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January 16, 1981

MEMORANDUM FOR THE PRIME MINISTER

The NDP Position on the Constitution:
Premier Blakeney and the NDP Caucus

When Premier Blakeney appeared before the Joint Committee on the Constitution on December 19, he made a number of recommendations for changes in the draft Resolution. His recommendations can be divided conveniently into three categories:

(a) Amendments which are acceptable to the federal government;

(b) Amendments which are unacceptable to the federal government but which do not seem to be part of the Premier's "bottom line";

(c) Amendments which have been unacceptable to the federal government, at least until now, and which seem to constitute the Premier's "bottom line".

Appendix A to this memorandum lists the items which make up categories (a) and (b). You may wish to glance over it to see which of the points that the Premier made have been covered, or do not need to be covered. The main purpose of this memorandum, however, is to examine the two issues in category (c) which were not covered by the amendments Mr. Chrétien announced on January 12 and which are critical if the Premier is to be brought on side. The possible loss of federal NDP support, in whole or in part, in the face of a final rejection of the Resolution by the Premier is also considered in this memorandum.

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The two issues of category (c) - Premier Blakeney's bottom line issues - are:

(1) The question of national referenda and particularly "an element of reciprocity" in such referenda;

(2) The question of ensuring that provincial regulation of resource production will not be struck down by the courts merely because it affects international trade.

General Appraisal of the Premier's position

In trying to judge where the Premier stands, it is useful to look at what he said to the Special Joint Committee on December 19, and at the statements he made at his press conference of January 14, in which he reacted to Mr. Chrétien's amendments announced on January 12. Extracts from that press conference -- are attached as Appendix B, and the more interesting comments are underlined. Also, the Premier telephoned Gordon Robertson (completely unexpectedly from Gordon's point of view) and went over his position with him. -- A copy of Gordon's memorandum to Michael Pitfield reporting on that conversation is attached as Appendix C.

The Premier has made clear, both in his appearance before the Committee and in his press conference, that he will make no final decision about supporting the Resolution until he knows its final form. In making his ultimate judgment, he will have considerable regard for his sense of responsibility as a Western Premier. He will take into account his strong feelings against unilateral action, against referenda as a federal instrument, and his concerns about the wisdom of a Charter of Rights (apart from language rights). His apparent willingness to support the Resolution, if his concerns are met on the two issues mentioned above, means that he has placed, in his own mind, very great stress on attaining some satisfactory solution in these areas.

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We have not been able to ascertain with any certainty which of the two issues is of the greater concern to him. Even his own comments can be interpreted in several ways. He said on January 14 that "our key area was the amending formula and our subsidiary keys were resources, and these have not been addressed". He also said, however, in respect of resources, that if the problem arising from the potash case "isn't dealt with in the Resolution, then that is not acceptable to us". Suffice it to say that he regards both areas as highly important, indeed essentially, to his support.

The Referendum and Constitutional Amendment

At the Special Joint Committee on December 19, the Premier said:

> "The proposed amending formula is the most unacceptable part of the federal Resolution, the part which does most serious violence to the basic principles of federalism. Saskatchewan cannot endorse the Resolution unless major changes are made in the amending formula.
>
> "There must be some measure of reciprocity as between Parliament and the provincial legislatures in their power to initiate a referendum. The proposed process permits a referendum where provinces fail to agree to a federal proposal for constitutional change. It does not provide for a referendum in the reverse case, where the federal government opposes an amendment endorsed by the provinces. In other words, it is a way to temper provincial intransigence, but not federal intransigence. In our view, appropriate provisions for reciprocal treatment are required to make the referendum a fairer and more balanced instrument."

Since then, the federal changes announced on January 12 have gone a considerable distance to meet the Premier's concerns. He is left, however, with a feeling that the whole referenda process should still be eliminated and a belief that, if such a step is impossible, something must be done on the issue of reciprocity.

