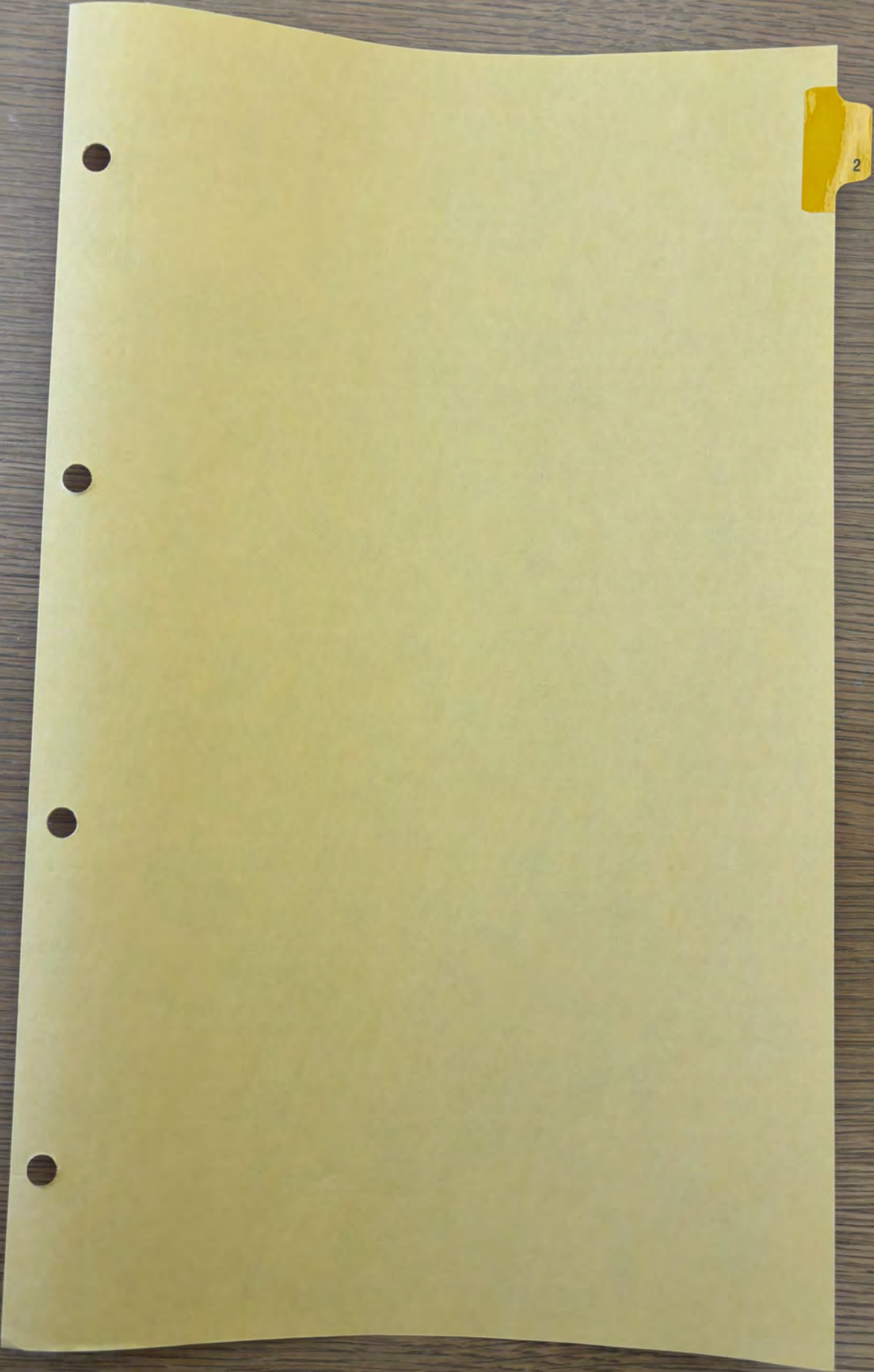


CONFIDENTIAL

October 30, 1981

PRIME MINISTER'S BRIEFING BOOK - MEETING
OF FIRST MINISTERS - NOVEMBER 2, 1981INDEXTAB NO.

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PROVINCIAL POSITIONS: REVIEW AND UPDATE

a) Report on the Tuesday, Wednesday and Thursday Meetings

Responding to a last minute request from B.C., provincial ministers and officials of the eight dissenting provinces flew to Toronto for a meeting in a suite of the Harbour Castle Hotel, on Tuesday, October 27. The meeting opened with only five delegations involved. The other three had transportation problems due to late invitation and did not arrive in Toronto before late Tuesday evening.

There was apparently a lot of uncertainty among the participants about the exact purpose and structure of the meeting. It started with no agenda for discussions and provinces were confused as to its duration. It ended up lasting until Wednesday afternoon.

A private invitation from Saskatchewan and Ontario to refine the compromise proposals was received with little enthusiasm by British Columbia and Nova Scotia. Howe attended only briefly (and declined to include any officials) and Gardcm dispatched a middle-ranking official after expressly directing Matkin and Smith to avoid the meeting. As a result, little was accomplished on the drafts although Ontario and Saskatchewan expanded their areas of agreement. This particular meeting lasted until late Thursday.

It is clear that the other provinces were not involved in discussions of any compromise draft. Following the October 27-28 meeting in Toronto, FIGA Minister Dick Johnston stated that the eight dissenting provinces were sure to stick together for a "first level of consensus" at the November 2 meeting. He said that B.C. and Saskatchewan have assured him that there are "no deals, no papers and no meetings" to come up with a compromise position. When pressed, he said there may in some circumstances be a split in the eight later in the conference, but it was more of a gratuitous statement to what he considered a rhetorical question. Officials are unavailable for discussion.

b) Projections on Sunday's Meeting

The indications are to the effect that the eight dissenting Premiers will meet in Ottawa, on Sunday evening, to work out the final strategy for Monday's meeting. It is very unlikely that the two pro-federal provinces will be invited. However, the New Brunswick and Ontario delegations will arrive in Ottawa early Sunday.

c) Compromise Proposals

Little was accomplished on the proposals at the Toronto meeting. Saskatchewan did not table its drafts for discussion and eventually discussed them only with Ontario on an informal basis. It seems evident that the anticipated liaison among Saskatchewan, Ontario, and B.C. failed to develop. This was largely because of the B.C. delegation's difficulty in dealing with matters of substance. Further, B.C. does not trust Saskatchewan and even passed a secret draft to Ontario. There is a converging view of the ingredients necessary for compromise by both Saskatchewan and Ontario, but nothing more. There remains the added difficulty that Ontario prefers to deal with B.C. which it perceives to be a leader.

Most provinces were, however, dissatisfied with British Columbia's failure to lead the discussion and to encourage the development of a common approach. Indeed, B.C. gave some indications that it is considering reversion to its former position of opposition to a Charter in any form.

d) Status of Each Province

British Columbia

British Columbia officials are entering an intensive round of discussions preparing for the FMC. While rumours of a B.C.-Ontario-Saskatchewan compromise proposal surround these meetings, there is little concrete information on the province's current position.

One can expect B.C. will enter the FMC genuinely striving for a negotiated agreement. B.C.'s opening position will be support for patriation with an amending formula only; anything else should be "made in Canada", in other words dealt with after patriation. They will start with the April Accord but would consider other amending formulas. If a Charter of Rights is deemed essential for agreement, they would be prepared to split the Group of Eight and agree to a Charter, particularly one dealing only with fundamental and democratic rights. Support for a Charter going beyond that will depend on the give and take of negotiations.

B.C. will require some significant federal compromise to achieve a negotiated agreement. The province is reluctant to abandon the other dissenting provinces and if pushed too far will revert to the patriation and amending formula only. B.C. wants a negotiated agreement but feels it can take a hard line if necessary because their advice supports the views of other provinces that the resolution will not pass, intact, in England.

Alberta

Premier Lougheed's approach to the conference is greatly influenced by his concern for the position of Quebec. The Premier is angry and worried that the federal Liberals have created a situation in which they will not be able effectively to deal with the greatly increased threat of Quebec succeeding in an early separation thrust. He reportedly feels that the Premiers must not isolate Quebec in any way in these upcoming constitutional discussions. In New York, Premier Lougheed allowed that if some provinces were lured over to the federal side, an isolation of Quebec would be "extremely dangerous". It is unlikely with this added rationalization, that Alberta will soften any of its positions for next week as it may be viewing itself as the only province, or one of only a few, dedicated to avoiding a dangerous isolation of Quebec. The number of Alberta officials working on the conference is at a bare minimum for security reasons. No information can be gleaned, almost no statements are made and phone calls are not returned.

Mr. Lougheed can be expected to insist that unless Mr. Trudeau withdraws his intention to act unilaterally there is no forum for negotiation. If the PM concurs, Mr. Lougheed may be willing to move toward some compromise position on an amending formula if he can do so without breaking ranks with Lyon and especially Lévesque. He will begin and may remain a strong advocate of the April Accord, but may accede to a variation of the Robertson-Pickersgill suggestion.

Under favourable negotiating terms, Alberta may support the entrenchment of a Charter either of diminished scope or with a number of overriding provisions. However, it is more likely that Alberta would stay on the side of Quebec and Manitoba if a consensus of seven provinces emerged in support of some form of Charter.

Saskatchewan

Saskatchewan continues to be in favour of a compromise solution and has apparently developed an exhaustive table of possibilities directed toward this objective. The province is experiencing difficulty, however, in persuading others to consider its drafts.

It is known that Blakeney is now prepared to negotiate on an expanded Charter with several variations on application. The Pickersgill/Robertson approach and examination by an independent commission during an interim period are two possibilities. He is prepared to accept readily a limited Charter comprising fundamental freedoms, democratic rights, language rights and perhaps, legal rights. Blakeney continues to be flexible on an amending formula on condition that there would be neither a provision for opting-out nor a requirement for unanimity.

