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MEMORANDUM TO THE PRIME MINISTER

Federal Position on Second Chamber Revision

This paper considers federal government strategy concerning the issue of second chamber revision for the August 26-29 CCMC meeting and the September 8-12 First Ministers' Conference. Sections I and II review negotiating considerations, Section III and IV analyse longer-term objectives and alternatives, and Section V and VI lay out the considerations and recommendations for a partial or interim solution on this issue intended to assist the resolution of other questions under discussion at the August and September meetings.

I Status of the Issue in the CCMC Deliberations

As previously reported in the Memorandum to Cabinet reporting on the July CCMC Meetings (July 28, 1980), a striking development during the three weeks of July discussions was the extent to which the provinces gave to the issue of second chamber revision a high priority and approached the subject from a largely common frame of reference in contrast to previous constitutional discussions. The report of the committee of officials on a new second chamber (Document 830-83/017, Vancouver, July 24, 1980) which includes a statement of the points of consensus arrived at by the Ministers is included as Annex A to this paper.

Left open for discussion at the August meeting was the choice between two basic alternatives: (1) a hybrid second chamber that would combine (a) a provincial ratifying power of federal action in a specified list of matters affecting provincial jurisdiction and (b) a general federal legislative review power (with only a suspensive veto); (2) two distinct institutions, one a non-parliamentary intergovernmental council performing function (a) and the other a federal legislative second chamber performing function (b). Also identified for further discussion in August were the precise distribution of seats among the provinces and the extent to which issues relating to duality should be dealt with by a special voting requirement or by a special committee.

II Negotiating Considerations

The number of outstanding issues still to be resolved within the CCMC concerning the revised second chambers means that there is insufficient time to negotiate and work out with the provinces a best efforts constitutional draft for approval at the First Ministers' Conference in September. Furthermore, this complex and controversial subject would undoubtedly prolong the debate within Parliament, and particularly within the existing Senate, thus delaying seriously the timetable for implementing the first phase of constitutional revision.

On the other hand a positive federal position on this subject at the August CCMC and September First Ministers' Conference is desirable for the following reasons:

(1) In order to influence the developing provincial consensus and to avoid the solidification of a broadly agreed provincial position which would then be more difficult to reverse later.

(2) In order to avoid the appearance of unresponsiveness to provincial progress on this matter and charges of "bad faith" in the negotiations. This could contribute a souring note undermining the resolution of other issues.

(3) In order to provide a counterpoise to arguments for greater devolution in the distribution of powers. A feature of some of your previous public comments and of the position taken by the federal representatives at the July ÇCMC meetings has been to emphasize that second chamber revision and in particular provincial representation in a revised second chamber would be an alternative and not supplementary to a greater devolution in the distribution of powers. Given the federal insistence in the negotiations to date upon the importance of federal "economic powers" and upon limiting the degree of transfer of powers to the provinces, federal proposals for a revised second chamber with realistic powers or an effective institutional alternative could significantly help in getting other parts of the federal "package" accepted by the provinces. Thus some progress towards Senate reform, or at least an iron-clad commitment to pursue the subject after September, could help the federal government in establishing its case for withstanding decentralizing pressures.

(4) In order to provide a non-judicial way of dealing with derogations from the proposed s.121 or the Charter. A number of provinces and particularly Saskatchewan, are indicating that they might support a statement of principles and operative section concerning the economic union (i.e., revised s.121) and the inclusion of certain rights in the Charter, provided non-judicial ways of dealing with derogations were adopted. There are also some views within the federal government that economic policy issues are better handled by non-judicial processes. A revised second chamber or alternatively an intergovernmental institution might provide a process for settling such issues politically rather than judicially.

In the light of the considerations above it is clear that the negotiating and working out of all the details of an acceptable renewed federal second chamber will have to be completed in a later phase of the constitutional deliberations. However, the resolution of other issues to be implemented immediately after the First Ministers' Meeting in September might be assisted if the initial package incorporated partial or interim arrangements relating to second chamber revision together with an iron-clad commitment to pursue the subject of second chamber revision during the second phase of constitutional review. The inclusion of such elements in the initial package would, of course, be proceeded with only if the economic powers and resources issues were resolved at the same time.

Since any partial or interim solutions incorporated in the initial September revisions should take account of the ultimate objectives, sections III and IV below consider those before the consideration of partial or interim solutions in Section V.

III Institutional Considerations

(a) Premises

(1) A parliamentary Cabinet system will continue to operate in both federal and provincial orders of government. This implies that any second chamber revision must allow for the responsibility of the Cabinet to the

House of Commons and therefore, that by contrast with second chambers in the USA or Switzerland, a new Canadian second chamber would normally only have powers to delay legislation and not to block it if the House of Commons wishes to proceed. Furthermore, a new second chamber should not have power to delay supply bills since this would give it power in effect to dismiss a government, as happened in Australia in 1975. In any revision, the impact of a revised second chamber upon the operation and procedures of the House of Commons will need to be clearly borne in mind.

(2) Since some areas of overlapping jurisdiction between federal and provincial governments are unavoidable in any federal system there is a need for institutional machinery or procedures to reconcile as far as possible federal and provincial policies in these areas.

(3) The institutions through which areas of joint federal-provincial concern are handled should be designed to encourage and induce accommodation in areas of shared power rather than confrontation and obstruction.

(4) In order to achieve a strong union in a country composed of vigorous regional diversities, there is a need for a better expression of regional and provincial viewpoints in the second chamber. This would enhance the political acceptability of the legislation, policies and actions of the federal government, and help to withstand pressures for decentralization.