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-- Appendix D attached is a paper on this question prepared by Eddie Goldenberg, which argues strongly that the referendum arrangement should indeed be dropped from the Resolution. The paper reflects the strongly held views of the Minister, of Roger Tassé, Barry Strayer, and of a number of other officers of the Department of Justice.

My own view, supported by Fred Gibson and Michael Pitfield, is that the government should not back off on the fundamental principle of the right to ask the Canadian people, through a national referendum, to decide on a constitution amendment on which their federal and provincial governments cannot agree, and the principle that there must be a way out of a deadlock to replace the historical way out - unilateral action - which we are using now.

I believe the existence of the possibility of a national referendum is important for the future of the country. It would not be used often, that much is certain. But, just as there is now a case for unilateral action, so in the future could there be a critical time when some escape hatch from a constitutional bind might be essential for national survival. With unilateral action no longer available as the means of escape, something is needed to replace it.

Having said that much, however, I believe it is important to see what can be done to meet the Premier's concerns, at least in part. I agree with Eddie Goldenberg that "reciprocity" in its full sense is something to be avoided at all costs. On the other hand, I think a good argument can be made for another approach which would give provinces an influence over the federal right to call a referendum. Given that no federal government could win a referendum against the combined opposition of all of the provinces, one could accept conceptually, at no cost to the federal government, a combination of the support of Parliament and of some provinces as the basis on which Parliament could place a referendum in train.

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Such an arrangement could work in this fashion:

> Under the revised Section 42 of the Resolution, Parliament will now have to wait a year before mounting a referendum. This requirement could be made more stringent by new wording which would stipulate that Parliament could proceed, after the year was up, only if in the meantime resolutions against the referendum (on the matter at issue) had not been passed by provincial legislatures representing 50% or more of the population.

Such a change would give provinces a "say" in whether or not a referendum should be held. To stop a referendum, however, it would require widespread provincial opposition confirmed by legislatures. (In the present circumstances, for example, the "six" opposing provinces might not be sufficient to block a referendum. I emphasize "might" because I am not certain whether those provinces represent slightly less or slightly more than 50% of the population on the basis of the latest census.) It should be noted that provinces not objecting, would not be obliged to obtain the support of their legislatures for such a decision. Also, provinces desiring to block a referendum would be forced to take a positive action. They would have to introduce resolutions in their provincial legislatures. They could not block the referendum by just doing nothing.

Thus, a referendum could only be held if the national Parliament and governments representing 50% or more of the Canadian population agreed to the proposed amendment, where agreement means the failure to expressly vote against the resort to a referendum.

We cannot, of course, guarantee that this proposal would satisfy Premier Blakeney. We would think, however, that the chances are very good since it goes further than his suggestion conveyed privately through his officials that he would be content with a proposal which required the positive support of three provincial legislatures before a referendum could be held.

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In summary, a decision needs to be made on whether the referendum provision will be dropped entirely, whether some element of reciprocity will be introduced such as the method outlined above or the suggestion in Appendix D that at least three provinces must agree before a referendum can be held, or whether no change will be made in the referendum provisions now in the Resolution.

International Trade and Resources

As you instructed, I have continued to stall negotiations with Saskatchewan officials over an administrative solution to the international trade problem. While those officials have been indicating their willingness to begin the work, I think it is most doubtful, in light of the Premier's latest comments, that an administrative solution acceptable to us and to them could be worked out.

The Saskatchewan brief stated (and the Premier reiterated to the Special Joint Committee) that the "Broadbent" changes will not:

> "permit provinces to pass laws affecting international trade. For Saskatchewan, that is crucial. Almost all our resources are sold on world markets. We don't want to take over the federal government's responsibility for Canada's international trade policy. But we need to ensure that the steps we take to regulate the production of a resource in Saskatchewan will not be struck down by the courts merely because they are seen to affect international trade, a field that is reserved exclusively to the federal government."

It seems apparent, in any event, that the Premier will not be satisfied with a vague federal promise to solve his "problem" eventually by some means or other. If his support for the "package" is to be obtained, something definite will have to be offered very soon.

