February 25, 1981

MEMORANDUM TO THE PRIME MINISTER

Constitutional Debate

Yesterday I sent you a note outlining the major criticisms regarding the constitutional proposals.

The enclosed information may be useful to you in responding on the issues. The information includes speaking notes which have been prepared as well as a copy of Mr. Joyal's speech which dealt extensively with process and the referendum.

Michael Kirby

TALKING POINTS

1. Need for Entrenched Charter of Rights

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.

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 Québec). More recently, laws have been adopted restricting residents of one province from seeking employment in another province (Québec and Newfoundland), restraining public assemblies (Montreal street bylaw), limiting the use of English (in Québec) and restricting freedom of speech and association (Québec 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, it seems too facile to assert that our inherited traditions are a sufficient bulwark against infringement of rights and freedoms.

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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 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 always 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 hopefully no one would be opposed to this. Indeed, viewed from this perspective, entrenching rights would enhance the supremacy of Parliament since legislators would become 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 legis-

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lators 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, 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 an objective 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.

With respect to entrenchment of rights "freezing" their development, it is difficult to appreciate this argument. If the rights are described in sufficiently general terms, our courts should 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.

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In sum, arguments against entrenchment of basic rights are not convincing. Rather, Canadians are entitled to have these rights spelled out in our basic law where they will know what they are and legislators and bureaucrats will be bound to abide by them. Moreover, Canadians have indicated they do not want a 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.

2. Entrenchment at Provincial Level

Questions have been raised respecting the propriety of Parliament requesting entrenchment of a Charter of Rights in the Constitution when a number of provincial governments have clearly indicated that they do not want an entrenched Charter applicable to the provincial level.

This, of course, raises the question of whether amendments to the Constitution can be legally sought from the U.K. Parliament by the Canadian Parliament without the consent of all the provinces when such an amendment affects the rights, privileges or legislative powers of the provinces.

The federal government's position on this is clear: there is no legally binding convention which requires that the consent of the provinces be sought for such amendments.

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Beyond this, it is important to consider the impact which an entrenched Charter would have on the existing balance of legislative powers between Parliament and the provincial legislatures. The Charter would involve no transfer of powers from one level of government to the other. Rather, it would place certain limitations on the powers of both federal and provincial legislatures and governments, in order to protect certain fundamental rights and freedoms of the individual that are recognized as essential in every advanced democracy.

Thus, the provincial governments can hardly argue that Parliament is attempting, by seeking an entrenched Charter, to transfer powers from the provinces to the federal level.

In addition, it is important to remember that in our federal system most fundamental rights and freedoms fall partly within federal jurisdiction and partly within provincial jurisdiction. Consequently, it is not very meaningful to tell citizens that, for example, their freedom of speech is assured against arbitrary limits being imposed by Parliament, but that there is no similar guarantee insofar as provincial laws are concerned. Or, that an accused has a number of constitutionally guaranteed rights when he is charged under the Criminal Code, but that there is no guarantee to these same rights if the charge is under a provincial Highway Traffic Act.

For all of these reasons, the federal government believes it is both constitutionally legal and proper to have the Canadian Parliament request the entrenchment of a Charter that will give all Canadians the same basic rights and freedoms wherever they choose to live in Canada.

3. Deleting the Charter from the Resolution and Entrenching Rights Following Patriation

The government considers that the Charter is fundamental to our Constitution and that the rights and freedoms included in the Charter are a statement of the very foundation of our society. Constitutional protection

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of individual and minority rights is the essence of being Canadian and the Charter is certainly as critical to the Constitution as an amending formula or the principle of equalization.

Waiting until the Constitution is patriated before entrenching the Charter is unsatisfactory because it would require the agreement of all or, depending on the amending formula adopted, of a certain majority of provinces. However, each time entrenchment of the rights and freedoms of Canadians is discussed with provinces, one or more provincial Premiers decide that they can only agree with entrenchment in return for some power, be it jurisdiction over offshore resources or cultural sovereighty. These discussions have inevitably ended in failure. Therefore, to have a Charter it is important that it be included in the Resolution; this last time, as it were, that Canada is going to Britain with the authority of the House of Commons and the Senate.