(b) <u>Possible functions and powers of a revised second chamber</u>

(1) The second legislative chamber:

- (i) critical review and improvement of House of Commons legislation
- (ii) initiation of legislation
- (iii) conducting investigatory studies

(2) representation of regional and minority interests:

- (i) ensuring effective representation for less populous regions and provinces
- (ii) protecting minority rights (e.g., linguistic rights, rights of native peoples)
- (iii) providing a broader regional basis for federal political parties to facilitate cabinets and caucuses which are broadly representative regionally.

(3) the interrelation of federal and provincial government interests (a set of functions which could be performed either by a revised second chamber or by a constitutionally established intergovernmental council):

- (i) ratification of federal legislation or action having a significant impact upon areas of provincial jurisdiction (as identified by CCMC Committee of Officials, those in brackets having been tentatively excluded):
  - the exercise of the declaratory power
  - the exercise of the spending power in areas of provincial jurisdiction
  - the exercise of the emergency power (after the fact in certain cases)

- federal legislation administered by the provinces (e.g. criminal law)
- approval of appointments to certain boards and commissions
- matters which have or might emerge in the overall process of constitutional review
- (constitutional amendements)
- (the delegation of legislative authority)
- (approval of appointments to the Supreme Court)
- (ratification of treaties affecting areas of provincial jurisdiction)

(ii) approval of derogations by the federal or a provincial government from the statement of principles and operative section in the Constitution concerning the "economic union" or from the Charter of Rights.

(iii) Promotion of federal-provincial consultation and agreement on particular areas of joint concern (i.e., in those areas outlined in (i) and (ii).

(c) Interrelation with other constitutional revisions

In specifying the functions of a revised second chamber these must be related to the other constitutional revisions such as the formulations of the distribution of powers which include special procedures of approval, methods of intergovernmental consultation regarding appointments, degree of institutionalizing of First Ministers' Conference, House of Commons reforms directed at improving its powers of legislative scrutiny or at increasing its representativeness by introducing an element of proportional representation, and the extent to which political review rather than expanded judicial review is sought to safeguard the economic union or minority rights.

(d) Special Considerations Relating to Proposed s.121 and Charter

If a political rather than judicial safeguard is sought for the statement of principles and operative provisions concerning the economic union (i.e. proposed s.121 and Charter guarantee of mobility) or for the invoking of a "notwithstanding clause" for any provisions in the Charter the following three tests might together be specified as required to establish constitutionality

(i) declaration in the bill that it is a derogation or in the case of the Charter that the "notwithstanding clause" is being invoked;

(ii) ratification before it becomes law by an intergovernmental council or the second chamber, subject to a vote requiring one of the following forms of majority:

(a) a majority of the provinces containing a majority of the population of Canada;
(b) a majority of the provinces containing 80 per cent of the population of Canada;
(c) a majority within a body where the Federal and provincial governments were represented as 11 equal units;
(d) a majority within a body where each province has one vote and the Federal government two votes plus a casting vote (ie. the Federal government plus 4 provinces would carry the day) c.f. Australian Loans Council voting pattern;
(e) a majority within a body where each province has one vote and the Federal government three votes plus a casting vote (i.e. the Federal government plus 3 provinces would carry the day).

Of those above (b) would provide each region including Quebec with a stronger guarantee but neither (a) nor (b) give the Federal government a vote. The requirement in (d) reproduces strictly the Australian Loans Council requirement, but (e) is closer to the proportional Federal weight in Australia which has only 6 states. Of the five options (e) would be the preferred one from the Federal point of view.

(iii) the law includes a sunset clause requiring repassage within 5(or possibly 7) years, enabling its impact to be reviewed. These three tests taken together have the advantage of requiring a positive identification of derogations by the legislating authority if the law is not to be vulnerable to a judicial judgment as unconstitutional and of including the requirement of a "sunset" clause to ensure that impact can be taken into account in any continuance of the law. However, by contrast to the purely judicial process of enforcing s.121 or the Charter, this arrangement would remove from individual citizens or corporations the opportunity to challenge such derogations.

Since both provincial and federal legislation involving derogations must be subject to review and ratification, the suggested procedure would involve an unorthodox role for a federal second chamber which normally in other federations is confined to reviewing only federal legislation. The role of reviewing both federal and provincial legislation would appear to imply an intergovernmental rather than a federal legislative institution.

why federal? Parl. represents all Canada.

(e) Distribution of Seats Among Provinces

In most federations efforts have been made to represent the constituent political units (i.e. provinces) equally (e.g. U.S.A., Switzerland, Australia, Malaysia and Nigeria) or with weighting to favour the smaller units (e.g. West Germany and India). In the case of Canada a problem is created by the fact that equality of representation for provinces or weighting in favour of smaller provinces would accentuate the minority situation of French Canadians. The major considerations in arriving at an appropriate distribution of seats in a revised second chamber would appear to be (i) to provide adequate weighting for smaller provinces; (ii) to give more representation to the western provinces who are clearly under-represented in the existing Senate by comparison with the four Atlantic provinces or the two central provinces; (iii) to provide an adequate voice to French Canadians through the system of representation or through special voting or procedural requirements on issues which especially affect them.

Historically Canada has been unique among federations in distributing seats on a regional basis. The four region approach has ensured a substantial representation for French Canadians through treatment of Quebec as a region. However, it has led now to serious under-representation of the 4 western provinces, and B.C.'s claim to be itself a region and Alberta's claim to equality with B.C. indicates the difficulties of the regional concept as a basis for the distribution of seats.

While equality of provincial representation is perhaps the most appropriate form for an intergovernmental council, in a legislative chamber the particular Canadian context would probably make a weighted representation more appropriate. For reference purposes Annex B summarizes a variety of proposals for weighted representation in a renewed Canadian second chamber.

If a system of equal or weighted provincial representation is adopted it may be necessary in order to protect the Canadian duality to adopt a special procedure for the approval of specified matters in the form either of (i) a special voting pattern (e.g. Bill C-60 double majority requirement) or (ii) approval by a special duality committee of the chamber composed equally of French and English Canadians (c.f. Beige Paper proposal). In either procedure it would be preferable to have the franco-phone component include a broader range of French Canadians than representatives from Quebec, but this would only be effective under a procedure where provincial delegations do not vote as an instructed block or where party discipline does not override the expression of free views.