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If a policy decision was made to solve the Premier's "problem", I think we could find ways to do it fairly quickly which would not result in any serious loss of federal power. One difficulty is that there is strong opposition from different quarters in Ottawa to giving the provinces any power whatever to affect the international trade area. These matters are further developed, and several possible solutions are examined, in Appendix E attached. I should mention that the solution suggested for constitutional change in Section (a) of the Appendix is only one among several possibilities which Justice is examining with us. The example used will serve, however, to give you an idea of what might be done.

The policy decision required is whether you want us to make an intensive effort to solve the problem within the next few days. I strongly recommend that we do this because, as pointed out in the conclusion, I believe that Premier Blakeney's support is of vital importance at this time.

Mr. Broadbent's position and the national NDP

On January 6, I received a telephone call from Marc Eliesen, Mr. Broadbent's chief of staff. Marc stressed that the call was unofficial; that he was calling on his own initiative; but that as a long time friend of mine he thought I should be aware of recent developments in the NDP with regard to the Constitution.

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The essence of Eliesen's message was as follows: if we are unable to satisfy Premier Blakeney's "bottom line", the Premier will then, as he stated before the Committee, come out strongly against the Resolution, basing his attack on the final version with which the Committee reports back to Parliament on February 6. If Premier Blakeney comes out against the Resolution, Lorne Nystrom will also oppose the Resolution and carry with him a substantial number, if not all, of the western NDP members of Parliament.

Eliesen went on to say that in those circumstances, "Broadbent will have no other choice but to eat crow publicly and admit that he is unable to deliver the NDP caucus as he had planned. Moreover, at that point, Broadbent himself may feel compelled to oppose the Resolution rather than run the risk of splitting his Party on regional lines." (Ontario versus the West.)

Another possible indication came from Peter Dobell, whose consulting group provides administrative services to the Special Joint Committee, and who has had long experience in dealing with members of all parties in the setting of Parliamentary Committees. At a private lunch meeting a few days ago, he voluntarily expressed to me his strong conviction that if Mr. Blakeney goes against the Resolution which comes from the Committee, Mr. Broadbent will be incapable of keeping his caucus in line and a majority of his western members will desert him.

A further indication came from Mark Rose of the NDP, a member who supports the Resolution. He spoke to Eddie Goldenberg recently about the Party's potential problem in deciding what to do on the Resolution. He did not predict what decision would be taken, but emphasized very strongly the caucus intention to remain united, whichever way the decision went. If a significant number wanted to vote against the Resolution, then all would do so.

Jack Austin has had various recent conversations with Lorne Nystrom and other members of the NDP caucus. Mr. Austin has been able to draw a number of strong impressions from them:

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- Premier Blakeney is highly unlikely to support the Resolution unless significant changes are made in one or both of the two major questions outstanding (referenda and international trade);

- Mr. Broadbent will almost certainly support the Resolution whether or not Premier Blakeney is satisfied;

- If the Premier is not satisfied, it is very doubtful whether and to what extent the NDP caucus will maintain a united front in the House, and it will likely be impossible to be sure of the result until the last minute.

Mr. Austin drew to our attention the serious implications for the federal government if the NDP caucus split on the issue. If the NDP western members were to desert Mr. Broadbent, and with Premier Blakeney opposed, the government would lose much credibility in Canada and in the United Kingdom. It could no longer argue that its proposals had support from all parts of the country.

Within Justice and the FPRO, we find it impossible to make any reliable assessment of these somewhat conflicting reports. The strains within the NDP in face of a Blakeney rejection of the Resolution could result in a split NDP vote in the House on the Resolution with western members against, or in the caucus all voting against the Resolution - or all voting in favour despite internal dissention. What does seem certain, however, is that the NDP in Parliament will undergo very severe strains and the risks will be very high that we will lose some NDP support in the House if the government does not meet Premier Blakeney's concerns.

