdiction continue?

General

1. Regardless of possible changes in jurisdiction, is it appropriate to make constitutional provision for mandatory consultation in fisheries matters?

The federal objectives should be:

(1) to seek maximum recognition for federal flexibility as demonstrated by the offers it is making on inland fisheries etc.;

(2) to get across to Canadians that the government's refusal to give concurrent jurisdiction to the provinces is founded upon genuine concern for the fishermen and the industry.

(3) to seek recognition that the government's offer to see consultation on the fisheries made mandatory in the Constitution is far more than an empty gesture.

Tactics

After you have spoken yourself, you might ask Premier McLean to speak. He should be followed by Premier Buchanan whose province has been the only one to support the federal position. He might then be followed by Premier Peckford whose position is the most extreme.

If other provinces want to speak, it might then be useful to revert to the "traditional" order which would see Ontario, Quebec, etc. making comments. This order may help to bring out some positive comments from the non-coastal provinces which have at least a mild interest in taking on the inland fisheries which the federal government has offered to transfer. Quebec, however, will support very strongly the Newfoundland position.

The remaining coastal provinces, which will be scattered through the speakers, are, in traditional order, Quebec, New Brunswick and British Columbia. All will speak against the federal refusal to accept the principle of concurrent jurisdiction over seacoast and marine. Quebec and British Columbia will be more forceful on this issue than the other two.

You might, at this point, try to solicit positive comments on the federal offer on inland fisheries from provinces that may have avoided doing so, in their haste to criticize the lack of federal movement on the seacoast fisheries. Ontario and the four western provinces are possible cases in point. Even Quebec could be placed slightly on the spot by such questions.

In addition to soliciting such comments, you might also use the occasion to make further points of your own. The Talking Points at Tab 6C and the Status Note at Tab 6D may be useful.

After this preliminary exchange, we suggest you turn everyone's attention to the six issues identified in the CCMC report. Happily, the first four issues deal with questions which surround positive federal offers - or offers that are "not quite sweet enough" from a provincial viewpoint. The discussion of these issues will produce, certainly, a greater indication of federal flexibility than the later discussion of the issue covering the seacoast fisheries. Preliminary comments for your use on each of the issues are contained in section (d) of 6D. Status Report.

It is conceivable that British Columbia may introduce a proposal that was floated informally at the very end of the CCMC negotiations: that where more than one province was affected, jurisdictional change with respect to the seacoast fisheries would take effect only upon the agreement of all provinces involved. The idea, of course, is to allow such a change to take place immediately on the West Coast. British Columbia would hope that the opposition of Nova Scotia would be softened, as presumably it would be able to block any such change on the East Coast. Newfoundland will probably reject any such proposal.

In any event, it is unacceptable to the federal government since the net result would be intolerable pressure on the federal government. It would almost certainly result in a transfer of jurisdiction in the seacoast fisheries, even though probably restricted to B.C. in the first instance. If the proposal is not "killed" by provincial opposition, you could derail it by suggesting that since the proposal involves a form of constitutional amendment, it should probably be considered in the context of that item.

Once the issues have been discussed, you might wish to use your prerogative as chairman to sum up, and if possible, to try to determine areas of consensus. If there are issues remaining which will require the further attention of First Ministers, you could explore at this stage what arrangements should be made in that regard - with an eye on the need to reach final agreement by the end of the week.

At this point, you may wish to adjourn for lunch.

7. OFFSHORE RESOURCES

We recommend that you make the first opening statement. A speaking note for your use appears under Tab 7B.

After your own comments, you may wish to ask Premier Peckford for his views, followed by Premier Buchanan and the other Premiers who represent coastal provinces.

The issues identified in the CCMC report are not very helpful given the "fundamental disagreement" between the federal government and the provinces concerning the principle that should govern the distribution of jurisdiction over the offshore: "All provinces agree that offshore resource should be treated in a manner consistent with constitutional provisions for resources onshore." In any event, the CCMC report puts the issues for consideration by the FMC in terms of two options:

(1) Constitutional recognition of provincial ownership with the same rights, privileges and responsibilities as pertain with onshore resources.

(2) Adoption of administrative arrangements which might be designed to confer on provinces all or most of the advantages of ownership.

The federal objective should be:

(1) To seek agreement on the broad principles of the federal proposal (outlined under Tab 7D), because some key questions cannot be negotiated in a few days.

(2) To seek at least the support of Nova Scotia for the federal position. If we reach an agreement with Nova Scotia, then New Brunswick and Prince Edward Island would follow.

In your opening remarks, you might:

- Note the importance of the offshore issue for Atlantic Canada and for Canada as a whole;

- outline the existing legal regime under Canadian and international law;

- indicate that the federal government wishes to find the best way of recognizing the important role the coastal provinces should play in the development of offshore mineral resources, especially concerning onshore impacts; and,

- outline the federal proposal in broad terms.

After your own remarks, you might wish to turn to Premier Peckford.

He will restate the traditional position of his province. He might de-emphasize ownership per se to insist on the principle of "equality of treatment" as between offshore and onshore resources in terms of both the revenue-sharing regime and the extent of provincial control. He may comment on the role of Petro-Canada, in particular the provisions for a Petro-Canada 25% working interest in Hibernia. (There is a briefing note on the Petro-Canada issue in the Background section of Tab 7.) It would be very beneficial if you could place yourself in the role of the defender of Petro Canada against provinces who would prevent Petro Canada from operating in the offshore.

The Premier sent you a telex on September 2 in which he asks you to clarify "statements" by Mr. Lalonde, in which the Premier claims Mr. Lalonde "dared the Government of Newfoundland to take the federal government to court on the issue." Mr. Peckford finds this unacceptable since offshore resources is an item on the constitutional agenda.

The Premier, as his Energy Minister has done publicly, might characterize the federal position as a "warmed-up" version of the 1977 Memorandum of Understanding. He might note his objection to the discussions of a solution based on administrative arrangements at a constitutional conference (Quebec, Alberta and British Columbia would agree).

After Premier Peckford has spoken, you could turn to Premier Buchanan.

We understand that Nova Scotia and Newfoundland have agreed to "stick together" at the outset of the FMC. However, Mr. Buchanan has been quoted recently in the Halifax press as saying that the federal offer made at the end of August is a good offer. The offer he has in mind is most likely much more generous than the position you will be putting forward because he may have misunderstood some of the things Mr. Chrétien said to him when they met privately in Halifax. This might make it difficult for him to change his opening position.

We have private indications however that Nova Scotia might put forward a proposal that would represent a significant move in the direction of our CCMC proposal. We will give you a new briefing note when we obtain better information.

New Brunswick still supports the 1977 Memorandum of Understanding; in particular, they prefer a multilateral joint body and form of regional pooling of the revenues, but Premier Hatfield was generally silent during CCMC discussions on this item.

Quebec and Alberta will support Newfoundland and so might British Columbia. Alberta is very uncomfortable with our revenue-sharing approach. The remaining provinces do not hold strong views on this issue.

In the general discussion, you might wish to make it clear that provincial ownership is out of the question. You may also want to respond to the "equality of treatment" principle and to the view that our proposal is a "warmed-up version" of the 1977 Memorandum. A comparison of the FMC proposal and of the 1977 arrangement is included in the Background section of Tab 7 (7F). We have prepared talking points on these matters (please see Tab 7C). You might also wish to elaborate on the federal position.

Tactics

The federal proposal will not be acceptable to the provinces. It will be difficult to demonstrate that we have bargained in good faith, because we are pulling back from the CCMC position, which itself was less favourable to the provinces than the concurrent jurisdiction suggestion made in February 1979.

However, there are some positive features to our proposal which can be played up to show that we are moving compared to 1977.

1. The revenue-sharing proposal should have some public appeal.

2. The bilateral bodies are more favourable because they considerably increase the representation from each province.

3. The presence of a neutral chairman would give the joint bodies more autonomy (although just how much autonomy remains to be worked out).

From the federal point of view, a useful development, if no accommodation with some provinces seems to be possible, would be to put the provinces in a position in which they would be rejecting a reasonable revenue-sharing proposal and demanding virtually total provincial control, with little recognition of the national interest. This would all take place in the context of a difficult Canadian and world energy picture, and of the well-known federal-provincial energy problems (which need not be mentioned directly under this item).

The provinces would have to realize that if they totally rejected our proposal, and refused to explore its possibilities, their only recourse would be to take their chances with the courts.

Once there has been a good general discussion, you should sum up the areas of agreement and disagreement. You may want to avoid counting heads if the provinces are all united against the federal position. If Nova Scotia is sympathetic to our position, you should highlight it.

Attachment (to this copy of this note):

- Status report and negotiating position.

8) COMMUNICATIONS

The people of Canada will most likely be sensitive to this item if the discussions focus on specifics such as telephone companies, broadcasting and cable distribution. We therefore suggest that you refer to these specifics as often as you can when handling this item.

You find yourself in an isolated position since the provinces have coalesced against the federal proposal by tabling a provincial draft which is, philosophically, entirely different from the federal draft. Your opening statement (See Tab 8B) emphasizes aspects of the federal proposal which constitute a devolution of powers to the provinces, namely:

- that under the federal offer, cable distribution would come under provincial jurisdiction;
- that the federal government, as stated by the Honourable Jean Chrétien in Montreal on July 8, is prepared to transfer to Newfoundland, Quebec, Ontario and British Columbia the authority over local rates of Terra Nova Tel, Bell Canada and B.C. Tel which are now fully regulated by the CRTC.

Following your opening statement, you might want to ask Premier Lyon to speak since his government introduced the provincial draft. Premier Blakeney should follow since a Saskatchewan official chaired the CCMC sub-committee on this subject. And then Premier Lévesque should be asked to speak.

The issues for resolution identified in the CCMC report and the federal objectives in each of the four areas are the following:

Carriers

The issue is whether there should be, in interprovincial and international services, exclusive federal jurisdiction (federal position) or concurrent jurisdiction with provincial paramountcy (provincial position).

Federal objective: You find yourself in an isolated position principally because the federal draft establishes exclusive federal jurisdiction over the interprovincial rates of telephone companies, an area which was considered to be very sensitive for the Western provinces, B.C. included, and also for the Maritimes with the possible exception of P.E.I.

When the issue of interprovincial rates of telephone companies is discussed, the federal objective should be to stress the necessity for a federal role. In the absence of a federal role in the regulation of interprovincial rates, the federal government belives that exclusive provincial regulation would increase barriers to interprovincial trade, erode the national structure of the industry and undermine the technological lead which Canada has achieved in the field of tele-communications. The federal government's position on this issue is consistent with our position on Powers over the economy.

On intraprovincial rates and other aspects of telephone companies, the offer to give to Quebec and Ontario jurisdiction over Bell Canada has been received with little enthusiasm by both provincial governments because we were retaining, at the federal level, exclusive jurisdiction over the interprovincial activities of telephone companies. B.C. and Newfoundland have also reacted mildly to the offer of control over intraprovincial rates of B.C. Tel and Terra Nova Tel. The point could be made that this offer would put all provinces on an equal footing in relation to telephone services.

Cable

Both proposals provide for provincial jurisdiction in cable systems. The issue is the extent of involvement of each order of government in this area.

The federal objective would be to emphasize the fact that the federal offer represents a devolution to the provinces. What the proposal does is to reverse a decision of the Supreme Court in 1977 and give to the provinces jurisdiction over cable distributors, whether they receive off-air signals or are closed circuit.

You should make it clear that the federal government regards the retention of priority of access over any other signal through all cable systems in the province for the French and English CBC network as essential.

Broadcasting

The federal proposal would provide for exclusive federal jurisdiction in broadcasting. The provincial proposal would, in general terms, provide for concurrent jurisdiction with provincial paramountcy. The issue is whether exclusive federal jurisdiction is warranted.

The federal objective should be to emphasize the fact that the broadcasting system in Canada constitutes a single integrated system for the dissemination of programming to the public. Broadcasting by its very nature involves the utilization of a scarce resource (the frequency spectrum). That use is not restricted by provincial or national boundaries and is not by its nature capable of being confined within the limits of any geographical area such as a province.

You should emphasize the fact that the broadcasting system in Canada is an essential element in the creation and preservation of a national identity and, therefore, should not be fragmented. The existence of Radio-Québec and TV Ontario provide ample evidence that the current system can accommodate the specific needs and concerns of provincial governments.

You should be aware that the foregoing argumentation will not be accepted by provincial Premiers. The provinces are united in their demand for a significant constitutionally entrenched role in the regulation of broadcasting.

Frequency Spectrum Management

Jurisdiction with respect to the frequency spectrum is at present exclusively federal. The federal proposal would continue this situation and, subject to one concern, there is little provincial disagreement on this

point. Provinces have expressed concern that the federal jurisdiction in this area is used, or could be used, in a manner that significantly frustrates legitimate provincial interests for federal objectives that are fundamentally unrelated to spectrum management.

The issue is how to affirm the federal jurisdiction in this area in a manner that would prevent interference with the legitimate interests of the provinces. To date officials have not been able to develop a formulation that will meet this concern. Officials could be instructed to pursue this matter further.

Two other principal issues have been identified by the provinces. They are the following:

Free Flow of Information

The provinces incorporated within their draft a provision that would render invalid a law of Parliament or a legislature that "in its pith and substance" was directed to the disruption of "the free flow of information". The objective of the provision was to meet the concerns of the Government of Canada to ensure the integrity of the national system. In essence, the "free flow of information" principle was substituted for federal jurisdiction.

If this issue is raised, you should indicate that it is a legitimate role of the federal government to ensure the integrity of the national system and not a role for the courts.

Technical Aspects of Telecommunications

The second issue revolves around the proposal in the federal draft that would ensure federal jurisdiction over the "technical aspects of telecommunications". The objective of this provision in the federal draft is to ensure the establishment of uniform minimum technical standards that would promote the development and preservation of the national system.

Technical Questions

Throughout consideration of this item, Mr. Fox and Mr. Roberts will be at the conference table with you. You may wish to refer technical questions relating to communications issues to Mr. Fox who will have been fully briefed on the issues that have arisen throughout the CCMC discussions this summer. Mr. Roberts has followed the communications issue closely throughout the summer.

Likely Outcome

The federal and provincial positions on this item are, in general, far apart. There is little likelihood of agreement being reached. Accordingly, you may wish to take the first opportunity to terminate discussion of this item.

9) FAMILY LAW

Even though this is a "powers item" and you might normally consider speaking first, it would be better for you to make an introductory statement as Chairman (see Tab 9B) and then ask Mr. Lévesque to lead off the discussion of this item. It may be good tactics to have Mr. Lévesque lead off and appear for once to be constructive and co-operative.

The issues for resolution identified (implicitly) in the CCMC report are:

1. Whether drafts should contain a clause allowing legislators to make laws providing for the non-enforcement of orders on the grounds of public policy (this is clause 5 of the "best efforts" draft - Tab 9E)?

2. Once a decision on clause 5 has been made whether the draft as it then stands is acceptable?

The federal objectives should be:

1. To maintain, and if possible enlarge, the high degree of consensus that now exists in support of the best efforts draft.

2. To gain Manitoba's (and thereby PEI's) support for clause 5, if necessary in an amended form. (They say it is now too broadly written -- especially "public policy" -- and allows too much discretion.)

Suggested federal tactics in regard to "public policy" in clause 5.

Once governemnts that wish to speak have spoken, either: (1) ask Ontario (with Quebec as back-up) whether it wishes to make the case for the clause (in an attempt to convince Manitoba and PEI); or

(2) point to the suggestions for administrative handling of the problem contained in your statement, including a review of federal legislation that inhibits access to information necessary to effective enforcement; or

(3) do both these things, one after another.

This last would probably be the most effective course since it may allow the federal side to seem like a peacemaker after some argument between Manitoba and, say, Ontario. It is highly unlikely that there will be unanimity on the proposal to transfer paramountcy over divorce grounds to the provinces. Manitoba, for one, disagrees as a matter of principle.

Accordingly, we would not recommend that much, if any, effort be put into trying to create a full agreement.

P.E.I. and Alberta are also opposed to or uneasy about the divorce grounds transfer. Newfoundland also bears watching. It was earlier one of the reluctant provinces. For bargaining purposes, they have supported the

federal government on this item throughout the summer, in the hope that their generally helpful line (on this, as well as on the Charter and Patriation) would gain concessions from the federal government on the off-shore or fisheries, or both.

Your own statement (Tab 9B) would come at the end of the round.

At the conclusion of the discussion you might sum up by indicating:

- areas of agreement
- areas of conclusions -- with a count and naming of who stands where
- any decisions for further action.

At this point, you might adjourn for the day and wish all delegates a good evening.

10. SUPREME COURT

You may want to begin the meeting with your introductory remarks as Chairman. (See Tab 10B). At this point, you may call on Premier Hatfield and then on Premier Lévesque.

The issues identified in the CCMC report are:

(1) Should the Supreme Court be composed of eleven judges, with six common law and five civil law judges? If not, how many judges should there be and how should the Court be structured?

(2) Should the alternate appointment of Chief Justices from among the common law and civil law members be entrenched in the Constitution?

(3) What mechanism is appropriate to deal with the situation where the federal Minister of Justice and the provincial Attorney General fail to agree on appointment?

(4) Should section 96 be repealed or otherwise amended?

The federal objective should be: (1) to be flexible and willing to consider seriously reasonable proposals made by the provinces; (2) to show sympathy for Quebec's particular concerns, and (3) if there is a lack of consensus on this item to make it clear that it is the result of divergent provincial positions and not of inflexibility on the part of the federal government.

Tactics

- After you have called on Premier Hatfield who can be expected to support the CCMC draft,

- You might call on Quebec; it is likely to express its traditional preferences for a constitutional court, its new proposal for a constitutional panel (Ryan's Beige Paper proposal) and its alternative support for the CCMC draft
- Unlike the "powers" items the Supreme Court provisions themselves are not ones in which there is a clear federal-provincial confrontation; the situation is different with respect to the appointment of section 96 judges.
- Accordingly the appropriate strategy with respect to the Court would seem to be to call on other provinces for the purpose of illustrating the differences between them (British Columbia has had a very trenchant position; Nova Scotia can be expected to oppose the CCMC draft, as can British Columbia; some provinces seem to take an ambivalent position e.g. Saskatchewan is willing to support consideration of a constitutional court but was not willing to support the CCMC draft; Alberta has reserved its position throughout; Ontario seems to support the CCMC draft but will express preference for the status quo).
- With respect to the issue of the appointment of section 96 judges a reactive position is possible since most provinces support a transfer of the appointing power of such judges to the provinces.
- After having heard from a number of provinces you may wish to use the remarks suggested for your use at Tab 10B . These remarks emphasize your willingness to greatly limit existing federal authority over the Supreme Court by entrenching its basic elements in the constitution, and by transfering certain authority to the provinces. They also emphasize the lack of a consensus among the provinces on the size and composition of the Supreme Court and their further demand not only for changes to the Supreme Court but also to the appointment power of section 96 judges.

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11. PATRIATION

You might want to make your opening remarks on the issue as Chairman (see Tab 11B) and then turn to Premier Davis followed by Premier Lougheed and Premier Lévesque. At this point, you could enter the debate. Your speech notes are at Tab 11B.

The issues for resolution identified in the CCMC report are:

1. Is the Alberta formula acceptable in principle?
2. How should general amendments not subject to "opting-out" be handled?
3. Should constitutional provision be made for the financial implications?

4. What other adjustments to the formula are needed of "opting-out" of amendments? (e.g. referenda in the event of dissent, as proposed in your statement).

5. Whether with some changes (in regard to 2-4) a formula based on Alberta's approach is acceptable?

The federal objectives should be:

1. to obtain statements from all provinces supporting the principle of patriation, but ...

2. to avoid, as much as possible, discussion on the procedure for patriation

3. to reach an agreement on an amending formula - so as to reinforce in a crucial way the legitimacy of patriation. Such agreement would achieve this more effectively than any other way.

4. To conclude an agreement on delegation of legislative authority. (This is virtually agreed already).

Suggested federal tactics:

1. In regard to patriation, there will no doubt be objections raised to unilateral patriation. You might want to answer by stating that "the purpose of the Conference is to achieve agreement. We are not here to discuss unilateral action; but I can assure you that if we cannot achieve agreement, the people of Canada will not wait any longer for patriation which is symbolic of our existence as an independent nation."

   As well, there may be an attempt to engage in extended discussion by provinces who oppose early or unilateral patriation. They may point to the "Victoria" procedure, calling for resolutions by all legislatures, and insist that similar action be envisaged now or they may threaten to adopt resolutions opposing patriation.

   For either event, you might try to cut-off discussions by saying that you are glad to have an indication of the intentions of provincial governments in this regard.

2. In regard to the amending formula; you should treat the Alberta formula as the best bet for agreement; there is unlikely to be near agreement on any other formula.

   Because you are prepared to be sympathetic to the Alberta formula, you should ask Premier Lougheed to speak immediately after Premier Davis on the assumption that the latter will talk about patriation and that Mr. Lougheed will stress the Alberta formula.

   You might take a count of support for the Alberta formula after all Premiers have spoken once. If it is not clear where a Premier stands, ask him (them) if he (they) wish to express a view.

If it appears that there is near unanimity, you might focus the discussion on the federal proposal for a referendum at the initiative of the electorate in the event of dissent of Parliament or a legislature.

If there is strong objection to this proposal, such that a significant move away from the Alberta formula could be started, a possible compromise would be to retain the idea of a referendum only for a situation where a province intends to in "opt-out" or where Parliament dissents. (This could mean that there could be no initiatives at the provincial level when Parliament had approved an amendment and less then seven provinces had.) The effect of this will be to make the federal side seem conciliatory, while maintaining strong implicit pressure on the provinces to get into line with the federal level. This compromise would help to maintain support for Alberta's idea and make the formula more attractive to Canadians.

Saskatchewan may suggest that if referenda are to be initiated by the electorate, the electorate should also be able to initiate amendments by means of referenda. This may be raised simply to make the federal proposal seem unwise. If that happens, you might want to agree that such an approach requires careful consideration and should be discussed at a second stage of constitutional negotiations.

At the conclusion of the discussion you might sum up by indicating:

- areas of agreement
- areas of consensus - with a count and naming of who stands where,
- any issues for further action and decision.

12. PREAMBLE

You will want to introduce this item as Chairman (See Tab 12B) and then ask Premier Lévesque if he has any comments. After Premier Lévesque has finished, you might ask Premier Bennett to speak. At this point, you might want to speak. Your speech is at Tab 12B. A new draft of the Preamble appears at Tab 12D. The opening lines have been prepared with a view to reflecting the points you have raised with us, and, to a lesser extent to take account of major provincial preferences.

The issues identified in the CCMC report are:

1. With regard to lines 1 to 5 of the "best efforts" draft which of the five alternative versions should be adopted? If none of these, should one of these be modified for inclusion?

2. With regard to lines 17 and 18 of the draft, which of the two alternative proposals should be adopted? and,

3. Once the choices have been made in regard to the first two issues, is the draft acceptable?

<u>The federal objectives for this item:</u>

Your suggested opening statement (at Tab 12B) is drafted to help achieve the following objectives by the end of the discussion:

1. to develop a consensus around the content of CCMC best efforts draft (copy at Tab 12E);

2. to achieve agreement on an opening sentence stating that the free will of Canadians, <u>not provincial governments</u>, is the ultimate basis of Canadian unity;

3. to develop a consensus for national recognition of the "distinct French-speaking society" with particular reference to Quebec, while avoiding adoption of wording that you feel would seem to confine the francophone "home" to Quebec.

4. To demonstrate to the people of Quebec that the federal government recognizes the existence of a distinct French-speaking society in Canada and that the Federation is maintained by the free will of Canadians.

<u>Suggested federal tactics for discussion of this item</u>

By the end of the opening statements, it should be fairly clear whether First Ministers have accepted the CCMC best efforts draft.

A. <u>If there is general acceptance</u> you could probably obtain consent to proceed immediately to the two substantive "wording problems". (This order of discussion might help channel most of the Premiers' debating energies into these several specific lines only -- so that they may be that much less prone to lengthy debate when the time comes later to approve or reject the draft as a whole.)

<u>If the opening statements convince you that the "best efforts" consensus has started to unravel</u>, you could try to repair it, or at least to block off further defections, by drawing on the approaches outlined in the talking points at Tab 12C. (These also include material on the possible function and place of Preamble in the Constitution.)

B. <u>Discussion of opening sentence</u> (lines 1-5 of best efforts draft): Unless there have been major changes of heart since last week, you should encounter no opposition <u>per se</u> to stating that the will of Canadians is the ultimate basis for Canadian unity. However, Mr. Lévesque may also say, for example, that if it does not flow through the provinces, the "will of Canadians" must mean that the (English-speaking) majority can always emprison the (Québécois) minority.

You could respond that, obviously, none of us wants a formulation which implies or suggests a basis for keeping a large group of Canadians in Canada against its clear and democratically-expressed will. Then you could read out a draft sentence (perhaps saying it is based on a British Columbia suggestion at CCMC) of this nature --

> "The citizens of Canada, or Canadians, wish their country to remain freely united as a sovereign and independent state..."

-- and ask Mr. Lévesque if that's okay so far, encouraging other First Ministers to carry the ball in responding to him as required.

You would have a good chance of ending this particular debate with a wide consensus, if you then offered to recognize "the contemporary and historical reality, quite important to most Canadians, of Canada's provincial dimension." You could do this by proposing that the "new" (or "B.C.") draft sentence you read out in your first intervention be completed with an additional phrase, so that it read:

> "The (citizens of Canada), (or Canadians), (Canadians inhabiting the various provinces of Canada), wish their country to remain freely united as a sovereign and independent state, a federation of provinces under the Crown..." etc.

C. Discussion of "distinct French-speaking society" (lines 17-18 of best efforts draft): The starting point for any scenario of this discussion is whether you find acceptable Quebec's proposed wording: "recognizing the distinct character of Quebec society, with its French-speaking majority."

The Quebec wording is not acceptable to the federal government as it ignores the one million French-speaking Canadians outside of Quebec. You should try to convince Premiers that it is precisely to protect the interest of these minorities that the Quebec wording is unacceptable.

(If it also turns out there have been important "defections" from the CCMC substantive consensus, the most likely motivation would have been fear that the clause (as federally-worded) could be used by courts to bind majority-anglophone provinces to provide more French schools, public services, etc. This is a phony argument and you should say so).

D. When and if you feel First Ministers are about ready to consider accepting the draft as a whole, you could provide a transition to "putting the question" by pointing out there are only two additional points, which can probably be settled without extensive discussion.

1. at line 8 of the best efforts draft: whether to say the fundamental purpose "of the Constitution" or "of the federation"? You might want to consider using both Constitution and federation so that it would read "the fundamental purpose of the Constitution and of the Federation..." The rest of the text would follow better;

2. at line 12: /You can say that the Native leadership has officially communicated their acceptance of this phrase, and therefore confirm -- unless there is objection. This point to be confirmed./

If consensus is achieved on a draft preamble, you could emphasize that this is a welcome sign of Canada's developing identity and helps provide a promising framework for later talks on specific items. Should you detect lingering unease among the Premiers, you might help soothe them by reconfirming the CCMC recommendation that there should be opportunity to receive further "stylistic" changes.

At the conclusion of the discussion you might sum up by indicating:

- areas of agreement
- areas of consensus
- any decisions for further action.

Here you may want to adjourn the meeting for the day and suggest that First Ministers meet for a working dinner in the evening.

G

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OVERVIEW OF PROVINCIAL POSITIONS

The following section gives an overview of our assessment of the present position of each province in the constitutional discussions. This report draws on:

1) material provided in the Report to Cabinet after the July CCMC meetings;

2) reports of officials responsible for individual subject items; and

3) other assessments.

Significant changes from the overview presented in the briefing for the August, 1980, CCMC Meeting, are indicated by a sidebar in the left hand margin.

Each province is considered in the following order:

Newfoundland

Prince Edward Island

Nova Scotia

New Brunswick

Quebec

Ontario

Manitoba

Saskatchewan

Alberta

British Columbia

The Annex to this section summarizes our estimates of the provincial positions at the beginning of the Summer, 1980 constitutional discussions, as reflected in the briefing for the June 17, 1980 CCMC meeting.

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NEWFOUNDLAND

Although not conveyed to the public at large, Newfoundland, in effect, made a leap of faith, at the outset of the constitutional talks. Instead of reserving its support on the entrenchment of rights as a bargaining chip, it decided to express its general support for the federal government's proposed people's package and parts of the federal position on powers over the economy, in the expectation that it would receive satisfaction on at least offshore resources and possibly on the fisheries as well. By doing so, it acknowledged the distinction the Government of Canada wishes to draw between the people's package and the rest, and has placed itself in an exposed position, should the federal government refuse to move sufficiently on matters of particular concern to it, especially on offshore resources.

More recently Newfoundland has been signalling the stress it is under, by taking steps to minimize its exposure. On August 18, it released a public statement detailing its position. This statement made explicit:

- The Newfoundland support of the proposed federal Charter of rights is less than total. It indicates support for fundamental freedoms and democratic rights, only. There are also indications Newfoundland would support some limited legal rights, and possibly minority education rights.

- The longstanding Newfoundland reservations in the family law area persist (regarding the transfer of certain aspects of divorce jurisdiction to the provinces). It is evident that if frustrated on the economic items, that Newfoundland's willingness during the Summer CCMC meetings to compromise in the family law area, may evaporate.

- The Newfoundland demands for ownership and greater control over offshore resources.

Moreover, the Premier is becoming somewhat edgy on the offshore item. It is clear that Mr. Lalonde's role is of concern to him. He is confused whether to respond to Mr. Chrétien's overtures to seek a compromise on this item, or to Mr. Lalonde's apparent support of the status quo. Given that Mr. Chrétien's private posture has been more conciliatory than his public position at the CCMC, Mr. Peckford, clearly remains skeptical that Mr. Chrétien can persuade the federal government to compromise at the FMC.