Three federations, India (1947-), Nigeria (1959-1966) and Malaysia (1963-) have made provision for a small additional group of appointed members in the federal second chamber, appointed either for their eminence or to represent special minorities or interests. New Zealand, while not a federation, has provided for the election of a number of Maoris in its unicameral legislature. An arrange-ment to provide, say 6 additional seats for appointed or elected representatives of the native peoples might be considered for a revised second legislative chamber, but such an arrangement would be less appropriate in a second chamber or an intergovern-mental council which was composed of governmental representatives since they would not represent any government.

(f) Method of Choosing Members

The method of choosing members of a second chamber which is appropriate will vary with the role and powers assigned to that body. For example, where a primary emphasis is put upon serving an intergovernmental function as compared to merely legislative review, the appointment of members as instructed delegates of provincial governments becomes appropriate as in the case of the West German Bundesrat which plays a major intergovernmental role. In most other federations, the federal second chamber has not been conceived as performing an intergovernmental function but simply as a body for review of federal legislation and a variety of methods of appointment or election have been employed. Among the options are:

(1) Direct election. This method is employed in the U.S.A., in most of the Swiss cantons (where the choice of method is left by the constitution to the cantons), and in Australia. Of the three only Australia, however, has a parliamentary cabinet system, and Australian experience suggests that the power of such a senate would need to be limited to a suspensive veto and the exclusion of the power to delay supply bills in order to ensure that such a second chamber would not rival the House of Commons or undermine cabinet responsibility to that House. The Australian experience also indicates that the impact of party discipline in such a senate may limit the expression of regional views. Such a method does provide the opportunity, however, to introduce election by proportional representation by province thus enabling a broadening of regional representation in Ottawa for each national party without having to intro-duce a component of proportional representation (and hence two classes of members) into the House of Commons.

(2) Indirect election. This method has been employed in India, Malaysia and Nigeria. In India all but a very small number of representatives in the Council of States are elected by the state legislative assemblies using proportional representation in order to ensure representation of minority parties and interests. In Malaysia and Nigeria a simple majority system of election by state legislatures made the process in most instances

equivalent to appointment by the state cabinet. There are no close equivalents elsewhere to the system of indirect election (50% chosen by provincial legislature and 50% by the House of Commons to reflect proportionately the provincial or federal vote within the province at the last election) proposed in Bill C-60. The disadvantage of such a system would be that the members would be accountable neither directly to the electorate nor to a duly elected government, but only to the provincial or federal parties appointing them, thus leading to the likelihood that party interests would predominate over regional ones. Such a system would appear to ensure a minority status in any such house for the governing party in Ottawa with little compensatory gain since the complexity of the arrangement and the method of election is likely to pose problems of legitimacy in public eyes. Furthermore since the provincial premiers' statement of August 1978 unequivocally opposed this approach it would not help to win their support on other constitutional issues.

(3) Appointment. Appointment of instructed delegates (indeed of state cabinet ministers) by the state cabinet serving at the pleasure of the state government is the method employed in the West German Bundesrat which has operated particularly effectively in facilitating intergovernmental coordination and cooperation. This has encouraged a number of recent Canadian proposals for such an arrangement in a revised Canadian constitution (e.g. Canada West Foundation, Canadian Bar Association, Ontario Advisory Committee on Confederation, B.C. government, Pepin-Robarts and the Beige Paper). At the CCMC meetings all the provinces have supported some form or other of provincial appointment of all or a large majority of the members in a revised second chamber. Such a chamber is more likely to represent provincial government views rather than more broadly regional views, and therefore its powers would need to be defined and limited accordingly. On the other hand, it would provide a basis for including intergovernmental issues within the scope of such an upper house. Appointment of all (as in Canada) or a majority of second chamber members by the Federal Government is unique to Canada, although the short-lived West Indies Federation included a similar method coupled with the requirement of prior consultation with the appropriate territorial government. In the Canadian context this method appears to have outlived its legitimacy in public eyes.

(g) Acceptability to the public and to governments:

(1) To public (as indicated by opinion surveys):

(i) preference for elected second chamber

(ii) second preference for balanced federal-provincial representation

(iii) difficulty of public understanding overly complex institutions.

(2) to federal government:

(i) desire to legitimize regional representativeness of federal institutions

(ii) concern to avoid blocks to effective federal action

(iii) desire to balance federal concessions to provinces with provincial concessions to federal governments.

(iv) interest in providing a political (i.e., non-judicial) process for reviewing and approving derogations from common market or Charter of Rights.

Hence some federal preference for either an elected second chamber or for one composed of members indirectly elected by the provincial legislatures and the House of Commons (e.g. , House of the Federation in Bill C-60).

(3) to provincial governments:

(i) concern that federal policies and actions take account of provincial concerns, especially where they have impact on areas of provincial jurisdiction

(ii) concern about being by-passed as spokesmen of regional and provincial views.

(iii) preference of some (e.g., Saskatchewan) for political rather than judicial resolution of derogations from common market and charter.

Hence general preference for a "House of the Provinces" approach as summarized by the Ministerial Points of Consensus agreed upon in Montreal meetings of CCMC in early July (see Section I of this paper).

IV The Alternatives and Variants

In order to cover the full range of functions listed in III(b) of this paper two general approaches have been under consideration by the CCMC: (a) a hybrid institution combining within one body the role of an intergovernmental body (e.g., ratifying on behalf of provincial governments federal actions affecting areas of provincial jurisdiction and possibly also federal or provincial derogations from s.121 or the Charter) and the traditional role of a parliamentary second chamber reviewing federal legislation with a suspensory veto. (b) two distinct bodies, (i) a revised upper house retaining the title "Senate" as part of Parliament for the general legislative review function and (ii) a separate intergovernmental council (not a part of Parliament and possibly an extension of the First Ministers' Conference) for the ratifying function and which could deal with derogations from s.121 or the Charter.