Finally, although Saskatchewan is anxious to bargain, it has been made clear that Blakeney will not yield excessively and, further, that a failure to reach agreement will place him firmly in the Group of Eight for the Battle of Britain.

Manitoba

At the FMC in 1979 Premier Lyon's concluding words on the Charter were:

"We are opposed to it and we will continue to be opposed to it and will never be part of the consensus in support of it."

It is a position he has held for over a decade; there has been no sign whatever that he would change it now.

Nothing short of the distinct possibility of extreme isolation in this position is likely to change the Premier's position on the Charter - perhaps even if only Mr. Levesque were left standing with him. In that case, he would likely dissociate himself from Mr. Levesque - their objectives are different - but would not willingly abandon his stand on the Charter.

The current election in Manitoba has the Premier in a bind. He has largely heeded the warning of his own provincial party to keep his strong feelings on the constitution in check. In the past two weeks he has said very little and none of that showed any inclination to greater flexibility. However, the Premier faces the inescapable need on Monday to leave himself an 'escape option', possibly through his public stance at the opening of the FMC. (Please see his possible options in the section: Opening Statements.)

Ontario

Premier Davis is firmly committed to federal government unilateral action on the current constitution package, if no compromise is possible. He and his Ministers will actively lobby for swift acceptance of the package in Britain, if necessary. However, he is equally committed to a last sincere attempt to reach a consensus with the other provinces that would be acceptable to the federal government. Therefore, he will be an active participant next week attempting to find a compromise, rather than a passive observer awaiting federal unilateral action.

Davis' conduct at the Premiers meeting in Montreal allowed him to regain some trust from some of the "dissenting" Premiers. He has personally encouraged his staff and officials from the Ministry of Intergovernmental Affairs in their attempts to lay the ground work for possible compromise.

There is agreement that Ontario will have to be prepared to move on the compromise initiatives so that possibly Saskatchewan, British Columbia and Nova Scotia could respond. For various reasons the latter group, also open to compromise, cannot take the lead position and thereby reap the scorn of other dissenting Premiers. However, they feel they could respond positively and participate constructively in such a debate, if Ontario helps create the opportunity by suggesting some possible compromise options.

There is little doubt that Bill Davis' first preference is a compromise. He publicly stated last weekend in London, Ontario that he will support a compromise proposal.

On the matter of an amending formula, one can anticipate flexibility from Davis. Ontario officials believe that it is possible to reach an agreement on an amending formula and are encouraged by the results of various meetings during the past week. Davis, personally, likes the Victoria formula, but feels it would be necessary for Ontario to surrender its veto and the federal government give up the referendum provision that is included in the current constitution resolution. Ontario is prepared to surrender the veto, if that is necessary, to gain acceptance for the Victoria formula. However, Davis will be equally prepared to consider favourably other formulas.

The Charter of Rights has been the focus of a great deal of work by Ontario officials during the last two weeks. It is in this area that the difficulties emerge for a compromise. While Ontario supports fully the current Charter, Davis may propose some refinements for the purpose of reaching a consensus. Ontario officials have now developed for the Conference a "basic floor package of rights" consisting of fundamental, democratic, linguistic, and minority language education rights. Other provinces could then suggest additional items to be added or accept this basic package. This proposal has been discussed several times during the past week with representatives from Saskatchewan, British Columbia and Nova Scotia. It is anticipated that other provinces might want to add individual items to the basic package.

As a final attempt at consensus, Ontario may be prepared to accept the Robertson-Pickersgill proposal, provided they sense that this might be the only acceptable option.

Québec

La province s'en tient très strictement à l'accord d'avril.

Nouveau-Brunswick

Les événements des deux dernières semaines n'ont fait qu'inciter le Nouveau-Brunswick à réaffirmer ses positions originales avec encore plus de détermination.

Le principal terrain de compromis pour monsieur Hatfield demeure au niveau de la formule d'amendement. Sa préférence va à une variante quelconque de la formule de Victoria mais il sera disposé à considérer toute autre formule qui n'aurait pas pour effet d'exclure les provinces de l'Atlantique en tant que région.

Il pourrait être disposé à négocier certaines parties de la Charte des droits en dehors des dispositions relatives à la langue et à la péréquation.

Ile-du-Prince-Edouard

Officiellement, l'Ile-du-Prince-Edouard ne veut pas entendre parler d'une charte des droits. Cependant si certaines des provinces dissidentes indiquaient une volonté d'accepter certains éléments de la Charte, elle serait susceptible d'emboîter le pas.

L'I.P.E. est disposée à être flexible quant à la formule d'amendement en autant que le principe de "l'égalité des provinces" soit maintenu. Sans vouloir un droit de veto, l'I.P.E. exige une voix égale à toutes les autres provinces en matière d'amendement.

Nova Scotia

Buchanan is a consensual politician. Fundamentally, he wants to be part of the club, so he watches to see what constitutes the club at any point and where it is going. The fact that he takes over in August 1982 as Chairman of the Premiers' Conference reinforces this tendency. His officials attended a meeting in Toronto this week with British Columbia, Saskatchewan and Ontario, but did so with some trepidation; they do not want to be isolated or identified with something that does not work. Next week, he will follow the mood and go with any emerging consensus. But he is unlikely to lead the push for any one package. He dislikes any amending formula that involves a single-province veto, but would accept it if necessary; generally, he prefers formulae along the line of seven provinces with a majority of the people. He would buy entrenchment of fundamental freedoms, democratic rights and legal rights; he could probably bring himself to accept language and education rights as well if conditions were right.

Newfoundland

The Newfoundland position on the Constitution is bound up in a fundamental belief (outlined in August 1980) in "the juridical equality of the provinces" and in the notion that the Constitution must recognize the duality of provincial and national identities. From the latter flows the conclusion that unilateral action is "totally unacceptable". Newfoundland is deeply offended by unilateralism and deadlines of any kind. It flies in the face of their view of how things should be done, a view they feel was upheld by the Supreme Court decision.

These perceptions come to light most clearly in the Newfoundland position on the amending formula. Peckford supports patriation, with an acceptable amending formula. He offered support at the September 1980 FMC for a Charter which entrenches democratic rights and fundamental freedoms; he neither rejected or accepted outright the other parts of the Charter. Since the FMC, he and his officials have almost ignored patriation and the Charter as talking points and focussed most of their anger on the process and on the formula.

Peckford's insistence that Newfoundland's Terms of Union be "carved in stone" has been constant. He sees the present formula as constituting a threat to the Terms and, more specifically, to Newfoundland's territorial integrity (the Labrador boundary). He insists that an amending formula include provisions whereby the province's consent is required either to change a province's boundary or to change the Constitution in any way that affects a province's natural resources, property or legislative jurisdiction. For other amendments, Peckford favors a formula involving two-thirds of the provinces with 50% of the people. He set out this position in August 1980 and the April Accord is consistent with this.

Beyond the Terms of Union concerns, Peckford finds other elements of the formula repugnant. He regards all provinces as equal and finds any formula based on regions unacceptable. He is not happy with single-province vetoes and opposes the referendum provision, as drafted now. In August 1980, he argued that unanimity should be required to change the amending formula; he has since acknowledged that this is not required.

The Newfoundland approach has changed very little in the last two years. The provincial government moved towards acceptance of entrenching a Charter in the 1979 FMC, but since Peckford's ascendancy to the premiership he has moved very little. He came into the 1980 FMC displaying broad support for the peoples' package and viewed patriation as something which should follow substantive agreement on the powers package. The only significant movement in the last year has been his acceptance of patriation without meeting his goals on issues such as offshore resources and fisheries.

e) Anticipated Monday's Opening Statements

British Columbia

Premier Bennett will be very concerned about his position as spokesman for the Premiers, while at the same time, preserving his often expressed desire for a negotiated agreement.

One can expect him to chide the Prime Minister for refusing to call a First Ministers' Conference in spite of B.C.'s repeated requests and for issuing threats (unilateral action) and setting conditions that might tend to make agreement more difficult. He may also pass along gratuitous comments on the current state of federal-provincial relations and the importance of the economy and a First Ministers' meeting on the economy.

Premier Bennett may make some hard line statements to the effect that anything beyond patriation with an agreed to amending formula tends to complicate the package and make it more difficult to achieve agreement and restate his opposition to unilateral action. Many of these statements will be designed to demonstrate to his fellow Premiers that B.C. will be taking a strong stand and to give him an opportunity to appear flexible in the event he must make concessions in the course of negotiations. His most important message will be a restatement of his genuine willingness to negotiate an agreement.

Alberta

As we understand it, Premier Lougheed will be taking a hard-line stand on process during his opening statement. His purpose will be to tell Canadians very clearly what his interpretation of the SCOC decision is and how that demands that the Prime Minister withdraw any intention to pursue his unilateral course. Lougheed is expected to use the time to outline his philosophy of federalism and to indicate that the SCOC decision supports him fully in his view. If the PM is willing to withdraw from his unilateral course, Lougheed will indicate his willingness to negotiate a patriation package with an amending formula upon which he would likely compromise if Ontario withdraws its veto. We would expect he may call for the Charter of Rights discussion to be part of the post-patriation negotiation. Lougheed's initial statement will likely demonstrate no compromise on their opposition to the entire procedure of the federal government.

Saskatchewan

We can expect a strong reference to the decision of the Supreme Court. Specifically, he will stress, first, the distinction between legality and constitutionality and, second, the importance of the ruling whereby a consensus is considered sufficient for a settlement. Further, there will likely be a reiteration of his opinion that a "double majority" is essential to the legitimate approval of any constitutional initiative. On these two premises, Blakeney can be expected to criticize the prospect of unilateral action in fairly strong terms.