On powers over the economy, Newfoundland shares the Saskatchewan concerns about the role the judiciary might have under the federal proposals and its preference for a political mechanism to achieve the harmonization of federal and provincial economic policies. On resources, Newfoundland seems content

to let Alberta and Saskatchewan lead while it stays quiet. It will probably accept any consensus on this item if it is reasonably satisfied on offshore resources and fisheries. Apart from Newfoundland's rhetoric on ownership and control of offshore resources, and its reservations until Mr. Lalonde's role is clarified, Newfoundland may possibly be brought to accept ultimately as little as an assurance of a high share of revenues for as long as it is a "have not" province, and the opportunity to exercise control over the "pace of development" except in extraordinary circumstances where the national interest must prevail, provided a face-saving means for this agreement is found. Newfoundland would also press hard to have a significant role in the day-to-day management of offshore resources. On fisheries, there is no doubt that Newfoundland has a definite objective of obtaining a significant measure of concurrent jurisdiction over marine fisheries and its fishing fleets, although it would probably settle for a role in the licensing process and in determining the allocation of quotas to fishermen.

It is also noteworthy that Newfoundland has been a strong supporter of the Alberta formula from the outset.

In sum, the government of Newfoundland seems to have a considered view on the constitutional issues, including its major aims, and the items on which it is prepared to compromise. If Newfoundland's main goals on offshore resources and fisheries can be met by the federal government, it is probable Newfoundland will agree substantially with the federal position on virtually all other items. To buttress its hand in the discussions, Newfoundland seems to be working in close concert with Nova Scotia on a number of shared interests.

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PRINCE EDWARD ISLAND

On resources, P.E.I. supports the federal position, and leans towards the federal position on powers over the economy. On fisheries, like New Brunswick, P.E.I. is probably seeking an essentially cosmetic form of provincial jurisdiction, with the federal government remaining the principal decision-maker. On offshore resources, it wants increased provincial autonomy.

On family law issues, P.E.I. continues to share many of the reservations of Manitoba; it would probably be more comfortable with the status quo. Despite its earlier support of a Charter, P.E.I. has more recently indicated reservations about supporting the entrenchment of a Charter of Rights. Apparently, P.E.I. does not endorse entrenchment, in principle. As well it is opposed to mobility rights which might inhibit local restrictions on property ownership. But if there is a consensus on a Charter, P.E.I. seems likely to join.

P.E.I. seems to have taken some care in developing its positions on the various constitutional items, although at times the mandate of the delegation has been unclear, so that it is difficult to predict where the province might ultimately come down. At present, the federal government has placed little on the table that is of strong interest to P.E.I. Thus P.E.I.'s main efforts seem directed at ensuring its options and interests are preserved as much as possible. For example, it is adamant that in any calculation of weighted regional or provincial support, each province, P.E.I. included, should be given equal weight. This partly explains its endorsement of the proposed Alberta amending formula which gives equal weight to each province.

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NOVA SCOTIA

Although not as hawkish as Newfoundland, Nova Scotia is also pressing for more provincial autonomy on offshore resources particularly in respect of the pace of development, revenue-sharing and day-to-day management. Mr. Buchanan appears anxious to achieve agreement with the federal government on offshore resources, and while apparently committed to stick with Newfoundland for at least the beginning of the FMC, might put forward a proposal along the lines of the federal proposal on the table during the August CCMC.

On resources, Nova Scotia is generally like New Brunswick and Manitoba, but more openly supports the federal side in discussions. However, it would likely go with any consensus that develops on the item. On fisheries, Nova Scotia supports retention of federal jurisdiction, although it would subscribe to mandatory consultation by the federal government. Its main objective on the fisheries item is to prevent the adoption of any form of provincial jurisdiction which might affect the mobility of the wide-ranging Nova Scotian trawler fleet and the conservation of fisheries stocks. On powers over the economy, Nova Scotia seems to be leaning towards the federal approach at least on Section 121.

Nova Scotia has backed-off somewhat from its earlier acceptance of the entrenchment of a Charter of Rights. During the Summer CCMC meetings, it indicated its opposition in principle, to entrenchment. It believes that rights are best left to legislative protection. Even if the offshore issues were resolved in Nova Scotia's favour, it is unlikely that one could count on firm support from this province for entrenchment of a substantial Charter, although it is possible it might accept a very limited Charter, perhaps agreeing to fundamental freedoms, democratic rights, and a few legal rights.

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NEW BRUNSWICK

Since the New Brunswick delegation to the CCMC is headed by the Premier, the New Brunswick position at the CCMC is judged to reflect definite positions of the government.

New Brunswick continues to be generally supportive of a broadly-based Charter, particularly respecting language rights; although it is expressing serious doubts about non-discrimination rights and about mobility rights respecting the acquisition of property. Its earlier concern about property rights has been satisfied by the federal removal of this item from the table during the August CCMC.

So far New Brunswick has shown willingness to consider special provisions for Quebec on the communications issues, in recognition of Quebec's unique circumstances. New Brunswick has also indicated support for the federal position on resources. On fisheries, as with P.E.I., it seems interested in an outcome which would permit a greater provincial presence to be seen, but with the federal government continuing as the principal decision-maker.

Of principal concern is New Brunswick's strong support of the Saskatchewan position on powers over the economy. The Premier has expressed serious reservations about the role the judiciary might have under the federal proposals. He considers these issues should be left to political discretion and resolution. To some degree the New Brunswick stance on powers over the economy, and its reaction to judicial review, is inconsistent with its support of a Charter of Rights. Care will be needed to avoid unravelling this support.

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QUEBEC

The Government of Quebec's approach to date has not in any way undermined the process or compromised the integrity of the talks and the federalist framework within which they are being carried on. However, the Quebec approach is also being significantly more closely orchestrated than in the other provinces. Close contact between the delegation and the government has been continuous. Moreover, the delegation has frequently been augmented by the temporary presence of additional ministers. Finally, Quebec followed the unusual practice of regularly holding a press conference following the CCMC Co-Chairmen's report to the press - despite the long-standing arrangement that individual provinces would not do this.

Quebec has been forthcoming in discussions of the Supreme Court, principles/preamble, Senate and family law, while also indicating that powers items come first, although Mr. Morin has stressed that a reformed Senate is no substitute for changes in the distribution of powers. For the first time Quebec has been an active participant in discussions on the topic of patriation and amendment, and has expressed interest in the opting-out feature of the Alberta amending formula proposal. Quebec's position on the distribution of powers and powers over the economy has been entirely predictable; it is opposed to any steps which might weaken Quebec's provincial powers. It has also asked for major transfers in resources, communications, fisheries and family law. While Quebec is prepared to discuss the question of the entrenchment of certain fundamental rights, it disagrees in principle with entrenchment and it is steadfastly opposed to any constitutional entrenchment of language rights. It may, however, accept a Charter of Rights limited to fundamental freedoms, democratic rights, and perhaps to a few legal rights (penal and criminal).

Quebec's long-term strategy remains unclear, although it appears that the outcome it would most like to see from the negotiations is agreement on some items (e.g., Supreme Court) which would undercut Ryan by showing that the PQ can negotiate successfully with the provinces and the federal government, and disagreement on all the powers items, thus showing that the PQ is a staunch defender of provincial rights against an excessively centralist federal government. Thus, Quebec's preferred outcome to the negotiations appears to be partial success because of Quebec's skillful negotiating ability, and partial failure because of Ottawa's demands for new powers and refusal to concede to Quebec's traditional demands.

A key concern will be that the constitutional talks not inadvertently give Mr. Lévesque an issue for the forthcoming provincial election that backs Mr. Ryan into a difficult corner. The Beige Paper for example represents a school of thought, which we understand is also shared by the PQ, that patriation should not occur until complete agreement on all aspects of the Constitution is reached. Although in theory this is a nice argument, in practical terms it is unrealistic, and is not a course of action that is supported by the federal government. These and other differences could offer the Quebec government opportunities to drive a wedge between the federal government and Mr. Ryan. This sort of development may be difficult to avoid in the FMC, since it will clearly be to the government of Quebec's advantage to push negotiations in this direction.

Generally Quebec seems to have taken considerable care not to be isolated in its position on any one item in the discussions. This seems to be part of a plan to maintain as low a profile as possible in the circumstances. Even the Quebec press conferences have been relatively mild in tone. It may be that this approach is intended to establish Quebec credentials on the one hand, and on the other hand, to lay the groundwork, including process precedents to permit Quebec to adopt a more strident posture at the FMC. For the moment the balance of signals conveys an impression that Quebec is anxious to be seen as a good working partner of Confederation.

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ONTARIO

Ontario released a detailed public statement on its position on each of the twelve items on the constitutional agenda prior to the August CCMC discussions. Generally, Ontario has been the strongest supporter of the Government of Canada's overall position in these talks, especially in the area of the division of powers, economic matters and patriation. It has offered a revised draft of a new section 121 which would secure all the positions which the Government of Canada deems to be important. In respect of mobility rights, it might even seek stronger guarantees than has the federal government. At times the warmth of Ontario's support in the economic areas endangered its credibility, so that it was not surprising to find Ontario placing some distance between itself and the federal government towards the end of the CCMC discussions. It is thought this tactic partly explains the Ontario challenge to the federal position that patriation, with an amending formula can be unilaterally sought by the federal government; although it did not give any indication that Ontario would challenge the federal government in the courts if, in fact, the federal government did proceed with such unilateral action.

Ontario, nevertheless, agrees in principle with the other provinces on the subject of offshore resources, and with giving coastal provinces a greater say in marine fisheries. On resources, Ontario supports provincial ownership and control, although it believes that benefits from resources should be fairly shared among all Canadians. It has taken issue with Alberta and Saskatchewan however, because it opposes provinces being given indirect taxation authority on resources.

On communications, Ontario has assumed a leadership role in the discussions, and has encouraged provinces to be wary of showing their cards to the federal government before the FMC.

Although Ontario supports the principle of an entrenched Charter of Rights, it would prefer to limit a Charter's coverage to fundamental freedoms, democratic rights, criminal and penal legal rights, non-discrimination rights, language rights at the federal level, and minority language education rights. The only area where Ontario still remains almost unalterably opposed is provincial language rights in respect of courts and statutes.

In sum, Ontario so far is cloaking itself in the role of honest-broker or statesman with a national viewpoint. Whether or not this posture will ultimately be successful, it is partly good staging for a forthcoming provincial election, and it is also consistent with Ontario's past performance and overall position on the constitutional items. But it is difficult for the other provinces to forget that "what is good for Canada, is also probably very good for Ontario", so that the Ontario efforts are being met with considerable

skepticism by other provinces. It is evident that Ontario has a co-ordinated position on the constitutional items, including possible fallback positions. However, it is not clear what action Ontario will take as a result of the current impasse in the federal-Alberta energy discussions. In the face of an election, it may well not be possible for Ontario to simultaneously maintain a statesmanlike stance and as well, be a defender of Ontario energy consumers' interests. This conflict may underly Ontario's posture at the FMC, perhaps causing its public and private stances in the discussions to be inconsistent.

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MANITOBA

It does not appear that Manitoba has a well co-ordinated mandate for the constitutional talks, although its firm opposition to the entrenchment of a Charter of Rights is clearly an explicit mandate from the Premier, and its position on family law reflects strongly-held views.

At the August CCMC, the federal movement from its July position on family law, goes some distance towards meeting the Manitoba concerns on family law. Apart from this development, and the possible entrenchment of equalization, there is little else on the table that is particularly attractive to Manitoba.

On resources, and powers over the economy, Manitoba has been generally quiet, but at the officials level has tended to fall in line with the other Western provinces on "head counts".

At the officials level, in the Supreme Court Sub-committee at the CCMC July meetings, Manitoba put forward a suggestion for increasing the Court to eleven members, five being civil law judges. This compromise received considerable support from other provinces and is now called the "Manitoba proposal". However, it seems the Premier is unenthusiastic about the proposal and it was disavowed by Manitoba at the August CCMC. Manitoba renamed it, the Pepin-Robarts proposal (to which it bears some resemblance). As a result, the consensus on the Supreme Court has weakened, and Manitoba's overall credibility has been considerably damaged.

It is curious to note the inconsistencies in the Manitoba position. For example, Manitoba is opposed to entrenching basic rights, such as mobility rights, in a Charter, and yet on family law, it has wanted to ensure that Canadians are not penalized by their characteristic mobility, so it is resisting the transfer of divorce jurisdiction from the national to a provincial level.

Otherwise, the Manitoba contribution to the talks has been low key, but without the underlying volatility as in the Alberta case. It can be expected that in areas where the Premier has strong views, there will be little movement in the Manitoba position at the FMC.

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SASKATCHEWAN

Saskatchewan has been without question generally less constructive than in past constitutional discussions. It has been particularly vocal in its opposition to the federal approach on powers over the economy. The reasons for this are obscure. To some extent, Saskatchewan may be functioning as a stalking horse for Alberta, although the extent to which that is a result of circumstances or design is not clear. Also, to a certain extent, Mr. Romanow may have been attempting to maintain the credibility of his government which is publicly vulnerable to attack if it is seen to be too close to what is perceived as the 'central' Canadian government. He may also have been trying to establish his credibility as provincial co-chairman in the eyes of the other provincial Ministers (although if so, this backfired to some extent).

Mr. Romanow was clearly under a good deal of pressure and made a few tactical blunders, including a major one by first bitterly attacking, and then supporting in principle, the federal position on the economic union. This isolated him from his provincial colleagues at times. Some provinces also took exception to what they believed to be his tendency to use the CCMC co-chairmanship as a soap-box from which to publicize his province's views, although he seemed to have modified his behaviour somewhat during the August CCMC.

While Saskatchewan has been the most aggressive province in these talks, it would be wrong to conclude that its position has been strengthened as a result. If anything, it is the reverse. However, the fact that Saskatchewan may feel boxed in and in danger of being isolated may make it difficult. In addition, it is not inconceivable that Saskatchewan may find sudden and strong support in Alberta, particularly now that the energy talks have broken down.

Although Saskatchewan has been more noisy than Alberta, it is seeking less autonomy on resources than Alberta. It is most concerned about protecting itself from the possible 'reach-back' effect of the federal powers of international trade, fearing these might be used as an indirect instrument for regulating resource production. If no "western front" develops, Saskatchewan will likely settle for less than Alberta on pricing and declaratory power. Saskatchewan too, was quite taken aback by the federal withdrawal of support from some important parts of the BED on resources.

Saskatchewan now formally opposes the entrenchment of any Charter of Rights, but is willing to consider possible entrenchment of limited rights probably including fundamental freedoms, democratic rights and legal rights applicable to criminal and penal matters. The province opposes inclusion of non-discrimination, mobility and property rights, and at the provincial level, language

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rights. To be noted on provincial language rights, is the reversal during the July CCMC meetings of Premier Blakeney's earlier position which recognized language rights as fundamental to the Confederation compact. It is assumed that this reversal has the Premier's blessing. Although the reasons are not readily evident, it is probably an indicator of the pressure on the Premier from vociferous local opponents to this measure. One Saskatchewan official has also suggested that the reasons are linked with resources and communications issues.

Saskatchewan appears ambivalent on the family law item, but has the strongest views on the communications item. On patriation, Saskatchewan will probably not support this, without agreement being reached on the 'powers' items, with something for everyone.

Finally, Saskatchewan has been an adamant supporter of a political process for resolving and protecting individual and provincial rights, rather than a process of judicial review - the latter of which, notably, has not in the recent past, been particularly sympathetic to Saskatchewan provincial rights arguments.

CONFIDENTIAL

ALBERTA

Alberta has been playing a minimal role in these talks so far, and has been virtually silent on several issues. It is obvious that their posture has been shaped by the continuing impasse in the energy negotiations.

Despite Alberta's relatively subdued approach so far, it is difficult to judge whether this will continue. However, it seems likely Alberta will want to avoid any constitutional commitments which might compromise its tough bargaining stance in the energy area, and that this posture will not change at the FMC. Clearly, the Alberta strategy on the Constitution is being carefully controlled by the Premier, but it is not evident that Alberta has developed detailed positions, and fall-backs, on all the items under discussion. Alberta seems to have taken some pains to gain support from B.C. and Saskatchewan, so as to avoid being isolated during the CCMC discussions, and so preserve its options as long as possible. Alberta has also extended significant support to the coastal provinces for increased provincial control of offshore resources.

Alberta probably thinks that it has little to gain for Alberta from the constitutional talks and so might be willing to risk a hard-line approach. On the other hand, the Premier's record on Quebec suggests he would certainly not jeopardize Confederation. This consideration, and the possibility of playing into federal hands, may temper Alberta's position at the FMC.

Alberta was taken aback by the federal withdrawal from the earlier BED on resources and interprovincial trade and has had to adjust its expectations in this area. As well, Alberta is not sympathetic to the federal position on powers over the economy and is firmly opposed to any entrenched Charter rights, although the strength of this stance may be partly linked to the resources issue. Their opposition is almost as firm as Manitoba's. Some movement may occur only if everything else goes Alberta's way.

Interestingly, however, Alberta has shown some flexibility on the "Manitoba proposal" on the Supreme Court, which acknowledges the dual nature of Canada's legal system. On patriation, Alberta proposed an amending formula, now known as the "Alberta formula". At the August CCMC, a provincial consensus developed around this proposal. The formula is based on provincial equality, has no single provincial veto, but has an opting-out provision for dissenting provinces. Alberta anticipates this formula should safeguard its interests in resources. Thus there is a possibility that if the consensus holds on at least the key features of this formula, Alberta will be better disposed to consider moving in other areas.

Nevertheless, the outlook with Alberta is not very positive. The prospect for any measure of federal agreement with Alberta is limited. A major difficulty will probably be Alberta's inclination to line up with those provinces dissatisfied with the federal position on the resources or rights issues. Indeed, at the FMC, Alberta could well emerge as the leader of the hard-line provincial position on resources.

CONFIDENTIAL

BRITISH COLUMBIA

Like Alberta, B.C. was also taken aback by the federal withdrawal from the BED on resources and it is taking B.C. a while to adjust its expectations. B.C. strongly supports increased provincial autonomy in the resources, offshore resources and fisheries areas, but is somewhat supportive of the federal position on powers over the economy. Apart from Quebec, it is the only province to table a detailed proposal on communications.

B.C. has shown a willingness to explore other options, particularly as fall-back positions. However, its preference for its proposals on a reformed Senate and in respect of the Supreme Court, continues to be evident, reflecting perhaps its continued objective of having B.C. recognized as a "fifth region" in any regional calculations. However, at the August CCMC meeting, B.C. began to lessen its demand for the "fifth region" requirement in a reformed Upper House, apparently as a compromise to salvage what it could respecting provincial participation in central institutions.

It has maintained its opposition throughout to the entrenchment of an equalization formula in the Constitution, although it does not seem to be opposed to acknowledging the principle of equalization in the Constitution. At the end of the August CCMC meeting, B.C. tabled a new proposal which closely resembles current drafts, but which meets B.C.'s concerns by avoiding a specific reference to equalization "payments".

B.C. does not appear rigid on the precise resolution of the resource-related areas. For example, the B.C. position on fisheries may be a bargaining chip to gain increased control on environmental matters.

Similarly it has shown a willingness to be flexible on its proposed requirement for Senate ratification of Supreme Court appointments, but has maintained the pressure to have provincial appointments to the Supreme Court.

At the Summer CCMC meetings, the B.C. delegation was in close communication with its government. There appears to be a co-ordinated B.C. strategy, with fall-back positions which would provide it with sufficient flexibility to attain its objectives, or to move if necessary where there is a provincial consensus. At the August CCMC, B.C. continued to register its opposition, in principle, to entrenching rights. At the same time its officials were very constructive during discussions of the proposed Charter of Rights. In line with this, B.C.'s philosophical opposition to the entrenchment of Charter rights will likely lessen, in line with provincial consensus, or with recognition of B.C.'s other objectives, such as "fifth region" status.

It also appears that B.C. will endeavour to maintain its support of Alberta on the resource-related items as long as possible, although it would not want to give up a good package of benefit to B.C. With the possibility of an impending provincial election, the Premier will want to be seen as a strong defender of B.C. interests, and as making no unjustified give-aways. It will also be tempting for him to fight the election by fighting the "feds" rather than the Opposition, so it will be in B.C.'s interest to stall the talks, so as to buy time to argue about the constitutional issues, or, to prod the federal government into taking unilateral action on constitutional issues not supported by B.C. residents.

ANNEX

APPARENT PROVINCIAL POSITIONS
ON CONSTITUTIONAL ITEMS
AS AT JUNE 17, 1980

NEWFOUNDLAND

The government of Newfoundland:

- favours an overall package approach which would include Newfoundland's concerns and opposes agreement seriatim, beginning with matters basically of concern to central Canada;
- supports the entrenchment of rights, including language rights;
- strongly advocates provincial ownership of offshore resources;
- supports fisheries as a shared jurisdiction;
- does not attach a high priority to patriation, but is prepared to see the matter resolved if possible.

Other items Newfoundland would be prepared to study as priority matters are:

- resource ownership and interprovincial trade;
- equalization and regional development;
- the control of broad federal powers (e.g., the declaratory power).

PRINCE EDWARD ISLAND

The Government of Prince Edward Island:

- supports the entrenchment of a Charter of Rights and Freedoms along the lines proposed in Bill C-60 (including language rights and perhaps language rights in education);
- wants a strong central government and a strong national identity. Canadians must have equal access to opportunities and enjoy national standards for basic services. P.E.I. is basically satisfied with the present division of powers, but is willing to discuss the concept of federal delegation of authority to the provinces;

- wants no change in the monarchy;
- supports regional representation on the Supreme Court and increased numbers and feels that civil law judges should primarily be responsible for civil law appeals with the support of a minority of common law judges. Appointment procedures should be studied further;
- supports an annual First Ministers' Conference and ministerial mechanisms for consultation;
- supports provincial equality thesis with regard to amending formula and possible Senate reform;
- wants constitutional expression of the principles of the redistribution of wealth.

NOVA SCOTIA

The Government of Nova Scotia:

- accepts the entrenchment of fundamental democratic and legal rights;
- has recently shifted on lingustic rights and would now be prepared to contemplate the entrenchment of minority language education rights;
- regards equalization as an important principle and will seek its constitutional expression;
- is no longer seeking new constitutional powers respecting fisheries;
- has stated that the federal-provincial agreement on offshore resources signed by Mr. Regan is no longer satisfactory. The province is very much interested in having ownership of the offshore but may be prepared to settle for less.

NEW BRUNSWICK

The Government of New Brunswick:

- strongly supports the entrenchment of a Charter of Rights and Freedoms, including language rights and language rights with respect to education;
- feels strongly that patriation is an urgent issue, with or without an amending formula;
- is not opposed to some form of provincial participation in the nomination of Senators, but is basically opposed to any radical change in the current Senate;

- strongly opposes the scrutiny of nominations to the Supreme Court by the Senate and wishes the current system to be maintained;
- wants no change in the monarchy, but is not opposed to clarifying matters;
- supports an annual First Ministers' Conference;
- does not want national institutions to be weakened through regionalism.

QUEBEC

The Government of Quebec will accept whatever decentralization of powers is agreed upon. However, it announced that it will not make a final commitment on any package of reforms until it has received a mandate to do so from the people of the province.

Communications (and particularly the broadcasting aspect) will be an area of special importance for the Quebec government.

ONTARIO

The Government of Ontario:

- believes it is unlikely that quick agreement could be reached on a comprehensive package of constitutional reform (including, for example, a revision in the distribution of powers), and is prepared to support a limited package as a first step;
- believes in a strong central government;
- believes substantial movement on a bill of rights is possible (particularly, fundamental and democratic rights);
- believes some movement on the entrenchment of language rights is possible and accepts the constitutional protection of certain minority language rights (particularly in the field of education);
- accepts the idea of patriation (unilateral or otherwise) without an amending formula, although not keen about the unanimity principle (if necessary, would prefer unilateral action without recourse to national referendum);
- would accept the entrenchment of the principle of equalization;
- is a leading proponent of family law reform agreed upon at the First Ministers' Conference of February 1979);
- wants the preservation of the monarchy;

- would like to entrench the "common market" principle;
- would support provisions that would allow for more flexibility in certain areas of jurisdiction so that some provinces, such as Quebec, could take on more responsibilities than the others if they so desired;
- would support the reform of existing national institutions such as the Senate to allow for the fuller expression of regional or provincial interests as long as it does not inhibit the central government's decision-making powers;
- would support provincial participation in the appointment of judges to the Supreme Court of Canada; and
- favours an annual First Ministers' Conference.

MANITOBA

The Government of Manitoba:

- strongly opposes the entrenchment of a Charter of Rights, but is unlikely to stand alone in opposition to entrenchment;
- opposes Senate scrutiny of nominations to the Supreme Court;
- wishes no change in the monarchy;
- favours an annual First Ministers' Conference;
- is basically satisfied with existing institutions and constitutional conventions; the first priority should be questions of the redistribution of powers and of an acceptable amending formula ("... until we have agreed on a procedure for the amendment of the Constitution, we can do nothing.");
- supports a strong central government.

SASKATCHEWAN

The Government of Saskatchewan:

- favours reactivating the CCMC and discussion of the first list items;
- wants the question of native participation to be considered;
- wants the provinces to have the right to control production of natural resources and to tax resources directly and indirectly, with any federal interventions in the resource field being subject to compelling national interest;

- would accept entrenchment of some language rights and fundamental human rights (with non obstant clause) as part of an overall package;

- has suggested consideration of the Toronto proposal for an amending formula, which specified unanimity for certain things, but not all;

- would be willing to consider some form of "special status" for Quebec;

- would accept modest proposal for proportional representation in House of Commons (perhaps an additional 50-60 seats);

- supports better representation of provincial and regional interests in central institutions;

- wants some restriction on the use of the so-called "unilateral" federal powers (emergency, declaratory, spending);

- would like some transfer of legislative jurisdiction from the federal government to the provinces -- in areas like resources, communications, or perhaps family law;

- favours an annual First Ministers' Conference;

- supports the principle of equalization.

ALBERTA

The government of Alberta set out its Constitutional position in Harmony in Diversity: A New Federalism for Canada. The fundamental principles that must be preserved and fully respected in any new arrangement, according to the government of Alberta, are:

- responsible parliamentary government must be the basis for our system of government;

- the principles of constitutional monarchy must be maintained;

- all provinces have equal constitutional and legal status within Confederation;

- strong provinces make a strong, viable Canada, complementing the role of a strong federal government;

- within their respective sphere of jurisdiction, the two orders of government - federal and provincial - are equal, neither being subordinate to the other;

- each of the two orders of government must respect the responsibilities and jurisdictions of the other.

The government of Alberta recommends that proposed changes to the Constitution be considered as a package and not be compartmentalized, that the process be undertaken with all due speed but without an unrealistic timetable, and that no changes affecting federal-provincial relations or the provinces be adopted without the concurrence of the eleven governments and legislative bodies of Canada.

Alberta positions include:

- that provincial ownership and control over natural resources be confirmed and strengthened;
- that a "representative constitutional court" (separate from the Supreme Court) be established;
- that forty per cent of the members of designated national boards and agencies be appointed by the provinces;
- that an amending formula reflect the principle that all provinces have equal constitutional status and that existing rights, proprietary interests and jurisdiction of a province cannot be diminished without the consent of that province;
- Alberta opposes change in the Senate along the lines proposed by B.C. and Senate scrutiny of nominations to the Supreme Court;
- Alberta opposes proportional representation in the House of Commons;
- Alberta would accept fundamental and democratic rights and would consider legal rights;
- Alberta would support entrenching official languages "for Canada", but the status of the lenguages should not be entrenched with respect to provincial jurisdictions;
- Alberta would support early action on patriation if it were accompanied by adequate safeguards and assurances respecting the existing rights of the provinces.

BRITISH COLUMBIA

The government of British Columbia published a series of nine papers on its constitutional position. British Columbia is committed to the basic principles of a federal system and to the principle of responsible government under the Crown and it is opposed to unilateral federal action on the monarchy and the Senate. It rejects a compartmentalized approach to constitutional review. B.C. sees no necessity for codifying and, thus, freezing the conventions of the Constitu-

tion and it is opposed to constitutional "over-stuffing" (i.e., entrenchment of basic human rights and language rights). The basic recommendation is that B.C. be recognized as the Pacific Region and that it be fully and directly represented in federal institutions. Pursuit of this ambition is thus reflected in, and is frequently the determining factor in the B.C. position in a number of areas, e.g. the Senate, Supreme Court. B.C. desires:

- a Bundesrat-style Senate with equal representation for the five regions of Canada; the new Senate would have an absolute veto on some matters (including constitutional amendments) and a suspensive veto on others;

- the constitutional entrenchment of a Supreme Court of Canada with a general appellate jurisdiction, and composed of eleven judges (at least one per region) whose nomination shall have been ratified by the reconstituted Senate;

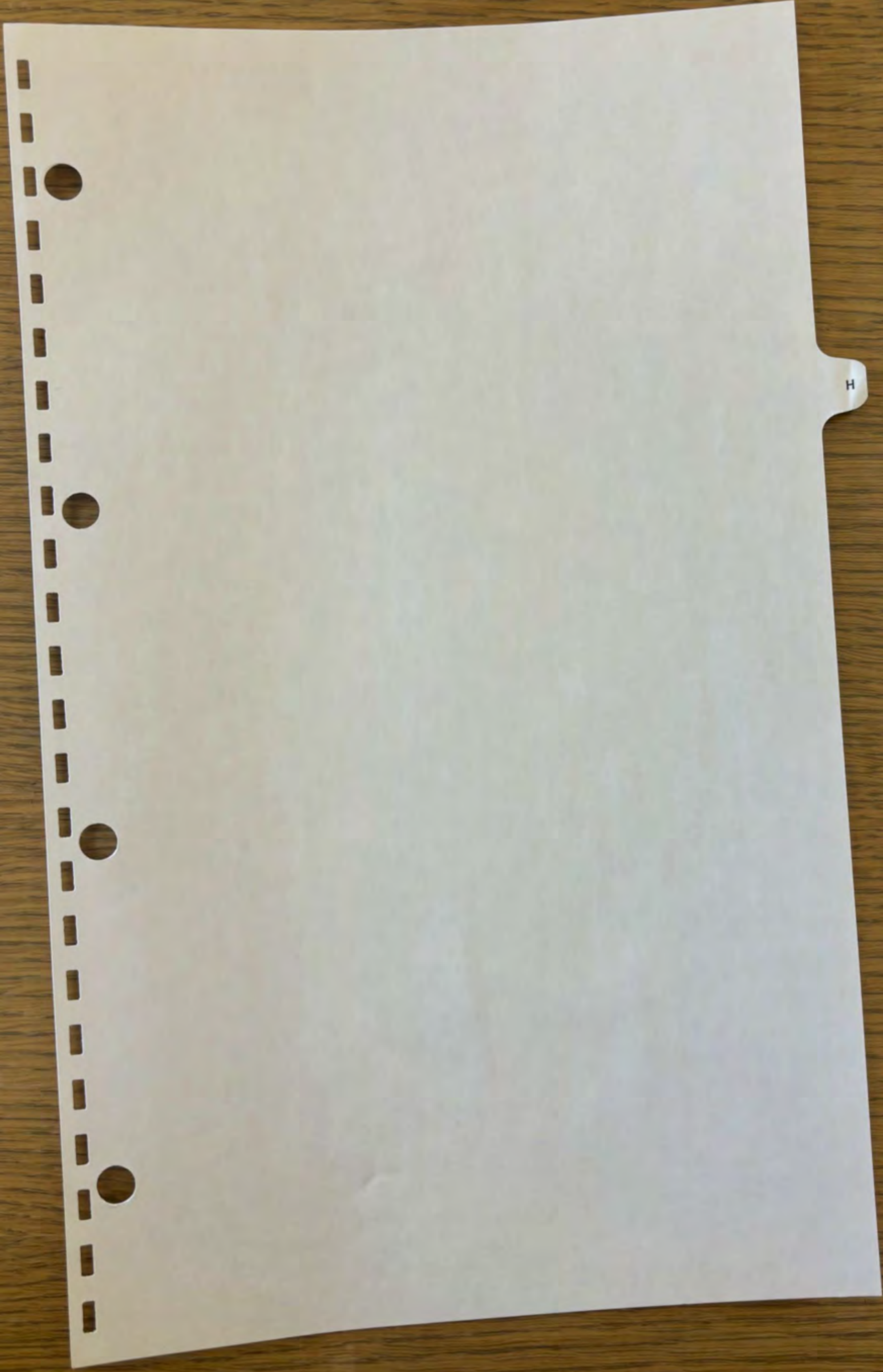
- the establishment of a permanent Federal-Provincial Liaison Committee on National Policy to facilitate the planning for and the follow-up of First Ministers' Conferences;

- gradual administrative and legislative initiatives to provide for minority official language needs as they occur rather than constitutional guarantees (except that s. 133 of the BNA Act could be extended to further federal and Quebec government services);

- a new distribution of powers on the basis of the four principles of nationalism, regionalism, benefit sharing and efficiency;

- an amendment formula that would require affirmative votes of the House of Commons, the Atlantic Region, Quebec, Ontario, the Prairie Region and British Columbia.