Under each of these approaches a number of variants is possible.

(a) Variants of the Single Hybrid Second Chamber:

(i) The House of the Provinces (first option in the Committee of Officials Report to CCMC). In this variant the second chamber would have distinct membership and procedures for handling the ratifying (or intergovernmental functions) and for handling the general review function. For the former members would be delegates appointed by provincial governments and vote on instruction from their provincial government with delegations including provincial cabinet ministers. There would be provision for non-voting Federal spokesmen. For the latter function, the membership would be supplemented by provincially appointed representatives appointed for fixed terms and voting freely (uninstructed).

(ii) The Council of the Federation (e.g. Task Force on Canadian Unity). The second chamber would consist for all its functions of provincially appointed delegates

(including provincial cabinet ministers) voting on instruction and there would be provision for non-voting Federal spokesmen. However, because of the nature of membership, the scope of such a second chamber's power would be limited to the intergovernmental ratifying function and to review of House of Commons legislation in areas of concurrent jurisdiction (the latter being subject only to a suspensive veto). House of Commons legislation in areas of exclusive federal jurisdiction would require passage only in the House of Commons and the function of careful scrutiny would have to be performed by that House's committees.

(iii) The House of the Federation (eg. Bill C-60). The second chamber would consist of uninstructed representatives, 50% chosen by provincial legislatures and 50% by the House of Commons to reflect proportionately the provincial or federal vote within the province at the last election.

(iv) The combined appointed and elected Senate (proposed by R.B. Bryce). Each provincial government would be entitled to appoint one Senator, to represent and speak for it, to serve "during pleasure" and to cast the block votes of the Senators from that province, for the intergovernmental ratifying functions. The balance of members would be elected directly by proportional representation in the province from party lists and would vote when the Senate exercises its general legislative review function. The Federal government would be entitled to appoint two or three Senators to speak for it in the Senate.

The first and fourth variant suffer from the complex combination of membership and procedures involved. The third, despite its superficial attractiveness could not really perform the intergovernmental functions because the method of appointment means that its members cannot act as spokesmen for the Federal or provincial governments. The second variant provides the most straightforward institution for dealing with the primarily intergovernmental functions, but achieves this by limiting the scope of the powers of the second chamber.

Some concern has been expressed concerning the first two variants about the lack of voting federal representation and the possibility that either of these forms might become a "house of obstruction". The lack of federal voting members is not inappropriate in so far as it is proposed in both variants that the chamber would have no initiating powers and would be confined to ratifying federal initiatives. In both cases, the possibility of the second chamber becoming a "house of obstruction" is reduced by limiting its veto on most federal legislation to a suspensive veto of 90 days. The knowledge that obstruction could soon be overridden would be likely to induce compromise. In the second variant the degree of possible obstruction is further reduced by the more limited scope of its powers.

In terms of dealing with derogations from a revised s.121 or the Charter, none of the four variants would provide a significant vote for federal appointees who could act as genuine spokesmen for the Federal government. If one of these variants were assigned the role of approving derogations from a revised s.121 or the Charter, a special voting requirement for this role would need, therefore, to be devised.

(b) Variants within a system of two distinct bodies:

If the approach of establishing two distinct bodies, a renewed Senate and an intergovernmental council were followed a number of variants would be possible for each of the bodies.

Among the forms which the upper house for legislative review might take in such a pair of institutions are:

(i) The Elected Senate (e.g. Australia) composed of members elected directly by proportional representation within each province from party lists.

(ii) The House of the Federation (e.g. Bill C-60) composed of members indirectly elected, 50% by the provincial legislatures and 50% by the House of Commons, to reflect proportionately the provincial or federal vote at the last election.

(iii) The Provincial House (e.g. Atlantic provinces and Manitoba at CCMC July 1980) composed of representatives appointed by the provincial government or legislatures (possibly with method of election left by the constitution to be determined by the provincial legislatures as in Switzerland) for a fixed term and voting freely, with up to 25% of the membership appointed by the Federal government or the House of Commons.

The first of these variants would have the greatest public appeal and would provide an alternative way of broadening the regional representation of national parties in Ottawa to that of introducing a component of proportional representation into the House of Commons. Care would have to be taken, however, to ensure that its powers did not undermine the responsibility of the cabinet to the House of Commons. The second variant suffers from the weaknesses identified in such a method of appointment in Section III (f) of this paper. The third variant, while favoured by many provinces, would be less likely to be insisted upon by them if their primary concerns, i.e. the power to ratify federal actions in areas affecting provincial jurisdiction, were assigned to a distinct but effective intergovernmental council.

Among the forms which an intergovernmental council might take in such a pair of institutions are:

(i) The Federal Council (e.g. Beige Paper, and Saskatchewan and Quebec at CCMC) composed of instructed delegates of provincial governments, including participation by provincial cabinet ministers with members casting a block vote by province. Since the role of the Council would be limited to ratifying federal initiatives in certain specified areas, non-voting federal spokesmen would participate to present federal proposals. Most provinces would favour equal representation in such a body, but B.C., Ontario, and Quebec at the CCMC and the Beige Paper advocated weighted or regional representation. Chairmanship would rotate.

(ii) The Intergovernmental Council (c.f.Australian Loans Council) would be an extension but not a replacement of the First Ministers' Conference, with powers and voting pattern of this council specified in the constitution. The provincial delegations might each have one vote and the Federal Government four votes plus a casting vote, i.e. the Federal Government plus 3 provinces would carry the day (a proportion similar to that in the Australian Loans Council - see section III (d) above). The Prime Minister would be chairman.