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The NDP and Native Rights

As an added complication to what is set out above, there is the strong interest within the NDP caucus in the question of native rights. The caucus generally is not satisfied with the changes proposed by Mr. Chrétien on January 12. Both Mark Rose and, more directly, Svend Robinson, have indicated to Jack Austin that strengthening of the native rights provision is more important to many western members of the NDP caucus than the "Blakeney issues". Robinson indicated to Austin that if he and some of his B.C. colleagues get satisfaction on the native rights issue, they will support Mr. Broadbent and the government regardless of the outcome on the "Blakeney issues". This is discussed further in Appendix F. It should be noted that Appendix F specifically reflects a viewpoint obtained through Jack Austin. Although the Minister of Justice and his officials confirm the fact that there is strong pressure within the NDP caucus for further amendment in the area of native rights, they are not in agreement that the nature of the amendment being pressed for is along the lines proposed by Jack Austin. Thus, the proposal set out in Appendix F should be regarded as illustrative only and not as a firm recommendation as to the form or substance of an amendment that would be broadly supported by western members of the NDP caucus.

Conclusion

It seems to me that you and the government are faced with an historic decision. At stake is not only the capacity of the government to press its constitutional proposals through Parliament and to persuade the Parliament of the United Kingdom to do the same, but the capacity of the constitutional proposals themselves to become accepted and eventually revered by the people of Canada. I feel certain that these things can all be accomplished much more readily if there is real support from the NDP in Parliament (including necessarily its western members) and from Premier Blakeney, whose reaction will influence NDP supporters in every western province.

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There is a danger that an effort by the government now at compromise could be taken as a sign of weakness and bring about even more strident opposition. Any move by the government to abandon its fundamental objectives - such as the referendum - would, I believe, entail such dangers. There is also the point in any great affair, however, where the right compromises make a major achievement possible. Such compromises are not signs of weakness, but demonstrations of statesmanship.

I believe the government has an opportunity now, at no loss to its major objectives or the major principles on which the package has been built, to find compromises which will stand a very good chance of bringing Premier Blakeney onside, and of ensuring NDP support in Parliament. These compromises lie in the three areas already discussed above:

- an arrangement whereby provinces would have a chance to block the holding of a national referendum if enough felt strongly about it;

- a minimum constitutional change to meet the resources problem which so concerns Premier Blakeney;

- an improved provision for native rights.

It would be sad to look back, five or ten years from now, and realize that if only there had been a little more generosity, at the right moment, it might have guaranteed the successful achievement of an historically unparalleled political endeavour, and the successful achievement of a goal long sought after by you and your predecessors.

M.R.

Michael Kirby

Proposals Made by Premier Blakeney on December 19, 1980 at his Appearance Before the Special Joint Committee of the Senate and of the House of Commons

A). Amendments acceptable to the federal government

1) Confirmation of provincial ownership and management of resources;

2) Access by the provinces to indirect taxation of resources;

3) Concurrent jurisdiction with federal paramountcy in interprovincial trade in resources;

4) Elimination of the 50% population requirement (in S.41) for the Atlantic Region (the P.E.I. amendment);

5) Provision for adequate public debate in Parliament and in the provincial legislatures before a referendum is held;

6) Provision for the holding of a referendum within a reasonable time;

7) Provision for an impartial referendum rules commission;

8) An equalization draft which is stronger than the existing draft;

9) Some constitutional recognition of multiculturalism;

10) A revised Section 24 on native rights similar to the proposal the federal government will make.

B) Amendments unacceptable to federal government but not part of Saskatchewan's "bottom line"

1) A change in the amending formula to state "the consent of majority of the provinces representing 80% of the population of Canada, which majority must include at least two of the Atlantic provinces and at lease two of the Western provinces with 50% of the population of the West.