B.C. would accept the entrenchment of fundamental and democratic rights and would consider legal rights.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September 6, 1980

Summary of Introductory Remarks

1. Welcome: useful summer work (tribute to CCMC)
   - good basis for discussion
   - can make progress, although difficult

2. Over 50 years of failure:
   - people are weary, frustrated
   - time for action, in response to the will of the people
   - last chance, on people's package

3. People's package:
   - people want charter
   - mobility rights useless without language rights.
   - discuss package on own merits
   - protect economic union

4. Powers: can't resolve everything now
   - can negotiate

5. Need action now:
   - last time to London
   - let's go with broadest possible package
     - certainly people's package
     - as much else as possible
       - seek no federal powers, except for economic union
       - on provincial powers, can move, but not all the way.

6. This week may turn out to be landmark in maturing strength and independence of Canada.

Confidential

September 6, 1980

Notes For Remarks By The Prime Minister
At The First Ministers Conference On The Constitution
Ottawa --- September 8, 1980

On behalf of the federal government, I take pleasure in welcoming all of you to this Conference of First Ministers on the Constitution of Canada. Given the useful work accomplished over the summer months by our ministers and officials, I believe that we begin with a good basis for discussion. Given the good will and love for our country which each of us has brought to this table, I am confident that despite the difficulties of our task, this meeting can become an important step toward the renewal of our federation.

For over fifty years, federal and provincial governments have met in conferences such as this, with the aim of modernizing our Constitution and completing the process of Canadian independence. For one reason or another, all of those conferences ended in a failure to do the job which needed to be done.

The people of Canada have grown justifiably weary of interminable discussion, and are understandably frustrated by our failure to make Canada work the way it can and should.

For that reason, the Government of Canada is firmly convinced that the time for talk is rapidly coming to an end, and the time for action is upon us.

We are committed to action on the Constitution, not only because the federal government and many of you pledged such action during the Québec referendum campaign, but also because it is clearly the will of the people in every part of Canada.

There can be no doubt at all that the overwhelming majority of Canadians in every province and territory want us to move forward with the job of constitutional reform as quickly as possible. I believe that, as politicians, we have no choice but to respond to the will of the people.

In May of this year, when I announced in Parliament that we were launching a new initiative toward constitutional consensus with the provinces, I said that in the fall, after assessing the results of three months of intensive consultation, I would be recommending a course of action to Parliament.

I will keep that pledge; and I look forward to reporting that the federal and provincial governments are ready and willing to act with Parliament in giving a new and historic beginning to the Canadian spirit of co-operation and partnership.

I look forward to showing the people of Canada strong proof that their eleven governments are indeed responsive to the will of the people -- that we can and will make Canada work better in the future than it has in the past.

In response to the national desire for change, the Government of Canada is determined to push forward with constitutional renewal when Parliament reconvenes.

This conference, therefore, really is the last chance for the people of Canada to have their eleven governments speak with one voice and act with one will on the re-writing of the fundamental law of the land, insofar as it applies to patriation and a charter of rights.

When this week comes to an end, the time for federal-provincial discussion of the so-called "people's package" -- that is, bringing the Constitution home to Canada with an entrenched charter of rights and freedoms -- will also have ended.

After half a century of effort, it is time we produced results. After half a century of talking, our tongues and the people's ears demand relief.

I approach this conference, therefore, with a desire for genuine and serious negotiation toward a consensus. I have come to listen seriously to the proposals of any and every premier who is prepared to listen seriously to mine.

The federal government is prepared to make good offers at this table, and I trust you are prepared to do the same. Negotiation, after all, is a two-way process. We made good offers to each other during the summer months, through our ministers and officials, and there is no reason why we cannot bring that series of negotiations to fruition this week.

So we are not starting at the beginning of our common quest for a new constitution.

For that happy fact I would like to pay public tribute to the ministers and officials who worked long and hard during a vacationless summer, under the co-chairmanship of Mr. Chrétien and Mr. Romanow. During their series of meetings in Montréal, Toronto, Vancouver and Ottawa, they found common ground which gives me confidence as we begin this conference.

I do not expect unanimity among us, nor is it necessary. Indeed, it was a false emphasis on the need for unanimous agreement which paralyzed many previous constitutional conferences.

We will be discussing two different aspects of national renewal, both of which are based on the need to define Canada clearly as a society of free people living in one strong federal and sovereign state. Those two aspects are:

1) the basic rights and freedoms of Canadians, and,
2) defining how Canada can best be governed, through an appropriate division of powers and institutions.

It is clear that Canadians want to have their basic rights, including mobility rights, firmly entrenched in the Constitution, safe from the arbitrary actions of any Parliament or legislature. It is equally clear that the right to move to any part of Canada to live and work is a fraud unless language rights are secure. I seek your help in defining fundamental rights and freedoms; but the federal government is not prepared to give away federal governing powers in order to secure provincial concessions on individual rights.

We will not discuss the rights package, the people's package, except on its own merits, without reference to any other aspect of our negotiations. The rights of the people are too important to be traded off for some extended jurisdiction of a provincial government.

Canadians want to reaffirm that we live in one federal and sovereign country, that we share this land together, that we want it to be a strong country, that there should be free movement of people, goods and services from sea to sea, and that the benefits of our economic union must be protected.

Here again, the federal government stands firm in its determination to have our Constitution define Canada as that kind of state. We will not bargain away the nature of our country, nor agree to weaken the right of all Canadians to call every part of Canada their own.

On the second aspect of our discussions, the appropriate powers and institutions of the federal and provincial governments, there is lots of room for negotiation.

The issue of the appropriate assignment of powers between the federal and provincial governments is, as I see it, a challenge to each of us to strive for the best possible agreement consistent with the need to preserve Canada as one strong and united country.

This is a continuing process which takes time, and which undoubtedly will be the subject of federal-provincial negotiations for years to come. I seek the widest possible agreement on governmental powers this week; but I realize that some of the issues which divide us will take more time to resolve.

We are agreed, however, that there is a clear need for urgent action now on the renewal of our federation.

That is why the Government of Canada intends to ask Parliament to act very soon on sending a joint address to London seeking legislative action by the Parliament of the United Kingdom.

This will be the last time we will be going to London to ask the British legislators to change the fundamental law of Canada; so let's go with the largest possible package of amendments.

The package must certainly include bringing our Constitution home to Canada once and for all, with an amending formula and an entrenched charter of rights and freedoms.

I would like it to include significantly more than that. That is why I am seeking the broadest possible agreement among us on the division of governmental powers.

I am not seeking unanimity, although that would be very welcome, but rather a major consensus. Those who disagree with such a consensus cannot expect to be able to prevent action forever.

So, on the question of powers, let us set out to reach the best agreement we can. I know that each of us thinks that his government can exercise those powers better than anyone else -- that's why we're in politics. But because we are all politicians, we are accustomed to settling for what is possible, when we know that our vision of the ideal arrangement is not attainable.

The federal government seeks no additional powers for itself, except the power to fulfill its responsibility to preserve Canada as a strong and liberating economic union.

As for the additional powers sought by provinces, we are prepared to make significant concessions, but we cannot go as far as some of you would like.

We won't resolve all our differences this week, but progress is certainly possible.

All of that having been said, I look forward to a most interesting and productive week, a week of negotiations and agreement which may turn out to be a landmark in the maturing strength and independence of Canada.

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CONFIDENTIAL

September 2, 1980

1. CHARTER OF RIGHTS

A. Introductory Remarks by Mr. Chrétien

The subject of an entrenched Charter of Rights was discussed at some length during the past two months by the Continuing Committee of Ministers. There were two main issues:

1) whether basic rights and freedoms of Canadians should be entrenched in the constitution at all, and
2) if so, what rights should be included in an entrenched Charter.

While some progress was made on the possible contents of a Charter in the event of entrenchment, there was no consensus on the question of entrenchment itself.

Turning first to the contents of a Charter, a sub-committee of officials, putting aside the issue of entrenchment, examined at length the categories of rights that might properly be included in a Charter. There was general agreement that fundamental freedoms and democratic rights could be included.

There was also considerable agreement on the inclusion of some legal rights, although provincial representatives favoured a somewhat narrower list of these rights than that proposed by federal representatives.

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Agreement was also reached on dropping the category of property rights.

With respect to mobility rights representatives of all provinces believed that, if these rights were to be included in a revised constitution, they were not ones appropriate for inclusion in a Charter of Rights.

Similarly, representatives of virtually all provinces believed that non-discrimination rights dealt with matters that were better left to development through federal and provincial human rights laws. Federal representatives continued to be of the view that mobility right and non-discrimination rights should be contained in a Charter.

With respect to language rights, Ministerial discussions indicated that while there was general support for including these at the federal level, there was only limited support for entrenching these rights at the provincial level.

A large majority of provinces believed that language rights respecting statutes, courts and services to the public should be left to determination by the legislatures.

With respect to minority language education rights several provinces indicated a willingness to entrench the principle of the "Montreal Agreement"

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of 1978, but a majority preferred to leave this matter as well to provincial laws. Federal Ministers continued to press for entrenchment of <u>all language rights</u> as proposed.

The sub-committee also discussed briefly the question of whether an entrenched Charter might include an override clause enabling a legislature to enact a law expressly overriding certain Charter rights. While some doubts were expressed about the desirability of such a clause, it was generally felt the matter should be given further consideration.

Turning to the question of an entrenched Charter, Ministers discussed this on several occasions. While no Minister questioned the importance of protecting rights in Canada, many provincial Ministers were of the opinion that such protection was better afforded through appropriate legislation enacted by elected representatives rather than by an entrenched Charter which would be interpreted by the judiciary and difficult to amend.

However, a number of provincial Ministers did seem to feel that if an entrenched Charter were strictly limited to some clearly defined and well recognized rights, for example, fundamental freedoms, democratic rights and specific legal rights, the idea of entrenchment may be more acceptable.

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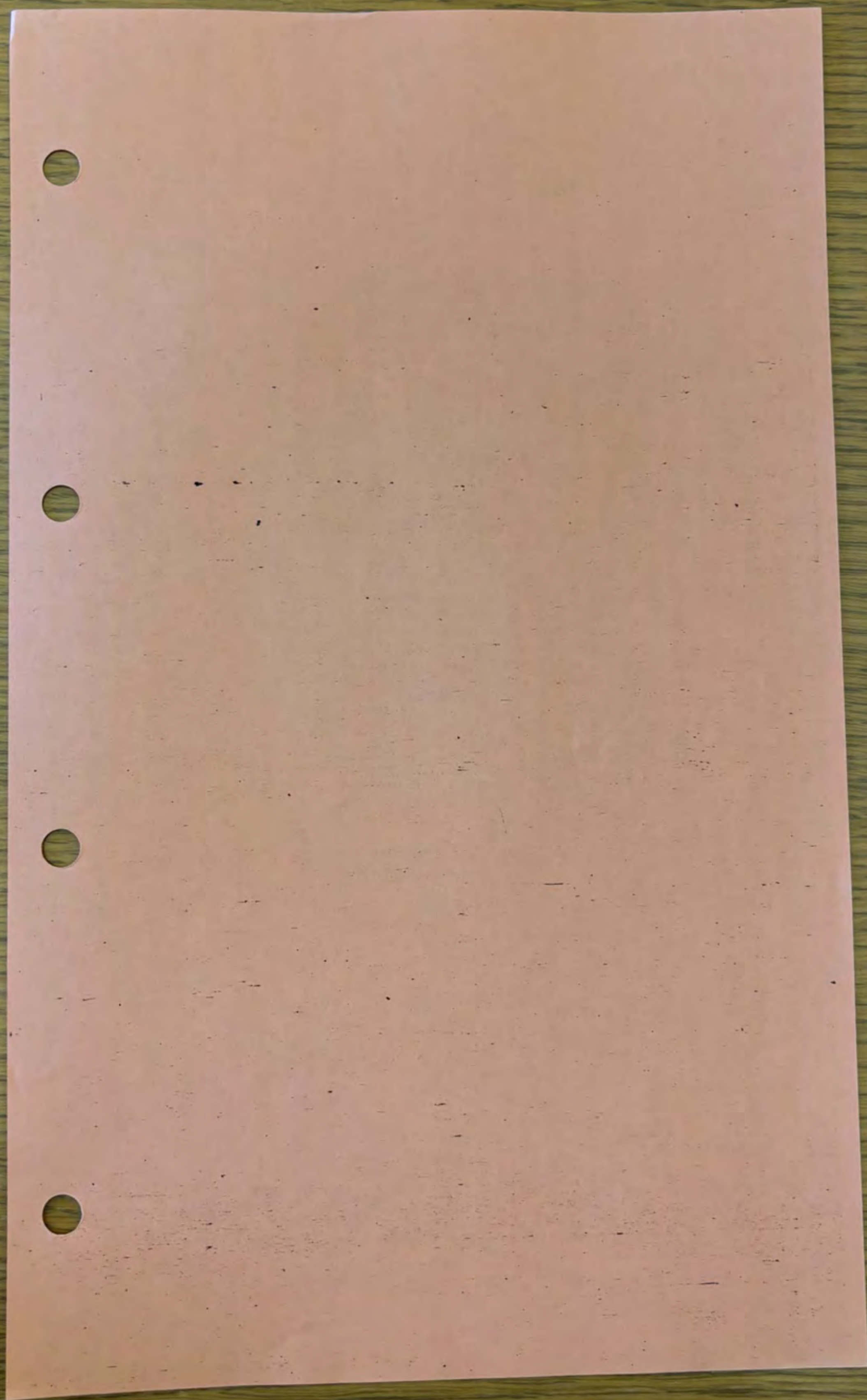
Nevertheless, when the question of entrenching rights was last discussed by Ministers on August 29, only the federal government and the provinces of New Brunswick, Newfoundland and Ontario indicated support for the principle.

Issues for Resolution by First Ministers

1. Should there be an entrenched Charter of Rights?

2. If so, which of the categories of rights mentioned above should be included?

3. In the event of an entrenched Charter, should it include an override clause to permit the enactment of laws expressly overriding some of the entrenched rights?



B-1

CONFIDENTIAL

September 5, 1980

1. CHARTER OF RIGHTS

B. NOTES FOR A STATEMENT BY THE PRIME MINISTER

I. OPENING REMARKS

The first item on our agenda is the Charter of Rights. I have had an opportunity to read the report from the Continuing Committee of Ministers and it is evident that, while the Committee has made some progress during the summer on this subject, they have left us with ample work to do here.

As I understand the situation, there are seven provincial governments that feel placing any basic rights and freedoms in the constitution is either unnecessary or undesirable. Beyond this, it seems that only one provincial government is inclined to entrench the range of rights that the federal government has proposed.

Thus, gentlemen, our task appears clear:

- to consider the fundamental question of whether putting people's rights in our constitution is the best means of protecting them, and

- if so, what rights should go in the constitution.

Premier Lyon. Perhaps you could lead off on this item.

B-2

CONFIDENTIAL

II RESPONSIVE REMARKS

1. We have heard many of these arguments against entrenchment of rights before. It will come as no surprise to anyone that the federal government is firmly in favour ... indeed committed ... to placing a Charter of Rights in the constitution.

2. Before turning to a response on some of the views expressed by Premiers (name them), let me indicate briefly what I feel is the real issue we are ... or should be .... talking about.

3. We are not here talking about whether the federal or provincial governments should have power over some particular matter - like communications or fish. Those are small issues compared to the matter before us now.

4. What we are talking about is the power which Canadians should have to protect themselves against arbitrary and unwarranted invasions of their basic rights and freedoms by big government - whether it be the policeman, the school board, the bureaucrat, or indeed, we legislators ourselves.

5. Constitutional protection of individual and minority rights is not some abstract, philosophical idea. Rather, it is the essence of being a citizen in a free and democratic society. It is the essence of being a Canadian and this is reflected in the clear desire of a vast majority of Canadians for an entrenched Charter of Rights.

6. These rights and freedoms are a statement of the very foundations of our society, and I can think of nothing more fundamental requiring clear expression in our Constitution.

7. This view is not just that of the federal government and the public. It is one shared by federal parliamentarians of all parties. Let me just recall that we have had two unanimous reports of joint parliamentary committees in 1972 and 1978 calling for broad entrenchment of rights in the Constitution. If Members of Parliament themselves are prepared to guarantee these rights to the people, why should we here be so reluctant to do otherwise?

8. Turning now to some of the points raised by the Premiers in their remarks, let me make a few comments on them.

9. First it is said that rights are sufficiently well protected by our common law traditions. It is true that, in comparison to some other countries, basic rights are reasonably well protected in Canada. But let us not blithely ignore instances where that has not been the case both in the past and the present.

10. In the past we can recall laws
    - denying the franchise to Chinese citizens in BC
    - abolishing the use of French in Manitoba
    - denying access to certain occupations by Chinese in B.C.
    - stripping Japanese Canadians of their citizenship by the federal government
    - suppression of freedom of religion and expression of political belief in Quebec

    to mention only some.

11. More recently we have seen laws
    - restricting the rights of citizens to acquire property in some provinces - PEI and Saskatchewan

- limiting the rights of citizens to seek employment from one province to another in Quebec and Newfoundland (and by the federal government on the Yukon pipeline)
- restraining public assemblies in Montreal
- limiting the use of English in Quebec.

As well, we have witnessed police practices at the federal level which must call into question how effectively our legal rights are protected.

12. Can we say in face of this evidence that our inherited legal traditions are a sufficient defence for people's basic rights? I think not!

13. Second it is argued that constitutional protection of rights is foreign to our parliamentary system of government. Whatever validity that proposition once may have had, it can find little support today.

14. Today, as we well know, laws are not those simply made by legislatures in open debate. The vast bulk of laws are made by Ministers or officials with no public debate. This process gives rise to much opportunity for rules and regulations, made in the interests of efficiency and expediency, to infringe individual rights.

15. Put in this context, I would suggest that the so-called threat to "supremacy of Parliament" by putting individual rights beyond its reach is not that at all. Rather, it would be putting restraints on the supremacy of government over the people - and would anyone dissent from that goal? Obviously not!

16. If anything, putting rights in the constitution would enhance the legislators' role. This, simply because we would be forced to be more vigilant when delegating powers to bureaucrats.

17. <u>Finally, it is argued that entrenching rights will leave us at the mercy of the judges who determine what those rights mean</u>. It is said: "Look at the terrible things that the United States Supreme Court has done under that country's Bill of Rights! We don't want that to happen here!" The old Dred Scott case (holding that a slave was property) is thrown up as an example. Sure it was a bad judgment, but maybe not out of keeping with the values at that time.

18. What is overlooked are the <u>good</u> judgments of the U.S. Supreme Court. Can anyone deny the value of the landmark decision in 1954 (Brown v. Board of Education) that finally spurred Congress to enact civil rights laws banning racial discrimination by the states?

19. Giving power to the courts to protect the basic rights of citizens gives me no great concern. If we as legislators and bureaucrats overlook these rights, why shouldn't the individual or minority affected be able to call us to account before the courts? Obviously they must be able to. Obviously we must be accountable for infringing basic rights of citizens. That is why the federal government passionately believes in putting rights in the Constitution.

20. In sum, gentlemen, I am not convinced by any of the arguments against entrenching rights.

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To me, they are simply a smoke-screen for denying that we feel strongly enough about the fundamental values of Canadians to put them in our constitution.

21. Let me turn briefly to mention a few of the rights and freedoms that some of you would deny constitutional protection.
    - freedom of religion and conscience
    - freedom of expression and opinion
    - freedom of the press
    - the right to vote
    - protection against unreasonable search and seizure
    - the right of an arrested person to be told the reasons
    - the right to be presumed innocent until proven guilty
    - protection against cruel and unusual punishment
    - the right of Canadians to move freely from province to province to gain employment
    - protection against discrimination
    - the right of English and French speaking minorities to receive some minimal government services in their own language
    - the right of these same minorities to have their children educated in their own language.

22. Can we seriously tell the people of Canada that these fundamental rights ... rights that are the very foundation of our Canadian society... are not important enough to find a place in our constitution? That we, their governments, will look after them well enough?

23. I would like to believe that the answer would be a resounding "no".. but that response rests with you.

CONFIDENTIAL

September 5, 1980

1. CHARTER OF RIGHTS

C. TALKING POINTS

Entrenchment

1. Question: Why does the federal government continue to press for an entrenched Charter?

Answer: On the matter of entrenchment of rights, we have now been discussing this question since 1978 and, in fact, long before. Indeed, at Victoria in 1971 all governments were agreed to entrenching at least fundamental freedoms, democratic rights and certain guarantees for the use of English and French. Since that time two Joint Parliamentary Committees in 1972 and 1978 have unanimously endorsed entrenchment of a fairly broad range of basic rights and freedoms, as have other recent studies and reports of the Canadian Bar Association, the Pépin-Robarts Commission and the Quebec Liberal Party to mention only some. It is also evident that a very large majority of Canadians want their rights entrenched.

There are those who contend that entrenchment of rights is unnecessary and undesirable in Canada. The justifications for this position are said to be the following. First, rights are already sufficiently well protected by our common law traditions. Second, entrenchment is foreign to a parliamentary system of responsible government. Third, legislators, not judges should ultimately determine the scope of basic rights. And, fourth, entrenchment will tend to freeze rights at a particular point, not allowing for evolving social values. Let me briefly attempt to point out what I believe are the basic fallacies in these arguments.

It is true that, in comparison to a number of other countries, many basic rights in Canada are by and large respected by our laws and traditions. But we have seen in the past and continue to see even today instances where unacceptable restraints are imposed on individual and minority rights. Out of the past one can readily recall laws denying the franchise (to Chinese in B.C.), abolishing the use of French (in Manitoba), denying access to occupations (to Chinese in B.C.), denationalizing Canadian citizens (Japanese Canadians) and suppressing freedom of religion and expression of political belief. (Roncarelli, Chaput and Saumur cases in Quebec). More recently, laws have been adopted restricting residents of one province from acquiring property (PEI and Saskatchewan) or seeking employment in

another province (Quebec and Newfoundland), restraining public assemblies (Montreal street bylaw), limiting the use of English (in Quebec) and restricting freedom of speech and association (Quebec referendum). Beyond these laws, we have also witnessed illustrations of police practices that call into question how effectively some of our legal rights are protected. In light of the foregoing, I would suggest it is too facile to assert that our inherited traditions are a sufficient bulwark against infringement of rights and freedoms.

The argument that entrenching rights is foreign to our parliamentary system perhaps had some validity when it was being expounded by Dicey a century ago, but I would suggest that times have changed since then. In that era the principle of supremacy of Parliament had greater significance when Parliament was in fact making all the laws. Today, as we well know, much of our law is not made by Parliament but by Ministers and officials through regulations, orders, rules, directives and the like. These do not receive effective public debate and consequently there is serious danger that laws will be made that infringe on basic rights without the public even knowing until some regulation is applied to an individual. In this context, it is difficult to contend that entrenchment runs counter to the concept of supremacy of Parliament. It would be more accurate to suggest that entrenchment would place restraints on the "supremacy of government" -- and I would hope that no one would be opposed to this. Indeed, viewed from this perspective, entrenching rights would enhance the supremacy of Parliament since legislators would have to be more conscious of specifying the conditions under which delegated powers were granted and administered -- to ensure that they accorded with the rights guaranteed by the constitution.

The third concern, that entrenchment of rights would make the judiciary rather than legislators the final arbiters of what basic rights mean, seems based upon particular perceptions of what has happened in the United States under its Bill of Rights and the assumption that the same thing will occur in Canada. In the first place, it is easy for detractors to point to a United States Supreme Court decision of the past that held property rights to mean that slavery was acceptable or to decisions of the 1930's which thwarted some social legislation of the "New Deal", and ask "Do we want our courts making these kinds of judgments?" What is overlooked are other significant judgments of that same Court which have advanced the cause of civil liberties immensely and well before the legislators were ready to move. One has only to refer

to the landmark decision of 1954 where the Court held that segregated schools violated the principle of equal protection of the law, more than ten years before Congress enacted laws designed to counter racial discrimination. Was this a bad decision? Should the courts not have had the power to make this judgment to protect minority rights?

Beyond this point, I think one also has to note that under the congressional system of government in the United States the courts have been placed in a more direct adversarial role with the legislatures than is the case under our parliamentary system. Consequently, to the extent that fears of "judiciary tyranny" have any real grounds, the fact is in Canada that the courts do not readily override the clearly expressed will of the legislators in matters of social policy -- indeed, our courts have frequently stated that the wisdom of the legislation is not for them to decide, even in constitutional cases.

At the same time, we must recognize that in entrenching basic rights what we are seeking is a means to ensure that a detached body (the courts) can decide when an imprudent majority or bureaucrat has acted in a manner which infringes the rights of an individual or a minority. If from time to time these decisions are found to be so unacceptable to the electorate, then they can be changed by constitutional amendment -- but not by ordinary legislative enactment as is now the case. Fundamental rights are too important to be treated in this manner.

With respect to entrenchment of rights "freezing" their development, I find great difficulty in appreciating this argument. If the rights are described in sufficiently general terms it seems to me that our courts will have no difficulty in molding the language as values change. In doing this they will, of course, be guided by the laws enacted by the legislators which will be reflective of evolving social values.

In sum, I am frankly not convinced by those who argue against entrenchment of basic rights. In my view Canadians are entitled to have these spelled out in our basic law where they will know what they are and legislators and bureaucrats will be bound to abide by them. Nor do I believe that Canadians want some half-way measure such as entrenched rights applicable only at the federal level. Rights require protection at the provincial level as well.

This is particularly important in a federal state where jurisdiction over rights is divided between two levels of government and there are eleven different governments. To the greatest extent possible basic rights in a country should be common to all people wherever they live or move. This can only be assured by putting those basic rights in the constitution. And this is what Canadians want.

Entrenchment

2. Question: What about the argument that entrenchment gives too much power to the courts to say what rights are?

Answer: Of course it gives power to the courts -- but too much? I don't think so. Some say that the Bill of Rights in the United States has resulted in "tyranny of the judiciary". However, I have yet to see the evidence of this. I think the U.S. is still a pretty decent and democratic society. No court can afford to depart too far or too long from the mainstream of public opinion. Judges are, after all, pretty reasonable and sensible people. However, I see great value in entrusting to the courts the power to take a detached view of laws and administrative actions and test them against the constitutional provisions protecting basic rights. Is it not better to have judges equipped with a written Charter of rights expressing the will of the people rather than leaving them to create these rights themselves?

Entrenchment

3. Question: Will the transfer of the legislatures' powers to the courts not deprive citizens of their most effective instrument of influence over the evolution of their individual rights?

Answer: Entrenchment of rights will not prevent a legislature or Parliament from adding to the protection of rights, as they have done under their human rights legislation. Also, the Charter casts the rights in broad terms and contains a clause stating that the rights listed are not exclusive. Courts will have sufficient latitude to interpret the rights flexibly, but subject to reasonable limitations.

Limitation Clause

4. Question: Why have you removed the specific justifiable limitation clauses from the various rights and replaced them with an undefined general limitation clause?

Answer: For two reasons. First it is very difficult to develop appropriate specific grounds for limiting certain rights and in doing so there is the danger that they will be cast too broadly or narrowly. Second, by adopting the language of our new section 1, we feel we have both given sufficient guidance to the courts as to the standards to be applied by use of such words as "free and democratic" and "parliamentary system of government" and at the same time enhanced the supremacy of lawmakers by imposing on them the duty to ensure that they spell out what are reasonable limits when they enact laws and rules.

Opting-in Clause

5. Question: Why does not the Charter provide for an "opting-in" clause so that each province could choose the rights it wants entrenched?