To temper these remarks, the statement will turn to the possibility of compromise by expressing Saskatchewan's willingness to enter into serious negotiations directed toward a package acceptable to all governments. Any reference to the Charter will be cast in moderate tones and will be brief except to note a willingness by the province to consider a Charter as part of a consensual package.

Any reference to the economy and the federal budget will likely be cursory on the premise (probably stated) that the sole objective is agreement on a package. This will reflect Blakeney's earnest wish to bargain.

Manitoba

Premier Lyon is past mid-point in a difficult electoral campaign, in which so far he has carefully avoided the constitution, particularly the Charter. He wishes to remain unscathed by his own stand after the FMC, for the remainder of the campaign.

An objective in his opening statement will be to leave himself an 'escape-option' from the worst final scenario in which he would be isolated with only Mr. Levesque, on the Charter.

His approach on Monday, therefore, is likely to be any one, or a combination, of the following:

- no opening statement at all, deferring to Premier Bennett - which might already be arranged - and demanding to hear first what the Prime Minister is prepared to 'concede' to the dissident majority;
- a statement without substance on either the Charter or the amending formula, focusing instead on the need a) to abide by constitutional convention, b) to allow for due process and for more time for this (beyond the election November 17), and c) to deal with the economy - a sure bet for mention at some point at the FMC for transmittal to Manitoba;
- intentional mention of the Charter as the cornerstone of his position, taking extreme care to distance himself in the process from Premier Levesque, by espousing his conviction, held for over a decade, that the entrenchment and the protection of rights by the Courts would in the final outcome erode the rights we now enjoy. Provinces are different and their people have different perceptions of their rights: Quebec is surely different from Manitoba, a reality that must be taken into account; as Premier he would see, on principle as a statesman, the need to defend Manitoba, etc. (This is the least likely approach unless it became evident in preceding statements that a) the Eight had collapsed on the Charter or b) every other Premier would deal with substance.)

- hardly likely but possible if the Premier wished to regain prominence and to take the initiative on the constitution, he could make the grand concession of espousing some variation of the recent Robertson/Pickersgill proposal. The pre-condition would have to have been a drastic dismemberment of the Eight and the April Accord by Sunday night.

Ontario

One can anticipate a very short opening statement from Premier Davis. There was some discussion earlier this week by his staff that the Premier might abstain from an opening statement. However, they later decided that he would deliver a very brief statement calling for compromise and having a conciliatory tone.

Davis is concerned that the tone of the opening statements could make any possibility of compromise more difficult.

Québec

Rien ne transpire évidemment des préparatifs du Québec. On peut toutefois s'attendre à ce que le Québec fasse état des compromis auxquels il a déjà consenti afin d'en arriver à un accord au plan constitutionnel: il a renoncé à cette exigence traditionnelle de l'entente préalable sur le partage des pouvoirs et, par l'accord d'avril, il a renoncé à son veto. Il pourrait chercher à démontrer que dans le même temps, le fédéral a durci sa position, notamment en retirant la formule d'opting in de son projet de charte. La conclusion de son discours devrait être que c'est au tour du fédéral de faire des concessions et devrait rappeler que le Québec ne peut pas faire de concessions qui aillent au delà de ce que permet la résolution adoptée par l'Assemblée nationale.

Il ne faut pas exclure la possibilité que le Québec fasse une sortie sur la question de l'unilatéralisme, réclamant d'abord du premier ministre qu'il renonce à agir sans le consentement des provinces.

Nouveau-Brunswick

Etant donné ses démêlés avec les premiers ministres dissidents à Montréal et compte tenu des déclarations qu'il a faites par la suite, les yeux seront certes tournés sur monsieur Hatfield. Il a promis de faire en sorte, lors de cette conférence, que le public canadien puisse enfin constater la mauvaise volonté des premiers ministres dissidents.

En dépit de toutes ces déclarations belliqueuses, on doit s'attendre à ce que monsieur Hatfield adopte un ton modéré lors de la déclaration d'ouverture. Il ne voudra pas compromettre les chances d'obtenir plus d'appuis à la résolution constitutionnelle en indisposant les premiers ministres dissidents dès le départ. Il réservera ses "attaques" pour la déclaration de clôture si la conférence aboutissait à un échec.

Ile-du-Prince-Edouard

Le premier ministre MacLean a été absent du pays depuis environ un mois. De plus, il a annoncé sa retraite pour très bientôt. Un successeur lui sera choisi le 7 novembre.

Il faut donc s'attendre à la déclaration d'un premier ministre relativement détaché des contraintes immédiates du pouvoir et qui voudra, pour une dernière fois peut être, réaffirmer devant le public canadien sa conception, sa philosophie du pays. Tout en défendant ses positions antérieures, il évitera probablement d'engager trop irrévocablement son successeur quant aux modalités des divers éléments (rapatriement, formule d'amendement, Charte) de la résolution constitutionnelle.

On peut aussi s'attendre à ce qu'il presse le gouvernement fédéral de s'occuper d'économie.

Nova Scotia

Premier Buchanan will probably stick to the pattern he has followed at the last FMC and at the Joint Committee. He will welcome the chance to meet again and reiterate his faith that an agreement is possible as long as everyone is willing to compromise. He will probably express his willingness to listen to all proposals with an open mind and in a spirit of goodwill.

Any reference to the Supreme Court decision will likely be pro forma, perhaps a simple assertion that the federal package of October 1980, while legal, is unconstitutional. He may refer to his fresh mandate; if he does, he will not try to read too much into it vis-à-vis the Constitution.

Aside from expressing support for patriation, he will not lock himself into any position on the formula or the Charter. He may reiterate his earlier support for either the Vancouver consensus, the Victoria Charter or the April Accord, but make it clear he is not committed to any one of them. He will probably signal his flexibility on the Charter. He may express his earlier preference for no entrenchment but acknowledge that he is not dogmatic about that.

There may be an element of cheerleading to his comments: we can do it - let's go.

Newfoundland

Peckford harangued the other Premiers in Montreal and he is likely to do the same in Ottawa.

The Terms of Union will, of course, take top billing for the sake of his home audience if no one else. He will argue that the Supreme Court has validated his arguments and suggest - implicitly at least - that the federal package is a betrayal of the contract signed between Newfoundland and Canada in 1949. He will want the Terms of Union "carved in stone". He may gloat a bit about the court decision.

He is likely to dwell on his vision of Canada - not a unitary state, not a centralized federation, but a looser system which allows the provinces maneuvering room to have some say in their own destiny. He will criticize unilateralism and perhaps express the hope that a compromise can be reached that will turn the process of patriation into a multi-lateral exercise. He may suggest that a compromise exists in the form of the April Accord and it is up to the Prime Minister to respond to the Accord because it already commands broad support. He may touch on his disappointment that the 1980 items so dear to his heart - the offshore and fisheries - are not on the agenda.

Peckford will support patriation. On the amending formula, he may acknowledge that unanimity is not required, according to the court decision. But he may reiterate the conditions he set out last year: no boundary change without the consent of the province concerned; no change in a province's natural resources, property or legislative jurisdiction without the consent of the province affected; no amending formula based on regions; no single-province veto.

Should he mention the Charter, he will probably underline his support for entrenchment of fundamental freedoms and democratic rights, but suggest he still has some real problems with other segments. To the extent that he has taken a hard line on the Terms of Union and the amending formula, however, he may offer up the Charter as the item on which he will be flexible.

Peckford is beginning to get some negative feedback at home for his overly combative stance, but he has advanced the Terms of Union argument so forcefully and he believes so deeply that he is right that he will only let such public opinion temper his attack; he is too far out on a limb to soft-pedal it.

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General Comment

The general situation in Toronto at the meeting of the group of eight was not positive or successful.

The only factor that continues to hold the group together is the ultimate "defensive position" of battling the federal government in London, if necessary.

It is now apparent that any move to compromise will have to be taken by individual provinces. They will not move as a group. It was not even possible for the eight to discuss possible compromise proposals. The hardliners are very bitter and vindictive about any possible compromise. It is clear that the acceptance of a compromise will be treated as a "sell out" by the hardliners (Quebec, Alberta and Manitoba).