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(The difficulty with this proposal is that it does not guarantee Quebec a permanent veto since early in the next century the population of Quebec may be less than 20% of the Canadian population);

2) No change to Section 1 of the Charter;
(The Premier indicated, however, on January 14 that he can live with Mr. Chrétien's amendment to the Section);

3) That Section 7 (right to life, liberty and security of the person) be concerned only with procedural fairness (our view is that the present draft meets Premier Blakeney's concern and no change is necessary);

4) That Section 15 (equality or non-discrimination rights) be dropped until a later stage.
(On January 14, the Premier registered concern about the widening of this Section, but did not press the point and is unlikely to do so.)

C) Amendments unacceptable to the federal government and part of Saskatchewan's "bottom line"

1) The question of national referenda and particularly some element of reciprocity between Parliament and the provincial legislatures in the power to initiate such referenda;

2) Access to the field of international trade in resources with federal paramountcy to ensure that the regulation of the production of a resource in Saskatchewan will not be struck down merely because it affects international trade.

Appendix E

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International Trade and Resources

The federal government in February 1979 accepted in principle the idea of concurrent provincial jurisdiction over international trade subject to full federal paramountcy, provided that federal-provincial agreement could be reached on a long series of constitutional items. No such agreement was reached, and when negotiations were renewed in July, 1980, this offer was not placed back on the table.

Saskatchewan had always been the province most interested in this question - an interest arising from the facts that the greater part of its resources are exported, and that its resource exports almost all flow to the USA, and from Saskatchewan's experience in the CIGOL and Central Canada Potash cases in which Supreme Court decisions went against them. Saskatchewan representatives pressed their argument all through this past summer and fall, and the Premier pressed it hard in his December 19 appearance before the Special Joint Committee of the Senate and of the House of Commons. On the federal side, various hints were given to the province during the summer, and again since the September First Ministers Conference, that "some means will be found to solve their problem".

At the time this issue was considered by Cabinet prior to the September Conference, no final decision was reached. A request was made, however, that the Prime Minister's briefing book examine three alternatives: a constitutional change giving provinces more limited powers than those in the 1979 proposal, the possibility of legislative delegation, and the possible use of federal-provincial marketing boards. Comments on each of these are set out hereafter. It should be noted that the federal side did not discuss any of these alternatives at the September Conference.

The comments below are made in the light of the stated objective of the Premier: "We need to ensure that the steps we take to regulate the production of a resource in Saskatchewan will not be struck down merely

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because they are seen to affect international trade, a field that is reserved exclusively to the federal government." The Premier has frequently cited the Supreme Court decision against the province's setting of quotas on potash production, a step the province took to ensure at least a limited continuing production at a number of mines, in days of world oversupply - thereby protecting the viability of a number of Saskatchewan communities.

(a) A constitutional change to give provinces limited capacity to affect international trade

Sections (2) and (3) of the resources proposals already agreed upon with Mr. Broadbent say this:

Export from provinces of resources

(2) In each province the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

It would be possible to make (2) above into 2(a) and to add a new 2(b) along these lines:

(2(b) In each province the legislature may make laws in relation to the rate of the primary production from such resources and production from such facilities for the purpose of protecting the economic viability of the industry concerned notwithstanding that the legislation affects the international trade in the primary production from such resources or the production from such facilities.

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Such a new subsection would constitute a good deal more restricted concession to the provinces than what was offered in 1979. It would appear to solve Mr. Blakeney's "problem". It would be subject to the "full federal paramountcy" in Section (3) above. It would give provinces no new powers to set prices for export.

External Affairs objected to this proposal, as we understand it, on grounds that it would be impossible to make an exhaustive list of possible reasons, arising from Canada's foreign policy, as to when and why provinces should not use this new power. These 'reasons' were thought to be too diverse to spell out in general legislation designed to set limits on provincial action. Hence, there would be many circumstances in which a special federal law would be required to head off a particular provincial action that could have bad effects internationally - yet it might take months before Parliament could act, and much damage might be done.