Answer: This matter was considered during the 1978-79 round of constitutional talks and after debate on the various "pros" and "cons" it was generally agreed, as I recall, that opting in was not a good way to approach entrenched rights. Its basic flaw is that it results in patch-work quilt application of rights across the country and defeats the purpose of having rights common to all Canadians wherever they live.

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Freedom of Conscience

6. Question: Is it necessary to include freedom of conscience in the Charter given that it is impossible to control a person's conscience?

Answer: It is arguable that a guarantee of "freedom of religion" does not protect the freedom of the person who chooses to have no religion. In order to protect such persons, the guarantee has been widened to protect "freedom of conscience".

Freedom with respect to the individual's internal belief or conscience may not require protections. However, the external manifestation of the beliefs or the exercise of these beliefs require protection.

The Saskatchewan Bill of Rights includes a reference to "freedom of conscience" as does the International Covenant on Civil and Political Rights.

Legal Rights

7. Question: Why under "Legal Rights" are terms such as "reasonable" and "arbitrary" used rather than "in accordance with law" or "lawful" to qualify rights?

Answer: In our view, the use of qualifiers such as "lawful" or "according to law" would water down considerable the entrenched legal rights. With these words, anything the law provided would be acceptable even though what was being done was arbitrary or unreasonable. What we should have are qualifiers that will put teeth into the rights and make legislators ensure that what is authorized is reasonable in the circumstances. (However, if the proposed tests are considered too extreme, we could consider the lesser test of "according to law" which would afford at least minimal protection for these rights.)

Legal Rights

8. Question: Is it likely that the courts will interpret the "right to life" as meaning that the death penalty or abortion laws are unconstitutional?

Answer: The right to life has been in the Bill of Rights for 20 years now and this has not yet happened. However you will note that, out of deference for provincial concerns, we have changed the "due process of law" phrase in the Bill of Rights to read "in accordance with the principles of fundamental justice". Since this implies a test of only procedural fairness (rather than substantive fairness), it is even more unlikely now that the courts would strike down any such laws. The Supreme Court has held, I might add, that imposition of the death penalty does not constitute cruel and unusual punishment.

Legal Rights

9. Question: Why have you eliminated certain legal rights now found in the Bill of Rights such as the right to a fair hearing in civil cases?

Answer: we have done this to meet concerns of the provinces about some of these rights applying at the provincial level. We have no problem with such rights, including property rights which have also been omitted, applying at the federal level, but

here we are looking for a Charter on which both levels of government can agree. Obviously if this Charter goes ahead in its present form we will want to consider a new federal Bill of Rights to cover rights left out of the Charter.

Legal Rights

10. Question: Why have you agreed to delete the provisions in "Legal Rights" respecting invasion of privacy and the right of a witness to counsel?

Answer: With respect to invasion of privacy, there was considerable concern as to how far this might be interpreted as extending into the private law areas which are already dealt with by the common law and provincial statutes. Because it is such a complex area, we feel it best to leave it aside for the moment. As for the right to counsel for witnesses, this has never been a clearly recognized right and we felt that it was not one requiring entrenchment. When a witness really requires a lawyer, the judge will ensure one is present.

Legal Rights

11. Question: Why are you excluding the ability of the courts to refuse to admit evidence on grounds that it was illegally obtained?

Answer: Canadian rules of evidence have long regarded the admissibility of evidence to be based on its relevance and have not viewed the court's role as one of disciplining the police officer for his illegal acts by letting the accused go free when there is evidence indicating guilt. This is the United States practice and we would not want to see it adopted in Canada. The better approach is to develop more effective means of disciplining police officers who obtain evidence by illegal means.

Legal Rights

12. Question: Why are you including the provision under "Legal Rights" on protection against self-incrimination when the laws of evidence are now under review?

Answer: The right to protection against having evidence compulsorily given by a person used to incriminate him in subsequent proceedings is one of long-standing, and we felt that it should be included even though the Task Force on Evidence is now reviewing the rules of evidence. I would be very surprised if they proposed a change in this rule.

Non-discrimination

13. Question: Why does the federal government continue to press for inclusion of non-discrimination rights when so many provinces oppose it?

Answer: The provinces contend that non-discrimination rights are a developing area where it would be best to leave this development to federal and provincial human rights legislation. While there is some substance to this position it is important to note that most of our human rights laws are limited in scope, covering non-discrimination only in relation to employment, accommodation and public services. It does not apply to such matters as, for example, discrimination under the Indian Act.

In addition to the importance of ensuring that in Canada discrimination on certain grounds will no longer be tolerated, we must be aware of Canada's obligations under international law in this regard. The U.N. International Covenant on Civil and Political Rights (to which Canada became a party in 1976) requires that all persons are to be equal before the law and to enjoy equal protection of the law without any discrimination. Consequently, we should have a non-discrimination provision in the Charter. (See Background on International Covenants at Tab F)

I think it important to note two other aspects. First, the courts have never said that any discrimination is bad. Only where it has no rational basis has it been struck down. Second, our proposed clause provides for "affirmative action" programs to ensure that activities designed to assist those who have been disadvantages by past discrimination will be permitted.

(However, if the provinces feel very strongly about the present wording, we could consider narrowing the application of the provision to the other rights contained in the Charter.)

Mobility Rights

14. Question: Why are mobility rights so important as to be included in a Charter?

Answer: First, there are the rights of citizens to enter, remain in and leave Canada. This guarantees basic aspects of citizenship, most important of which is, of course, the right not to be denied the right to remain in Canada as happened to our Japanese-Canadian citizens at the end of the War.

Second, there are the rights of people in Canada, regardless of their province of residence, to move their place of residence, acquire property and seek a living. These are fundamental aspects of a single and united country. If we permit the erection of barriers at provincial boundaries, then we are on the path to setting up quasi-sovereign states. Surely, if being a Canadian means anything, it means the liberty to move anywhere in the country.

Language Rights

15. Question: Why are the language provisions respecting Quebec, Manitoba, Ontario and New Brunswick more stringent than those for the other provinces?

Answer: These are the four provinces in which the vast majority of the minority language populations are found and consequently it is most important that the rights to both languages in the statutes and courts be ensured in these provinces. However, we have not ignored the other provinces where lesser language obligations are imposed. We have also made provision for these other provinces to become bound by the more stringent obligations of Quebec, Ontario, Manitoba and New Brunswick. Obviously, we would prefer ideally to see the same language rights throughout Canada, but at the moment that does not seem practical except for debates in the legislatures and for minority language education.

Education Rights 15A. Question: Why are minority language education rights limited to children of Canadian citizens?

Answer: This is essentially to meet a concern of Quebec where in the past immigrants to that province have generally tended to assimilate in the anglophone community and language. It is not a restriction that I particularly welcome, but if it at least enables citizens from other provinces to have their children educated in the minority language of the province to which they move, this will represent an improvement over the present situation.

In regard to minority language education rights I might note that despite what others may read into the Pépin-Robarts recommendations, the report states quite clearly at page 109 that the unanimous agreement of the Premiers in February 1978 to ensure minority language education rights should be entrenched. Our proposal simply would confirm this agreement.

Remedies Clause 16. Question: Why have you decided to delete the remedies clause from the Charter?

Answer: On closer examination, we have concluded that remedies already exist in law for a breach of most Charter rights -- suits for damages, applications for injunctions and penal sanctions. We felt it was better to allow these ordinary procedures to be followed rather than leaving it to the courts to invent new ones. To the extent that more effective remedies may be needed, we will have to legislate them.

War Measures Act 17. Question: What is likely to be the effect of this Charter on the War Measures Act?

Answer: That will depend on the circumstances. Quite clearly one of the limits which courts have always recognized on individual liberties are those necessary in national emergencies, such as war. Obviously under an entrenched Charter the courts will have to scrutinize closely the particular limits imposed to ensure that they conform with what is reasonably necessary in the circumstances of the case. The provisions of the War Measures Act will, of course, have to reviewed in light of the Charter to eliminate any discrepancies.

1. CHARTER OF RIGHTS

C. TALKING POINTS - SUPPLEMENTARY

Response to statement S. Lyon may make regarding the Charter of Rights

On two occasions recently Premier Lyon of Manitoba has made public statements regarding the Charter of Rights: at a press conference on August 19 and as a guest on "Question Period" on August 24. The Premier may well repeat his comments during the FMC. These comments follow along with some points that may be raised in responding to Mr. Lyon.

A. From the press conference:

Statement - "There is no jurisdiction in Canada that wants an entrenched bill of rights except Mr. Trudeau and the present government of Canada."

Response - New Brunswick, Ontario and Newfoundland have indicated support for an entrenched bill of rights; other provinces have reservations about the principle of entrenching rights in the constitution but only Manitoba and one other province (Alberta) appear to be firmly opposed to the concept.

Statement - "It's just one of those trendy ideas that they're bound and determined to impose."

Response - The Charter of Rights is not a new item. It has been included in the constitutional debates since 1968 when the federal government proposed, as one of four items on the agenda, the issue of "fundamental rights".

A decade later, in 1978, when the government submitted Bill C-60 - the constitutional amendment bill - there was a proposal for a new Canadian Charter of Rights and Freedoms.

To the greatest extent possible basic rights and freedoms in a country should be common to all people, and this <u>can</u> only be accomplished by placing them in the Constitution. This was the conclusion of a number of major studies on the subject during the 70's, including the Molgat/MacGuigan Report, the Lamontagne/MacGuigan Report, the Canadian Bar Study and the Pepin-Robarts Task Force. More recently, the Quebec Liberal Party has produced a report supporting entrenchment.

Statement - The Premier dismissed questions about a recent poll in which 91% of 1,057 participants supported a constitutionally guaranteed bill of rights. "There's a Gallup Poll which shows that 75% of the people in Canada favour the return of the death penalty".

Response - The Gallup Poll asked participants whether they agreed with a six point plan for reform of the Constitution. This plan included a provision for an entrenched bill of rights. The Poll showed that there were more Canadians (91%) in favour of the constitution guaranteeing basic human rights than there were in favour in Canada having its own constitution. In fact, of all the points raised with participants the question

regarding entrenchment of the Charter had the smallest number of dissidents with only 2% of the 1,057 participants stating that the constitution should not guarantee basic human rights.

Statement - "Under a monarchical parliamentary system we have achieved about as good a system for the protection of individual human rights as exists on the fact of the earth."

Response - While our present legislative and legal systems have provided Canadians with a reasonably good degree of protection of rights and freedoms, there have been instances where legislative and administrative abuses have occured:

- citizens have been exiled, denied the right to vote and deprived of rights respecting the use of English and French;
- religious and other minorities have suffered discrimination;
- accused have been denied the right to counsel;
- public assemblies have been outlawed;
- the mobility of workers has been restricted.

B. From Question Period

Statement - The Premier stated that he was not opposed to human rights but he believes that the best way of ensuring the protections of rights is through the parliamentary system. He said entrenchment would put the judges in the position of making social policy in this country, it would make our country more presidential, more of a republic and what is fundamentally at issue is the monarchical and the parliamentary systems.

Response - The courts will not be given new powers when a Charter is entrenched only new laws on which to judge. The judiciary has traditionally decided disputes between the citizen and the state and this would be performing a normal role in interpreting entrenched rights.

The rights of individuals and minorities are the very rights which require protection from the supremacy of Parliament where the tyranny of the majority can be used to the detriment of minority rights.

A large number of parliamentary democracies have entrenched a Bill of Rights in recent years - Kenya, India, Singapore, Barbados, Malta, to name a few. Even in Britain, the bastion of supremacy of Parliament, serious thought is being given by eminent jurist to entrenching rights in that country.

Statement - The Premier said that proponents of the bill of rights say that the forced movement of Japanese nationals during the war would not have taken place if we had a bill of rights. The American had a bill of rights and it happened in the

United States. "So you can't put your faith in documents that are entrenched, or lines that are entrenched on a document in your constitution. You've got to put your faith in the institutions, in parliament and in the courts, to enforce the law in keeping with the opinions of the people of that time."

Response - Although the American Japanese were also forced to live in internment camps the treatment they received was better than the Canadian Japanese and the compensation they were given following the war was superior to that provided by the Canadian government.

There is danger in enforcing the law in keeping with the opinions of the people at the time as there is danger in the rule of the majority. In governing a large country it is often efficient to overlook minorities in order to get things done quickly or effectively. However, this is not what we want in Canada, we want all people to have guarantees not only the majority. Therefore, rather than put faith in institutions, in parliament and in the courts, to enforce the law in keeping with the opinion of the people at that time I would prefer to enshrine rights and freedoms for Canadians in the Constitution so that at no point in the future of this country, could the opinion of a majority of the people remove these rights. If we look at our past we can see that this curtailment of minority rights has happened on occasion. Usually in times of crises when, in an attempt to be pragmatic, we have mistreated some citizens. The internment of the Japanese is one example of this. Perhaps it would have happened even if we did have an entrenched Charter of Rights. On the other hand a Charter may have forced Parliament to give greater consideration to their decision or the courts could have reversed the decision.

tement - The Premier also commented "I don't know that Canadians do support a bill of rights at all because I think it is a very complex topic that perhaps when fully explained to Canadians that it would mean a fundamental change and an erosion, I think, of the parliamentary form of government, in the supremacy of Parliament - that is, the right of the people who are elected by the citizens of Canada to make the decisions - then I think you would find a different response from what you perhaps think is the case."

Response - Canadians have had the opportunity to weigh the various arguments regarding a Charter of Rights since 1968. Also a number of reports including the Canadian Bar Association Report, the Pepin-Robarts Commission findings and the Quebec Liberal Party paper titled "A New Canadian Federation" all proposed an entrenched Charter of Rights and all were debated in public.

I think that over the past two years, since the February 1979 meeting we had in Ottawa on the Constitution, enough information has been provided by the media on the Charter to ensure that interested Canadians are fully aware of what a Charter of Rights and Freedoms means.

Finally, I believe that the majority of Canadians who were recently polled on this matter and who were in favour of an entrenched Charter, as 91% were, had a good understanding of the subject matter. Also, I must add, that I am convinced that those who were opposed to an entrenched Charter, 2% of the Canadians who were polled, very likely had an equally good understanding of what they were opposing.

CONFIDENTIAL

September 5, 1980

1. CHARTER OF RIGHTS

D. STATUS REPORT AND NEGOTIATING POSITION

I STATUS REPORT

A. Principle of Entrenchment

At the end of the CCMC meetings the only provinces indicating a continued commitment to the principle of entrenching a Charter were New Brunswick, Ontario and Newfoundland, the latter two qualifying their support for only a limited Charter. Provincial positions have remained relatively consistent throughout the CCMC meetings, although during July there appeared to be a greater willingness by some provinces (Quebec, PEI, Saskatchewan and British Columbia in particular) to at least consider an entrenched Charter of limited scope, i.e., fundamental freedoms, democratic rights and some legal rights. The growing opposition is no doubt in part, at least, engendered by federal government pressure for a more comprehensive Charter, particularly one including language rights. Only Manitoba and Alberta have remained adamantly opposed to entrenchment throughout.

B. Contents of Charter

On the contents of a Charter, some considerable progress has been made at the officials level in refining the federal draft tabled at the outset of the meetings and in reaching further consensus on certain categories of rights. Officials of all governments have now reached agreement on fundamental freedoms, democratic rights and a considerable number of legal rights. This latter category is important since there was no agreement on it at the outset.

On the other hand, it must be noted that Manitoba and Alberta Ministers have expressly reserved their positions on the officials' agreement. In addition, there remain outstanding differences on several legal rights and there exists extremely little provincial support for inclusion of mobility and non-discrimination rights. This is equally the case with respect to language rights in the courts and statutes at the provincial level where most provinces except New Brunswick and perhaps Newfoundland are following the Pépin-Robarts line of leaving these rights to provincial laws. Ontario would probably like to come aboard on these rights, but would require some time delay on publication of statutes and on implementation of court language rights, the latter, perhaps, on a "where numbers warrant" basis.* Quebec and Manitoba remain firmly opposed to entrenching these language rights.

* Indications from Ontario today (Sept. 5) are that Premier Davis will indicate acceptance of minority language education rights and possibly language in the courts, but is likely to oppose the proposals for both languages in the legislatures and statutes.

On minority language education rights, it is difficult to detect any clear support from other than New Brunswick, Ontario and Newfoundland, although PEI may be brought aboard. The rest seem firmly opposed, with Quebec being the most vociferous opponent -- seeing the proposal as an attempt to "rebilingualize" that province.

Notable on language rights is Saskatchewan's apparent reversal from Premier Blakeney's position in 1979 when he seemed to endorse entrenchment of language rights as part of the "Confederation Pact".

Provincial positions have remained largely unaltered even though the federal government at the August CCMC meetings offered a number of concessions in the new draft Charter that was tabled. These included

- an introductory clause for reasonable limits on rights in a democratic society to replace the specific limitation clause; (note in this that the wording of section 1 has been changed back to "parliamentary" rather than "representative" system of government. We felt that using "representative" would simply lead to a debate on whether this meant the federal government was seeking to change our present form of government.)
- deletion from legal rights of a fair hearing in civil matters;
- deletion of the category of property rights; and
- deletion of the right of witnesses to give evidence in their choice of English or French.

Material in the "Background" section sets out in more detail the positions of the provinces on entrenchment of the various rights.

II PROPOSED NEGOTIATING POSITION AT FMC

It is evident from the foregoing that it will be very difficult, if not impossible, to bridge the existing gulf between the federal and provincial positions both on the principle of entrenchment and on the specific contents of an entrenched Charter.

A. Principle of Entrenchment

1. On the question of entrenchment, it is recommended that the federal position continue to be one of very firm insistence that entrenchment is the only effective means by which to guarantee rights, and this is the course desired by a vast number of Canadians. (See Talking Points under Tab C)

2. One subsidiary issue that will likely arise is the inclusion of an override clause to enable legislatures by express enactments to derogate from certain categories of rights. It is recommended that the federal position continue to be one of strong resistance to have such a clause on grounds that it is both unnecessary and undesirable, undermining the very concept of entrenched rights. (See Talking Points under Tab C)

3. Another subsidiary issue likely to arise is inclusion of an opting-in clause whereby a province may adhere to certain categories of rights but not to others. It is recommended that the federal position be one of total opposition to any such proposal since it creates a "checkerboard" Charter when the whole idea of entrenched rights is to have them apply uniformly across the country. (See Talking Points under Tab C)

B. Content of Charter

On the question of content, it is recommended that emphasis be placed heavily on the fact that a number of drafting and substantive changes have already been made at the urging of the provinces during the summer negotiations and that care must be taken to avoid reducing the proposed rights to a point where they are less than Canadians expect and deserve.

It could then be indicated that the federal government, in light of the CCMC negotiations during August, has prepared a revised draft of the Charter which takes into account some further concerns raised by the provinces. You could then indicate that you will table the new draft for consideration by First Ministers and be interested to have their comments on it.

The principal changes are (you may not wish to refer to them at this point):

1. Legal Rights

   (a) deletion of the protection against arbitrary invasion of privacy;

   (b) deletion of the right of witnesses to counsel; and

   (c) inclusion of a provision preserving existing rules relating to admissibility of evidence in court proceedings.

2. Removal of the general remedies clause. (See Talking Points under Tab C)

With respect to other possible modifications in the Charter it is recommended that the general position be one of firm resistance subject to what is said below.

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1. Legal Rights. The provinces are pressing for at least two other changes in these rights.

(a) With respect to search and seizure, detention and imprisonment, and bail, the provinces want to replace the test of "reasonable" or "arbitrary" which now qualify these rights with a test of "lawful grounds and in accordance with prescribed procedures". This latter test is much weaker than the others since "lawful grounds and prescribed procedures" simply means whatever the law authorizes, however arbitrary or unreasonable it may be. In addition, the stronger tests are now found in our Bill of Rights. It is therefore recommended that the federal position be one of strong resistance to this change. If the provinces continue to press strongly on the point, as a fall-back position we could very reluctantly accept the proposed change. If we do, it is recommended that the wording be changed to read "on grounds and procedures expressly prescribed by law".

(b) Withdrawal of the right of an accused to be tried within a reasonable time. The provinces will argue that this provision will introduce the U.S. Bill of Rights requirement for a "speedy trial", and cite the recent U.S. case where an admitted murderer was acquitted because he was not brought to trial for three years. It is recommended that the federal position be to press strongly for retention of this provision (five provinces supported it) arguing that "reasonable time" does not equate to "speedy trial" and that legislatures will simply have to provide in their laws for what constitutes a "reasonable time". It may be a provision that will bring about reforms to overcome the present delays in our courts.

2. Non-discrimination Rights. There is concern by all provinces that this provision will cause serious problems in relation to "age" and "sex" (retirement age, pension plans, insurance premiums, etc.) if it remains as at present in a broad form. While there is some basis for their concern, it is recommended that the federal position be to press firmly for retention of the provision as drafted, both on the basis that discrimination is too important a matter not to include and on the basis that the courts will, as now, read reasonable limits on the scope of the non-discrimination grounds.

If provincial opposition is vehement and convincing, you may wish to consider testing as a fall-back position a provision whereby the non-discrimination rights are limited to the other rights set out in the Charter. (See Talking Points under Tab C)

3. Provincial Language Rights. Because of the serious resource problems faced by Manitoba and Ontario in implementing immediately the use of French in the statutes and courts, consideration

was given at the August CCMC meeting to a possible delay period for implementing these rights in those provinces. It seemed possible that some reasonable delay periods might bring Ontario aboard. (Manitoba is bound in any case.)

As a result of consideration of this matter by Ministers, it is recommended that the first position of the federal government be one of opposing any delays or any implementation of court language rights on a "where numbers warrant" basis.

As a fall-back position, it might be indicated that consideration could be given to a clause requiring the two provinces to implement the rights with "all due diligence". The problem with this is that it would have the courts ordering the implementation of the rights where they perceived delays. This would raise the spectre of the school desegregation "bussing" orders in the United States and would likely be opposed by the provinces.

As a possible further fall-back position, reconsideration might be given to the earlier option of permitting the two provinces a delay of five years in which to get their statutes fully into French and ten years to have full French language services in the courts. If this would bring Ontario into the language rights, the delay could be well worthwhile.

N.B. There is another potential problem on provincial language rights respecting New Brunswick. Premier Hatfield has indicated that he would want to entrench special provisions for certain language rights in his province. These would include declaring both languages official the same as at the federal level, providing that services to the public are available in both languages in all cases and providing that every student is entitled to education in his mother tongue without any qualifications as to numbers.

These provisions cause problems, particularly in the education area where New Brunswick's provisions vary substantially from those of the Charter. Equally, if New Brunswick has a declaration on official languages, might not Premier Levesque ask that there be a provision declaring French the official language of Québec?

For these reasons, no provisions for New Brunswick have been included in the revised Charter draft. To forestall a debate on this matter, you may consider it advisable to speak with Premier Hatfield before the conference to explain the problems and ascertain how strongly he feels on the matter. If no other provinces object, there would seem to be no particular problem to accommodating the Premier's wishes in relation to official languages and services to the public, but education rights would pose a problem.

4. Minority Language Education Rights. This provision as drafted poses particular problems for Québec in that it will permit immigrant children as soon as their parents become citizens to enrol in English schools as long as they can show they are "members of the English-speaking minority population". The justification for this draft is that it simply tries to reflect the principle adopted by the Premiers in 1978: "Each child of the French-speaking or English-speaking minority is entitled to an education in his or her language..."

If Québec persists in its insistence that this provision is simply an attempt to "rebilingualize" the province, you may wish to indicate that it is not the federal government's wish to insert a provision that goes beyond Quebec's language law except to the extent of its provisions that discriminate against Canadian citizens moving to Québec. You may wish to indicate further that we are prepared to consider a different provision that better meets Québec's concerns if they have something to propose that meets the federal government's concerns. One possible approach might be the use of a mother tongue test as applied to the parents rather than the children, but it would have to contain a provision whereby school age children of a Canadian citizen moving to another province would be entitled to continue their education in the language in which they had begun their schooling. This would have to apply to younger siblings as well.

This approach would narrow the number of persons who would qualify to choose the minority language education. For example the Italian speaking immigrant in Québec would not upon becoming a Canadian citizen be able to insist upon his children being educated in English on the basis that he is "a member of the English-speaking minority"; his mother tongue would govern. On the other hand, such an approach would enable that person, on moving from Québec to another province, to continue to have his children educated in French if that was the language in which they had commenced their education in Québec.

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September 4, 1980

SUMMARY OF MINISTERIAL POSITIONS ON CHARTER OF RIGHTS

SUBJECT	CANADA	ONT	QUE	NS	NB	MAN	BC	PEI	SASK	ALTA	NFLD
Entrenchment of Charter Rights	Yes	Yes, but not all the rights	Doubtful	No	Yes	No	Doubtful	Doubtful	No	No	Yes, but limited rights
Fundamental Freedoms	Yes	Yes	Yes	No	Yes	No	Possibly	Possibly	Possibly	No	Yes
Democratic Rights	Yes	Yes	Yes	No	Yes	No	Possibly	Possibly	Possibly	No	Yes
Legal Rights	Yes	Yes, but very limited	Yes, but very limited	No	Yes	No	Possibly but very limited	No	Doubtful	No	Yes, but limited
Non-discrimin-ation rights	Yes	No	No	No	Doubtful	No	No	No	No	No	No
Mobility Rights	Yes	Possibly	No	No	Yes	No	No	No	No	No	No
Language Rights - Federal	Yes	Yes	Possibly	Yes	Yes	No	Possibly	Yes	Yes	Yes	Yes
Language Rights - Provincial (Debates, Statutes and Courts)	Yes	No	No	No	Yes	No	No	Doubtful	No	No	Yes
Minority Education Rights	Yes	Yes	No	No	Yes	No	No	Doubtful	No	No	Yes

Note: In a number of cases Ministers did not expressly state their positions. Hence the foregoing summary is in certain respects a "best guess" based on general comments.

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September 5, 1980

CHARTER OF RIGHTS AND FREEDOMS

Commentary on Revised Discussion Draft, September 3, 1980.

The revised discussion draft contains the following changes from the August 22, 1980 draft, tabled at the August 25, 1980 CCMC meeting:

Modifications

Section 1 - The Canadian Charter of Rights and Freedoms recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free and democratic society.

has been changed to:

The Canadian Charter of Rights and Freedoms recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

Section 6 - Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except by due process of law.

has been changed to:

Everyone has the right to life, liberty and security of the person and right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 12 - A witness has the right when compelled to testify not to have any evidence so given used against him or her in any subsequent proceedings, except a prosecution for perjury or the giving of contradictory evidence.

has been changed to:

A witness has the right when compelled to testify not to have any evidence so given used to incriminate him or her in any subsequent proceedings, except a prosecution for perjury or for the giving of contradictory evidence.

Section 16 - (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident has the right

(a) to move to and take up residence in any province; and

(b) to acquire and hold property in, and to pursue the gaining of a livelihood in any province.

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(3) The rights specified in subsection (2) are subject to any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence.

has been changed to:

(1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Everyone in Canada has the right

(a) to move to and take up residence in any province; and

(b) to acquire and hold property in, and to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence, and

(b) any other laws referred to in subsections (4) or (5) of section 121 of the British North America Act.

Section 23 - The enumeration in this Charter of certain rights and freedoms shall not be construed to exclude, or to derogate from, any other rights or freedoms that may exist in Canada, including any rights or freedoms that may pertain to the native peoples of Canada.

has been changed to:

The enumeration in this Charter of certain rights and freedoms shall not be construed to deny the existence of any other rights or freedoms that may exist in Canada, including any rights or freedoms that may pertain to the native peoples of Canada.

Section 24 - Any law, order, regulation or rule that authorizes, forbids or regulates any activity or conduct in a manner inconsistent with this Charter is, to the extent of such inconsistency, inoperative and of no force or effect.

has been changed to:

Any law, order, regulation or rule that is inconsistent with the provisions of this Charter is, to the extent of such inconsistency, inoperative and of no force or effect.

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Deletions

Everyone has the right to be secure against arbitrary invasion of privacy.

A witness has the right not to be compelled to testify if denied the right to consult counsel.

Where no other legal resource or remedy is available, anyone whose rights or freedoms as declared by this Charter have been infringed or denied to his or her detriment has the right to apply to a court of competent jurisdiction to obtain relief or remedy by way of declaration, injunction, damages or penalty, as may be appropriate and just in the circumstances.

Additions

Section 25 - No provision of this Charter other than section 12 affects the laws respecting the admissibility of evidence in any proceedings or the authority of Parliament or a legislature to make laws in relation thereto.

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September 3, 1980

REVISED DISCUSSION DRAFT

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

1. The Canadian Charter of Rights and Freedoms recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media; and

(c) freedom of peaceful assembly and of association.

Democratic Rights

Democratic rights of citizens

3. Every citizen of Canada has, without unreasonable distinction or limitation, the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Duration of elected legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date of the return of the writs for the election of its members.

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond the period of five years, if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once in every year and not more than twelve months shall intervene between sittings.

Legal Rights

Life, liberty and security of person

6. Everyone has the right to life, liberty and security of the person and right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search and seizure

7. Everyone has the right to be secure against unreasonable search and seizure.

Detention or imprisonment

8. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

9. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay; and

(c) to the remedy by way of habeas corpus for the determination of the validity of the detention and for release if the detention is not lawful.

Proceedings against accused in criminal and penal matters

10. Anyone charged with an offence has the right

(a) to be informed promptly of the specific offence;

(b) to be tried within a reasonable time;

(c) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(d) not to be denied reasonable bail without just cause;

(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;

(f) not to be tried or punished more than once for an offence of which he or she has been finally convicted or acquitted; and

(g) to the benefit of the lesser punishment where the punishment for an offence of which he or she has been convicted has been varied between the time of commission and the time of sentencing.

Treatment or punishment

11. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

12. A witness has the right when compelled to testify not to have any evidence so given used to incriminate him or her in any subsequent proceedings, except a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

13. A party of witness has the right to the assistance of an interpreter if that person does not understand or speak the language in which the proceedings are conducted.

Mobility Rights

Rights of citizens to move

14. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights of persons in Canada to move, etc.

(2) Everyone in Canada has the right

(a) to move to and take up residence in any province; and

(b) to acquire and hold property in, and to pursue the gaining of a livelihood in any province.