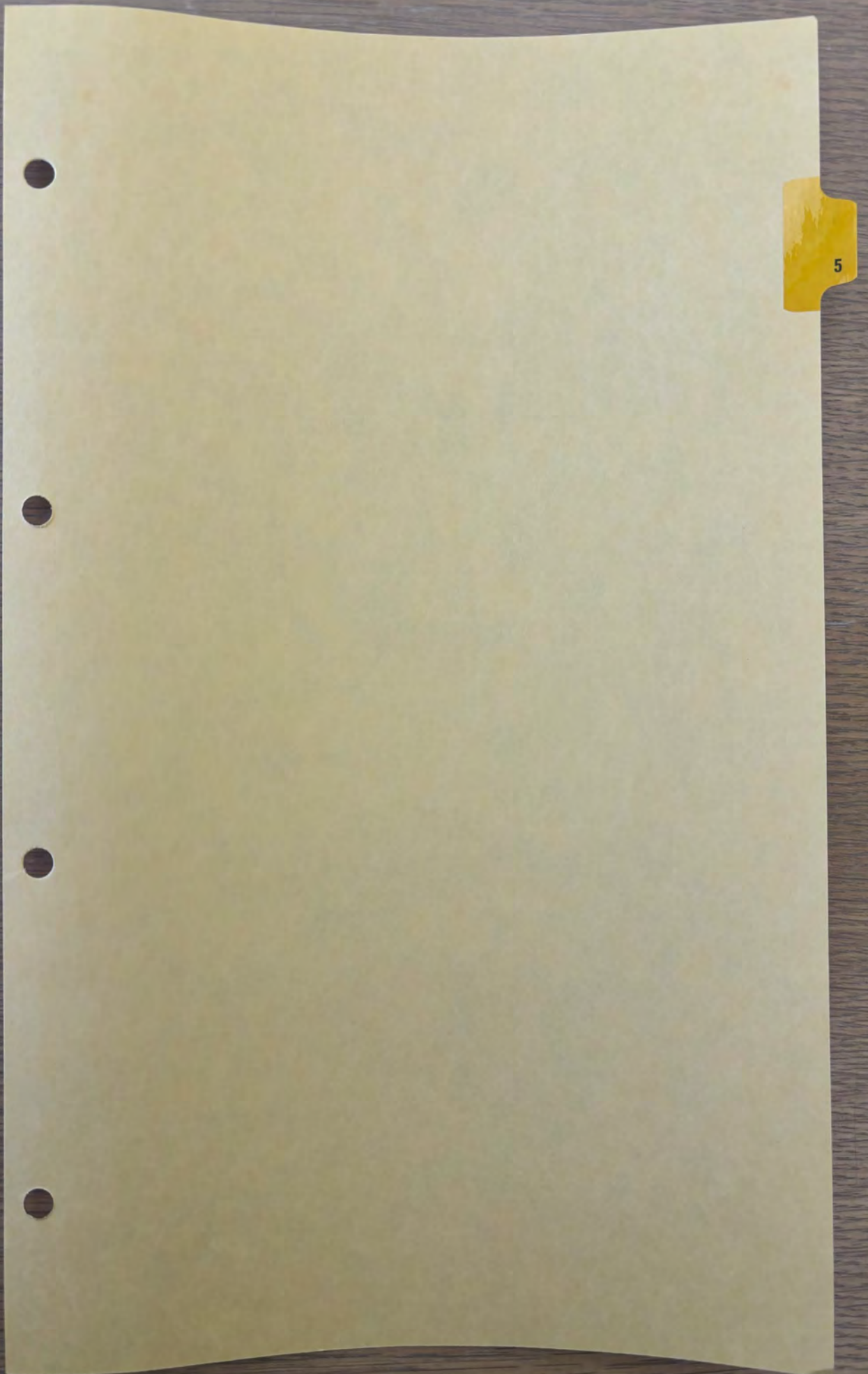
There were bitter exchanges at the meetings and British Columbia lost a great deal of credibility because of lack of leadership and organization (This comment will be the subject of a separate note.).

It appears that the acceptance of an agreed-upon amending formula may be easier to achieve than agreement on the rights package. Therefore, it may be advantageous to focus on this matter first.

It is essential that some compromise proposal be placed on the table earlier to allow some of the group of eight to exercise their independence. Otherwise, they will all retreat to their "united defensive position" and it may be more difficult for them to come forward later during the meeting.

The frustration level within the group of eight has increased during the past week and lack of trust is emerging. However, this increased frustration could cause some of the "eight" to be bitter and explosive next week. It is important not to overreact to such developments but rather interpret them as signs that the cohesiveness of the eight might indeed be fragile.

It is clear that the hardline position of Quebec, Alberta, and Manitoba is not necessarily accepted by British Columbia, Saskatchewan and Nova Scotia.



Charter of Rights in Relation to Premiers' Accord

1. The Premiers' proposal does not include any provision for a Charter of Rights, thus denying to Canadians the basic rights and freedoms contained in the Resolution before Parliament. The Premiers are therefore turning their backs on the will of the vast majority of Canadians who want basic rights entrenched now.
2. This represents a drawback from the Victoria Charter of 1971 where all provinces agreed to entrench basic political, democratic and some linguistic rights on the Constitution. Now the eight provinces aren't even prepared to go this far.
3. Under the Premiers' proposal, a Charter of Rights could only be adopted under their general amending formula (7 provinces with more than 50% of the population). Even assuming agreement under this formula were possible, up to three provinces would be able to opt out of any Charter, thus having rights applying in some provinces but not in others.

Surely, with respect to fundamental freedoms, democratic rights, legal rights, equality rights and mobility rights, these should apply to Canadians wherever they are in the country, as proposed in the Resolution before Parliament.

4. In addition, under the Premiers' plan, English and French language rights at the federal level could only be entrenched by the unanimous agreement of all provinces, thus giving every province a veto. Hence, the Resolution now before Parliament guaranteeing additional constitutional language rights at the federal level could be blocked by any one province.
5. As for additional language rights at the provincial level, this would be impossible to achieve except where a province agreed, thus giving each province a total veto on this vital matter. This would deny to the French and English minorities the basic minority language education rights contained in the Resolution now before Parliament.

Comparison of "Vancouver Formula" and "Premiers' Accord"

1. The "Premiers' Accord" established a sun-set provision for a resolution to amend the Constitution (three years); Vancouver did not.
2. The "Premiers' Accord" provides for "reasonable compensation" for a province that opts-out of an amendment; Vancouver did not.
3. The "Premiers' Accord" provides a 180-day suspensive veto for the Senate over constitutional amendments; the suspensive veto in Vancouver was 90 days.
4. The "Premiers' Accord" provides that unanimous consent is required for amendments respecting:
 - a) the office of the Queen, of the Governor General or of the Lieutenant Governor;
 - b) the right of a province to a number of members in the House of Commons not less than the number of Senators representing the province at the time this provision comes into force;
 - c) the use of the English or French language (except for the use of English or French within a province, which could be amended by Parliament and the provincial legislature in question);
 - d) the composition of the Supreme Court of Canada;
 - e) an amendment to any of the provisions of this Part.

The "Premiers' Accord" further provides that the following matters may only be made under the general formula with no opting-out:

- a) the principle of proportionate representation of the provinces in the House of Commons;
- b) the powers of the Senate and the method of selection of members thereto;
- c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;
- d) the Supreme Court of Canada (except with respect to the composition of the Court);

- e) the extension of existing provinces into the Territories;
- f) notwithstanding any other law or practice, the establishment of new provinces;
- g) an amendment to any of the provisions of Part B (delegation of legislative authority).

Vancouver provided only that the general amending formula with no opting-out would apply to the following matters:

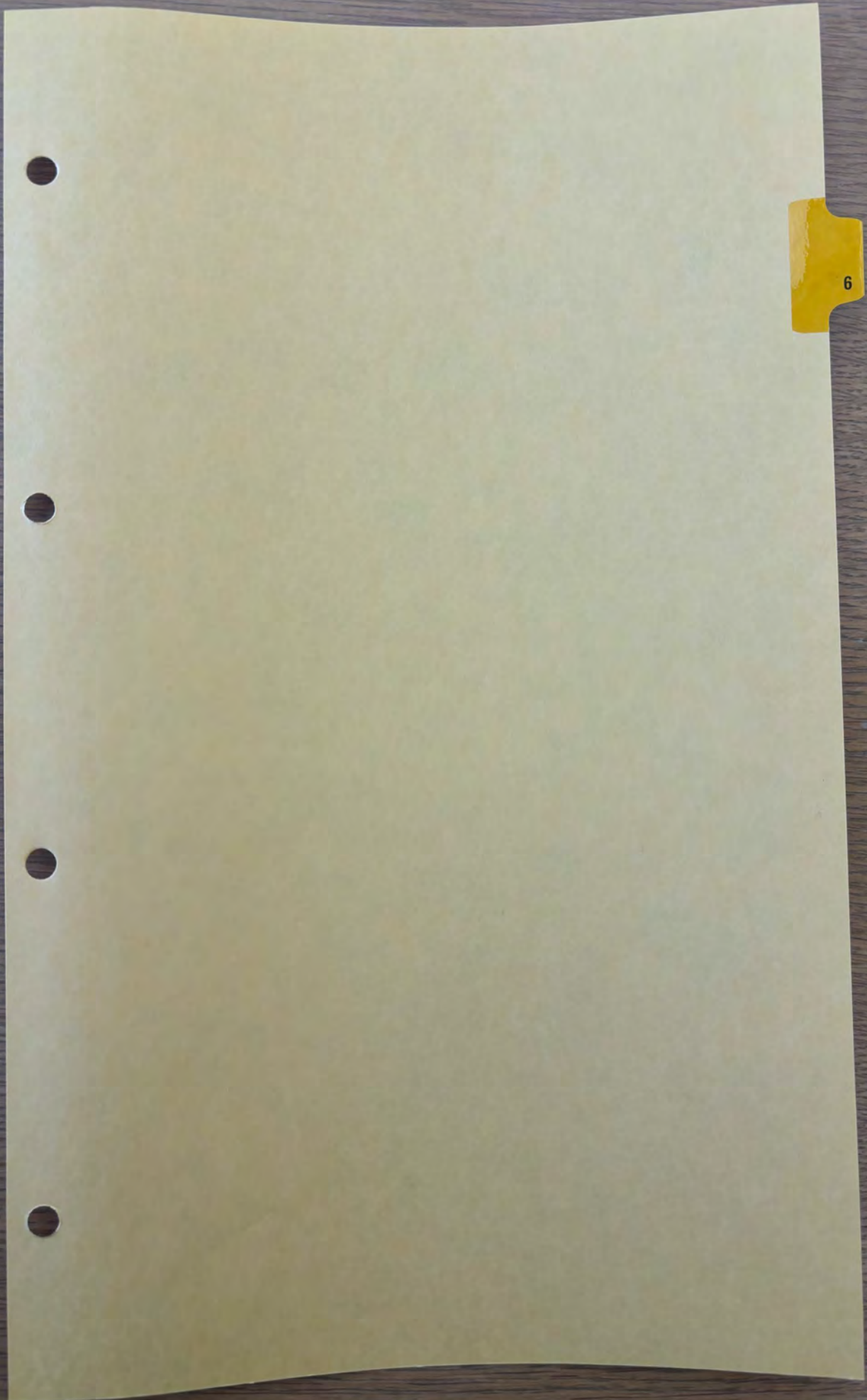
- a) the office of the Queen, of the Governor General and of the Lieutenant-Governor;
 - b) the requirements of the Constitution of Canada respecting yearly sessions of the Parliament of Canada and the Legislatures;
 - c) the maximum period fixed by the Constitution of Canada for the duration of the House of Commons and the Legislative Assemblies;
 - d) the powers of the Senate;
 - e) the number of members by which a Province is entitled to be represented in the Senate and the residence qualifications of Senators;
 - f) the right of a Province to a number of members in the House of Commons not less than the number of Senators representing the Province;
 - g) the principles of Proportionate representation of the Provinces in the House of Commons prescribed by the Constitution of Canada, and
 - h) the use of the English or French language.
5. The "Premiers' Accord" provides for a Constitutional Conference to review the amending procedure 15 years after the enactment of the patriation package; Vancouver did not.
6. The "Premiers' Accord" does not provide a schedule of enactments to be known collectively as the Constitution of Canada; Vancouver did have such a provision.