Industry, Trade and Commerce objected on the general ground that no other federation gives such a capacity to one of its component units. It also objected that the proposal would let a province choose to discriminate, if it wished, between foreign countries, and that could lead to problems with one or more of those countries, or worse, could lead to foreign interference in our affairs behind the scenes.

The validity of the worries of these two departments, and particularly the judgment that federal legislation using the paramountcy clause could not be adequately designed to protect federal interests, would have to be carefully tested if a realistic assessment of the difficulties with

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this option is to be obtained. It seems possible, however, that many of their objections could be overcome if the paramountcy could be applied rapidly through the Governor General in Council acting under the authority of a law of Parliament. This could be achieved by adding words such as those underlined below to Section 3 of the Broadbent proposal:

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament or a law made under the authority of such a law of Parliament and a law of a province conflict, the law of Parliament or law made under such a law prevails to the extent of the conflict.

The foregoing is not intended to represent a specific proposed amendment that has been approved by Justice officials or that has the policy support of other concerned departments. It is, however, illustrative of the kind of amendment that might be pursued intensively if officials were instructed to do so.

(b) Legislative Delegation

(i) A provision could be made in the Constitution under which Parliament would be able to delegate to a provincial legislature authority to legislate or regulate some aspects of international trade within whatever limits were chosen. The delegation could apply to say, potash only, or even just to certain aspects of potash. It could be revoked by Parliament at any time.

This arrangement would technically meet Premier Blakeney's insistence for a constitutional provision. He would find it a good deal less attractive (and probably not attractive enough), than option (a) which would give the province broader powers, even though their exercise would be limited whenever the federal government felt that its international interests were threatened. Option (b)(i) would involve Saskatchewan and the federal government negotiating the full details of the delegation before either side could determine what would really be involved. The delegation, in theory at least, could be withdrawn by Parliament whenever it wished.

From the federal viewpoint, the need for precision in the delegating legislation could draw it into making or appearing to make major policy decisions on what commodities should or should not be controlled. ITC officials argue strongly that absence of federal legislation controlling trade in a commodity is just as much a "policy" as having such legislation in place;

(ii) Provision could be made in federal legislation to delegate to some provincial agency, such as a provincial marketing board, the right to administer regulations established by Parliament. (This would be comparable to the way inter-provincial trucking is handled.) From the Premier's point of view, this would give the province much less

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policy-making scope than (i) above. From the federal viewpoint, it would retain greater federal control, but tend often enough to force the federal government to issue detailed regulations in fields it would rather ignore. It might be noted that, for both (i) and (ii), it is most difficult politically for the federal government to withdraw a delegation once it has been made, as the trucking question has amply demonstrated.

(c) Federal-Provincial Marketing Boards

Joint federal-provincial marketing boards are common in the agricultural products field. Federal and provincial legislation is used to delegate to such boards identical jurisdiction over extraprovincial and intraprovincial trade in the relevant commodity and the board is thus able to administer a uniform regulatory scheme. The Board itself may be created by either federal or provincial legislation and its members may be appointed by either the federal or provincial government, or by both.

Such a board could have been used at the time to handle the potash "problem", but the federal government did not wish then to become openly involved. In similar circumstances in future, it might also wish to avoid involvement. Premier Blakeney is well aware of this, and would regard with considerable suspicion and is almost certain to reject any federal suggestion that joint boards should be the course to follow. From the federal viewpoint as well, this solution has the disadvantage of the government becoming more or less permanently locked into a situation of constant warfare within the joint board, caused by the differing philosophies of the federal and provincial members.

APPENDIX F

THE NDP AND NATIVE RIGHTS

On January 12th, the Minister of Justice indicated that the government was prepared to see section 24 of the draft Resolution revised to read as follows:

Rights and freedoms not affected by Charter

"The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of
(a) any aboriginal, treaty or other rights or freedoms that may pertain to the aboriginal peoples of Canada including any right or freedom that may have been recognized by the Royal Proclamation of October 7, 1763; or
(b) any other rights or freedoms that may exist in Canada."