Limitations

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence, and

(b) any other laws referred to in subsections (4) or (5) of section 121 of the British North America Act.

Non-discrimination Rights

Equality before the law and equal protection of the law

15. (1) Everyone has the right to equality before the law and to equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.

Affirmative action programmes

(2) This section does not preclude any programme or activity that has as its object the amelioration of conditions of disadvantaged persons or groups.

Official Languages

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and Government of Canada.

Status of languages and extension thereof

(2) In addition, English and French have the status set forth in this Charter, which does not limit the authority of Parliament or a legislature to extend the status or use of the two languages or either of them.

Language Rights

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

Debate of legislatures

(2) Everyone has the right to use English or French in the debates of the legislature of any province.

Statutes, etc. of certain legislatures

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French.

Statutes, etc. of certain legislatures

(2) The statutes, records and journals of the legislatures of Ontario, Quebec, New Brunswick and Manitoba shall be printed and published in English and French.

Idem

(3) The statutes, records and journals of the legislature of each province not referred to in subsection (2) shall be printed and published in English and French to the greatest extent practicable accordingly as the legislature of the province prescribes.

Both versions of statutes authoritative

(4) Where the statutes of Parliament or a provincial legislature are printed and published in English and French, both language versions are equally authoritative.

Proceedings in Supreme Court and courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading or process in or issuing from, the Supreme Court of Canada or any court established by Parliament.

Proceedings in courts of certain provinces

(2) Either English or French may be used by any person in, or in any pleading or process in or issuing from, any court of Ontario, Quebec, New Brunswick or Manitoba.

Idem

(3) Either English or French may be used by any person in, or in any pleading or process in or issuing from, any court of a province not referred to in subsection (2), to the greatest extent practicable accordingly as the legislature prescribes.

Rules for orderly implementation and operation

(4) Nothing in this section precludes the making of such rules by any competent body or authority for the orderly implementation and operation of this section.

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Communications by public with government of Canada

20. (1) Any member of the public in Canada has the right to communicate with and to receive available services from any head or central office of an institution of the Parliament or Government of Canada in English or French, and has the same right with respect to any other office of any such institution where that office is located within an area of Canada in which it is determined, in such manner as may be prescribed or authorized by Parliament, that a substantial number of persons within the population use that language.

Communications by public with government of a province

(2) Any member of the public in a province has the right to communicate with and to receive available services from any head, central or principal office of an institution of the legislature or government of the province in English or French to the greatest extent practicable accordingly as the legislature prescribes.

Rights and privileges preserved

21. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the commencement of this Charter with respect to any language that is not English or French.

Language of educational instruction

22. (1) Citizens of Canada in a province who are members of an English-speaking or French-speaking minority population of that province have a right to have their children receive their education in their minority language at the primary and secondary school levels wherever the number of children of such citizens resident in an area of the province is sufficient to warrant the provision out of public funds of minority language educational facilities in that area.

Provisions for determining where numbers warrant

(2) In each province, the legislature may, consistent with the right provided in subsection (1), enact provisions for determining whether the number of children of citizens of Canada who are members of an English-speaking or French-speaking minority population in an area of the province is sufficient to warrant the provision out of public funds of minority language educational facilities in that area.

Undeclared Rights

Undeclared rights and freedoms

23. The enumeration in this Charter of certain rights and freedoms shall not be construed to deny the existence of any other rights or freedoms that may exist in Canada, including any rights or freedoms that may pertain to the native peoples of Canada.

. . ./

General

Laws, etc. not to apply so as to derogate from declared rights and freedoms

24. Any law, order, regulation or rule that is inconsistent with the provisions of this Charter is, to the extent of such inconsistency, inoperative and of no force or effect.

Laws respecting evidence

25. No provision of this Charter other than section 12 affects the laws respecting the admissibility of evidence in any proceedings or the authority of Parliament or a legislature to make laws in relation thereto.

Application to territories and territorial institutions

26. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory or the Northwest Territories or to the appropriate legislative authority thereof, as the case may be.

Legislative authority not extended

27. Nothing in this Charter confers any legislative power on any body or authority except as expressly provided by this Charter.

Continuation of existing constitutional provisions

28. Nothing in sections 17 to 19 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.(*)

Application of certain language rights

29. A legislature of a province to which subsections 18(2) and 19(2) do not expressly apply may declare that one or both of those subsections shall have application, and thereafter any such provision shall apply to that province in the same terms as to any province expressly named therein.

(*Transitional provisions will be required for repeal of these provisions at an appropriate time.)

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CONFIDENTIEL
1980-09-03

DOCUMENT DE TRAVAIL

CHARTE CANADIENNE DES DROITS ET LIBERTES

Droits et libertés au Canada

1. La Charte canadienne des droits et libertés reconnait les droits et libertés énoncés ci-après, sous les seules réserves raisonnables généralement acceptées dans une société libre et démocratique régie par un système de gouvernement parlementaire.

Libertés fondamentales

Libertés fondamentales

2. Toute personne jouit des liberté fondamentales suivantes:

a) liberté de conscience et de religion;

b) liberté de pensée, de croyance, d'opinion et d'expression, notamment liberté de la presse et des autres media;

c) liberté d'association et de réunion pacifique.

Droits démocratiques

Droits démocratiques des citoyens

3. Tout citoyen canadien a le droit de voter aux élections en vue de la désignation des députés de la Chambre des communes ou des assemblées législatives et d'y poser sa candidature; ce droit ne peut sans raison valable, faire l'objet d'une distinction ou d'une restriction.

Durée des organes législatifs élus

4. (1) La durée maximale de la législature de la Chambre des communes et des assemblées législatives est de cinq ans à compter de la date du rapport du bref d'élections.

Prorogations spéciales

(2) La législature de la Chambre des communes ou celle d'une assemblée législative peut être prorogée respectivement par le Parlement ou par la législature en question au-delà de cinq ans en cas de guerre, d'invasion ou d'insurrection, réelles ou appréhendées, pourvu que cette prorogation ne fasse pas l'objet d'une opposition exprimée par les votes de plus du tiers des députés de la Chambre des communes ou de l'assemblée législative, selon le cas.

Session annuelle

5. Le Parlement et les législatures siègent au moins une fois tous les douze mois.

Droits personnels

Vie, liberté et sécurité

6. Toute personne a le droit à la vie, à la liberté et à la sécurité de sa personne et a le droit de n'en être privée qu'en vertu des principes de justice fondamentale.

Perquisitions et saisies

7. Toute personne a le droit d'être protégée contre les saisies et perquisitions déraisonnables.

Détention et emprisonnement

8. Toute personne a le droit de ne pas être détenue ou emprisonnée d'une façon arbitraire.

Arrestation et détention

9. Toute personne a le droit, en cas d'arrestation ou de détention

a) d'être informée sans délai des motifs de son arrestation ou de sa détention;

b) d'avoir sans délai l'assistance d'un avocat de son choix;

c) de faire contrôler, par habeas corpus, la légalité de sa détention et d'obtenir, le cas échéant, sa libération.

Affaires criminelles et pénales

10. Toute personne inculpée d'une infraction a le droit

a) d'être informée sans délai de l'infraction précise qu'on lui reproche;

b) d'être jugée dans un délai raisonnable;

c) d'être présumée innocente tant qu'elle n'est pas déclarée coupable à l'issue d'un procès public et équitable devant un tribunal indépendant et impartial;

d) de ne pas en être privée sans raison valable d'une mise en liberté assortie d'un cautionnement raisonnable;

e) de ne pas être déclarée coupable d'une infraction fondée sur une action ou une omission qui, au moment où elle a été commise, ne constituait pas une infraction;

f) de n'être poursuivie ou punie qu'une seule fois pour une infraction dont elle a déjà été définitivement acquittée ou déclarée coupable;

g) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont elle est déclarée coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

Punition

11. Toute personne a le droit de n'être soumise à aucun traitement ou peine cruels et inusités.

Déclaration incriminante

12. Un témoin a le droit, s'il est contraint de témoigner, à ce que son témoignage ne soit pas utilisé pour l'incriminer dans des procédures ultérieures sauf lors d'une poursuite pour parjure ou pour témoignages contradictoires.

Interprète

13. Une partie ou un témoin a le droit de bénéficier des services d'un interprète s'il ne comprend pas ou ne parle pas la langue dans laquelle se déroulent les procédures.

Liberté de circulation et d'établissement

Droits des citoyens

14. (1) Tout citoyen canadien a le droit de demeurer dans le pays et d'en franchir les frontières.

Droits généraux

(2) Toute personne a, au Canada, le droit:

a) de se déplacer et d'établir sa résidence dans toute province;

b) d'acquérir des biens et de gagner sa vie dans toute province.

Restriction

(3) Les droits mentionnés au paragraphe (2) sont soumis:

a) aux lois et usages d'application générale qui sont en vigueur dans la province s'ils n'établissent pas de distinction entre des personnes, fondée principalement sur leur province de résidence antérieure ou actuelle;

b) aux autres lois visées aux paragraphes (4) et (5) de l'article 121 de l'Acte de l'Amérique du Nord britannique.

Droits à la non-discrimination

Égalité devant la loi et protection égale de la loi

15. (1) Tous sont égaux devant la loi et ont droit à la même protection devant la loi sans distinctio illicite fondée sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge ou le sexe.

Programmes de redressement positif

(2) Le présent article n'a pas pour effet d'interdire les programmes ou les activités destinés à améliorer la situation des personnes et des groupes défavorisés.

Langues officielles

Langues officielles du Canada

16. (1) Le français et l'anglais sont les langues officielles du Canada;
elles ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

Statut des langues officielles et portée

(2) D'autre part, le français et l'anglais jouissent du statut qu'accorde la présente Charte,
cette dernière ne limite pas le pouvoir du Parlement et des législatures d'améliorer le statut de ces langues ou d'en développer l'usage.

Droits linguistiques

Procédures du Parlement

17. (1) Toute personne a le droit de participer aux débats et travaux du Parlement en français ou en anglais.

Débats des législatures

(2) Toute personne a le droit de participer aux débats des législatures provinciales en français ou en anglais.

Documents parlementaires

18. (1) Les lois, les archives, les comptes rendus et les procès-verbaux du Parlement sont impri[més] et publiés en français et en anglais.

Documents de certaines législatures

(2) Les lois, les archives, les comptes rendus et les procès-verbaux des législatures de l'Ontario, du Québec, du Nouveau-Brunswick et du Manitoba sont imprimés et publiés en français et en anglais.

Idem

(3) Les lois, les archives, les comptes rendus et les procès-verbaux des législatures des provinces non mentionnées dans le paragraphe (2) sont imprimés et publiés en français et en anglais dans toute la mesure du possible, conformément à ce qui est prévu par chacune de ces législatures.

Valeur des deux versions

(4) Les versions française et anglaise des lois du Parlement et des législatures imprimées et publiées conformément au présent article font également foi.

Procédures judiciaires à la Cour Suprême etc.

19. (1) Toute personne a le droit d'utiliser le français ou l'anglais devant la Cour suprême du Canada et les cours établies par le Parlement ainsi que dans les procédures et documents de ces cours.

Idem

(2) Toute personne a le droit d'utiliser le français ou l'anglais devant les cours de l'Ontario, du Québec, du Nouveau-Brunswick et du Manitoba et dans les procédures et documents de ces cours.

Idem

(3) Toute personne a, dans toute la mesure du possible conformément à ce qui est prévu par la législature de chacune des provinces non mentionnées dans le paragraphe (2), le droit d'utiliser le français ou l'anglais devant les cours de ces provinces et dans les procédures et documents de ces cours.

Application des règles

(4) Le présent article n'a pour effet d'interdire aux autorités compétentes d'établir des règles pour la mise en oeuvre du présent article.

Rapports du public avec le gouvernement du Canada

20. (1) Toute personne au Canada a, en tant que membr du public, le droit de communiquer en français ou en anglais avec le siège des institutions du Parlement ou du gouvernement du Canada et de recevoir en français ou en anglais les services qu'il offre; elle a le même droit à l'égard de toute autre bureau de ces institutions situé dans une région où il est reconnu, conformément aux modalités prévues ou autorisées par le Parlement, qu'une partie importante de la population emploie cette langue.

Rapports du public avec les gouvernements provinciaux

(2) Toute personne a, dans toute province, en tant que membre du public, le droit de communiquer en français ou en anglais avec le siège ou un bureau principal de toute institution de la législature ou du gouvernement de la province et de recevoir en français ou en anglais, les services qu'il offre, dans toute la mesure du possible, conformément à ce qui est prévu par la législature.

Droits préservés

21. Les articles 16 à 20 n'ont pas pour effet de porter atteinte aux droits et privilèges antérieurs ou postérieurs à l'entrée en vigueur de la présente Charte, des langues autres que le français ou l'anglais, découlant de la loi ou de la coutume.

Langue d'instruction

22. (1) Les citoyens canadiens qui font partie de la minorité anglophone ou francophone de la province où ils habitent ont le droit de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité lorsque le nombre de ces enfants dans une région de la province justifie que soient mises à leur disposition, au moyen de fonds publics des

installations d'enseignement dans la langue minoritaire dans cette région.

Détermination du nombre suffisant

(2) Les législatures de chaque province peuvent, afin de donner effet au droit qu'accorde le paragraphe (1) adopter des mesures pour déterminer si le nombre d'enfants des citoyens canadiens qui font partie de la minorité anglophone ou francophone dans une région de la province justifie que soient mises à leur dispositions, au moyen de fonds publics, des installations d'enseignement dans la langue minoritaire dans cette région.

Droits non reconnus expressément

Droits et libertés non reconnus

23. La présente Charte ne nie pas l'existence des droits et libertés qu'elle n'énumère pas expressément et qui peuvent exister au Canada, notamment les droits et libertés des peuples autochtones du Canada.

Dispositions générales

Primauté de la déclaration

24. Les règles de droits, lois, ordonnances, règlement ou règles qui sont incompatibles, avec les dispositions de la présente Charte sont inopérants, dans la mesure de cette incompatibilité.

Droit sur la preuve

25. A l'exception de l'article 12, les dispositions de la présente Charte n'affectent en rien les lois portant sur l'admissibilité de la preuve dans toute procédure, ni les compétences respectives du Parlement et des législatures de légiférer en cette matière.

Application aux territoires et à leurs organismes

26. Le Yukon et les Territoires du Nord-Ouest, ainsi que le Conseil ou le Commissaire en Conseil de ces territoires sont assimilés, pour l'application de la présente Charte, à une province, à une assemblée législative provinciale ou à une législature provinciale selon le cas.

Pas d'extension du pouvoir législatif

27. La présente Charte ne confère aucun pouvoir législatif autre que ceux qu'elle prévoit expressément.

Maintien en vigueur de certaines dispositions

28. Les articles 17 à 19 n'ont pas pour effet de porter atteinte aux droits, privilèges ou obligations relatifs à la langue française ou anglaise, ou à ces deux langues, qui existent ou sont maintenus aux termes d'une autre disposition de la Constitution du Canada. (1)

Application de certains droits linguistiques

29. La législature d'une province où les paragraphes 18(2) et 19(2) ne sont pas expressément applicables, peut déclarer qu'à l'avenir ces paragraphes ou l'un deux seront applicables à la province comme si elle y était expressément désignée.

NOTE: (1) Cette disposition s'applique jusqu'à ce que certaines dispositions de la Constitution actuelle puissent être abrogées.

DOCUMENT: 800-14/E.1

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FEDERAL-PROVINCIAL CONFERENCE

OF

FIRST MINISTERS

Report of the Continuing Committee of Ministers on the Constitution to First Ministers

CHARTER OF RIGHTS

Ottawa
September 8-12, 1980

CHARTER OF RIGHTS

I. Issues for Resolution by First Ministers

1. Should there be an entrenched Charter of Rights?

2. If there is to be an entrenched Charter, which of the following categories of rights should be included?

   (a) fundamental freedoms

   (b) democratic rights

   (c) legal rights

   (d) non-discrimination rights

   (e) mobility rights

   (f) language rights at the federal level

   (g) language rights at the provincial level

   (h) minority language education rights

3. If there is to be an entrenched Charter, should an override clause be included to enable enactment of laws expressly overriding entrenched rights, and if so, to what categories of rights might an override apply?

II. Background

1. Ministers considered a report from a Sub-Committee of Officials dated August 29 which is attached hereto in which are set out their deliberations on the possible contents of an entrenched Charter and related matters. As noted in that report, the officials' discussions were without prejudice to the position of any province on the principle of entrenchment itself. Manitoba and Alberta in particular emphasized that the attached report and the annexes thereto do not in any way reflect a commitment by the governments of those provinces to entrenching any rights. Some others shared this view. The annex to the report entitled "Provincial Proposal (In the Event that there is Going to be Entrenchment)" should be read subject to the foregoing qualifications.

2. In considering the report, Ministers did not discuss in any detail the issues outlined above. A poll was taken on the issue of the principle of entrenchment. The Governments of Canada, New Brunswick, Newfoundland and Ontario supported this principle. Ontario and Newfoundland indicated that an entrenched Charter should be limited in scope. The Governments of Nova Scotia, Quebec, Manitoba, Prince Edward Island, British Columbia, Alberta and Saskatchewan were opposed to entrenchment of rights.

3. In light of the position taken on the principle of entrenchment, Ministers decided that it would not be productive to canvass positions of governments on the other issues set out above.

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CHARTER OF RIGHTS

Report to Ministers by
Sub-Committee of Officials

1. Since its report of July 24, 1980 to Ministers, the sub-committee of officials has met this week to consider:

(a) a revised federal discussion draft Charter dated August 22, 1980;

(b) a provincial proposal dated August 28, 1980 for modifications and deletions in the federal discussion draft;

(c) the practicability of including an override (non-obstante) clause in an entrenched Charter; and

(d) the possibility of strengthening the Canadian Bill of Rights as an alternative to an entrenched Charter.

2. As before discussions on these items proceeded without prejudice to any province's position on the principle of entrenchment itself, it being felt that this was a matter for ministerial consideration in light of this report.

Federal Discussion Draft of August 22, 1980

3. This draft was prepared in light of concerns of provincial officials noted in the earlier report and sought to cover in particular the following points:

- to remove the specific grounds for limiting rights by specifying in section 1 that all rights are subject to generally accepted reasonable limits,
- to clarify and limit the scope of legal rights,
- to ensure that courts could not exclude improperly obtained evidence on that ground alone,
- to contain the scope of non-discrimination rights,
- to eliminate the category of property rights,
- to allow for some restrictions on mobility rights(1),
- to eliminate the right of witnesses in criminal and penal proceedings to give evidence in English or French as they choose.

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(1) A revised draft on mobility rights was tabled by federal officials to correspond with amendments being proposed to Section 121 of the BNA Act. A copy is annexed to the federal draft Charter of August 22, 1980.

In addition, officials of Ontario and Manitoba were invited to consider a delay provision for the implementation of the language rights provisions respecting statutes (five years) and courts (ten years).

4. Following examination of the revised draft, officials of most provinces remained concerned about both the scope of rights covered by the draft and by the language of many of its provisions. To respond to these concerns, provincial officials met and prepared a joint provincial proposal for a Charter in the event one was to be entrenched. This was subsequently reviewed with federal officials.

Provincial Proposal for a Charter, August 28, 1980

5. The changes which this proposal would make in the federal draft are set out in a tabular comparison of Charter of Rights drafts annexed hereto and carry the unanimous support of provincial officials except as otherwise indicated in the table.

6. The principal changes may be summarized as follows:

- several of the legal rights would be deleted,
- other of the remaining legal rights would be qualified by a "lawful grounds and prescribed procedures" test rather than a "reasonable or non-arbitrary" test,
- any reference to non-discrimination rights would be deleted,
- mobility rights, if included in the Constitution, would not be in the Charter,
- any reference to undeclared rights would be deleted,
- the remedies section for breach of rights would be deleted, and
- the paramountcy of Charter rights provision would be qualified to ensure that admissibility of evidence rules would not be superseded.

7. Provincial officials did not make any joint proposal on official languages and language rights, feeling that further discussion by Ministers of the federal draft provisions was required on this matter.

8. Federal officials indicated in response to the joint provincial proposals that a number of changes advanced would be given close consideration in a re-examination of the federal draft. With respect to some of the others, serious doubts were expressed about the acceptability of proposed changes and deletions.

Legislative Override Clause

9. Some consideration was given to the possible inclusion in an entrenched Charter of an override clause whereby a legislative body could expressly provide that a law would operate notwithstanding a Charter right. While some doubt was voiced about the desirability of including such a provision, there was general agreement that further consideration should be given this matter.

10. One mechanism that was discussed, in the event it is decided that an override clause is necessary (and this could depend on the ultimate scope and wording of an entrenched Charter), is a requirement that any law enacted under an override provision be adopted by a 60% majority of the legislative body and that any such law would expire after a specified time period, e.g., five years unless repealed earlier. There was no discussion of the particular categories of rights to which any override clause might apply.

Strengthening Canadian Bill of Rights

11. As an alternative to entrenching a Charter, some consideration was given to the possibility of strengthening the Canadian Bill of Rights by making it a clear statement of effective rights rather than an interpretive statute. In discussion of this matter, it was noted by federal officials that this would not be seen as a viable approach to protecting basic rights since it

- would apply only at the federal level,
- would not cover the range of rights contemplated in the federal draft, particularly language rights, and
- would not guarantee common basic rights to persons throughout Canada.

Issues for Ministers

12. In light of the foregoing summary, the following issues arise for consideration and determination by Ministers:

(1) Should there be an entrenched Charter of Rights?

(2) If so, which categories of rights should be included from among the following categories:

(a) fundamental freedoms

(b) democratic rights

(c) legal rights (including the scope of such rights)

(d) non-discrimination rights

(e) mobility rights

(f) language rights at the federal level

(g) language rights at the provincial level

(h) minority language education rights?

(3) Should inclusion of an override clause along the lines described above be contemplated?

13. Annexed hereto are the following documents:

(1) Provincial Tabular Comparison of Charter Drafts

(2) Provincial Proposal for a Charter, August 28, 1980

(3) Federal Discussion Draft of Charter, August 22, 1980.

Roger Tassé
Chairman

TABULAR COMPARISON OF CHARTER OF RIGHTS DRAFTS

CONFIDENTIAL

SUMMARY OF PROVISIONS - JULY 4, 1980 DRAFT	SUMMARY OF PROVISIONS - AUGUST 22, 1980 DRAFT	PROVINCIAL PROPOSAL (IN THE EVENT THAT THERE IS GOING TO BE ENTRENCHMENT) - AUGUST 28, 1980 DRAFT
Section 1 - Title	**Section 1 - Recognized Rights and Limits**	**Section 1**
1. To be entitled "Canadian Charter of Rights and Freedoms".	1. Rights and freedoms recognized subject only to reasonable limits generally accepted in free and democratic society.	Rights and freedoms recognized subject only to reasonable limits generally accepted in a free society living under a parliamentary democracy. (unanimous)
Section 2 - Fundamental Freedoms	**Section 2 - Fundamental Freedoms**	**Section 2 - Fundamental Freedoms**
2. (1)(a) Freedom of conscience and religion.	2. (1)(a) Freedom of conscience and religion.	2. (1)(a) Freedom of religion (unanimous)
(b) Freedom of thought, opinion and expression, including freedom to disseminate news, opinion and belief.	(b) Freedom of thought, belief, opinion and expression, including freedom of press and other media.	(b) As in August 22 Draft (unanimous)
(c) Freedom of peaceful assembly and of association.	(c) Freedom of peaceful assembly and of association.	(c) As in August 22 Draft (unanimous)
Limitation Clause	**Limitation Clause**	
(2) Those prescribed by law as are reasonably justifiable in a free and democratic society in interests of - national security - public safety, order, health or morals - rights and freedoms of others.	Deleted	

Federal - July 4, 1980	Federal - August 22, 1980	Provincial - August 28, 1980
Section 3-5 - Democratic Rights	Section 3-5 - Democratic Rights	Section 3-5 Democratic Rights
3. Principles of universal suffrage and free democratic elections affirmed.	3. Deleted	
Right of citizens to vote and to qualify for election to House of Commons or legislature without unreasonable distinction or limitation.	Right of citizens to vote and to qualify for election to House of Commons or legislature without unreasonable distinction or limitation.	Agree with August 22 draft
4. (1) Limits on maximum duration of House of Commons and legislatures (5 years) (2) except in case of national emergency.	4. (1) Limits on maximum duration of House of Commons and legislatures (5 years) (2) except in case of national emergency.	
5. Requirement for annual sittings of Parliament and legislatures.	5. Requirement for annual sittings of Parliament and legislatures.	
Section 6 - Legal Rights	Sections 6-15 - Legal Rights	Sections 6-15 Legal Rights
6. (1) Right to life, liberty and security of person and right not to be deprived thereof except by due process of law which encompasses:	6. Right to life, liberty and security of person and right not to be deprived thereof except by due process of law.	6. Delete (unanimous)
(a) right against unreasonable searches and seizures.	7. Right against unreasonable search and seizure.	7. Right against search and seizure except on lawful grounds and in accordance with prescribed procedures (N.B. & Newfoundland dissented and would prefer the federal August 22 draft).

Federal - July 4, 1980	Federal - August 22, 1980	Provincial - August 28, 1980
(b) right against arbitrary or unlawful interference with privacy;	9. Right against arbitrary invasion of privacy.	9. Delete (N.B. dissenting if Federal August 22 draft applied only to federal legislation)
(c) right against detention or imprisonment except on lawful grounds and prescribed procedures;	8. Right against arbitrary detention or imprisonment.	8. Agree with July 4 draft (unanimous)
(d) right on arrest or detention	10. Right on arrest or detention	10. Agree with August 22 draft (unanimous)
(i) to be told promptly of reason;	(a) to be told promptly of reasons therefor;	
(ii) to be provided with the opportunity to retain and consult counsel promptly; and	(b) to retain and instruct counsel without delay; and	
(iii) to remedy of _habeas corpus_;	(c) to remedy of _habeas corpus_.	
(e) right when charged with offence	11. Right when charged with offence	11.
(i) to know specific charge,	(a) to be informed promptly of specific charge;	(a) Agree with August 22 draft (unanimous)
(ii) to be tried within reasonable time,	(b) to be tried within reasonable time;	(b) Delete - Man., Alta, P.E.I., Ont., Sask. Agree to August 22 - B.C., N.B., Nfld, Que. N.S.
(iii) to presumption of innocence, to a fair and public hearing before impartial tribunal,	(c) to presumption of innocence until proven guilty according to law in fair and public hearing before impartial tribunal;	(c) Agree with August 22 draft (unanimous)
(iv) not to be denied reasonable bail unfairly,	(d) not to be denied reasonable bail unfairly;	(d) Right not to be denied pre-trail release except on lawful grounds and in accordance with prescribed procedures (unanimous)
(v) to protection against _ex po[illegible] facto_ offences and p[illegible]shment;	(e) to protection against _ex pos[illegible] facto_ offences and p[illegible]shment;	(e) Agree with August 22 draft (unanimous)

Federal - July 4, 1980	Federal - August 22, 1980	Provincial - August 28, 19[...]
(f) protection against double jeopardy;	(f) to protection against double jeopardy;	(f) Agree with August 22 draft (unanimous)
(g) benefit of lesser penalty where law is changed before sentencing;	(g) to benefit of lesser penalty where law is changed before sentencing.	(g) Agree with August 22 draft (unanimous)
(h) protection against cruel and unusual treatment or punishment;	12. Protection against cruel and unusual treatment or punishment.	12. Delete words "treatment or" but otherwise agree with August 22 draft (unanimous)
(i) right when compelled to testify to benefit of counsel, to protection against self-incrimination and to other constitutional safeguards;	13. Right of witness compelled to testify not to have evidence used against him in subsent proceedings, except prosecution for perjury or giving contradictory evidence.	13. Defer and reword after report from Evidence Task Force (unanimous)
	14. Right of witness not to be compelled to testify if denied right to consult counsel.	14. Delete (unanimous)
(j) right of party or witness to assistance of interpreter in any proceedings.	15. Right of party or witness to assistance of interpreter in any proceedings.	15. Agree with August 22 draft (unanimous)
(2) Right to fair hearing when rights or obligations being determined.	Deleted.	

Federal - July 4, 1980	Federal - August 22, 1980	Provincial - August 28, 19[illegible]
Limitation Clauses	**Limitation Clauses**	
(3) In times of serious public emergency threatening life of country limits strictly required by circumstances may be placed on right to liberty and security, right against unreasonable searches and seizures, right against arbitrary interference with privacy, right against unauthorized detention or imprisonment, right to habeas corpus, right to reasonable bail, and right to fair hearing for determination of rights and obligations, but all other rights protected.	Deleted.	
(4) Right to legal proceedings in public may be curtailed in interests of - national security or public - public order or morality - protection of individual privacy.	Deleted.	
Section 7 - Non-Discrimination Rights	**Section 17 - Non-Discrimination Rights**	17. **Section 17 - Non-Discrimination Rights**
7. (1) Right to equality before the law and equal protection of the law without unreasonable and unfair distinction or restriction.	17. (1) Right to equality before the law and equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.	Delete (N.B. dissented because it favours the principle but does not support current wording)
Limitation Clause	**Exception**	
(2) Those limits provided by fair and reasonable test. Th[illegible] programs or activities de[illegible]ned for "affirmative action" on behalf of dis-	(2) Those programs or activities designed for "affirmative action" on behalf of [illegible]isadvantaged persons or [illegible]roups.	

Federal - July 4, 1980

Section 8 - Mobility Rights

8. (1) Right of citizen to enter, remain in and leave Canada.

(2) Right of citizen or permanent resident to

(a) move to and take up residence

(b) acquire and hold property, and

pursue a livelihood,

in any province or territory subject to laws of general application but without discrimination based on place of residence or previous residence.

Limitation Clause

(3) Those prescribed by law as are reasonably justifiable in a free and democratic society in the interests of

- national security
- public safety, order, health or morals.

Section 9 - Property Rights

9. (1) Right to use and enjoyment of property, individually or collectively, and right not to be deprived thereof except in accordance with law and for reasonable compensation.