(iii) The Combined Intergovernmental Council, which would take the form of the Federal Council for ratification of federal initiatives in specified areas, and of the Intergovernmental Council for dealing with derogations to s.121 or the Charter and with other intergovernmental negotiations.

Of these variants, the Federal Council would appear the most appropriate for ratifying federal actions in matters affecting provincial jurisdiction, but if the council's powers are extended to include the ratifying of provincial as well as federal actions (i.e. for dealing with derogations from s.121 or the Charter) the second or third variant would be more appropriate. The third variant would get greater provincial support but at the expense of more complexity.

The general approach of establishing two distinct institutions would cover between them the full range of functions outlined in Section III (b). By keeping the second legislative chamber distinct, confusion of functions and complexity within a single institution are avoided. It also makes it easier to combine any one of the variants among the intergovernmental councils with any one of the variants of the second legislative chambers (or for that matter with abolition of a second chamber) easier because membership and procedures do not have to be interlinked. It also makes it easier to incorporate appropriate arrangements for dealing with derogations from a revised s.121 or the Charter, if such arrangements are desired.

The disadvantages are that the opportunity to sensitize provincial delegates to wider federal concerns through tying them into the second chambers is lost and there may be some public resistance to the proliferation of governmental institutions. The latter would be reduced if an intergovernmental council was portrayed as the extension and constitutionalizing of one aspect of the First Ministers' Conference.

V Partial or Interim Solutions

Since the attempt to resolve all the issues relating to a revised second chamber and/or intergovernmental council, and to obtain rapid passage through the existing Senate would impose a serious delay on the implementation of the initial package of constitutional revision immediately after the First Ministers' Conference, September 8-12, this section considers a strategy whereby either a partial or interim solution might be incorporated in that initial package together with a commitment to complete the revision of the second chamber in the second phase of constitutional revision. The objective of such a strategy would be to increase provincial support for other provisions which the Federal government wishes to include in the initial package. A "partial solution" would be one in which a portion of the eventual longer-term solution was implemented initially, while an "interim solution" would be one in which temporary arrangements would be established, to be replaced subsequently by whatever long-term solution is adopted later.

(a) The Partial Solution

Partial implementation of an eventual single complex hybrid second chamber combining the intergovernmental and legislative review functions would be extremely difficult to work out in the brief time remaining before the September First Ministers' Conference. But if it were considered preferable and agreement could be reached at the August CCMC meetings on the eventual creation of two distinct and separate institutions, one an intergovernmental council to be established under the constitution and the other a renewed second chamber or Senate to perform the traditional legislative review functions it might then be possible to obtain agreement at the September FMC meetings to proceed immediately with the establishment of the intergovernmental council, while leaving Senate reform as a commitment to be pursued in the second phase of constitutional review. This strategy would have the advantage of providing within the initial constitutional

package an institutional element facilitating a possible resolution of provincial concerns about the federal exercise of "unilateral" powers and also provide a political process for safeguarding the economic union and/or the Charter, while at the same time deferring for a second later package lengthy debates on the final form of a "renewed" Senate.

In terms of provincial support the non-parliamentary intergovernmental council was the preference of Saskatchewan and Quebec at the CCMC meetings, and although Alberta reserved its position at those meetings it would appear to come closest to their preference. Furthermore, such a council would also in many ways be similar to the non-parliamentary Federal Council proposed in the Beige Paper thus encouraging the support of the QLP. For this reason, Ontario might well support it, even though their first preference, like that of British Columbia, is for a House of the Provinces performing both the ratifying and legislative review functions. The Atlantic provinces and Manitoba are more interested in a revised second chamber exercising the general function of legislative review, but a commitment to proceed with Senate reform in the second phase of constitutional review might win their acceptance since they have generally leaned to the two-institution solution during the July CCMC meetings.

An advantage of supporting the two institution approach as opposed to the single hybrid institution is that it would leave more freedom for the form which the second legislative chamber might take. In a hybrid second chamber which includes the intergovernmental role, implicitly the basic form of regional membership must be provincial government representatives since only they can negotiate and speak for those governments. Where the two roles are performed by two separate institutions, the second legislative chamber could be directly elected, indirectly elected, or provincially and/or federally appointed. Indeed, this approach, by meeting provincial concerns primarily through the establishment of an intergovernmental council, would leave open the possibility, if the federal government wished to pursue it, of a renewed Senate composed of members elected within each province on the basis of proportional representation. This would provide an alternative way of broadening regional representation in Ottawa for each national party without having to introduce proportional representation for a component of the House of Commons (and the need for two classes of members in that House).

(b) The Interim Solution

If it were decided that a single hybrid second chamber (performing the total range of functions identified by the CCMC) was ultimately much preferred, or if an acceptable fall-back position from proposing the "Partial Solution" at the CCMC August meeting were needed at the First Ministers' Conference, an "Interim Solution" might be proposed.

The basic interim measure would be to provide for the performance of the intergovernmental role by the establishment of an interim process to last for a period of say five years, during which it would be hoped that proposals for a renewed second chamber would be worked out. This would be done by stipulating in the initial constitutional text that federal actions in a specified list of matters affecting provincial jurisdiction (i.e. those identified at CCMC: e.g., general declaratory power, spending power in areas of provincial jurisdiction, the emergency power [after the fact in certain cases], federal legislation administered by provinces, etc.) would have to be approved in the First Ministers' Conference by a majority of the provinces having a majority of the population

of Canada. The requirement for this assent would lapse after five years thus putting pressure on the provinces to reach agreement on a permanent institution by that time. The political review and approval of provincial statutes which would otherwise be contrary to the provisions of the constitution regarding the economic union or the Charter might require the same procedure but requiring approval by a majority vote within the First Ministers' Conference in which the Federal Government would have four votes plus a casting vote (or one of the other voting requirements listed in Section III (d) of this paper).