The amendment would have the affect of stating in greater detail the kinds of rights and freedoms pertaining to Native peoples that are not affected by the Charter and would set them apare from other rights and freedoms not affected by the Charter.

This amendment has been reasonably well received but, according to discussions that Senator Jack Austin has had with B.C. members of the NDP Caucus, it does not go far enough to enable them to support the provision.

Their concerns centre around the following:

(1) The amendment refers to "aboriginal peoples" and in so doing leaves the Métis with great concern that the amendment does not extend to them;

(2) The amendment gives no undertaking to negotiate and settle Native claims;

(3) The amendment does not acknowledge the validity of Native claims.

At a meeting of the joint committee on Thursday, January 15, Senator Austin questioned the Minister on a limited extension of the amendment that would go some distance to meet the first two concerns of NDP members but not the third. Following the questioning, he spoke at length with Svend Robinson, at Mr. Robinson's initiative, regarding the issue. Mr. Robinson indicated that the kind of amendment that Senator Austin was implying would meet only about half of what is required in their view, the other half being represented by their third concern listed above. Nonetheless, Robinson indicated that Austin's amendment would be sufficient to ensure the support of a number of western NDP members regardless of the outcome of consideration of Mr. Blakeney's concerns, assuming the amendment also received support from Native groups.

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Senator Austin's proposal would be along the following lines:

Commitment with respect to native claims

"The Government of Canada and the government of each of the provinces shall proceed expeditiously and continuously in association with the Indian, Inuit, Métis and other native peoples of Canada to negotiate and settle aboriginal and other native claims."

Senator Austin and Robinson are both of the opinion that there is a good chance that such an amendment would receive the endorsement of the Inuit and, perhaps, the Métis. The amendment would not enshrine in the Constitution anything more than a commitment that Senator Austin indicates has already been given by the federal government and by all concerned provinces. It does not, on its face, admit to the validity of any existing claims. It is in the nature of the commitment set out in section 32 of the draft Resolution with respect to equalization.

As noted at page 9 of the main memorandum, Senator Austin's proposal for an amendment as quoted above should be regarded as illustrative only. Though Justice officials confirm the fact that there is strong pressure within the NDP Caucus for further amendment in the area of Native rights, they are not in agreement that the nature of the amendment being pressed for is along the lines proposed by Senator Austin.

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The Referendum and Constitutional Amendment

In his appearance before the Joint Committee, Premier Blakeney stated that:

> "The proposed amending formula is the most unacceptable part of the federal Resolution, the part which does most serious violence to the basic principles of federalism...
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> "In a federal state, the procedure for amending the Constitution is the most important part of the fundamental law. And the amending formula proposed in the Resolution is so weighted in favour of the central government, so biased against the interests of the provinces, that it threatens to destroy the balance that is crucial to the maintenance of the Canada as we now know it."

In his initial reaction to the amendments announced by the Minister of Justice, Mr. Blakeney restated that "our key area was the amending formula and our subsidiary keys were resources and these have not been addressed".

With respect to the amending formula, Mr. Blakeney's first preference is to eliminate the concept of a referendum altogether. His fall-back position is some type of reciprocity. "While we don't necessarily need or insist upon the provisions we set out in our position paper to the Committee on December 19, we do think that there ought to be something concerning the ability of provinces to trigger referenda."

It is worth considering the advantages and disadvantages of:

(a) dropping the referendum altogether; or

(b) providing some degree of reciprocity.

(a) Dropping the Referendum

There is no question but that it is extremely important to have the support of at least one Western province as well as members of Parliament from Western Canada. This in itself would give added legitimacy to the course of action we are pursuing. Such would be the first tangible benefit of dropping the referendum.

The second benefit would be to strengthen our position in the court challenges. By dropping the referendum, provincial legislatures could not be by-passed in the amending process and no one could argue that the balance of powers is being altered in any way by the amending formula. Further, our argument that the Victoria formula had at one time been approved by the provinces would be strengthened, as no one would be able to argue that the referendum component of it had never been agreed to by any province.