7. Provisions respecting the delegation of legislative authority form an integral part of the "Premiers' Accord"; such provisions were discussed last summer. The differences between the two texts respecting delegation are:
 - a) The Premiers' text requires two years' notice before revoking delegated authority; there was no requirement for notice in the best efforts draft last summer.
 - b) The Premiers' text requires "reasonable compensation" for authority delegated to a province; the best efforts draft had no such provision.

Special Points to Note

1. The unanimity provisions of the "Premiers' Accord" make it a more rigid formula than either the Vancouver consensus or the Victoria formula.
2. The "Premiers' Accord" tries to "constitutionalize" the Supreme Court by placing it under the general amending formula (and placing its composition under the unanimity provision):
3. The "Premiers' Accord" places the extension of provinces into the Territories and the creation of new provinces under the general amending formula.
4. The "Premiers' Accord" would make any subsequent amendment respecting a Charter of Rights subject to opting-out.
5. The "Premiers' Accord" is presented as a "made in Canada" solution to the constitutional question: it will still require legislation by the Parliament of Westminster. The only differences between the government of Canada's Resolution and the "Premiers' Accord" are that the "Premiers' Accord" would require unanimous consent and it would be limited in scope. Both would be "made in Canada" and both would require legislation by the Parliament of Westminster.
6. At Vancouver, it was generally agreed that s. 121 of the B.N.A. Act (free movement of all articles of growth, produce or manufacture) should not be subject to opting-out; the "Premiers' Accord" would permit opting-out on amendments to s. 121.

James Ross Hurley



CONFIDENTIAL

October 29, 1981

COMMENTS FOR PRIME MINISTER ON CHARTER OF RIGHTS

(Response to Criticisms or Objections by Provinces)

I CHARTER WILL RESTRICT POWERS OF LEGISLATURES

It is true, as the Supreme Court noted, that entrenching rights in the Charter will place limits on the ability of Parliament and the provincial legislatures to enact laws. But, what kinds of laws? Laws which restrict the basic rights and freedoms of Canadians in an unreasonable and unjustified way!

Can it really be argued that this is not a proper fetter to place upon the exercise of governmental powers? Do we want legislators and bureaucrats free to arbitrarily restrict freedom of religion and expression, the right to vote, protection against unreasonable searches or arbitrary detention, the right of Canadians to move freely from one province to another, the right to equality in law without discrimination, the rights of English and French minorities to receive government services and education in their minority language? Because that is basically what arguments against an entrenched Charter come down to -- an insistence that provincial legislatures and governments remain totally free to act in whatever manner they see fit in granting or denying the fundamental rights of Canadians.

This position is totally at variance with every public opinion survey of which I am aware. These have consistently indicated that the large majority of Canadians want their basic rights enshrined in a manner which will effectively protect them from the arbitrary will of governments. They are well aware of laws and government actions, past and present, which have discriminated against Canadians due to their race, colour, religion, political beliefs, or language, denied them employment due to their province of residence, or subjected them to arbitrary or unreasonable law enforcement procedures. Our existing system of protecting and respecting basic rights through the ordinary legislative and governmental processes is simply not adequate -- in a complex and diverse society as Canada is -- to provide the certainty of respect for rights which is essential. All parties in Parliament were in full agreement on the need for constitutional entrenchment of the rights reflected in the Charter.

II JUDGES WILL USURP THE FUNCTION OF LEGISLATORS

The argument that judges rather than legislators will become the arbiters of social and economic policies under an entrenched Charter seems to me to be a gross exaggeration of the role which judges will play in interpreting the Charter.

First, judges even now are required, whether interpreting constitutional or ordinary laws, to apply value judgments of an economic and social nature. This is so, for example, when they determine whether the federal government has

properly invoked the peace, order and good government power (as in the Anti-Inflation case) or whether a provincial law has infringed on the federal trade or indirect taxation powers (as in the Potash and CIGOL cases). It is again so when the courts are called upon to apply a law relating to a commercial contract, a child custody case or that governing undue restraint of competition in the market place. The judges will be making the same kinds of value judgments in applying the provisions of the Charter.

Second, the judgments which the courts will make under the Charter will be legal judgments. They will not be asking whether, for example, a particular policy expressed in a law is good or bad, but rather whether it is in conflict with a right or freedom protected in the Charter. This is the ordinary process of interpretation. If they find a conflict, it will simply mean that the legislators must modify the law in question in a way which does not breach the right which is being dealt with. The Charter, after all, reflects norms of our society which are fundamental enough that they must not be breached except by limits that are reasonable and demonstrably justified. Is this too much to ask of our legislators?

Finally, the supremacy of the legislator is always preserved, even under an entrenched Charter, for the amending process is always available where a sufficient number of legislatures believe that the courts have interpreted the Charter in a totally unacceptable manner.

[If the provinces do not have a sufficient degree of faith in the ability and good reason of our courts, we could, of course, place a provision in the Resolution which would enable a legislature, in enacting a particular law, to expressly override specific provisions of the Charter. This would preserve the idea of the supremacy of Parliament, while at the same time ensuring that the fundamental nature of Charter rights is maintained. Any such legislative override should therefore be of a limited duration such as five years, to ensure that it was reviewed by a subsequent legislature to determine if its continuation was warranted. In addition, we would want to consider if any such override clause should not be available in any circumstances with respect to certain categories of rights -- such as fundamental freedoms and democratic rights, and perhaps others such as institutional language rights and mobility rights -- which form the cornerstones of our democratic union as a single economic and political union. I personally doubt the need for an override clause, but if the provinces are convinced that such a provision is absolutely necessary, I am prepared to consider an amendment to the Charter under the limited conditions which I have outlined above.]

III CHARTER WILL PREVENT PROVINCES FROM PURSUING DISTINCTIVE ECONOMIC, SOCIAL AND CULTURAL POLICIES

Premier Lévesque has argued strenuously, in his brochure "Minute Ottawa!" that the Charter would impinge drastically on the powers of the National Assembly to pursue various

economic, social and cultural policies which it believes to be in the best interests of Quebecers. In it, he lists a litany of Québec laws and policies which, he contends, would be imperilled by the Charter.

I will not, at this point, attempt to show in detail why virtually all of his allegations are unfounded on a close reading of the Charter, but let me respond to several of the major points.

First, the document asserts that the mobility rights and equality rights in the Charter would invalidate many Québec laws which favour Québec residents over non-residents in the economic and cultural areas.

This is without substantial foundation. There is nothing in the Charter which prevents a province from encouraging the indigenous development of economic and cultural enterprises. All the mobility rights require is that a province not erect unjustified barriers to Canadians from outside Québec participating in the economic and cultural enrichment of Québec. Would Premier Lévesque prefer a policy where Quebecers were denied the opportunity to seek work in British Columbia, Alberta, Ontario, Newfoundland or any other province as they now do? Is his "Quebecker first" policy not simply a manifestation of his Party's foremost objective of taking Québec out of the Canadian Federation?

Under the Charter, there is nothing which would, as Premier Lévesque asserts, have the James Bay project "invaded" by workers from outside Québec, permit the agricultural lands of Québec from being preserved for agricultural purposes, or deny Québec the right to encourage the development of indigenous cultural and economic enterprises.

Second, "Minute Ottawa!" asserts that the equality rights of the Charter would strike down any provincial law that draws distinctions among persons or groups based on particular characteristics.

Obviously, this is patently incorrect. Both the Canadian and American courts have recognized that every distinction in law drawn between one group or class in society and another is not necessarily discriminatory. Such a distinction is only discriminatory, and therefore offensive to the Charter, where the distinction is arbitrary, capricious or without a rational basis. To accept Québec's thesis that any distinction is automatically discriminatory would lead to the absurd result that the Criminal Code is invalid because it is directed only at those who commit crimes!

Third, Mr. Lévesque contends that the Charter rights, combined with equalization and reduction of regional disparities, is a design by Ottawa to concentrate additional economic powers at the federal level to the detriment of the provinces.

Nothing could be further from the truth. The Charter contains no provision which would enhance federal powers; indeed it reduces them in favour of individual

and collective rights. The equalization and regional disparities provision commits the federal government to the longstanding principle of ensuring that federal monies will be provided to "have not" provinces -- a principle of which Québec has long been one of the major beneficiaries.

In addition, "Minute Ottawa!" conveniently overlooks the fact that Part VII of the Resolution would substantially augment provincial powers over natural resources as well as interprovincial trade and taxation in relation thereto. Thus, the beneficiaries on the "powers" issue are the people of Canada and the provinces.

Finally, the Québec document asserts that the Charter of Rights would seriously undermine the protection of the French language in Québec provided by Bill 101.

The simple fact is that, apart from minority language education rights, the Charter would have no adverse effects on Bill 101. French would remain the official language of Québec as the language of administration, work and business. (Obviously, as the Supreme Court ruled in the Blaikie case, both French and English continue, under section 133 of the BNA Act, as equal languages in the laws and courts of Québec -- as in Manitoba.)