An optional supplementary second interim measure which might be offered at the First Ministers' meeting in September is the inclusion in the initial constitutional package of special authority to permit the revision of the present provisions of the BNA Act relating to the Senate. This would be intended both to facilitate such a revision and to symbolize the federal government's commitment to proceed in the second stage with such reform. The procedure specified would be separate from and in addition to the general amending formula and would require only action by Parliament (including the existing Senate) and the approval of a majority of provinces including a majority of the population of Canada. No one province should have a veto, as Senate reform does not reduce the powers of any province, and a large majority should not be required in order that the need to increase the proportionate representation of the western provinces is not easily blocked, and would also be designed to reduce the likelihood of an increase in the representation of the western provinces being blocked. Nevertheless, the attempt to include such a special amendment process for Senate reform might cause greater difficulties than benefits if it were itself to become controversial. An escape provision against the Senate itself blocking change might be considered but the attempt to include such a provision in the initial constitutional package after the September First Ministers' Conference would be likely to provoke considerable debate and hence delay in the existing Senate and, therefore, should be avoided.

While the "Interim Solution" would not go as far as the "Partial Solution", and leaves the ultimate direction of second chamber revision less settled, it might at least provide both an indication of a federal commitment to revision and a possible procedure for dealing with those areas of potential "unilateral" federal action about which the provinces are concerned and for safeguarding by a political process the economic union or charter. It would, of course, leave completely open for later decision the longer-term choice between a single hybrid second chamber or the establishment of two institutions. On the other hand, the tentative character of the interim solution might leave the provinces less satisfied and hence less forthcoming on other constitutional issues under discussion and if combined with an interim solution on the general issue of constitutional amendment might encourage the provinces to argue that instead of interim solutions implementation should be delayed until final solutions have been agreed upon.

It should be noted that in the case of either the "partial" or the "interim" solutions the offer should be conditional upon provincial concessions over the economic and other issues under discussion. Furthermore, although the CCMC discussions on the second chamber have identified the federal spending power in areas of provincial jurisdiction as one of the key areas for which provincial ratification would be required, this particular item would need to be more precisely defined before the Federal government makes this major concession as a trade-off against provincial acceptance of the federal position on economic powers.

yes

It should be used in a later round

VI Recommendations

1. In terms of ultimate outcomes, the single hybrid institution as developed at CCMC would involve considerable complexity if the full range of desired functions including approval of both federal and provincial derogations from a revised s.121 or the Charter are to be performed. Therefore, if the Pepin-Robarts variant is not adopted, an ultimate outcome involving two distinct institutions is to be preferred. This would involve the establishment under the constitution of (i) an intergovernmental council with certain specified functions and (ii) a renewed federal second legislative chamber.

2. The preferred form of the intergovernmental council, if its functions include approving provincial derogations from a revised s.121 or the Charter, would be the Intergovernmental Council (Variant (ii) as outlined in Section IV(b) of this paper). Although established by a constitutional provision, such a Council would in essence be an extension of (but not a substitute for) the First Ministers' Conference. If the approval of provincial derogations from s.121 or the Charter were not included in its functions the Federal Council (Variant (i) outlined in Section IV(b)) would be appropriate and would increase the likelihood of provincial acceptance.

3. The preferred form of federal second legislative chamber would be a directly elected Senate based on proportional representation. With the proper safeguards outlined earlier in this paper it should be possible to avoid the Australian difficulties, and this form would not only have the widest public acceptance but achieve the benefits of proportional representation without the complications involved in introducing that into the House of Commons.

4. If provisions to safeguard the Canadian duality in a way that represents French Canadians across the country are desired, these can be incorporated more appropriately in the federal second legislative chamber than in an intergovernmental council.

5. The Federal negotiating position at the CCMC August meetings and at the First Ministers' September meetings would be enhanced if either a "partial solution" or an "interim solution" for the second chamber issue could be presented.

6. A "partial solution" (as outlined in Section V(a)), involving a constitutional provision recognizing and establishing an intergovernmental council for certain specific purposes, would be the appropriate and preferable proposal if the ultimate outcome envisaged is the establishment of two distinct institutions. The intergovernmental council would be proceeded with in the initial constitutional package, and a renewed Senate would be implemented at a second stage.

7. An "interim solution" (as outlined in Section V(b)) involving the use of the First Ministers' Conference with special procedures for an interim five-year period during which longer-term second chamber revision would be pursued would provide a fall-back position for the First Ministers' Conference in September if it transpires that agreement on a "partial solution" cannot be reached.

R.L. Watts

A N N E X E S

DOCUMENT: 830-83/017

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Continuing Committee of Ministers on the Constitution

Vancouver, July 24, 1980

Report of the Committee of Officials
on a New Second Chamber

Background

Ministers met on July 22 to discuss a new second chamber and to provide directions for further work by the Committee of Officials. The Chairman of the Committee gave an oral report on the conclusions reached by Ministers on the basis of the ministerial document "Points of a Senate Consensus" (Montreal) and the Report of the Committee of Officials on the Senate (Toronto; July 17, 1980), copies of which are attached.

After discussion, Ministers asked the Committee:

(a) as a first step, to study the desirability of creating an institution for ratifying federal action, dealing only with a limited list of specified matters of shared federal-provincial concern, and whose voting members would be solely provincial delegates voting on government instruction;

(b) as a second step, to look at the desirability of a wide role of review of House of Commons legislation for a new second chamber whose members would be appointed solely or primarily by the provinces;

(c) to enquire into the desirability of having both of the functions in (a) and (b) dealt with in one new institution or of having two separate institutions for those functions;

(d) to examine the issue of the basis of representation (whether there should be equality of representation by province or region or a weighted formula); and

(e) to consider whether the new body or bodies should make special provision for handling matters related to "dualism".