Federal - August 22, 1980

Section 16 - Mobility Rights

16. (1) Right of citizen to enter, remain in and leave Canada.

(2) Right of citizen or permanent resident to

(a) move to and take up residence

(b) acquire and hold property, and

pursue a livelihood

in any province or territory

(3) Rights subject to laws or practices of general application but without discrimination based on place of residence or previous residence.

Limitation Clause

Deleted.

Property Rights

Deleted.

Provincial - August 28, 1980

Section 16 - Mobility Rights

Whole issue, if in the constitution, should be elsewhere than in Charter of Rights (unanimous)

Federal - July 4, 1980	Federal - August 22, 1980	Provincial - August 28, 1980
Limitation Clause		
(2) Those which control or restrict use of property in public interest or to secure payment of taxes, duties or penalties;		
(3) Those prescribed by law as are reasonably justifiable in a free and democratic society in the interest of - national security - public safety, order, health or morals.		
Section 10 - Official Languages	**Section 18 - Official Languages**	
10. (1) English and French official languages of Canada with status and protection specified in Charter.	18. (1) English and French official languages of Canada with equal status, rights and privileges re use in all federal institutions.	
(2) Power of Parliament and legislatures to provide more extensive rights for French and English.	(2) English and French have statu provided in Charter which may be extended by Parliament or legislatures.	
Section 11-16 - Language Rights	**Sections 19-24 - Language Rights**	
11. (1) Right to use English or French in all debates and proceedings of Parliament.	19. (1) Right to use English or French in all debates and proceedings of Parliament.	
(2) Right to use English or French in debates of legislatures of all provinces.	(2) Right to use English or French in debates of legislatures of all provinces.	

Federal - July 4, 1980	Federal - August 22, 1980	Provincial - August 28, 19
12. (1) Statutes, records and journals of Parliament to be in English and French.	20. (1) Statutes, records and journals of Parliament to be in English and French.	
(2) Statutes, records and journals of legislatures of Ontario, Quebec, New Brunswick and Manitoba to be in English and French.	(2) Statutes, records and journals of legislatures of Ontario, Quebec, New Brunswick and Manitoba to be in English and French.	
(3) For other provinces not referred to in (2) the same requirement to greatest extent practicable as determined by the legislatures.	(3) For other provinces not referred to in (2) the same requirement to greatest extent practicable as determined by legislatures.	
(4) Where the statutes are published as per subsections (1) to (3) both versions of statutes are equally authoritative.	(4) Where statutes are printed and published in both languages, both versions are equally authoritative.	
13. (1) Right to use English or French in all proceedings of federally constituted courts.	21. (1) Right to use English or French in all proceedings of federally constituted courts.	
(2) Right to use English or French in all proceedings of courts in Ontario, Quebec, New Brunswick and Manitoba.	(2) Right to use English or French in all proceedings of courts in Ontario, Quebec, New Brunswick and Manitoba.	
(3) Right to use English or French in courts of other provinces not referred to in (2) to greatest extent practicable as determined by the legislatures.	(3) Right to use English or French in courts of other provinces not referred to in (2) to greatest extent practicable as determined by the legislatures.	
(4) Right of witness to be heard in English or French, through interpreter where necessary, in any court in Canada in any criminal or serious provincial penal proceedings.	Deleted.	

Federal - July 4, 1980	Federal - August 22, 1980	Provincial - August 28, 1980
(5) Power to make rules for the orderly implementation and operation of language rights in the courts.	(4) Power to make rules for the orderly implementation and operation of language rights in the courts.	
1. (1) Right of public to communicate with and receive services in English or French from head or central office of any federal government institution, and from any other principal office in areas determined by Parliament on basis of minority language numbers.	22. (1) Right of public to communicate with and receive services in English or French from head or central office of any federal government institution and from any other office in areas determined by Parliament on basis of minority language numbers.	
(2) Right of public to communicate with and receive services in English or French from any head, central or principal office of a provincial government institution in areas of provinces where legislatures determine practicability and necessity of providing such services.	(2) Right of public to communicate with and receive services in English or French from any head, central or principal office of a provincial government institution to greatest extent practicable as determined by the legislature.	
15. Preservation of legal and customary rights or privileges for use of languages other than French or English.	23. Preservation of legal and customary rights or privileges for use of languages other than French or English.	
16. (1) Right of minority language (English or French speaking) parents who are Canadian citizens to choose minority language education for their children in any areas of province where numbers warrant.	24. (1) Right of minority language (English or French speaking) parents who are Canadian citizens to choose minority language education for their children in any areas of province where numbers warrant	
(2) Legislatures may enact rules, consistent with this right, for determining sufficiency of numbers.	(2) Legislatures may enact rules, consistent with this right, for determining sufficiency of numbers.	

Federal - July 4, 1980	Federal - August 22, 1980	Provincial - August 28, 1980
Section 17 - Undeclared Rights	Section 25 - Undeclared Rights	Section 25 - Undeclared Rights
17. Preservation of any rights not specifically mentioned in Charter including those that may pertain to native peoples.	25. Preservation of any rights not specifically mentioned in Charter including those that may pertain to native peoples.	Delete (unanimous)
Sections 18-23 - General	Sections 26-31 - General	Section 26
18. Charter rights to render inoperative any law or administrative act which is in conflict with Charter provisions.	26. Charter rights to render inoperative any law, order, rule or regulation that authorizes, forbids or regulates activities or conduct in manner inconsistent with Charter.	(a) Agree with August 22 draft and add (b) nothing in this Charter affects the admissibility of evidence or the ability of Parliament or a Legislature to legislate thereon. (unanimous)
19. Where no other effective recourse or remedy exists, courts are empowered to grant such relief or remedy for a violation of Charter rights as may be deemed appropriate and just.	27. Where no other legal recourse or remedy exists, courts are empowered to grant remedy by way of declaration, injunction, damages or penalty for a violation of Charter rights.	27. Delete (unanimous)
20. Charter provisions made applicable to Territories.	28. Charter provisions made applicable to Territories	28. Agree with August 22 draft (unanimous)
21. Legislative authority is not affected except as expressly provided by the Charter.	29. Legislative authority is not affected except as expressly provided by the Charter.	29. Agree with August 22 draft (unanimous)
22. Preservation of existing constitutional provisions respecting French and English languages until Charter provisions are effective.	30. Preservation of existing constitutional provisions respecting French and English languages until Charter provisions are effective.	
23. Power of other provinces to entrench same language rights as Ontario, Quebec, New Brunswick and Manitoba respecting statutes and courts.	31. Power of other provinces to entrench same language rights as Ontario, Quebec, New Brunswick and Manitoba respecting statutes and courts.	

CONFIDENTIAL

PROVINCIAL PROPOSAL (IN THE EVENT THAT THERE IS GOING TO BE ENTRENCHMENT)

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Canadian Charter of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free society living under a parliamentary democracy.

(a) freedom of religion;

(b) freedom of thought, belief, opinion, and expression, including freedom of the press and other media; and

(c) freedom of peaceful assembly and of association.

Democratic Rights

Democratic rights of citizens

3. Every citizen of Canada has, without unreasonable distinction or limitation, the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Duration of elected legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date of the return of the writs for the election of its members.

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond the period of five years, if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once in every year and not more than twelve months shall intervene between sittings.

Legal Rights

Search and seizure

6. Everyone has the right to be secure against search and seizure except on grounds provided by law and in accordance with prescribed procedures.

Detention or imprisonment

7. Everyone has the right not to be detained or imprisoned except on grounds provided by law and in accordance with prescribed procedures.

Arrest or detention

8. Everyone has the right on arrest or detention

a) to be informed promptly of the reasons therefor;

b) to retain and instruct counsel without delay; and

c) to the remedy by way of habeas corpus for the determination of the validity of the detention and for release if the detention is not lawful.

-	Proceedings against accused in criminal and penal matters	9. Anyone charged with an offence has the right (a) to be informed promptly of the specific offence; * (b) to be tried within a reasonable time; (c) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; (d) not to be denied pre-trial release except on grounds provided by law and in accordance with prescribed procedures; (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; (f) not to be tried or punished more than once for an offence of which he or she has been finally convicted or acquitted; and (g) to the benefit of the lesser punishment where the punishment for an offence of which he or she has been convicted has been varied between the time of commission and the time of sentencing.
	Treatment or punishment	10. Everyone has the right not to be subjected to any cruel and unusual punishment
**	Self-crimination	11. A witness has the right when compelled to testify not to have any evidence so given used against him or her in any subsequent proceedings, except a prosecution for perjury or the giving of contradictory evidence.

* The Provinces (officials) were split 5-5 on the inclusion of this provision - see concordance.

** The Provinces (officials) suggested that consideration of the inclusion of this provision or any other provision dealing with this subject matter be deferred pending the report of the Evidence Task Force.

Interpreter

12. A party or witness has the right to the assistance of an interpreter if that person does not understand or speak the language in which the proceedings are conducted.

*** **Mobility Rights**

*** The Provinces (officials) suggest that the whole issue of Mobility Rights, if in the constitution, should be elsewhere than in the Charter of Rights.

**** **Official Language and Language Rights**

(Sections 18-24 and 30 and 31 of the Federal August 22, 1980 Draft would be sections 13-21 if included in this document.)

**** Provincial officials have not made any joint proposal with respect to these subject matters prior to further discussion by the Minister of the Federal Draft Proposals.

General

Laws, etc. not to apply so as to abrogate declared rights and freedoms

22. (a) Any law, order, regulation or rule that authorizes, forbids or regulates any activity or conduct in a manner inconsistent with this Charter is, to the extent of such inconsistency, inoperative and of no force or effect.

Admissibility of Evidence

(b) Nothing in this Charter affects the admissibility of evidence or the ability of Parliament or a legislature to legislate thereon.

Application to territories and territorial institutions

23. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory or the Northwest Territories or to the appropriate legislative authority thereof, as the case may be.

Legislative authority not extended

24. Nothing in this Charter confers any legislative power on any body or authority except as expressly provided by this Charter.

CONFIDENTIAL

FEDERAL DRAFT

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Canadian Charter of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion, and expression, including freedom of the press and other media; and

(c) freedom of peaceful assembly and of association.

Democratic Rights

Democratic rights of citizens

3. Every citizen of Canada has, without unreasonable distinction or limitation, the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Duration of elected legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date of the return of the writs for the election of its members.

Continuation in special circum- stances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond the period of five years, if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once in every year and not more than twelve months shall intervene between sittings.

Legal Rights

Life, liberty and security of person

6. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except by due process of law.

Search and seizure

7. Everyone has the right to be secure against unreasonable search and seizure.

Detention or imprisonment

8. Everyone has the right not to be arbitrarily detained or imprisoned.

Invasion of privacy

9. Everyone has the right to be secure against arbitrary invasion of privacy.

Arrest or detention

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay; and

(c) to the remedy by way of *habeas corpus* for the determination of the validity of the detention and for release if the detention is not lawful.

Proceedings against accused in criminal and penal matters

11. Anyone charged with an offence has the right

(a) to be informed promptly of the specific offence;

(b) to be tried within a reasonable time;

(c) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(d) not to be denied reasonable bail without just cause;

(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;

(f) not to be tried or punished more than once for an offence of which he or she has been finally convicted or acquitted; and

(g) to the benefit of the lesser punishment where the punishment for an offence of which he or she has been convicted has been varied between the time of commission and the time of sentencing.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness has the right when compelled to testify not to have any evidence so given used against him or her in any subsequent proceedings, except a prosecution for perjury or the giving of contradictory evidence.

Counsel

14. A witness has the right not to be compelled to testify if denied the right to consult counsel.

Interpreter

15. A party or witness has the right to the assistance of an interpreter if that person does not understand or speak the language in which the proceedings are conducted.

Mobility Rights(*)

Rights of citizens

16. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights of citizens and permanent residents

(2) Every citizen of Canada and every person who has the status of a permanent resident has the right

(a) to move to and take up residence in any province; and

(b) to acquire and hold property in, and to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence.

Non-discrimination Rights

Equality before the law and equal protection of the law

17. (1) Everyone has the right to equality before the law and to equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.

Affirmative action programmes

(2) This section does not preclude any programme or activity that has as its object the amelioration of conditions of disadvantaged persons or groups.

(* This section is subject to revision in light of discussions in the "Powers over the Economy" committee respecting amendments to section 121 of the BNA Act.)

Official Languages

Official languages of Canada

18. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and Government of Canada. (*)

Status of languages and extension thereof

(2) In addition, English and French have the status set forth in this Charter, which does not limit the authority of Parliament or a legislature to extend the status or use of the two languages or either of them.

Language Rights

Proceedings of Parliament

19. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

Debates of legislatures

(2) Everyone has the right to use English or French in the debates of the legislature of any province.

Statutes, etc. of Parliament

20. (1) The statutes, records and journals of Parliament shall be printed and published in English and French.

Statutes, etc. of certain legislatures

(2) The statutes, records and journals of the legislatures of Ontario, Quebec, New Brunswick and Manitoba shall be printed and published in English and French.

(* New Brunswick may wish special provision added respecting status of English and French in that province.)

Idem

(3) The statutes, records and journals of the legislature of each province not referred to in subsection (2) shall be printed and published in English and French to the greatest extent practicable accordingly as the legislature of the province prescribes.

Both versions of statutes authoritative

(4) Where the statutes of Parliament or a provincial legislature are printed and published in English and French, both language versions are equally authoritative.

Proceedings in Supreme Court and courts established by Parliament

21. (1) Either English or French may be used by any person in, or in any pleading or process in or issuing from, the Supreme Court of Canada or any court established by Parliament.

Proceedings in courts of certain provinces

(2) Either English or French may be used by any person in, or in any pleading or process in or issuing from, any court of Ontario, Quebec, New Brunswick or Manitoba.

Idem

(3) Either English or French may be used by any person in, or in any pleading or process in or issuing from, any court of a province not referred to in subsection (2), to the greatest extent practicable accordingly as the legislature prescribes.

Rules for orderly implementation and adaption

(4) Nothing in this section precludes the making of such rules by any competent body or authority for the orderly implementation and operation of this section.

Communications by public with government of Canada

22. (1) Any member of the public in Canada has the right to communicate with and to receive services from any head or central office of an institution of the Parliament or Government of Canada in English or French, and has the same right with respect to any other office of any such institution where that office is located within an area of Canada in which it is determined, in such manner as may be prescribed or authorized by Parliament, that a substantial number of persons within the population use that language.

Communications by public with government of a province

(2) Any member of the public in a province has the right to communicate with and to receive services from any head, central or principal office of an institution of the legislature or government of the province in English or French to the greatest extent practicable accordingly as the legislature prescribes.(*)

Rights and privileges preserved

23. Nothing in sections 18 to 22 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the commencement of this Charter with respect to any language that is not English or French.

(* New Brunswick may wish special provision added respecting language of services to the public.)

Language of educational instruction

24. (1) Citizens of Canada in a province who are members of an English-speaking or French-speaking minority population of that province have a right to have their children receive their education in their minority language at the primary and secondary school level wherever the number of children of such citizens resident in an area of the province is sufficient to warrant the provision out of public funds of minority language education facilities in that area.

Provisions for determining where numbers warrant

(2) In each province, the legislature may, consistent with the right provided in subsection (1), enact provisions for determining whether the number of children of citizens of Canada who are members of an English-speaking or French-speaking minority population in an area of the province is sufficient to warrant the provision out of public funds of minority language education facilities in that area.

Undeclared Rights

Undeclared rights and freedoms

25. The enumeration in this Charter of certain rights and freedoms shall not be construed to exclude, or to derogate from, any other rights or freedoms that may exist in Canada, including any rights or freedoms that may pertain to the native peoples of Canada.

General

Laws, etc. not to apply so as to abrogate declared rights and freedoms

26. Any law, order, regulation or rule that authorizes, forbids or regulates any activity or conduct in a manner inconsistent with this Charter is, to the extent of such inconsistency, inoperative and of no force or effect.

Enforcement of declared rights and freedoms

27. Where no other legal recourse or remedy is available, anyone whose rights or freedoms as declared by this Charter have been infringed or denied to his or her detriment has the right to apply to a court of competent jurisdiction to obtain relief or remedy by way of declaration, injunction, damages or penalty, as may be appropriate and just in the circumstances.

Application to territories and territorial institutions

28. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory or the Northwest Territories or to the appropriate legislative authority thereof, as the case may be.

Legislative authority not extended

29. Nothing in this Charter confers any legislative power on any body or authority except as expressly provided by this Charter.

Continuation of existing constitutional provisions

30. Nothing in sections 19 to 21 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.(*)

Application of sections 20 and 21

31. A legislature of a province to which subsections 20(2) and 21(2) do not expressly apply may declare that one or both of those subsections shall have application, and thereafter any such provision shall apply to that province in the same terms as to any province expressly named therein.

(* Transitional provisions will be required for repeal of these provisions at an appropriate time.)

REVISED FEDERAL DRAFT ON MOBILITY RIGHTS

Rights citizens to move

16. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights of persons in Canada to move, etc.

(2) Everyone in Canada has the right

(a) to move to and take up residence in any province; and

(b) to acquire and hold property in, and pursue the gaining of a livelihood in, any province.

Limitations

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence, and

(b) any other laws referred to in subsections (4) or (5) of section 121 of the _British North America Act_.

CONFIDENTIAL

September 4, 1980

1. CHARTER OF RIGHTS

F. Background: Assessment of Provincial Positions

Entrenchment of the Charter

During the August 29 meeting of the CCMC provincial Ministers were requested to indicate the provincial position with respect to entrenchment of a Charter. Canada, New Brunswick, Newfoundland and Ontario indicated agreement with entrenchment, Ontario and Newfoundland specifying they agreed with a limited Charter. Other provinces indicated they opposed an entrenched Charter. This may not be an accurate assessment of actual positions, however, since a number of other provinces had earlier indicated a willingness to consider a limited entrenched Charter extending at least to fundamental freedoms and democratic rights. Only Manitoba and Alberta have maintained a position of consistent opposition to any entrenchment.

Substance of the Charter

This assessment is drawn from discussions with provincial officials during the meetings of the CCMC in July and August and from the draft Charter proposed by provincial officials, dated August 28, 1980. As indicated earlier both Manitoba and Alberta Ministers reserved their positions on the provincial draft, and the details of the drafts were not discussed by Ministers.

For the purpose of this assessment categories of rights included in the federal draft Charter dated September 3, 1980 have been divided into:

a) rights supported by officials of all provinces;
b) rights supported by officials of some provinces; and
c) rights opposed by officials of all provinces.

A) RIGHTS SUPPORTED BY OFFICIALS OF ALL PROVINCES	Provision in September 3 Draft
Introductory clause with general limitation	
Rights and freedoms recognized subject only to reasonable limits generally accepted in free and democratic society with a parliamentary system of government.	Section 1
Remarks:	
Provinces favour this approach over the specific limitation clauses included in earlier federal drafts of the Charter.	
Fundamental Freedoms	
(a) Freedom of conscience and religion.	Section 2
(b) Freedom of thought, belief, opinion and expression, including freedom of press and other media.	
(c) Freedom of peaceful assembly and of association.	

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Remarks:

All provinces agreed with Section 2, with the exception of the word "conscience" included in 2(a) "freedom of conscience and religion". As provincial objections to "conscience" have not been well articulated it is felt that provinces will not continue to request deletion of the word. Also, this word is necessary to extend the right to those who choose to have no religion.

Democratic Rights

Right of citizens to vote and to qualify for election to House of Commons or legislature without unreasonable distinction or limitation. — Section 3

(1) Limits on maximum duration of House of Commons and legislatures (5 years). — Section 4

(2) except in case of national emergency.

Requirement for annual sittings of Parliament and legislatures. — Section 5

Legal Rights

1. Right on arrest or detention — Section 9

   (a) to be told promptly of reasons therefor;
   (b) to retain and instruct counsel without delay; and
   (c) to remedy of habeas corpus;

2. Right when charged with offence — Section 10

   (a) to be informed promptly of specific charge;

   (c) to presumption of innocence until proven guilty according to law in fair and public hearing before impartial tribunal;

   (e) to protection against ex post facto offences and punishment;

   (f) to protection against double jeopardy;

   (g) to benefit of lesser penalty where law is changed before sentencing.

3. Protection against cruel and unusual treatment or punishment. — Section 11

Remarks:

Provinces agreed with this right but proposed that the word "treatment" be deleted. Provincial objections to including "treatment" were vague, referring to medical practices with respect to the mentally deficient. It is felt that provinces will not continue to oppose the inclusion of the word "treatment".

4. Right to the assistance of an interpreter in proceedings. — Section 12

General Clauses

1. Charter rights to render inoperative any law, order, rule or regulation that is inconsistent with Charter. — Section 24

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2. Other than section 12 nothing in the Charter to affect the admissibility of evidence or the authority of Parliament or a legislature to legislate thereon. — Section 25

Remarks:

Section 25 is a new clause drafted along the lines proposed by provincial officials to preclude courts from adopting American jurisprudence excluding illegally obtained evidence in all cases.

B) RIGHTS SUPPORTED BY OFFICIALS OF SOME PROVINCES

Legal Rights

1. Right against unreasonable search and seizure. — Section 7

Remarks:

New Brunswick and Newfoundland support the right as proposed in the federal draft. Other provinces propose that the right be qualified by a "lawful grounds and prescribed procedures" test rather than a "reasonable" test.

2. Right when charged with offence — Section 10

(b) to be tried within reasonable time.

Remarks:

Manitoba, Alberta, Prince Edward Island, Ontario and Saskatchewan propose that this section be deleted. British Columbia, New Brunswick, Newfoundland, Quebec and Nova Scotia agree with the right as proposed in the federal draft.

Mobility Rights

(1) Right of citizen to enter, remain and leave Canada. — Section 14

(2) Right of everyone in Canada to

(a) move to and take up residence
(b) acquire and hold property, and pursue a livelihood.

(3) Rights subject to (a) laws or practices of general application but without discrimination based on place of residence or previous residence, and (b) laws relating to equalization and eliminating regional disparities.

Remarks:

In their August 28 draft Charter provincial officials proposed that this issue should be dealt with elsewhere if it is to be in the constitution at all.

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However, during earlier meetings some provincial officials indicated support for the right to enter, remain in and leave Canada (14(1)) as well as the right to move and take up residence in any province (14(2)(a)). Support for these two rights would likely be forthcoming from British Columbia, Newfoundland, Prince Edward Island, New Brunswick, and possibly Ontario. Quebec is firmly opposed to this whole category of rights andother provinces either reserved their opinion or were opposed to including these rights in the Charter. Virtually all provinces were opposed to inclusion of rights respecting acquisition of property and gaining of a livelihood (14(2)(b)).

Language Rights

General Remarks:

In their August 28 draft Charter provincial officials did not deal with language rights, feeling that further discussion on these rights was required at the Ministers' level. This did not occur. However, during earlier discussions provincial officials from eight provinces stated their provinces' positions on the language rights. Quebec abstained from these discussions and Manitoba reserved its position throughout the discussion.

Official Languages

(1) English and French official languages of Canada with equal status, rights and privileges re use in all federal institutions. — Section 16

(2) English and French have status provided in the Charter which may be extended by Parliament or legislatures.

Remarks:

On the question of entrenching English and French as official languages of Canada, British Columbia, New Brunswick, Ontario and Newfoundland were clearly in favour. Nova Scotia and Prince Edward Island were opposed. Alberta and Saskatchewan reserved their position.

Language in the Legislatures

(1) Right to use English or French in all debates and proceedings of Parliament. — Section 17

(2) Right to use English or French in debates of legislatures of all provinces.

Remarks:

Recognizing the use of both languages was favoured by Ontario, New Brunswick, Newfoundland and opposed by Prince Edward Island, Nova Scotia, Alberta and Saskatchewan. British Columbia took no position.

Languages of Statutes

(1) Statutes, records and journals of Parliament to be in English and French. — Section 18

(2) Statutes, records and journals of Ontario, Quebec, New Brunswick and Manitoba to be in English and French.

(3) For other provinces not referred to in (2) the same requirement to greatest extent practicable as determined legislatures.

(4) Where statutes are printed and published in both languages, both versions are equally authoritative.

Remarks:

With respect to the four provinces where both languages would be obligatory, New Brunswick favoured the provision while Ontario was opposed. It is evident from Ministerial statements that Quebec and Manitoba are also opposed. Of the six provinces where the legislature could decide, five favoured the provision with Saskatchewan opposed. As to both versions of the statutes being authoritative, only Ontario was opposed.

Languages in the Courts

(1) Right to use English or French in all proceedings of federally constituted courts.

(2) Right to use English or French in all proceedings of courts in Ontario, Quebec, New Brunswick and Manitoba.

(3) Right to use English or French in courts of other provinces not referred to in (2) to greatest extent practicable as determined by the legislatures.

(4) Power to make rules for the orderly implementation and operation of language rights in the courts.

Remarks:

While there was no objection to the use of both languages in Courts at the federal level there was opposition to this right at the provincial level. With respect to the four provinces where both languages would be obligatory, New Brunswick favoured entrenchment while Ontario was opposed. Obviously, so are Quebec and Manitoba. As for the remaining six provinces where it would rest with the legislature to decide the extent of both languages use, British Columbia, Newfoundland and Prince Edward Island favoured the provision, Saskatchewan opposed it while Nova Scotia and Alberta reserved their positions.

Language of services to the public

(1) Right of public to communicate with and receive services in English or French from head or central office of any federal government institution and from any other office in areas determined by Parliament on basis of minority language numbers. — Section 20

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(2) Right of public to communicate with and receive services in English or French from any head, central or principal office of a provincial government institution to greatest extent practicable as determined by the legislatures.

Remarks:

While there was little real concern with the proposed rights at the federal level, proposed rights at the provincial level were opposed by Alberta and Saskatchewan, but supported by New Brunswick, Ontario, Newfoundland, British Columbia, Prince Edward Island and Nova Scotia.

Rights and privileges preserved

Preservation of legal and customary rights or privileges for use of languages other than French or English. — Section 21

Remarks:

Only Saskatchewan opposed this clause.

Minority Language Education Rights

(1) Right of minority language (English or French speaking) parents who are Canadian citizens to choose minority language education for their children in any areas of province where numbers warrant. — Section 22

(2) Legislatures may enact rules, consistent with this right, for determining sufficiency of numbers.

Remarks:

Ontario, Newfoundland and New Brunswick will support these rights. Prince Edward Island may offer support. British Columbia, Saskatchewan, Manitoba and Alberta oppose the inclusion of any provisions, preferring the Pepin-Robarts approach and Quebec is strongly opposed to entrenchment of education rights.

Undeclared Rights

Preservation of any rights not specifically mentioned in Charter including those that may pertain to native peoples. — Section 23

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Remarks:

This clause was re-drafted following the August 25 CCMC meeting. Some provinces will likely continue to oppose the reference to native peoples of Canada included in this clause.

C) RIGHTS OPPOSED BY OFFICIALS OF ALL PROVINCES

Legal Rights

1. Right to life, liberty and security of person and right not to be deprived thereof except in accord-andce with the principles of fundamental justice. Section 6

Remarks:

This clause was re-drafted following the August 25 CCMC to overcome provincial aversion to the use of "due process of law". Nevertheless it will likely continue to be opposed by all provinces as they feel it will cause such social issues as abortion and euthanasia to be treated by the courts rather than by the legislatures.

2. Right against arbitrary detention or imprisonment. Section 8

Remarks:

All provinces propose that this right be qualified by a "lawful grounds and prescribed procedures" test rather than an "arbitrary" test.

3. Right when charged with offence Section 10

(d) not to be denied reasonable bail unfairly.

Remarks:

All provinces proposed that the right refer to "pre-trial release" rather than "bail" and that it be qualified by the test of "lawful grounds and prescribed procedures". Provinces were unable to justify the use of the term "pre-trial" when questioned by federal officials.

4. Right of witness compelled to testify not to have evidence used to incriminate him in subsequent proceedings, except prosecution for perjury or giving contradictory evidence. Section 12

Remarks:

All provinces proposed that this right to protection against self-crimination be deleted at this time, subject to being included in the Charter at a later date once the Evidence Task Force has reported on these matters.

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Non-Discrimination Rights

(1) Right to equality before the law and equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex. — Section 15

(2) Exception

Those programs or activities designed for "affirmative action" on behalf of disadvantaged persons or groups.

Remarks:

All provinces oppose this category of rights. Provinces feel that non-discrimination is a developing area of the law where new grounds are being developed (in federal and provincial human rights legislation) and where certain grounds (sex, age, marital status) still require exceptions or limitations. Provinces feel that the legislatures are better equipped to handle these emerging rights than the courts.

F. BACKGROUND: TABULAR COMPARISON OF CHARTER OF RIGHTS DRAFTS

SUMMARY OF PROVISIONS - SEPTEMBER 3, 1980 FEDERAL DRAFT	PROVINCIAL PROPOSAL - AUGUST 28, 1980 DRAFT	REMARKS
Section 1 - Recognized Rights and Limits	**Section 1**	
1. Rights and freedoms recognized subject only to reasonable limits generally accepted in free and democratic society with a parliamentary system of government.	Rights and freedoms recognized subject only to reasonable limits generally accepted in a free society living under a parliamentary democracy.	
Section 2 - Fundamental Freedoms	**Section 2 - Fundamental Freedoms**	
2. (1)(a) Freedom of conscience and religion	2. (1)(a) Freedom of religion	Provincial objections to "conscience" are vague. It is felt this term should be included to extend this right to those people without religion.
(b) Freedom of thought, belief, opinion and expression, including freedom of press and other media.	(b) Freedom of thought, belief, opinion and expression, including freedom of press and other media.	
(c) Freedom of peaceful assembly and of association.	(c) Freedom of peaceful assembly and of association.	