Only with respect to minority language education rights would the Charter require a departure from Bill 101, by ensuring that English speaking or English educated citizens resident in Québec would be able to send their children to English schools, a tradition that had been respected in Québec until 1977. If Premier Lévesque has proposals to make which would lessen the threat to the French language and culture which he perceives in section 23 of the Charter, I would be willing to consider them. However, I would remind the Premier once again of two points: (1) the Charter for the first time guarantees to francophones outside Québec the right to have their children educated in French (thus strengthening the "French fact" throughout Canada and lessening the sense of linguistic isolation of Québec), and (2) the Charter reflects the intent of the Premiers' agreement on minority language education reached at Montréal in 1978, and avoids the need for reciprocal interprovincial agreements on minority language education rights contemplated by Bill 101. Is it not better to have these rights guaranteed in the Constitution rather than left to transient political agreements -- none of which have yet been concluded?

IV OTHER CRITICISMS

(1) Freedom of Religion and Denominational Schools

Fears have been expressed that freedom of religion and conscience and non-discrimination based on religion will result in the outlawing of state-supported religious schools.

This is simply not the case. Lest there be any doubt in this regard, section 29 was added to the Charter to ensure that laws providing for denominational schools would not be affected by the Charter rights.

(2) Abortion and Capital Punishment

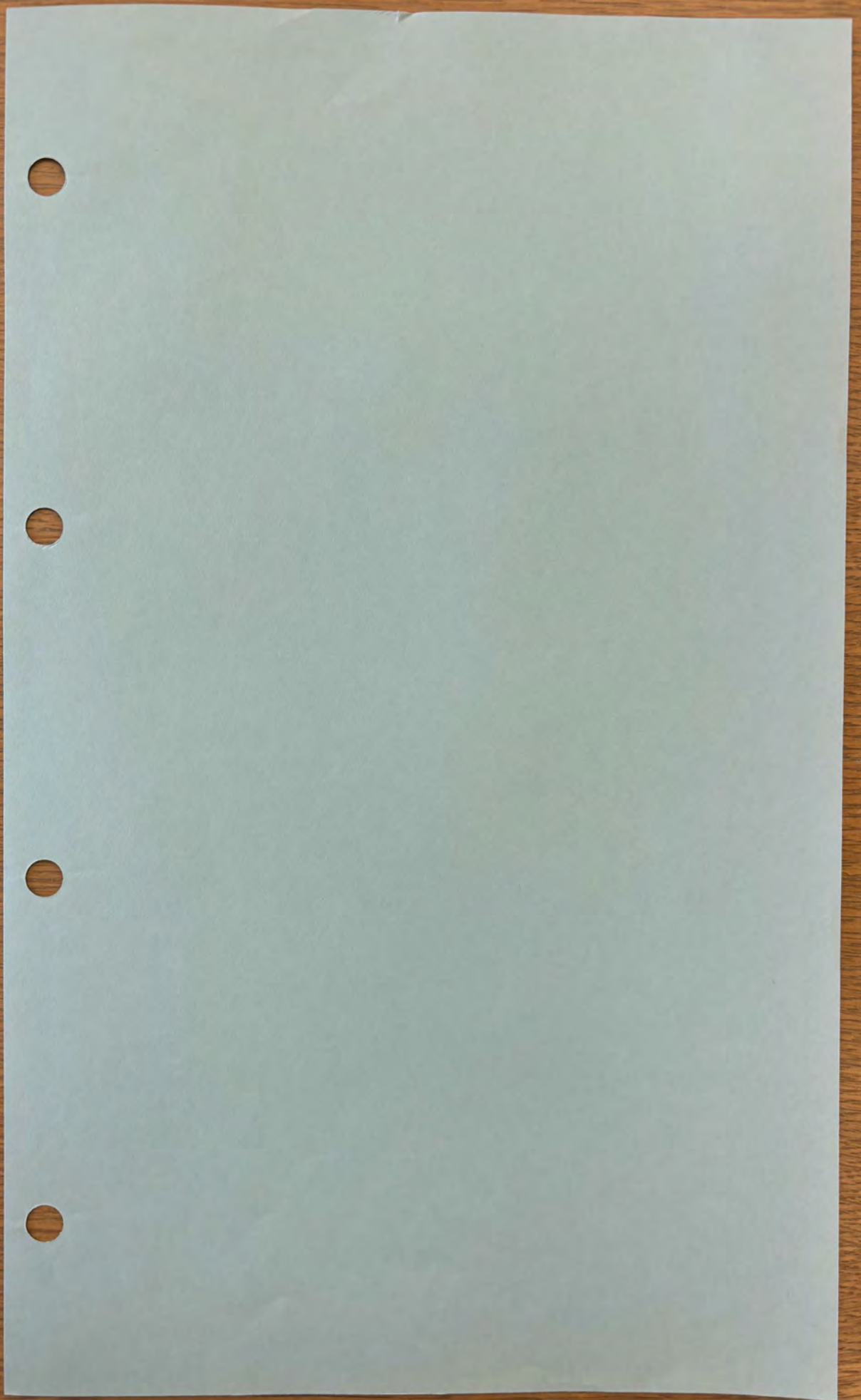
Concerns have been voiced that the Charter will result in an entrenched right to obtain abortions and a constitutional prohibition against capital punishment.

Neither of these results will flow from the Charter. The right to life in section 7 is not unqualified, and thus Parliament will be left with the responsibility for dealing with these issues as it now does.

(3) Exclusion of Illegally Obtained Evidence

Some provinces (Ontario in particular) have voiced concern that section 24(2) of the Charter, which empowers a court to exclude evidence in a trial where it has been improperly obtained, will result in "criminals" being released on legal technicalities, as in the United States.

This is not the case. The rule in section 24(1) is carefully drawn to require the exclusion of tainted evidence only where, having regard to all the circumstances of the case, admission of evidence would bring the administration of justice into disrepute. Thus, this is no automatic exclusion of evidence rule as pertains in United States, but rather one where the judge must weigh the fairness and the effectiveness of the administration of justice in reaching a decision on the matter.



October 30th, 1981.

PROVINCIAL POSITIONS ON THE CHARTER OF RIGHTS

SEPTEMBER, 1980

SELECTED EARLIER POSITIONS *

fundamental rights

entrenchment supported by:

New Brunswick
Newfoundland
Ontario

in 1978 at First Ministers' Conference indicated would support if an override clause was included:

Alberta

at 1979 FMC all provinces except Manitoba prepared to support.

democratic rights

entrenchment supported by:

all provinces
except Manitoba

mobility rights

entrenchment supported by:

New Brunswick
Ontario

qualified support:

P.E.I. (if a notwithstanding clause was added to qualify the right to acquire property - this right is no longer included in the section)

Newfoundland (if affirmative employment programs were allowed)

reserved position: Alberta

note Premier Levesque's sovereignty association option, to the extent that it is modeled on the E.E.C. would demand more express guarantees of mobility than now exist in the Canadian Constitution (decrease of federal powers would of course operate in the other direction)

legal rights

entrenchment supported by:

New Brunswick
Ontario

suggested addition of a notwithstanding clause: Saskatchewan - but without expressing support

at 1978 FMC would support if override clause included:
Alberta

at 1979, February, FMC expressed support:
Nova Scotia
Newfoundland

... 2

* - provincial positions in general seem to have remained amazingly consistent; changes of position have occurred with changes of government (e.g.: Premier Schreyer in Manitoba re: rights, and Premier Campbell in P.E.I.); these are not noted.

SEPTEMBER, 1980

SELECTED EARLIER POSITIONS

equality rights

entrenchment supported by:

New Brunswick
Ontario

language rights

at the federal level

entrenchment supported by:

all provinces
Quebec ambivalent?

at the provincial level

entrenchment supported by:

New Brunswick

opposed by:
Manitoba
Quebec

minority education rights

entrenchment supported by:

New Brunswick
Ontario

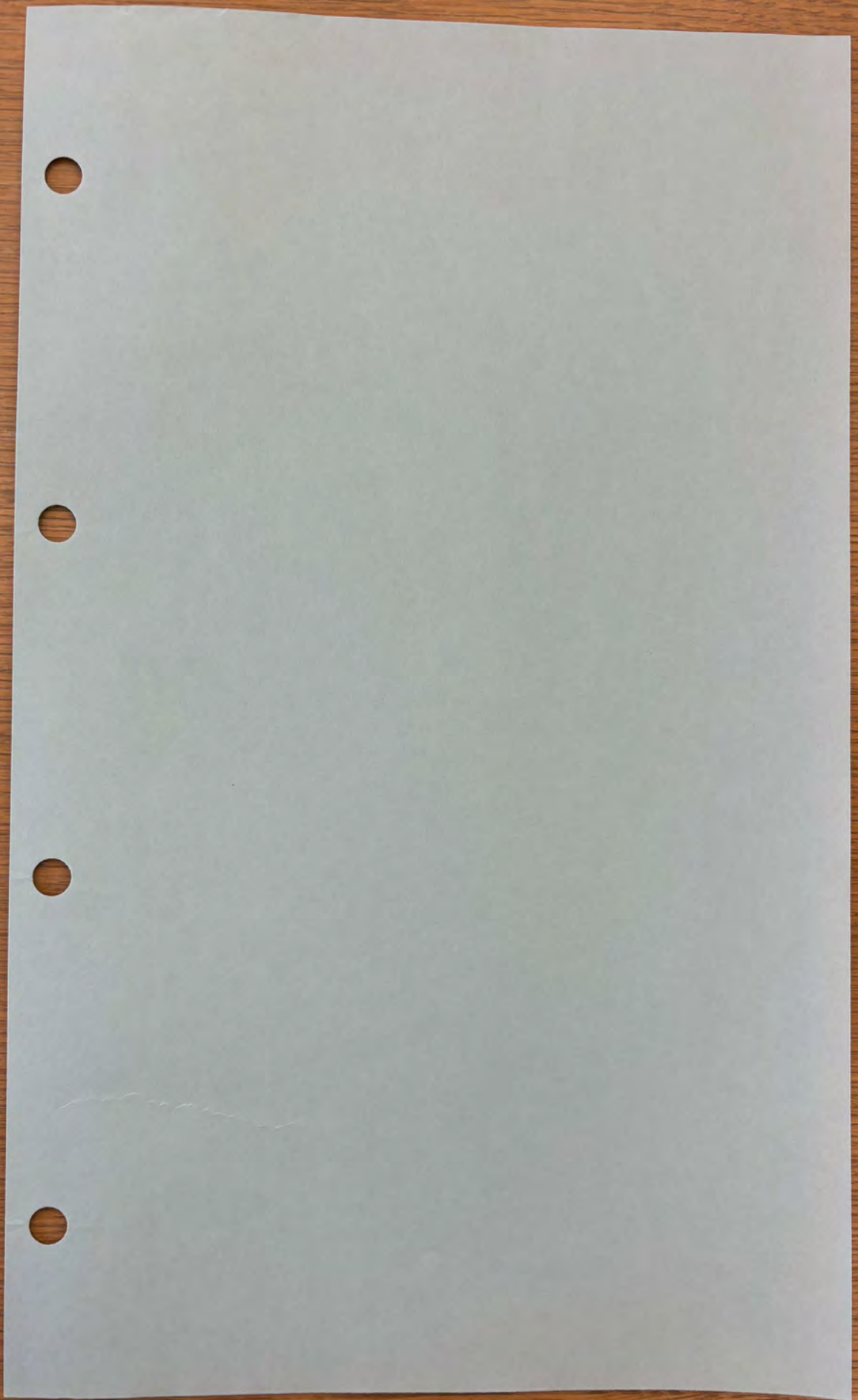
tentative support:

Saskatchewan (indicated
it might support) and in
brief to Joint Parliamentary
Committee, December, 1980,
Premier Blakeney expressed
support.

1978, November, FMC
supported entrenchment:
Saskatchewan

1979, February, FMC
supported entrenchment:
Newfoundland
Saskatchewan

reserved:
Alberta
British Columbia



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."

CONFIDENTIAL

September 5, 1980

1. CHARTER OF RIGHTSF. BACKGROUNDProvincial 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.

Education Rights

12. 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.

War Measures Act

13. 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 be reviewed in light of the Charter to eliminate any discrepancies.

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

Legal Rights

6. 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

7. 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

8. 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

9. 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

10. 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 disadvantaged 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

11. 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.

*Update: The right to acquire property was deleted from the October resolution and does not appear in the resolution filed with the Supreme Court.

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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.

Opting-in Clause

4. 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.

Legal Rights

5. 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.)

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

*Update: An entrenched Charter of Rights was also endorsed by the Special Joint Committee on the Constitution 1980-81.

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

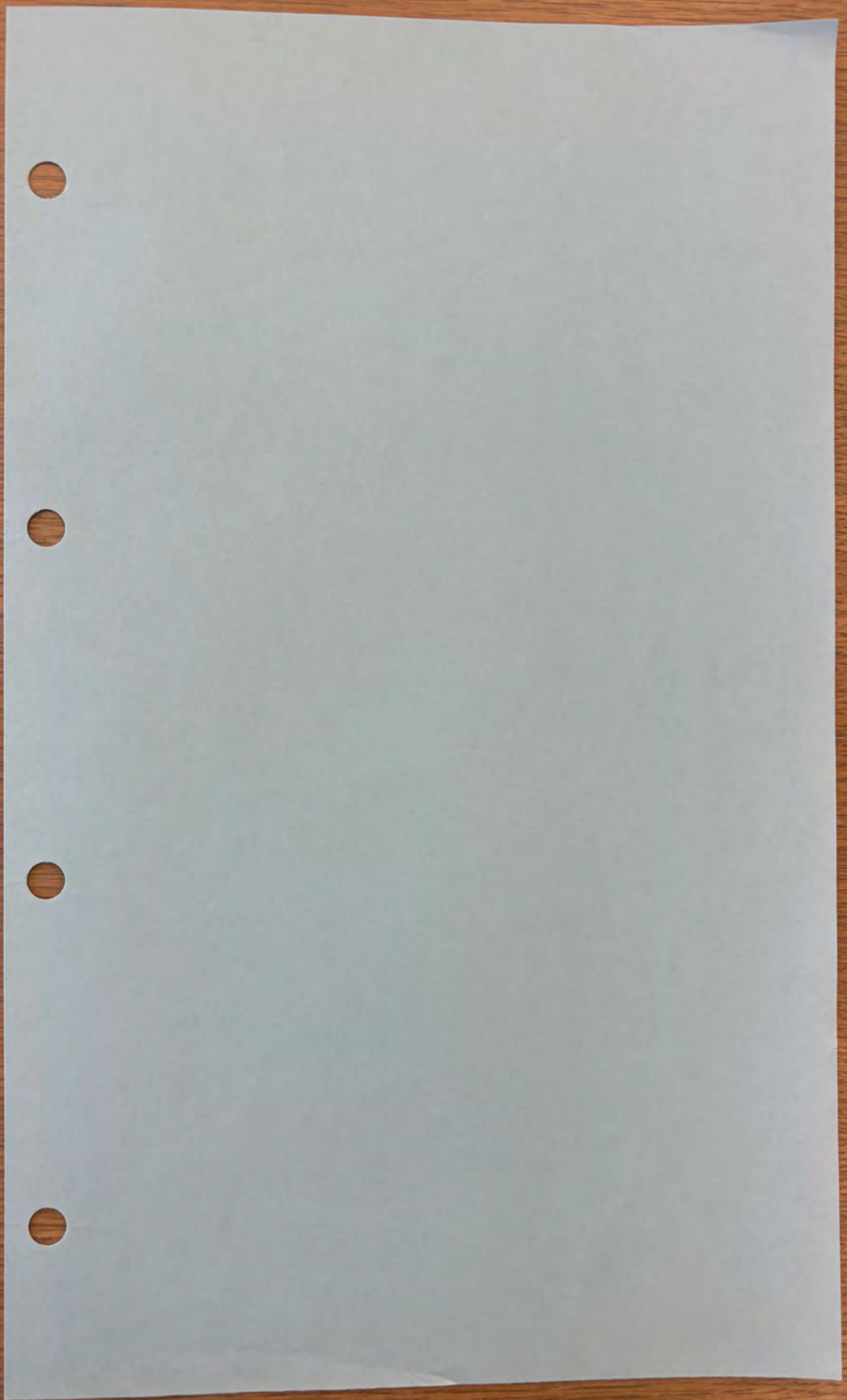
CONFIDENTIAL

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.



CANADIAN CONSTITUTIONAL

CHARTER

1971

PART I
POLITICAL RIGHTS

Art. 1 It is hereby recognized and declared that in Canada every person has the following fundamental freedoms:

freedom of thought, conscience
and religion,
freedom of opinion and expression,
and
freedom of peaceful assembly and of
association;

and all laws shall be construed and applied so as not to abrogate or abridge any such freedom.

Art. 2. No law of the Parliament of Canada or the Legislatures of the Provinces shall abrogate or abridge any of the fundamental freedoms herein recognized and declared.

Art. 3. Nothing in this Part shall be construed as preventing such limitations on the exercise of the fundamental freedoms as are reasonably justifiable in a democratic society in the interests of public safety, order, health or morals, of national security, or of the rights and freedoms of others, whether imposed by the Parliament of Canada or the Legislature of a Province, within the limits of their respective legislative powers, or by the construction or application of any law.

Art. 4. The principles of universal suffrage and free democratic elections to the House of Commons and to the Legislative Assembly of each Province are hereby proclaimed to be fundamental principles of the Constitution.

Art. 5. No citizen shall, by reason of race, ethnic or national origin, colour, religion or sex, be denied the right to vote in an election of members to the House of Commons or the Legislative Assembly of a Province, or be disqualified from membership therein.

Art. 6. Every House of Commons shall continue for five years from the day of the return of the writs for choosing the House and no longer, subject to being sooner dissolved

by the Governor General, except that in time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by the Parliament of Canada if the continuation is not opposed by the votes of more than one third of the members of the House.

Art. 7. Every Provincial Legislative Assembly shall continue for five years from the day of the return of the writs for the choosing of the Legislative Assembly, and no longer, subject to being sooner dissolved by the Lieutenant-Governor, except that when the Government of Canada declares that a state of real or apprehended war, invasion or insurrection exists, a Provincial Legislative Assembly may be continued if the continuation is not opposed by the votes of more than one third of the members of the Legislative Assembly.

Art. 8. There shall be a session of the Parliament of Canada and of the Legislature of each Province at least once in every year, so that twelve months shall not intervene between the last sitting of the Parliament or Legislature in one session and its first sitting in the next session.

Art. 9. Nothing in this Part shall be deemed to confer any legislative power on the Parliament of Canada or the Legislature of any Province.

PART II
LANGUAGE RIGHTS

Art. 10. English and French are the official languages of Canada having the status and protection set forth in this Part.

Art. 11. A person has the right to use English and French in the debates of the Parliament of Canada and of the Legislatures of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island and Newfoundland.

Art. 12. The statutes and the records and journals of the Parliament of Canada shall be printed and published in English and French; and both versions of such statutes shall be authoritative.

Art. 13. The statutes of each Province shall be printed and published in English and French, and where the Government of a Province prints and publishes its statutes in one only of the official languages, the Government of Canada shall print and publish them in the other official language; the English and French versions of the statutes of the Provinces of Quebec, New Brunswick and Newfoundland shall be authoritative.

Art. 14. A person has the right to use English and French in giving evidence before, or in any pleading or process in the Supreme Court of Canada, any courts established by the Parliament of Canada or any court of the Provinces of Quebec, New Brunswick and Newfoundland, and to require that all documents and judgments issuing from such courts be in English or French, and when necessary a person is entitled to the services of an interpreter before the courts of the other Provinces.