A. <u>An Institution for Ratifying Certain Federal Actions</u>

Under section (a) of the ministerial directives, the Committee examined the desirability of creating a new institution for ratifying federal action on a limited list of specified matters of federal-provincial concern.

(i) <u>Role of the new institution</u>

There was a general view in the Committee that the principal role of the new institution should be that of providing a "national consensus" on a short list of "crucial" matters of special concern to the provinces where the federal authorities may now act alone.

(ii) <u>Matters requiring ratification by the new institution</u>

There was a general view that the following matters be subject to the requirement of ratification by the new institution:

- the exercise of the declaratory power;
- the exercise of the spending power in areas of provincial jurisdiction;
- the exercise of the emergency power (after the fact in certain cases);
- federal legislation to be administered by the provinces.

The Committee also retained for further examination other matters which might be added to the list if other means of handling them could not be found:

- approval of appointments to certain federal boards and commissions;
- matters which have or might emerge in the overall process or constitutional review which Ministers deem appropriate.

The Committee considered the following matters for action by the new institution, but the general view was that they not be included on the present list:

- constitutional amendments;
- the delegation of legislative authority;
- approval of appointments to the Supreme Court;
- a role in treaty-making in areas of provincial jurisdiction.

(iii) Method of selection of members of the new institution

The general view was that members be appointed by provincial governments and vote on instruction by their provincial government. Such members may or may not be provincial Cabinet Ministers. It was noted that there should be no prohibition against dual membership in a legislature and in the new institution. There was a general view that there should be provision for non-voting participation by federal government spokesmen.

(iv) Tenure

It was agreed that appointments to the new institution should be at the pleasure of the Lieutenant-Governor in Council.

(v) Basis of Representation

Seven provinces expressed a preference for equality of representation by provinces, although three of them would accept a compromise weighted formula. Two provinces preferred a weighted formula approach based on population and/or other considerations, but one would accept equality if that were the general view. One preferred equality of representation for five regions but would consider a weighted formula. The federal view was that this was a matter in the first instance for the provinces to determine.

(vi) Voting Procedures

It was generally agreed that members would cast a bloc vote by province on instruction by their provincial government. There was a general view that ratification should require a majority or 2/3 vote, the choice of which, in the view of some provinces, would depend on the basis of representation selected. These criteria might be varied for issues related to dualism.

B. A New Second Chamber for the Review of Federal Bills

Consideration of this matter was carried out under the terms of section (b) of the directives given by Ministers.

(i) Powers

There was general agreement that the new second chamber should have the power to review all federal legislation except for appropriations bills and those matters covered under the institution

described above in section A. It was also generally agreed that a new second chamber having the review role would only exercise a short suspensive veto of, say, 90 days which could be overridden by a repassage in the House of Commons requiring only one reading and a simple majority.

(ii) Voting Procedures

All members would be free agents and would not vote on instruction.

(iii) Basis of Representation

A majority of provinces expressed a preference for equality of representation, but two could move to a compromise weighted formula. Two preferred a weighted formula based on population and/or other considerations. One preferred equality for five regions but would consider a compromise weighted formula. Manitoba provided the following proposal for compromise weighted formula:

- the Yukon and NWT: 2 each;
- P.E.I.: 4;
- N.S., N.B., Newfoundland, Manitoba and Saskatchewan: 8 each;
- Alberta: 10;
- B.C.: 12;
- Ontario and Quebec: 16 each.

(iv) Appointments

It was agreed that appointments should be for a fixed period of, say, 8 years, to ensure independence, and that the duration of the initial appointments should

... 6

be staggered. Whether members could be reappointed was judged to be a matter requiring further consideration. On whether there should be a mix of federal and provincial appointments or provincial appointments only, views were mixed. The federal government proposed that 50% of the members should be federally appointed and 50% provincially. Two provinces shared this view. The majority of provinces favoured provincial appointments only, but a number were willing to consider a minority proportion of federal appointments. It was suggested by one province that consideration could be given to having 75% of the members appointed by provinces and 25% appointed federally.

C. One Institution or Two?

There were divergent views on whether the two distinct functions of ratification and review should be handled by one institution or two. If they were combined in one institution, there would be two sorts of members (government delegates and free agents) who would have different rights and powers. Provincial delegates alone would debate and vote on matters for ratification. Both delegates and free agents would debate bills under legislative review.

Arguments in favour of having both functions handled by one institution were:

- there would be a highly beneficial cross-fertilization between the delegates and the free agents if they sat in one House;

- in any given year, the number of issues requiring ratification would be limited and might not provide enough business to keep members of the new institution fully occupied if they did not also have to consider questions arising under the review function;
- creation of two separate institutions rather than one might be criticized by the public as creating one more level of "bureaucracy";
- there would be significant cost savings on support services by having both functions handled by one institution.

Arguments in favour of having the two functions handled by two separate institutions were:

- a single institution might lead to undue confusion for the public on the operations of government;
- the participation of those provincial delegates who are Cabinet Ministers in the deliberation of bills under legislative review would be time consuming and could conflict with their other responsibilities;
- if provincial delegates were accorded voting privileges and were to participate in debate on bills under legislative review, this would alter the balance of the voting structure and would distort the careful distinctions made between the two separate functions to be served;
- it would be inappropriate for provincial Cabinet Ministers to participate in a general review of legislation solely under federal jurisdiction.

There was no agreement on whether there should be one or two institutions.