FEDERAL - SEPTEMBER 3, 1980	PROVINCIAL - AUGUST 28, 1980	REMARKS
Sections 3-5 - Democratic Rights	**Sections 3-5 - Democratic Rights**	
3. Right of citizens to vote and to qualify for election to House of Commons or legislature without unreasonable distinction or limitation.	3. Right of citizens to vote and to qualify for election to House of Commons or legislature without unreasonable distinction or limitation.	
4. (1) Limits on maximum duration of House of Commons and legislatures (5 years) (2) except in case of national emergency.	4. (1) Limits on maximum duration of House of Commons and legislatures (5 years) (2) except in case of national emergency.	
5. Requirement for annual sittings of Parliament and legislatures.	5. Requirement for annual sittings of Parliament and legislatures.	
Sections 6-13 - Legal Rights	**Sections 6-12 - Legal Rights**	
6. Right to life, liberty and security of person and right not to be deprived thereof except in accordance with the principles of fundamental justice.	No provision.	This right was modified following the August 25 CCMC meeting to take into account provincial objections to the phrase "due process of law" which has been replaced by "in accordance with the principles of fundamental justice".
7. Right against unreasonable search and seizure.	6. Right against search and seizure except on lawful grounds and in accordance with prescribed procedures.	New Brunswick and Newfoundland agree with federal language. In order to reach agreement with the provinces this right could be modified along the lines proposed by the provinces.

FEDERAL - SEPTEMBER 3, 1980	PROVINCIAL - AUGUST 28, 1980	REMARKS
8. Right against arbitrary detention or imprisonment.	7. Right against detention or imprisonment except on lawful grounds and prescribed procedures.	In order to reach agreement with the provinces this right could be modified along the lines proposed by the provinces. This would be a departure from the Bill of Rights language.
9. Right on arrest or detention	8. Right on arrest or detention	
(a) to be told promptly of reasons therefor;	(a) to be told promptly of reasons therefor;	
(b) to retain and instruct counsel without delay; and	(b) to retain and instruct counsel without delay; and	
(c) to remedy of habeas corpus.	(c) to remedy of habeas corpus.	
10. Right when charged with offence	9. Right when charged with offence	
(a) to be informed promptly of specific charge;	(a) to be informed promptly of specific charge;	
(b) to be tried within reasonable time;	(b) to be tried within reasonable time;	Manitoba, Alberta, P.E.I., Ontario and Saskatchewan propose that this clause be deleted. Unless provincial opposition increases, we should retain this provision.
(c) to presumption of innocence until proven guilty according to law in fair and public hearing before impartial tribunal;	(c) to presumption of innocence until proven guilty according to law in fair and public hearing before impartial tribunal;	

FEDERAL - SEPTEMBER 3, 1980	PROVINCIAL - AUGUST 28, 1980	REMARKS
(d) not to be denied reasonable bail unfairly;	(d) Right not to be denied pre-trial release except on lawful grounds and in accordance with prescribed procedures.	Provinces were unable to justify the use of the term "pre-trial release". In order to reach agreement with the provinces the right could be modified to include "lawful grounds and in accordance with prescribed procedures". However, this would be a departure from existing Bill of Rights wording.
(e) to protection against <u>ex post facto</u> offences and punishment;	(e) to protection against <u>ex post facto</u> offences and punishment;	
(f) to protection against double jeopardy;	(f) to protection against double jeopardy;	
(g) to benefit of lesser penalty where law is changed before sentencing.	(g) to benefit of lesser penalty where law is changed before sentencing.	
11. Protection against cruel and unusual treatment or punishment.	10. Protection against cruel and unusual punishment.	Provinces had only vague objections to including "treatment". No change would should be considered.
12. Right of witness compelled to testify not to have evidence used to incriminate him in subsequent proceedings, except prosecution for perjury or giving contradictory evidence.	11. Defer and reword after report from Evidence Task Force.	Provinces feel that this right should be dealt with only after the report from the Evidence Task Force. We should seek to resist deletion since right is now in Bill of Rights.
13. Right of party or witness to assistance of interpreter in any proceedings.	12. Right of party or witness to assistance of interpreter in any proceedings.	

FEDERAL - SEPTEMBER 3, 1980

Section 14 - Mobility Rights

14. (1) Right of citizen to enter, remain and leave Canada.

(2) Right of everyone in Canada to

(a) move to and take up residence

(b) acquire and hold property, and

pursue a livelihood

(3) Rights subject to (a) laws or practices of general application but without discrimination based on place of residence or previous residence or (b) laws relating to equalization and eliminating regional disparities.

Section 15 - Non-Discrimination Rights

15. (1) Right to equality before the law and equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex

(2) Exception

Those programs or activities designed for "affirmative action" on behalf of disadvantaged persons or groups.

PROVINCIAL - AUGUST 28, 1980

Mobility Rights

Whole issue, if in the constitution, should be elsewhere than in Charter of Rights.

Non-Discrimination Rights

All provinces with the exception of New Brunswick proposed this clause be deleted. New Brunswick favours the principle but does not favour the current wording.

REMARKS

There is some provincial support for 15(1) and 15(2)(a). There is no support for 15(2)(b). We should continue to press firmly for inclusion of this category of rights as fundamental to Canadian unity.

Provinces fear that this category of rights could well apply to every sector of activity rather than just to governmentsas is the intention. They feel unsure how the courts will view this category relative to pension plans, special treatment of minors by the courts, etc. We should continue to press for inclusion of this category of basic rights.

FEDERAL - SEPTEMBER 3, 1980	PROVINCIAL - AUGUST 28, 1980	REMARKS
Section 16 - Official Languages	LANGUAGE RIGHTS NOT TREATED IN PROVINCIAL DRAFT.	
16. (1) English and French official languages of Canada with equal status, rights and privileges re use in all federal institutions.		Same as in August 22, draft
(2) English and French have status provided in Charter which may be extended by Parliament or legislatures.		
Sections 17-22 - Language Rights		
17. (1) Right to use English or French in all debates and proceedings of Parliament.		"" "" "" "" "" "" ""
(2) Right to use English or French in debates of legislatures of all provinces.		
18. (1) Statutes, records and journals of Parliament to be in English and French.		"" "" "" "" "" "" ""
(2) Statutes, records and journals of legislatures of Ontario, Quebec, New Brunswick and Manitoba to be in English and French.		
(3) For other provinces not referred to in (2) the same requirement to greatest extent practicable as determined by legislatures.		

CONFIDENTIAL

FEDERAL - SEPTEMBER 3, 1980	PROVINCIAL - AUGUST 28, 1980	REMARKS
(4) Where statutes are printed and published in both languages, both versions are equally authoritative.		Same as August 22 draft.
19. (1) Right to use English or French in all proceedings of federally constituted courts.		"" "" "" "" "" ""
(2) Right to use English or French in all proceedings of courts in Ontario, Quebec, New Brunswick and Manitoba.		
(3) Right to use English or French in courts of other provinces not referred to in (2) to greatest extent practicable as determined by the legislatures.		
(4) Power to make rules for the orderly implementation and operation of language rights in the courts.		
20. (1) Right of public to communicate with and receive services in English or French from head or central office of any federal government institution and from any other office in areas determined by Parliament on basis of minority language numbers.		"" "" "" "" "" ""

FEDERAL - SEPTEMBER 3, 1980	PROVINCIAL - AUGUST 28, 1980	REMARKS
(2) Right of public to communicate with and receive services in English or French from any head, central or principal office of a provincial government institution to greatest extent practicable as determined by the legislatures.		Same as August 22 draft.
21. Preservation of legal and customary rights or privileges for use of languages other than French or English.		" " " " " "
22. (1) Right of minority language (English or French speaking) parents who are Canadian citizens to choose minority language education for their children in any areas of province where numbers warrant.		" " " " " "
(2) Legislatures may enact rules, consistent with this right, for determining sufficiency of numbers.		

FEDERAL - SEPTEMBER 3, 1980	PROVINCIAL - AUGUST 28, 1980	REMARKS
Section 23 - Undeclared Rights 23. Preservation of any rights not specifically mentioned in Charter including those that may pertain to native peoples.	Undeclared Rights No provision.	This clause was re-drafted following the August 25 CCMC meeting to take into account the provinces' concern that it may cause the courts to entrench other rights. Modifications to the language should lessen provincial concerns in this regard. Provinces also objected to the mention of "native peoples".
Sections 24-29 - General 24. Charter rights to render inoperative any law, order, rule or regulation that is inconsistent with Charter.	Sections 22-24 - General 22. (a) Charter rights to render inoperative any law, order, rule or regulation that is inconsistent with Charter. (b) nothing in this Charter affects the admissibility of evidence or the ability of Parliament or a Legislature to legislate thereon.	Note: Provision on August 22 draft providing for courts to grant remedies for breach of Charter rights has been deleted in the September 3 draft in recognition that legal remedies already exist for such breaches.
25. Other than section 12 nothing in the Charter to affect the admissibility of evidence or the authority of Parliament or a legislature to legislate thereon.		This clause has been added to take into account the provincial concern regarding the adoption of American jurisprudence excluding illegally obtained evidence in all cases. (See 22(b) of provincial draft.)
26. Charter provisions made applicable to Territories.	23. Charter provisions made applicable to Territories.	

FEDERAL - SEPTEMBER 3, 1980	PROVINCIAL - AUGUST 28, 1980	REMARKS
27. Legislative authority is not affected except as expressly provided by the Charter.	24. Legislative authority is not affected except as expressly provided by the Charter.	
28. Preservation of existing constitutional provisions respecting French and English languages until Charter provisions are effective.	No provision.	
29. Power of other provinces to entrench same language rights as Ontario, Quebec, New Brunswick and Manitoba respecting statutes and courts.	No provision.	

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September 1, 1980

1. CHARTER OF RIGHTS

F. BACKGROUND

TABULAR COMPARISON OF LANGUAGE RIGHTS PROPOSED CHARTER vs. VICTORIA CHARTER

PROPOSED CHARTER (Sections 16-22 & 28-29)	VICTORIA CHARTER (Articles 10-19)
1. English and French official languages of Canada with equal status and right in all federal institutions. (s.16)	1. English and French official languages of Canada with status and protection set forth below. (Art.10)
2. English and French have status set forth in Charter and status and use may be extended. (s.16)	2. Power of Parliament and legislatures to provide for more extensive rights re English and French. (Art.18)
3. Rights to use English and French in debates and proceedings of Parliament and in debates of all legislatures. (s.17)	3. Right to use English and French in debates of Parliament and legislatures except in B.C., Alta. and Sask. (Art.11)
4. Statutes, records and journals of Parliament and legislatures of Ontario, Quebec, New Brunswick and Manitoba to be in both French and English. In other provinces, optional with legislatures. Both versions to be authoritative. (s.18)	4. Statutes, records and journals of Parliament and statutes of all provinces to be in both English and French, both versions authoritative. Federal government obliged to publish provincial statutes in other languages where provinces don't. (Arts.12&13)
5. Right to use English or French in all court proceedings at federal level and in Ontario, Quebec, New Brunswick and Manitoba. In other provinces right optional with legislatures. (s.19)	5. Right to use English or French in giving evidence and in any pleading or process before federal courts and those of Quebec, Newfoundland and New Brunswick. Right to services of interpreter in courts of other provinces. (Art.14)

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PROPOSED CHARTER	VICTORIA CHARTER
6. Right of member of public to communicate with and receive services in English or French from head or central office of any federal institution, and from any other such institution in areas where determined by Parliament on basis of minority language numbers. (s.20)	6. Right of person to communicate in English or French with head or central offices of federal department or agency, and with principal offices in areas designated by Parliament. (Art.15&17)
7. Right of member of public in any province to communicate with and receive services in English or French from head, central and principal offices of provincial government to extent determined by legislatures. (s.20)	7. Right of person to communicate in English or French with head or central offices of provincial departments or agencies in Ontario, Quebec, New Brunswick, PEI and Newfoundland. (Art.15)
8. Preservation of rights of languages other than English and French. (s.21)	8. Same provision. (Art.19)
9. Right of parents of minority language (English or French) population in a province to have their children educated in minority language in areas where numbers warrant. (s.22)	9. No provision.
10. Preservation of existing constitutional language guarantees until repealed. (s.28)	10. No provision.
11. Ability of other provinces to opt in to and be bound by similar language provisions applying to Quebec, Ontario, New Brunswick and Manitoba in respect to statutes and courts. (s.29)	11. Ability of provinces other than those specified in Articles 13, 14 and 15 to declare that language rights re statutes, courts and government services to public pertain in their province. Once declaration is made, rights become entrenched. (Art.16)

1. CHARTER OF RIGHTS

F. BACKGROUND

Provisions of Various International Instruments relating to Equality

1. International Covenant on Civil and Political Rights:

a) Article 2, para. 1:

"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

b) Article 3:

"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

c) Article 14, para. 1:

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order ("ordre public") or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juveniles otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

d) Article 26:

"All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

2. International Covenant on Economic, Social and Cultural Rights:

a) Article 2, para. 2:

"The States Parties to the present Covenant undertake to guarantee that the rights enunciated in

the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, religion, political or other opinion, national or social origin, property, birth or other status."

b) Article 3:

"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in this Covenant."

3. European Convention on Human Rights and Fundamental Freedoms:

Article 14:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

4. American Convention on Human Rights:

a) Article 1, para. 1:

"The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

b) Article 24:

"All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."

1. CHARTER OF RIGHTS

F. BACKGROUND

Premiers' Conference, Montreal, February 1978

Recognizing their concern for the maintenance and development of minority language education rights throughout Canada as expressed in St. Andrews and recognizing that education is the foundation on which language and culture rest;

The Premiers took note of the significant progress accomplished during the last years, as highlighted in the Ministers' of Education's report and further recognize the need for continued progress.

The Premiers reaffirm their intention to make their best efforts to provide education to their English or French speaking minorities, and in order to ensure appropriate levels of services, they also agree that the following principles should govern the availability of, as well as the accessibility to, such services;

(i) Each child of the French-speaking or English-speaking minority is entitled to an education in his or her language in the primary or the secondary schools in each province wherever numbers warrant

(ii) It is understood, due to exclusive jurisdiction of provincial governments in the field of education and due also to wide cultural and demographic differences, that the implementation of the foregoing principle would be as defined by each province.

The Premiers requested the Council of Ministers of Education to assume the responsibility to suggest ways and means of achieving further progress in minority language education and second language instruction consistent with the progress thus far made.

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September 5, 1980

1. CHARTER OF RIGHTS

F. BACKGROUND

Provincial Language Rights and the Pepin-Robarts Report

1. The Pepin-Robarts Report identifies only three specific linguistic rights which should be entrenched in provincial statutes and entrenched in the constitution should all provinces agree. These are

   a) minority language education rights;
   b) essential health and social services where numbers warrant; and
   c) criminal trials in principal language of accused whenever feasible.

   These are much less than proposed under the draft Charter. The Pepin-Robarts Report omits languages in the legislatures, in the statutes, and in civil proceedings in courts (in Ontario, Quebec, New Brunswick and Manitoba). In addition, in language services to the public the Charter covers areas other than health and social services.

2. The Report suggests that section 133 be repealed in relation to Quebec, and that the provinces be invited to legislate linguistic safeguards which will have a common denominator that can be entrenched in the constitution.

   This approach of a gradual evolution of protected linguistic rights at the provincial level through provincial legislation and policies not only is naive but also a backward step.

   For 113 years now we have been relying upon the goodwill of the provinces (other than Quebec) to provide some recognition for minority language rights and what have we witnessed until very recent times? Quite the contrary has been the approach of the provinces -- Manitoba withdrawing first educational rights and then French language rights more generally (1890), and Ontario in 1912 cutting back on French language instruction in the schools. In other provinces, such French language education as existed was usually accomplished contrary to the law.

   Virtually no French language rights were recognized and permitted in the other provinces until very recently when a number of provinces began to permit French language education. Even now, not all provinces have laws ensuring this right. Except for New Brunswick which has a comprehensive law respecting language rights, Manitoba which finds itself reluctantly bound constitutionally to section 133 rights, and Ontario which has some laws on language in certain courts and is translating some statutes, there has been little demonstration of any significant goodwill toward the Francophone minorities. More recently, of course, Quebec has moved to limit the use of English in that province. Consequently it can hardly be said that provinces are prepared, as Pepin-Robarts suggests, to grant meaningful rights to their linguistic minorities.

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In light of the foregoing, rather than repealing section 133 for Quebec, we should be using it as a building block to gain a guaranteed recognition of minority language rights in all provinces. Francophone minorities are properly tired of waiting for provinces to agree, either individually or collectively, on what rights might someday be entrenched. Equally, Anglophones in Quebec are concerned about the status of their linguistic rights. Consequently, rather than stepping backward as Pepin-Robarts would seem to suggest, we should be stepping forward to entrench rights now.

With respect to minority language education rights, provincial Premiers all agreed that every English and French speaking child of the minority language population in a province should be entitled to receive his education in the minority language whenever numbers warrant. As Pepin-Robarts noted at page 109, in light of this unanimity, this right should be entrenched.

On other language rights all provincial Premiers agreed in 1976 and 1978 that French and English in the legislatures, statutes, courts and services to the public should be recognized. Consequently, it would follow that these rights too should be entrenched.

It is fine to respect and accept the expressed goodwill and intentions of present governments respecting minority language rights, but in this area good intentions are not sufficient. Even legislative action is not enough for what is given today can be gone tomorrow unless it is entrenched.

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September 5, 1980

1. CHARTER OF RIGHTS

F. Background

Discussions on the Charter - First Ministers' Conference February 1979

Tuesday, February 6, 1979
Afternoon Session

I. Exchange between Prime Minister Trudeau and Premier Blakeney within discussion on patriation. This exchange took place a few minutes before the conference adjourned.

Premier Blakeney:

"I think that we all have to understand that we are trading here and while this may not be in the judgment of some an appropriate subject for trade (patriation) I feel that we ought to try to accommodate as many as we can of the views here and for our part we think that if we are going to Westminster we want to see resources and communications a part of the trip.

The Prime Minister responded with a list of concessions the federal government had made during the conference.

Premier Blakeney:

"We for our part came with the same point of view. We came with a different point of view on human rights, and we are prepared to move on that. We came unconvinced with respect to special language rights, and we're prepared to move on that. We came believing that at least we would go with respect to the Supreme Court as far as Victoria, and we are prepared to agree to something even less than that. There is give and take in each case.

But what I am talking about is whether we would like each of us to make a declaration of what we are prepared to do, and each of us to deliver at the same time, and it is the date of delivery that is the problem. If you will deliver on your things that you are prepared to do at the same time you're asking us to deliver on what we are prepared to do with respect to patriation and amending formula, our arguments are over. If you're asking me to deliver before you deliver on the things you say you're going to do, then we have - the problems are still here."

THE CHAIRMAN: You haven't delivered anything to me. You haven't delivered anything here. I've got a second list, like Premier Lévesque has.

(Laughter)

Thus far, all you've delivered is perhaps to the people of Canada, you're not giving the federal government any greater jurisdiction under language rights or whatever. You're prepared to deliver something to them, but thus far we've only - I always quote myself if we're attacking one of my points - we've almost given up the shop to you people in return for ... I withdraw that.

II. The Charter was discussed on two occasions during the February 1979 FMC. Once during the closed session on February 5 and on February 6 during the open session when the above exchange took place.

During both sessions provinces were polled on their position regarding entrenchment of various rights. During the closed session Alberta's position was similar to Manitoba's opposing on entrenched Charter. During the open session Alberta came out quite strongly in favour of an entrenched Charter, although limited to fundamental freedoms and democratic rights.

With respect to fundamental freedoms and democratic rights all provinces except Manitoba were prepared to see entrenchment. (Saskatchewan with reluctance and Quebec only if all other provinces agreed.)

There was less support for legal rights. Six provinces supported some legal rights (Ontario, Quebec, Prince Edward Island, New Brunswick, Newfoundland and Nova Scotia) while Alberta and British Columbia agreed to consider them further. Saskatchewan and Manitoba opposed including of these rights in the Charter.

With respect to non-discrimination rights, mobility rights and property rights, apart from New Brunswick there was virtually no support for entrenchment.

Protection of general language rights was supported by Newfoundland, Prince Edward Island, New Brunswick and Saskatchewan. Ontario and Alberta had major reservations; British Columbia reserved its position; and Nova Scotia, Quebec and Manitoba opposed these rights.

Minority language education rights were supported by Newfoundland, Prince Edward Island, New Brunswick, Ontario and Saskatchewan. These rights were opposed by Nova Scotia, Quebec and Manitoba. Alberta and British Columbia reserved their positions.

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September 2, 1980

12. STATEMENT OF PRINCIPLES/PREAMBLE

A. Introductory Remarks by Mr. Chrétien

All governments support inclusion of a Preamble. A "best efforts" draft was adopted by the CCMC. There are, however, problems with handling, or incorporating, a few of the concepts that might be covered in a Preamble.

The principal issues which require decisions of First Ministers are:

1. With regard to lines 1 to 5 of the draft Preamble, which of the five alternative versions should be adopted? If none of these, should one of these be modified for inclusion?

2. With regard to lines 17 and 18, which of the two alternative proposals should be adopted? and,

3. Once the choices have been made in regard to the first two issues, is the draft acceptable?

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September 2, 1980

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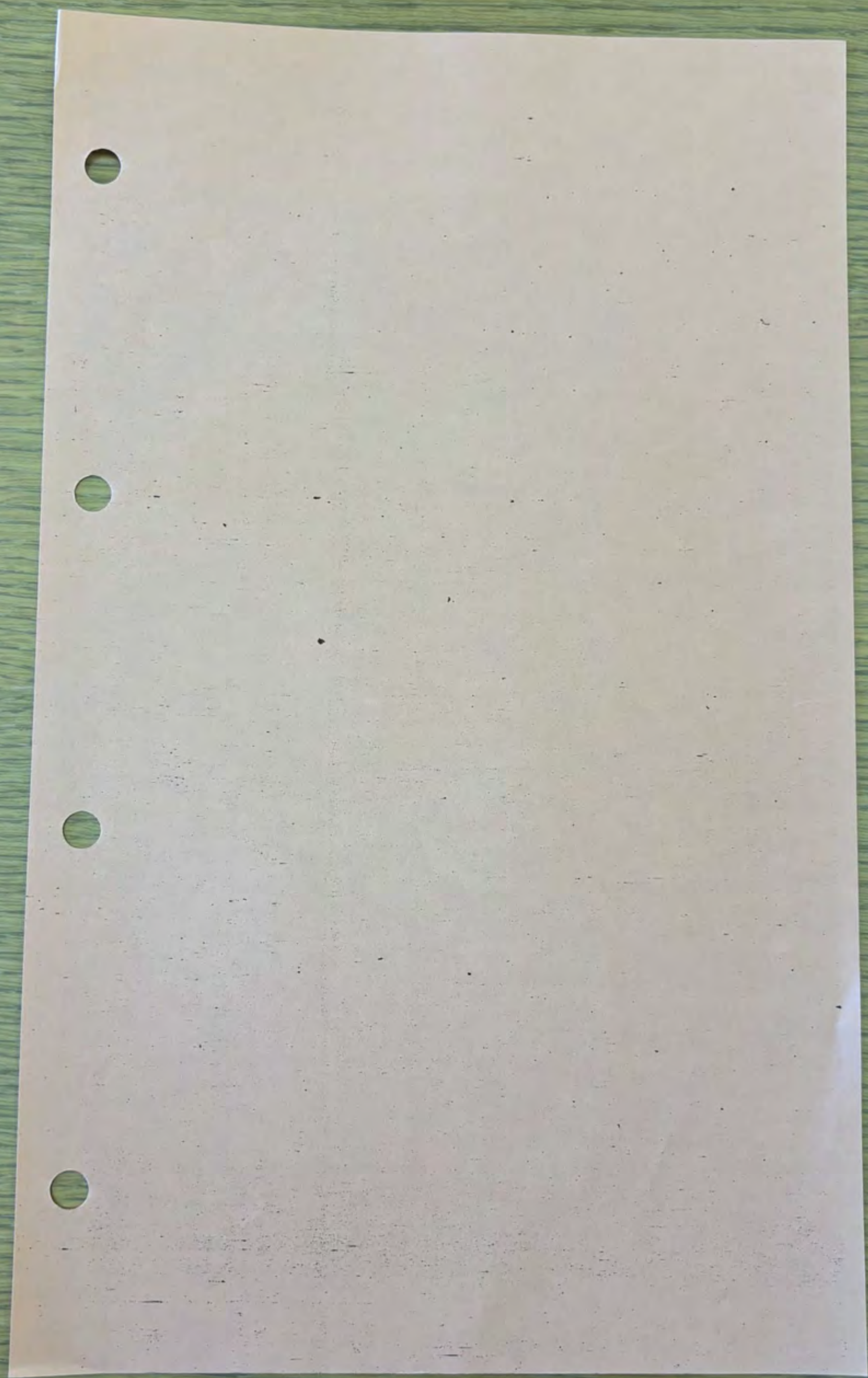

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12. Preamble

B. Suggested draft notes for Prime Minister's Opening Statement

(French) Next on the agenda is the preamble and fundamental purposes, an item which attempts to summarize the purposes of our constitution, and even of why we are together as Canadians. For the next /hour or so,/ we all will have to think simply as Canadians: reflecting no doubt the different experiences and insights of our provinces, but all trying for-- and as-- Canadians to put into words the fundamental goals of our national life together.

(English) This of course is no simple task in a country as diverse as Canada, or in a society as complex as Canada's has become in recent decades. Therefore I think the first and most important point is to record my pleasure with the large measure of agreement on the Preamble that is reflected in the report which the CCMC has sent us To me, this says something significant, and encouraging. It says that, though this is a country where we speak different languages, come of many different origins, hold different beliefs-- and a country still undergoing great social change -- we can indeed agree on the fundamentals of what we want to stand for as a people.

All governments support inclusion of a Preamble. A "best efforts" draft was adopted by the CCMC. There are, however, problems with two of the concepts that might be covered in a Preamble.

In view of the extensive measure of agreement our ministers have reached during the summer, I have a suggestion to make. Unless your opening statements reflect any significant departure from the CCMC consensus on this item, I suggest that we focus

on the two important questions of wording which, once resolved would mean we can indeed achieve a modern constitutional preamble and true statement of fundamental purpose.
In that spirit, I will give you a summary of my views on each of the two "wording" questions that must be resolved by us today.

(On lines 1 to 5 of the best-efforts draft): The basic and paramount thought we are trying to express-- and I am sure that not one First Minister among us has a mandate, or would want one, to suggest otherwise -- is that Canada exists because its citizens want it to exist. That

is what distinguishes us from many other societies: that our continued existence as a sovereign, independent, united country depends on the free consent of the people; not on compulsion, not on force -- but on the free consent of the people of Canada.

I'd suggest that we can and indeed must focus our efforts on finding the words clearly to express that idea; I will
have some new wording to suggest when we open our discussion of those lines.

(On lines 17 and 18 of the best-efforts draft:) The other important phrase requiring discussion involves two related requirements, as far as the Government is concerned.

...3

(French) First, it must reflect-- as indeed, both alternatives in the CCMC "best efforts" draft already would-- a profound collective realization which is quite promising for Canada's future. This is the emergence at last of a national commitment-- a commitment by all Canadians confirmed by all eleven of their governments-- to recognize permanently the French-speaking society that is an inseparable part of Canada's distinctive national existence in North America.

The second requirement is, for my government, only slightly more complex to state. On one hand, we want to recognize the incontestable reality that the French-speaking society of Canada has at present son premier foyer et son centre de gravité (its primary focus and centre of gravity) in Québec. At the same time, and with complete consistency, we wish to affirm that not just Québec, but all of Canada, is the country of French-speaking Canadians just as all of Canada is the country of any Canadian.

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12. Preamble

C. Talking Points

A. For use if the "best efforts"consensus seems to have unravelled or be in danger of unravelling

Leaving aside the two "wording" items reserved for First Ministers' decision, difficulties that Premiers may raise with the CCMC best efforts draft are likely to fall into three broad categories. We suggest below a broad avenue of response for each category. It may also assist to speed the discussion if you can sift each point raised by Premiers into matters of content requiring discussion (categories I and II), and matters of style which First Ministers may well agree can be put aside (category III).

Category I - Objections to items already included in the draft:

With TV present, in many cases you may be able to handle this category of objections with a series of "motherhood" responses. That is, by encouraging the Premier to quote the specific words he objects to and then asking him (to use hypothetical examples): "Surely I misunderstood you -- you obviously support 'promoting freedom and justice'?"

A specific response may be required if objection is raised to "protecting ... rights" (lines 12 and 13) as a constitutional objective. The main argument you may have to deal with is that you are including the phrase to "trap" provinces into prior commitment to entrenching a charter of rights. Should that argument be raised, you could try to avoid a substantive debate over the rights charter by replying that "protecting rights" is a purpose of "the Constitution" which can be fulfilled by Parliament, legislatures and courts -- all of which are part of "the Constitution" -- as well as by any charter. Hence there is no commitment to a charter per se stated or implied by inclusion of this phrase.

Category II - Demands for inserting new material into draft:

Another set of problems would arise if one or more Premiers want to re-open the best efforts draft to expand references to their particular concerns. (For example, Ontario had pushed for more extensive reference to "diversity" or "multiculturalism"; one province wanted "regional" explicitly associated with "economic opportunity".)

In this situation, you could draw on elements of the following approach:

- if any fundamental purpose really is absent from the draft, it can be considered on merit for addition. (We doubt any is.)

- But all eleven governments agreed in CCMC discussion that -- for a country of diverse and often differing aspirations and concerns, and which does not update its Constitution at frequent intervals -- only a generally phrased, "brief and basic" statement of purposes would serve us all, would be durable and non-divisive.

- The CCMC draft has touched all the "fundamentals", those from which important constitutional provisions (regional economic opportunity, official languages, et. al.) flow.

- If we start expanding upon these fundamentals here in the preamble, we are probably opening a "can of worms" and dooming our efforts, for two reasons:

  - One reason is that "to list is to omit": (for example, if one wants to expand on economic opportunity" to say "in every region", to someone else it might be more important to add "for both official language groups").

  - Second, the more extensive and specific the preamble becomes, the more it would increase the provinces' own worry and concern about potential problems that could be created for judicial interpretation of the Constitution. (Many provinces raised this argument at the CCMC, which, in fact helped win our support for the "generalist" approach of the best efforts draft as the most practical one for Canada.)

Category III - Stylistic criticisms of the best efforts draft:

First Ministers' consideration of the preamble will probably be more productive and conclusive if you can confine the discussion as much as possible to content.

When stylistic criticism is first raised - or you could raise it yourself - you would probably find good support if you argue that only after content is firmly agreed can we find the very best words to express it.