The third immediate benefit would be to destroy the perception in Western Canada that the ultimate aim of the federal government is to use a referendum to take over provincial resources. This fear - no matter how far-fetched - is relatively widespread.

The fourth immediate benefit would be to lessen the intensity of the opposition in some provinces and particularly in the province of Quebec where opposition to the concept of a national referendum is high. It should also lessen some of the opposition in the federal Conservative Party. This would serve to reduce the political temperature of the country and would make acceptance of the package less difficult. This is extremely important as there is only so much confrontation the country can take at any one time.

The fifth benefit would be to reduce opposition in Great Britain by removing the argument that the referendum provision destroys the balance of federalism in Canada.

A final benefit is that what will appear to be a very major concession will in reality be achieved at no cost. It is inconceivable in practice - especially with the time delay already accepted by the government - that there would ever be a federal referendum fought against serious provincial opposition in order to give new powers to the federal government. If such a referendum were to be called, it would be very very difficult for any federal government to win.

When Canadians vote, they do not like to put all their eggs in one basket. They create counter-weights by voting for strong provincial governments and for a strong national government. They do not like to vote in a way that would allow one level of government to crush the other level. This has been true especially in Quebec. So it is highly doubtful that a federal government would ever be able to impose its will against the provinces in a constitutional referendum where regional majorities are needed to win as well as a national majority. For example, the present procedure would not likely be successful in all regions.

Furthermore, given the wide powers already within federal jurisdiction, all pressure for constitutional change is to devolve more powers to the provinces. Even last summer, the economic union proposal was used more as a bargaining tool than as something so vital to the national interest that it could not wait for the development of a consensus in the country. Therefore, it is not likely that a deadlock breaking mechanism will be required for the federal government to be able to obtain more powers. It is more likely that deadlocks will be the result of federal vetoes of provincial proposals arising from "ganging ups" such as occurred on the last day of the First Ministers Conference in September. Such vetoes may be in the national interest and should not have to be confirmed by referenda.

There are two disadvantages to dropping the referendum. The first is that it would be an abdication of the principle of the sovereignty of the people. However, this principle is somewhat abstract as it is almost impossible

to envisage when a federal government is likely to ask the people to exercise their will in a constitutional referendum. And even the principle is open to question in Canada as referenda are not part of our heritage. Neither the plebiscite on conscription nor the Quebec referendum were particularly happy experiences inasmuch as they contributed to great division within families and communities.

The second disadvantage to dropping the referendum is that it may appear as weakness. Yet at this stage of the process, a major concession which will make it easier to achieve our objective should not be perceived as weakness. What is central to our objective is not an amending formula with a referendum. If that were so critical, then the government would not have been prepared in September to accept the Vancouver consensus if that was all that was necessary to achieve agreement on a people's package. The package we are seeking is patriation with a Charter of Rights including mobility rights and minority language education rights, and an amending formula which is much more flexible than unanimity.

(b) Reciprocity

The advantage of reciprocity is that it would appear to be less of a concession than dropping the referendum altogether. In fact, to permit provinces to trigger a referendum is far more dangerous than not having a referendum at all.

First, the so-called symmetry really adds up to a confederal model of Canada where the sum of the provincial governments is equivalent to the national government. This is not the type of federalism in which we believe.

Second, it is possible that the provinces would be able to get together to propose amendments through a referendum. These could be detrimental to the federal system and could pass in situations where there is a particularly unpopular federal government and where the vote becomes one of lack of confidence in the federal government rather than one where the issues are properly debated.

It may well be that an alternative to reciprocity would be to require the approval of three provinces and Parliament before a referendum could be called. This would not be a major concession because it would be politically extremely unwise for a national government to call a national referendum over the strenuous opposition of eight or more Premiers. However, this alone may not be enough to satisfy Premier Blakeney.