D. Dualism

Both Quebec and Ontario had suggested a dualist function for the new institution(s) or for a special committee thereof. During discussion, the following points emerged:

(i) there was general sympathy for accommodating the dualism concept;

(ii) there was a general willingness to examine proposals respecting language and linguistic measures;

(iii) there was concern about expanding the proposals to include "culture" because of the problems of defining such a concept;

(iv) it was felt that the mechanisms for dealing with dualism could only be properly discussed when a more concrete idea of the scope of the dualism proposal has been developed and a clearer picture of the new institution(s) has emerged;

(v) until mechanisms had been proposed for examination, it was felt to be premature to discuss whether francohpone interests under the dualism principle could best be safeguarded by Quebec members of a new second chamber, by francophone members of a new second chamber or in some other way.

It was suggested that Ontario and Quebec should prepare more precise proposals for consideration by the Committee at the August meeting of the CCMC. All other governments were invited to submit any ideas they might have to Ontario and Quebec.

Summary

On the basis of this examination of the ministerial objectives, guidance is requested on the following questions:

1. Should a new institution(s) deal with one or both functions of ratification and review?
2. In the event that it is decided that both functions would be desirable, should there be one institution combining two distinct functions and procedures or two separate institutions?
3. What should be the basis of provincial representation and the degree of federal participation in either of the two functions?
4. What should be the voting procedure for either of the two functions?

Respectfully submitted on behalf of the Committee,

Edward D. Greathed
Chairman

COMMITTEE REPORT

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APPENDIX A

Ministerial Document

Points of a Senate Consensus

In private discussion, the Ministers arrived at the following points of a Senate consensus:

1. on the need for a new second chamber.
2. that the new second chamber not be an elected body.
3. that it be composed of provincial representatives but that consideration be given to the possibility of federal representatives at the same time that the role and powers of the second chamber are discussed.
4. that on representation:
   a) a majority wanted equal representation on a province by province basis
   b) some wanted a weighted representation based on an undetermined number per region, using four regions as a basis
   c) one province wanted equal representation from five regions
   d) two reserved their position.
5. that the new upper chamber could possibly, but not necessarily, be a substitute for some of the regular federal-provincial mechanisms.
6. that the new chamber have the power to ratify federal actions in such areas as:
   a) declaratory power
   b) federal spending power
   c) amendments to the Constitution
   d) other powers as contained in the British Columbia proposal

   and, that there was a willingness to discuss further the establishment of another category of suspensive powers.

This consensus is to be used as a basis for discussion, after governments have given it further consideration.

APPENDIX B

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July 17, 1980

Report of the Committee of Officials on the Senate

The Committee of Officials on the Senate met twice on July 16th and once again on July 17. The Committee had for consideration a Ministerial Document entitled "Points of a Senate Consensus". A copy of the Document is annexed to this Report.

The Committee decided to proceed on the basis of the Ministerial Document according to which there is a need for a new second chamber (Point 1) and that it not be an elected body (Point 2). It was agreed that debate should focus initially on Point 6 (power to ratify certain federal actions and the possibility of establishing a category of suspensive powers).

During discussion of Point 6, it became apparent that several of the various delegations held views that were based upon distinct approaches to the question of Upper House reform; that the approaches were quite different; and that the different approaches were all compatible with the broad lines of the "Points of a Senate Consensus".

Four distinct "models" for Upper House reform were isolated for the purposes of discussion. The four "models" were based upon a consideration of what should be the principal purposes of an "Upper House" in the Canadian federation.

Model I

According to this model, the traditional function of the Upper House of providing review for all or most legislation emanating from the Commons should be maintained, with powers of absolute or suspensive veto, but the members of the Upper House should be appointed solely, primarily or on a 50% basis by the provinces. Members appointed by the provinces would be representatives of the provinces, but they would not be delegates voting on instruction by provincial governments.

Model II

According to this model, the "Upper House" should be an institution for ratifying federal action, dealing only with a limited list of specified matters of shared federal-provincial concern. Voting members would be solely or primarily provincial delegates voting on government instruction. Such an institution would not have the additional general power to review legislation within federal jurisdiction, but could have an advisory function.

Model III

This model would combine the main features of Model I and Model II. Membership would be provided solely, primarily or on a 50% basis by provincial governments, and each provincial delegation would include a Cabinet Minister. On a limited list of specified matters of shared federal-provincial concern, each provincial Cabinet Minister would cast a block vote for the province. On all other matters subject to Upper House review, members would be free to vote as they saw fit.

Model IV

During discussion, a fourth approach emerged for consideration. This approach would involve two distinct institutions: a version of Model I to serve as the new Upper House and a version of Model II to serve as a new intergovernmental institution.

In discussion, some governments noted that a final position on the new Upper House would be related to any redistribution of powers.

The Committee agreed that, in Vancouver, it would address itself to matters such as method of selection, representation and powers.

The Committee draws to the attention of Ministers that three of the four models identify a function of general review, and three of the four models identify a function of ratification of federal action on a limited list of specified matters of shared federal-provincial concern.

The Committee seeks instruction from Ministers as to whether they wish only one or both of these functions to be performed by a new or reconstituted body or bodies.

Edward Greathed
Chairman

Attachment

ANNEX B

PROPOSALS FOR DISTRIBUTION OF SEATS

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	Existing Senate	Joint Committee	Bill C-60	Ontario Proposal	Pépin-Robarts	Beige Paper	Manitoba compromise	R.B. Bryce
Newfoundland	6	6	8	2	4	3	8	8
Nova Scotia	10	10	10	2	4	4	8	8
New Brunswick	10	10	10	2	4	4	8	8
Prince Edward Island	4	4	4	1	2	2	4	4
Quebec	24	24	24	6	12	20	16	20
Ontario	24	24	24	6	12	20	16	20
Manitoba	6	12	8	2	4	5	8	8
Saskatchewan	6	12	8	2	4	5	8	8
Alberta	6	12	10	3	6	8	10	12
British Columbia	6	12	10	4	8	9	12	12
Territories	2	4	2	0	0	0	4	2
TOTAL:	104	130	118	30	60	80	102	110*

* Plus 2 or 3 appointed federal Senators at large.