If First Ministers' stylistic criticism is relatively low-keyed (the writing is pedestrian; couldn't better words be found? etc.), you and the Premiers could probably avoid further discussion simply by agreeing to confirm the CCMC recommendation that, after FMC approval of content, further stylistic suggestions can be received via the officials' committee.

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On the other hand, one or more Premiers could conceivably launch an initiative for a whole new, consciously "poetical" preamble to "inspire" Canadians. If so, if the Premier has such a draft to offer for FMC consideration, well and good. If he does not, you can re-emphasize the FMC's desire for further stylistic improvement after content is agreed.

If a more lengthy discussion of style cannot be avoided, you can draw on the following arguments, or enable provinces to do so (Saskatchewan, for example, has made most of these points through Mr. Romanow several times in the CCMC):

- very few of the world's constitutions take a "poetic" approach, and fewer still successfully. /Ireland's tries - but Ireland is highly homogeneous, and Canada is not./;
- in a bilingual, multicultural, regionally diverse country, what inspires one Canadian might very well offend another Canadian (and have a different meaning for other generations);
- it may be more in keeping with the Canadian taste and temperament - which values the practical, the decorous and cautious, the measured approach in all things, and is relatively reserved in expressing national sentiment - to avoid flowery or poetic prose. (Our most successful constitutional phrase is, after all, "peace, order and good government!")

B. For use if the Quebec version of lines 17 and 18 is unacceptable to you

If warranted by the circumstances of the discussion (including Mr. Lévesque's stance), you might draw on the following views addressed to Francophones inside as well as outside Quebec:

In French

As I said at the outset, there is nothing whatever inconsistent with that reality of today's Quebec and my affirmation that it must be all Canada that is the home of French-speaking Canadians - and this from two points of view.

First, there are the Acadiens, the Franco-Ontariens, the francophone Canadians of the west: one million Francophones who are not Quebecois, but who have their own proud history and culture, and are full and equal citizens of their own province.

No less important, from the point of view of the Quebecois (my own point of view, for example) there is something I will not accept. In my country's most fundamental written statement of its own being - describing the nature of my nationality, and the inhertance that will belong to my children and grand-children - I will not accept any statement that would

imply that my country, my home, is not (now in principle, and will not growingly become in practice) all of Canada ... all of the vast and magnificent country which my ancestors helped to explore, to create, to build.

Why else did we vote "no" in the referendum? For what other reason did we fight - in our generation and for more than two centuries - for our language rights, for French education, for respect, and for justice and dignity, everywhere in Canada?

The wording the federal government has proposed reflects these ideas; (and the federal government is willing to examine other variations that also do so). But let's not allow our discussion of wording to jeopardize this unprecedented written national commitment - to Quebecois and to all Francophones - that is almost within our grasp now, today, as a result of the referendum and of accommodation and good faith in all quarters of Canada.

C. With regard to the rights of Native Peoples (line 12)

With the authorization of the CCMC, the Chairman of the officials committee on the Preamble (Mr. Gwyn) met with Mr. Del Riley, President of the NIB, and representatives of the ICNI and the NCC to get their reaction to the passage in the draft preamble which would make "individual and collective rights, including those of the Native Peoples" a purpose of the Constitution. It was pointed out that specific mention of collective rights would be a tangible response by the governments of Canada to the concerns of the Native Peoples and, moreover, would be an unusual move given the orientation towards individual rights of western societies in general.

Without access to the entire draft of the preamble, the representatives of the three national Native organizations felt they could not take a firm position on what they had heard. However, the specific passage which was read out to them, as well as commentary on the context in which it would be situated, appeared to have been favourably received. Certainly they had no objection.

In speaking to this point of the Preamble you might draw on the following note:

"In my speech to the National Conference of Indian Chiefs and Elders in Ottawa, on April 29 of this year, I asked the leaders of the Indian nations of Canada to teach us what we have to learn, and to help us grasp their understanding of how we should live together in Canada as one people.

"In the proposed Preamble you have before you, specific mention is made of the concept of collective rights, including those of the Native Peoples. I believe the inclusion of this concept, as a purpose of the Constitution, would be both a reflection of

something they have been able to teach us. In a society where individual rights are sacrosanct, the Native Peoples have been urging us not to forget the collectivities to which those individuals belong. Those collectivities also must have rights, the Native Peoples tell us, because the individual cannot be strong if his family and his friends are weak.

"The proposed Preamble leaves the door open for further lessons to be learned by the rest of us from the Native Peoples' concept of collective rights. I am especially optimistic on what we will gain from the process of discussion with the Native leadership, because they have so often proclaimed that their notion of collective rights would strengthen both themselves and the people of Canada as a whole. They have repeatedly made it clear that, in their aspiration to be strong as collectivities, they make a strong and united Canada both their premise and their goal."

D. The possible uses of a Preamble

(i) Some of the Premiers may ask how a preamble might be used. In particular, someone may want to know whether it would replace the present (BNA) preamble.

You could respond by indicating that it could be used in such a way as to apply either to the whole constitution (including the BNA Act) and the new parts, or just to the new parts of the constitution. How would the Premier like it used?

(ii) There may be questions about the interpretive uses of the Preamble. You could reply by characterizing the Preamble as an "aid to interpretation"- of use only when the Constitution is either unclear or unwritten.

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12. Preamble

D. Status Report and Negotiating Position

(1) Federal and Provincial Positions

The item was considered in detail by the CCMC in August. (A preliminary discussion in July had narrowed the range of subjects to be covered in the preamble.) The federal government tabled a narrative proposal on August 26, and this became the basis for a draft which was further revised by the Conference. A "best efforts" draft was adopted.

All governments support inclusion of a preamble. There are, however, problems with handling or incorporating a few of the concepts that might be covered in a preamble.

(2) Significant Issues

a) Whether "governments" and, if so, whether the federal government should be explicitly referred to in the opening passages (lines 2 and 3) of the Preamble.

Comment: No province is seeking a reference to governments, though most want "provinces" mentioned in some way. No province objects to a reference to the Government of Canada, but it has been very difficult to find a satisfactory form of words. The problem can, of course, be avoided if there is no mention of governments - federal or provincial (See FMC Position - A.)

b) Whether "the provinces" should be referred to as "choosing freely" to maintain the federal union.

Comment: This problem can be resolved if the provinces will accept a formulation which, without referring to "provinces" (or "governments") indicates that the federation is freely maintained. (See FMC Position - A.)

c) What words to use to represent Quebec as the major element in the distinct French-speaking society in Canada.

Comment: Some provinces with Francophone minoroties object to this idea because they say their people do not agree that Quebec is, in effect, the key to their survival.

(3) FMC Position

A. Federal negotiating position on opening sentence of Preamble:

1. The primary objective of the Government of Canada will be to secure, to the clearest extent possible, recognition that the sovereign will of the Canadian people is the ultimate basis for Canadian unity (i.e. of Canada's continued existence, as a federation).

2. The second objective will be prevent acceptance of any new formulation that can reasonably be interpreted to suggest that the continued existence of Canada is exclusively dependent upon -- or that the will of Canadians in this regard is exclusively expressed through -- the governments of the provinces.

3. As long as these two requirements are met, the Government of Canada would not seek to have governments mentioned in the opening sentence, i.e. it would not seek, per se, to obtain any new, explicit recognition of the Government of Canada in the opening sentence. In the "best efforts" draft preamble, the Government of Canada is adequately covered in such phrases as:

   "federation"
   "sovereign and independent country"
   "Crown of Canada"
   "with a Constitution similar in
   principle to that which has
   been in effect in Canada"

B. Federal negotiating position on reference to Quebec (lines 17 and 18)

   1. The objective will be to secure constitutional recognition of the distinct French-speaking society in Canada, and the fact that it is centred in Quebec.

   2. The Prime Minister would attempt first to obtain agreement on the first version of the draft preamble (or some variation thereof). However, mindful of the concerns of provinces with Francophone minorities, he could agree to the second version (or some variation) if he regards it as acceptable in light of the objective set out above.

C. A possible new federal draft

   The draft preamble (set out below) has been revised to take account of your comments to Messrs. Kirby and Pitfield, chiefly your concern with the absence of Canada's people in the first line. The revision also reflects legal and structural points that were raised.

   It is worth noting that 90% or more of the "best efforts" draft adopted at CCMC is virtually identical in content to the draft set out below:

... 3

(Version 5.9.80)

"/CANADIANS/ /THE CITIZENS OF CANADA/ wish their country to remain freely united as a sovereign and independent state, a federation of the several Provinces[1] under the Crown of Canada, with a constitution similar in principle to the original constitution of Canada.

THEREFORE it is declared that the fundamental purpose of this the Canadian Constitutional Charter is:

TO PRESERVE AND PROMOTE the freedom and the well-being of all Canadians and, in the pursuit of that purpose,

- TO ASSURE that laws and political institutions are founded on the will and consent of the people;
- TO PROTECT individual and collective rights, including those of the native peoples; [2]
- TO FOSTER economic opportunity, and the security and fulfillment of Canada's diverse cultures;
- TO RECOGNIZE the distinct French-speaking society centred in though not confined to Québec; and
- TO CONTRIBUTE to the freedom and well-being of all mankind."

NOTE: (1) The words "and territories" are not included as it is questionable that the territories form part of the federation since they are not independent governing bodies.

(2) This phrase to be included only if desired by the native leadership. Native leaders have been consulted and have so far voiced no objection.

E.1

DOCUMENT: 800-14/

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FEDERAL-PROVINCIAL CONFERENCE

OF

FIRST MINISTERS

Report of the Continuing Committee of Ministers
on the Constitution to First Ministers

THE PREAMBLE

Ottawa
September 8-12, 1980

THE PREAMBLE

On August 29, Ministers discussed the Report of the Committee of Officials on the Preamble (CICS Document 830-84/033).

They decided to present the attached draft of a preamble and statement of purpose of the Constitution for the consideration of First Ministers.

Manitoba suggested that the CCMC record its support for a preamble that is as brief and simple as possible.

It was also suggested that a draft of the preamble not be made public until First Ministers had had an opportunity to review the attached draft together privately.

If First Ministers agree to a preamble and statement of purpose, the CCMC recommends that there be an understanding that there will be further opportunity to receive suggestions for stylistic changes and that these should be communicated to the CCMC officials committee.

Issues for Consideration

The draft contains two sets of passages that have been placed in square brackets, indicating that the CCMC did not reach a final decision on the particular form of words to recommend to the First Ministers Conference.

The principal issues which require decision by First Ministers are:

1. With regard to lines 1-5, which of the five alternative versions set out in the draft should be adopted for the preamble? If none, which of these should be modified for inclusion?
2. With regard to lines 17 and 18. which of the two alternative proposals should be adopted?
3. After the choices have been made in respect of 1 and 2, is the draft acceptable?

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BEST EFFORTS DRAFT

PREAMBLE AND STATEMENT OF PURPOSE OF THE CONSTITUTION

a) Federal Government:

/In accordance with the will of the citizens of Canada, 1
the Government of Canada and the Governments of the 2
Provinces of Canada have expressed their intention to 3
remain freely united in a federation, as a sovereign and 4
independent country, under the Crown of Canada/... 5

b) British Columbia:

(i) /The will of Canadians is that the Provinces of 1
Canada choose to remain freely united in a federation 2
with a federal government, 3
as a sovereign and independent country, 4
under the Crown of Canada/... 5

(ii) /It is the will of Canadians that Canada remain 1
united as a federation, as a sovereign and 2
independent country, under the Crown of Canada/... 3

c) Manitoba:

/It is the will of Canadians to remain freely united 1
in a federation of provinces, as a sovereign and 2
independent country, under the Crown of Canada, with 3
a federal /central/ government/... 4

d) Quebec:

/In accordance with the will of Canadians, the Provinces 1
of Canada choose to remain freely united in a federation, 2
as a sovereign and independent country, under the Crown 3
of Canada /all of which meets with the approval of 4
the federal government/ /... 5

with a Constitution similar in principle to that which 6
has been in effect in Canada. 7

THE FUNDAMENTAL PURPOSE of the Federation /Constitution/ is to preserve and promote freedom, justice and well-being for all Canadians, by:

PROTECTING individual and collective rights, including those of the native people;*

ENSURING that laws and political institutions are founded on the will and consent of the people;

FOSTERING economic opportunity, and the security and fulfillment of Canada's diverse cultures;

/RECOGNIZING the distinct French-speaking society centred in ,though not confined to Quebec;/

/RECOGNIZING the distinctive character of Québec society with its French-speaking majority;/

CONTRIBUTING to the freedom and well-being of all mankind.

---

*This phrase is subject to acceptance by the native leadership

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12. Preamble to the Constitution

F. Background

At last week's meeting of the CCMC the issues on which the federal delegation was attempting to secure provincial agreement were as follows:

1. Explicit acknowledgement that the people are the source of authority for the continuance of the federal union.

2. Agreement that there should be no implication in the preamble that the will of Canadians in regard to the continuance of the federation, or the existence of Canada, is dependent upon or expressed exclusively through "the provinces" (or the provincial governments).

3. Recognition of the distinct French-speaking society in Canada centred in ... Quebec.

In regard to 1. (the people) agreement seems to have been achieved. Each of the proposals for line 1 in the "best efforts" draft contains this acknowldgement. (The provinces had had a draft on this from the federal delegation Thursday morning; it had been accepted in principle by the CCMC as a whole when it discussed the matter on Thursday afternoon.)

The second point presented more difficulty, though chiefly because of the problem of drafting. No one claimed that the federal government was the creature/agent of the provinces. It was said that it is an integral and essential part of the federation, that it came into being with the federation, that it had not existed before and that it could not "unite" with the provinces to form a federation since it is the central government of the federation. All of this was true enough. As one delegate said, the federal Government of Canada is the only government that has no choice but to stay.

Claude Morin stressed that he would have no objection to a statement in the preamble to the effect that the federal government was "overjoyed" at the fact that the provinces had "chosen freely to remain" in the federation. He himself noted the apparent lack of seriousness in his phrase but felt that, if some such thought was wanted, the words could be found. (Thus the passage in square brackets at lines 4 and 5 of the Quebec proposal, (d) on page 1 of the draft Preamble.) One very much doubts that any provincial delegate would claim that, in voicing such approval (were that the course adopted), the federal government was not expressing the will of the Canadian people. (Thus, in Quebec's approach, the will of the people, as expressed through the provinces, would result in their choosing to maintain their membership in the federation; while the will of the people, as expressed through the federal government, would result in a statement that the Government of Canada approves the decision of the provinces and is satisfied at the continuation of the union.)

It appears that the underlying substantive issue that will have to be resolved -- after which finding the right words will be quite manageable -- is as follows:

Quebec (though decidedly not Ontario) clearly wants some reference in the preamble stating or at least implying that provinces are remaining "freely" (and therefore, can presumably leave freely). Of course this relates in Quebec's mind to the self-determination issue. There is no question, in the view of the Quebec government, that the right was exercised in the referendum, i.e. when Quebecers decided to stay in Canada. They maintain that the right was recognized implicitly by others, through the federal and other provincial participation in the campaign.

Mr. Morin has not sought any explicit reference to "self-determination". But Quebec seems very consciously to have been -- and will continue to be -- suggesting words that imply recognition, to the greatest extent their negotiators think they can extract, of this provincial right. Certainly, the best guess is that Quebec would find it very difficult to accept any new wording which appears to them to "remove" the implication arguably present in the opening of the BNA Act ("Whereas the provinces ... have expressed their desire...).

In accordance with the federal narrative proposal tabled on August 26 (copy attached), in the ministerial discussion it was stressed that it is essential that the popular "consent" on which Canada is founded be highlighted in a preamble.

As regards 3. (Quebec as centre of French-speaking society), whereas previously there was only the federal version, there are now two choices (lines 17 and 18). Quebec was given the opportunity to suggest the second version partly by Ontario's pugnaciousness in opposition to "self-determination", and partly because of the concerns about the federal draft raised by some provinces with Francophone minorities. These provinces said their people will not accept that Quebec is, in effect, the key to their survival.

Until Ontario, quite unnecessarily, disturbed the situation, the original federal proposal had been very well received by Quebec and was in the process of being accepted by the other provinces. One assesses its eventual acceptability to Quebec at a bit better than 50/50 if the difficulties with the opening segment (lines 2&3) can be overcome. Quebec approval would be even more likely if "though not confined to" were dropped, but this might well make it more objectionable to some other provinces.

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As matters stand there is agreement on 15 of the 20 lines (the exceptions are 2 and 3; 8; 17 and 18). Lines 17 and 18 may well be resolvable if 2 and 3 are.

The difficulty with line 8 is that the provinces which oppose an entrenced Charter - at least 7 - do not want it implied that there will be a Charter in the Constitution. They therefore favour "federation". It has been pointed out to them that "Constitution" does not mean only the written Constitution and that legislatures (their preferred means of "protecting" rights) are included within "Constitution".

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13. CANADA'S NATIVE PEOPLES AND THE CONSTITUTION

A. Jean Chrétien's Introductory Remarks

A sub-committee of the CCMC, consisting of myself as Chairman, Roy Romanow, Gerald Mercier, and Dick Johnston, met with delegations of the three national Native organizations led by Mr. Del Riley of the National Indian Brotherhood, Mr. Charlie Watt of the Inuit Committee on National Issues, and Mr. Harry Daniels of the Native Council of Canada, on August 26.

I gave the following report on that meeting to the full CCMC, which was ratified by the CCMC without dissent:

The CCMC agreed:

1. To communicate to First Ministers the views of the leaders of each of the three organizations.

2. To confirm the invitation to the national Native organizations to attend the September meetings with First Ministers as observers.

3. To recommend to First Ministers that the item "Canada's Native Peoples and the Constitution" be back on the agenda in the future round of negotiations and that Native leaders be able to meet with First Ministers at the negotiating table at that time, as a step in the consideration of this item.

4. To recommend to First Ministers that Native leaders be free to raise any of their constitutinal concerns under the heading of "Canada's Native Peoples and the Constitution". Those discussions could lead to constitutional changes. Whatever might be decided at the September meeting of First Ministers would not preclude subsequent constitutional changes which reflect Natives' concerns.

5. To confirm the invitation to Native leaders by the Chairman of the Sub-Committee meeting to have them meet with the Chairman of the CCMC Sub-Committee of Officials on the Preamble to discuss the content of a possible constitutional preamble.

The substance of these conclusions and recommendations is contained in the Reports of the CCMC to First Ministers.

13. CANADA'S NATIVE PEOPLES AND THE CONSTITUTION

C. Background

On August 26, a sub-committee of the CCMC met with leaders of the three national Native organizations to hear their points of view on the twelve items on the CCMC agenda, and on any other constitutional matters the leaders wished to raise. Each of the organizations tabled briefs. Those from the NCC and ICNI covered all 12 items and contained many interesting comments.

(Attached is a copy of the proposed CCMC report to First Ministers on that meeting.)

Most of the meeting was devoted to a wide-ranging discussion, during the course of which the following points (amongst others) were made:

CCMC Ministers said that:

(a) When the item on "Canada's Native Peoples and the Constitution" is on the constitutional agenda, it will allow for all constitutional issues which concern Native people to be raised. At this time, Native leaders will be able to comment on the constitutional proposals already discussed, and perhaps adopted, by First Ministers. If First Ministers are receptive to the views of Native leaders at that stage, the constitution could be amended further in accordance with the formula then in force.

(b) "Full, equal and ongoing" participation in all constitutional discussions is not envisioned. Full and ongoing participation will be possible, however, on the item "Canada's Native Peoples and the Constitution".

(c) Patriation of the Constitution would not reduce Natives' opportunities to affect the content of the Constitution.

(The NCC, however, argued that patriation would remove the need for Canada to go abroad in its bid to amend its Constitution; this would remove the leverage which Native leaders now have in their efforts to get recognized.)

(d) Native concerns had already been raised by CCMC Ministers during their discussions, and views expressed by Native leaders to the Sub-Committee of CCMC Ministers would be passed on to First Ministers.

(Mr. Chrétien, as Chairman, pointed out that a role for Native leaders in the amendment formula, to the point of having a veto over possible constitutional change, is not being considered by First Ministers. Mr. Del Riley, in answer, said Native people were distressed that they cannot be party to "full, equal and ongoing" discussions of the Constitution at <u>every</u> stage.)

... 2

To this Mr. Romanow responded that equality of Native associations with provincial governments is difficult to contemplate because Native government only exists at the band and community level. Mr. Riley agreed saying that the national associations are spokesmen, not governments.

The meeting was a successful one from many points of view. All ministers, except for Mr. Ottenheimer of Newfoundland and Mr. Carver of Prince Edward Island (who were represented by officials), had an opportunity to hear an expression of Natives' concern and respond to some of them.

The Native presentations, especially the one of the NCC, were quite comprehensive as the attached summary makes clear. Subsequent dialogue was conducted in a friendly atmosphere, and appeared to generate considerable interest amongst all participants.

From the Natives' point of view, however, very little that was new was accomplished. They did not succeed in augmenting their "observer" status at the September First Ministers' Conference to anything more substantial and they were rebuffed in their attempt to have "full, equal and ongoing" participation at every stage of the constitutional talks. Furthermore, they seemed not to understand (or not to believe) that, when the item "Canada's Native Peoples and the Constitution" comes up for consideration, they will have an opportunity to affect the tenor and substance of all the constitutional provisions which interest them. The NIB, to emphasize their disenchantment, will be holding a "constitutional conference" in Ottawa simultaneously with the First Ministers' Conference.

Yet the Native leaders did achieve something of consequence. The meeting went well enough to assure them of further meetings of the same type, and to assure them of a meeting with First Ministers when the Natives' constitutional positions have been developed. Presumably to protect these gains, the NIB, like the other associations, will be sending observers to the FMC in response to the Prime Minister's invitation of August 11.

It should be noted that the Prime Minister's August 11 letter (sample attached) to the Native associations, confirming their meeting with the CCMC sub-committee and inviting them to attend the FMC as observers, was used by the NIB to argue that their status as participants in the Constitution renewal process had been enhanced. The underlined passages in the sample letter make it clear that such was not the intent.

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Canada's Native Peoples and the Constitution

- Summary of views on constitutional reform: NIB, NCC and ICNI -

The briefs by the native organizations were quite comprehensive, as the following summary demonstrates.

On the Statement of Principles, all the organizations asked for a reference to native peoples. The ICNI wanted substantial elaboration on the distinctiveness of native cultures; the NCC would have the pluralism of Canada given emphasis, and were seemingly less intent on a specific mention of Inuit, Indian and Métis; and the NIB focussed on the process of drafting the preamble, which should include consultation with native peoples. Mr. Chrétien responded to these concerns by inviting input from native organizations to the Chairman of the CCMC's officials committee on the Preamble.

On the Charter of Rights, the call was for specification of collective rights, such as aboriginal rights, treaty rights, affirmative action programs for native peoples, and so on. The NCC wanted aboriginal rights entrenched separately from a Charter of Rights, and the ICNI mentioned a particular concern that mobility rights be limited to protect Inuit communities in the North.

Regarding Patriation of the Constitution, the NIB was generally opposed, the ICNI favoured it in principle but would have their rights specified first (or an "adequate provision" for such rights guaranteed in advance), and the NCC wanted prior assurance that an Amending Formula would include native peoples. The ICNI wanted participation in an amendment formula with respect to article 91(24) of the BNA Act, and a formalized procedure for consultation in other respects. Discussion on this topic brought out the point that native leaders feel the existing situation gives them more leverage, because of sympathy for their cause in the U.K., than they will have after the constitution is patriated.

The items dealing with natural resources (Resource Ownership, Offshore Resources, and Fisheries) saw all three organizations draw attention to aboriginal rights, to treaty rights (in the case of the NIB), and to the fact that native people have distinctive and traditional ties to the land.

On Powers affecting the Economy, and especially on Equalization, the main concern was that native peoples be dealt with as distinct entities, with access to financial support provided by the federal government to provinces on an individual and on a collective basis as a matter of right. The native peoples do not want equalization payments to continue to be an unconditional grant.

The native organizations asked for "representation" in federal institutions (A New Upper House and the Supreme Court), and a role in the areas of Family Law because of the differences between native cultures and the dominant cultures of Canada.

ANNEX

Meeting of the CCMC Sub-Committee with the Leadership of the NIB, NCC and ICNI

1. On August 26, 1980, a Sub-Committee of the CCMC met with the leadership of the NIB, NCC, and ICNI. This meeting was arranged in response to the CCMC Record of Decisions of June 17, 1980, Agenda Item 4(a).

2. In attendance at that meeting were the Ministers who form the Sub-Committee: Messrs. Jean Chrétien (who acted as Chairman), Roy Romanow, Gerald Mercier, and Dick Johnston; other members of the CCMC who were able to attend: Messrs. Edmund Morris, Rodman Logan, Claude Morin, Thomas Wells, and Garde Gardom; and, officials representting Newfoundland and Prince Edward Island. The delegations of the Native organizations were led by Messrs. Del Riley (President) and Sykes Powderface (Vice-President) in the case of the NIB; Mr. Charlie Watt (Co-Chairman) of the ICNI; and Messrs. Harry Daniles (President) and Louis Bruyére (Vice-President) of the NCC.

3. The leaders of the Native organizations presented briefs to the Sub-Committee. These documents were circulated to the CCMC and are attached to this report. It should be noted that the NIB tabled three submissions (numbered 830/85-003, 004 and 005).

4. The CCMC agreed:

a) To communicate to First Ministers the views of the leaders of each of the three organizations.

b) To confirm the invitation to the national Native organizations to attend the September meetings with First Ministers as observers. (This is the same as the status they had at the October 1978 and February 1979 meetings, and means that they would be able to observe all public sessions of the Conference.)

c) To recommend to First Ministers, as per their agreement of February 1979, that the item "Canada's Native Peoples and the Constitution" be on the agenda in the future round of negotiations and that Native leaders be able to meet with First Ministers at the negotiation table at that time, as a step in the consideration of this item.

d) To recommend to First Ministers that Native leaders be free to raise any of their constitutional concerns under the heading of "Canada's Native Peoples and the Constitution". Those discussions would lead to constitutional changes. Whatever might be decided at the September meeting of First Ministers would not preclude subsequent constitutional changes which reflect Natives' concerns.

e) To confirm the invitation to Native leaders by the Chairman of the Sub-Committee meeting to have them meet with the Chairman of the CCMC Sub-Committee of Officials on the Preamble to discuss the content of a possible constitutional preamble.

PRIME MINISTER · PREMIER MINISTRE

K1A OA2
August 11, 1980

Dear Mr. Starblanket:

You sought clarification in your letters of last spring of several rather important issues concerned with the participation of the National Indian Brotherhood in the process of constitutional renewal. In the course of our participation in the All Chiefs and Elders Conference and on subsequent occasions, my Cabinet colleagues and I sought to resolve those issues.

I am thinking, for example, of the meetings you and members of the NIB Executive Council have had this spring and summer with the Honourable Jean Chrétien and the Honourable John Munro. Also, I understand that you have been provided with the papers issued by the Government of Canada following the June 9th meeting of First Ministers and at the meetings of the Continuing Committee of Ministers on the Constitution (CCMC) last month. I would like to take this occasion to reiterate the position that the government has already expressed on the nature of the involvement in the constitutional renewal process as it affects the National Indian Brotherhood.

Mr. Noel Starblanket
President
National Indian Brotherhood
1st Floor, Bankal Building
102 Bank Street
Ottawa, Ontario
K1P 5N4

I was very pleased on April 29 to have had an opportunity to reaffirm the federal government's commitment to the continued involvement of Indian, as well as Inuit and Métis, people in constitutional discussions. As I said at that time, the federal government endorses direct participation by the Indian leadership at the table with the governments on those constitutional matters which directly affect Indian people. I then went on to refer to five subjects of special importance which had earlier been suggested by Indian, Inuit and other native leaders which we would see as falling within the scope of the item on "Canada's Native Peoples and the Constitution": aboriginal rights, treaty rights, internal native self-government, native representation in political institutions and the responsibilities of the federal and provincial governments for the provision of services to native peoples.

With respect to funding for the NIB's participation in the constitutional renewal process, we have, as you know, established a fund of $1.36 million to support policy development, research and consultations by Indian, Inuit and Métis/Non-Status organizations pertaining to their involvement in the constitutional process. I understand that, in this connection, the Brotherhood recently signed an agreement with the Department of Secretary of State to provide for a contribution to the NIB of $400,000.

As you will recall, at the June 9 meeting of First Ministers, governments agreed on the twelve priorities for intergovernmental work this summer. In addition, I emphasized at that time that governments should pay special attention to representations that might be received from the leadership of the Indian and other native peoples on the twelve items.

Following this recommendation, a Sub-Committee of the CCMC was established on June 17 to meet with representatives of the NIB, and of the ICNI and the NCC, to obtain your views on constitutional matters prior to the next First Ministers' Conference on the Constitution scheduled for September 8 - 12. The Sub-Committee is comprised of the Honourable Jean Chrétien, the Honourable Roy Romanow (Saskatchewan), the Honourable Dick Johnston (Alberta) and the Honourable Gerald W.G. Mercier (Manitoba). I understand that plans are being made for members of the NIB Executive Council to meet with the Sub-Committee during the last week of August when the CCMC will be holding its final week of deliberations before the First Ministers Conference.

You appreciate, I know, that the agenda of the CCMC and of First Ministers is such that it will not be possible to initiate discussions on the subjects of special importance to Indian and native peoples - that come under the item "Canada's Native Peoples and the Constitution" - until late this year or perhaps early in 1981. Pending this, we, in the Government of Canada, would welcome your views, prior to the First Ministers' meeting, on any constitutional matters on which you would like to comment at this time and especially with regard to the twelve items now being considered by the CCMC.

I should like to take this opportunity to invite the National Indian Brotherhood to have two representatives of the Executive Council attend the First Ministers Conference in September as observers. You will recall that similar arrangements were made for the October 1978 and February 1979 meetings of First Ministers on the Constitution.

May I say that my colleagues and I are heartened by your commitment to the renewal of the Constitution and the priority you have assigned to it. We look forward to our continuing work with you in this joint venture in the months ahead and we are grateful for your support and understanding in this important endeavour.

Yours sincerely,

(original signed by the Prime Minister)