Art. 15. An individual has the right to the use of the official language of his choice in communications between him and the head or central office of every department and agency of the Government of Canada and of the Governments of the Provinces of Ontario, Quebec, New Brunswick, Prince Edward Island and Newfoundland.

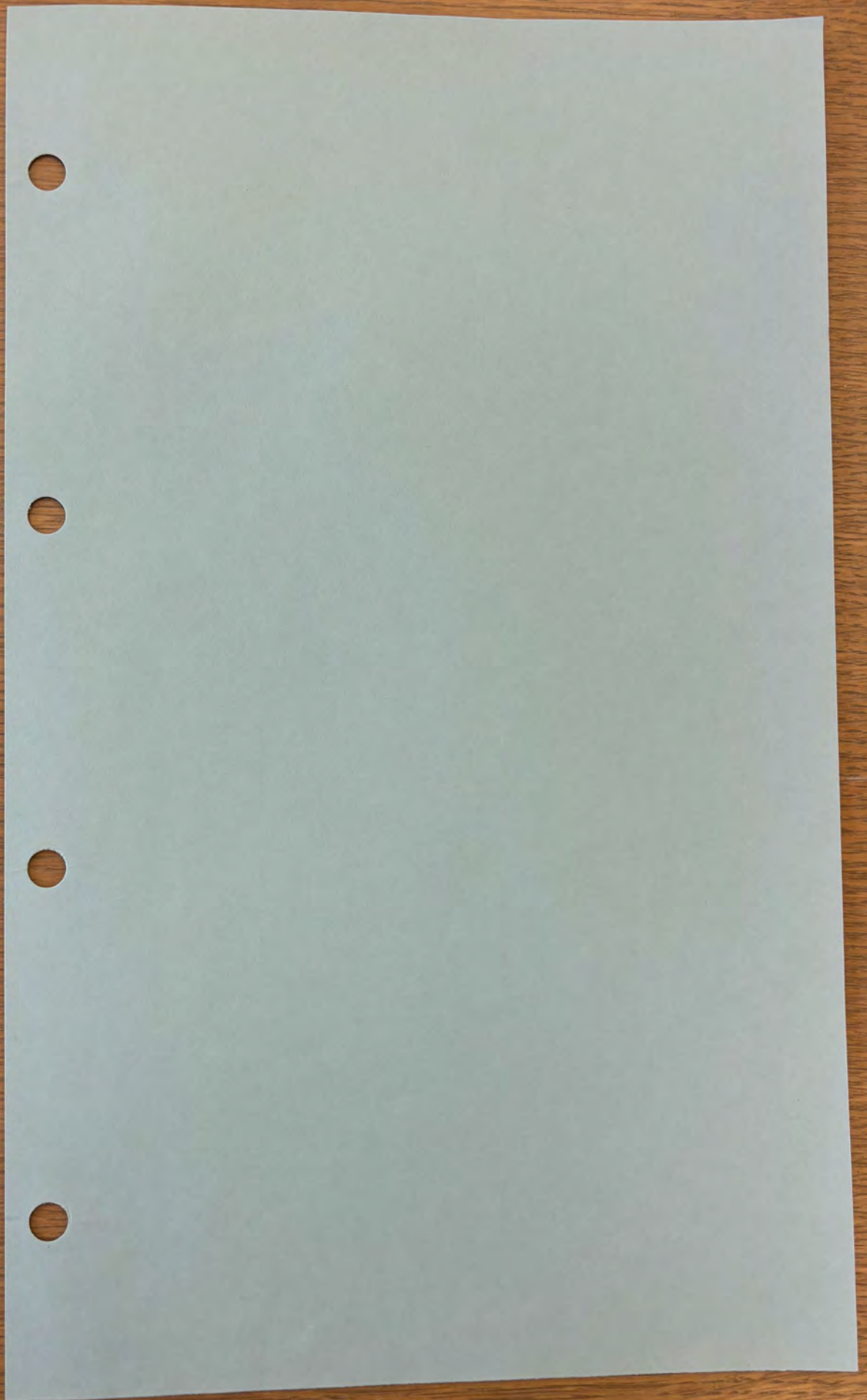
Art. 16. A Provincial Legislative Assembly may, by resolution, declare that any part of Articles 13, 14, and

15 that do not expressly apply to that Province shall apply to the Legislative Assembly, and to any of the provincial courts and offices of the provincial departments and agencies according to the terms of the resolution, and thereafter such parts shall apply to the Legislative Assembly, courts and offices specified according to the terms of the resolution; and any right conferred under this Article may be abrogated or diminished only in accordance with the procedure prescribed in Article 50.

Art. 17. A person has the right to the use of the official language of his choice in communications between him and every principal office of the departments and agencies of the Government of Canada that are located in an area where a substantial proportion of the population has the official language of his choice as its mother tongue, but the Parliament of Canada may define the limits of such areas and what constitutes a substantial proportion of the population for the purposes of this Article.

Art. 18. In addition to the rights provided by this Part, the Parliament of Canada and the Legislatures of the Provinces may, within their respective legislative jurisdictions, provide for more extensive use of English and French.

Art. 19. Nothing in this Part shall be construed as derogating from or diminishing any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Part with respect to any language that is not English or French.



18TH ANNUAL PREMIERS' CONFERENCE

August 18-19, 1977

St. Andrews, New Brunswick

STATEMENT ON LANGUAGE

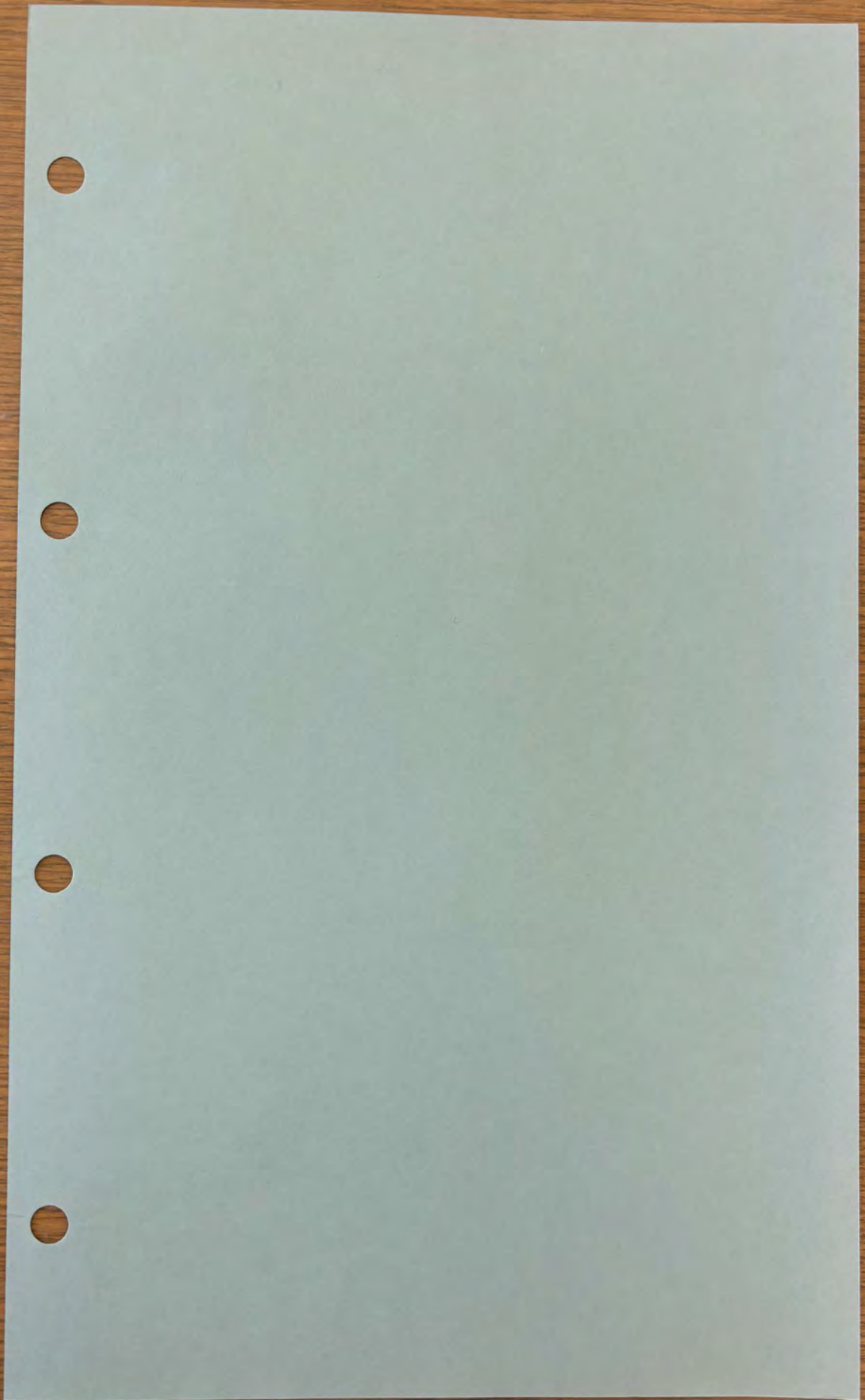
Recognizing our concern for the maintenance and, where indicated, development of minority language rights in Canada; and

Recognizing that education is the foundation on which language and culture rest:

The Premiers agree that they will make their best efforts to provide instruction in education in English and French wherever numbers warrant.

The Premiers direct the Council of Education Ministers to meet as soon as possible to review the state of minority language education in each province.

The Premiers ask further that the Council of Education Ministers report to each Premier within six months. Following this, each Province would undertake to ensure such provision of Canadian minority language education, and would then make a declaration of the policy plan and programme to be adopted by the Government of that Province, in this respect.



1. CHARTER OF RIGHTSF. BACKGROUNDPremiers' 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.