

SECRET
April 10, 1981

MEMORANDUM FOR MINISTERS

(Prepared by Officials in the Federal-Provincial
Relations Office and the Department of Justice)

RE: OPTIONS FOR HANDLING POSSIBLE AMENDMENTS
TO CONSTITUTIONAL RESOLUTION IN HOUSE
OF COMMONS

I PURPOSE

Pursuant to the Order adopted by the House of Commons on April 8, 1981, the two opposition parties may each give notice of one omnibus amendment to the Constitutional Resolution by 6:00 p.m., Tuesday, April 21, and the Government has until 10:00 p.m. that same evening to table a similar amendment. It should be noted in this regard that, under the Order adopted by the House, it will not be possible to adopt certain parts of a party's omnibus amendment while rejecting others. The amendments put forward by each party will be voted upon as a block. This will be an important consideration in determining the Government's strategy respecting amendments.

Given that the Government will have only four hours in which to evaluate the amendments put forward by the opposition and decide upon its course of action, this memorandum is designed to identify the various amendments which are likely to be put forward, and to set forth the possible options for the Government on reacting to them, whether by voting for or against the amendments or by preparing counter amendments for tabling by the 10:00 p.m. April 21st deadline.

II POSSIBLE OPPOSITION AMENDMENTS

A. NDP AMENDMENTS

There is agreement between the NDP and the Government on two amendments:

- (a) an amendment to the Charter (a new Section 28) providing that:

"Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

- (b) an amendment to Section 54 of the Constitution Act that would add to the list of items, which can be amended only by the general amending formula or by referendum, the rights of the aboriginal peoples set out in Section 33. The wording of this proposed amendment is:

"The rights of the aboriginal peoples of Canada set out in Part II".

While the NDP appears to be firm on the "equality of sexes" amendment, there is a possibility that they may, under pressure from the native peoples, seek to modify the "aboriginals" amendment by stipulating that any amendments relating to Section 33 (Part II) can only be made with the consent of the native peoples affected.

This proposal was rejected during clause-by-clause study in the Joint Committee on grounds that constitutional amendments should be made only by duly elected governments and legislatures recognized by the Constitution or by all the people in a referendum, and should not involve special interest groups be they natives, English or French language minorities or religious groups. There is no reason to change this position.

Consequently, if the NDP moves this amendment as a part of their package, the Government would want to denounce the NDP for renegeing on its agreement and vote against the NDP amendment package.

The Government would then want to move an amendment to provide for equality of sexes, and consider whether to proceed with an amendment of its own on aboriginal rights. If it decides to proceed with such an amendment, the Government will have to choose between the form of the amendment now agreed with the NDP, and the simpler form of amendment, preferred by officials, which would add to Section 54 the words "Part II of this Act".

B. PROGRESSIVE CONSERVATIVE AMENDMENTS

In addition to the Epp amendment (to delete the referendum provisions of the Resolution) which is already before the House, the following amendments may be anticipated from the Conservatives:

- (a) provision for a right to privacy,
- (b) provision for freedom of information,
- (c) provision for a right to life of the unborn,

- (d) provision for a right to protection of property,
- (e) provision for a preamble with a reference to God.

Beyond these, it is possible that there will be amendments to:

- (f) replace the amending formula with the one proposed by the Premiers, and
- (g) split off the Charter of Rights, leaving it to be dealt with after patriation.

With the exception of the preamble (God) issue and the question of property rights protection, the Government has already dealt previously with the other amendments and decided to reject them. Thus, they may be dealt with briefly below.

- (1) Right to Privacy - the position of the Government is that this right is a nebulous one and is only now being developed in federal and provincial laws. Consequently, until its dimensions have been further tested, it would be premature to entrench the right. In addition, the provisions of the Charter dealing with the right to security of the person and protection against unreasonable searches and seizures will provide some measure of privacy protection.
- (2) Freedom of Information - the Government's position on this is essentially the same as that respecting privacy: it is too undefined in its parameters, laws are only now being developed on the subject and it would be premature to place any such general right in the Charter.
- (3) Right to Life of the Unborn and Capital Punishment - the Conservatives may make an amendment ensuring the right to life of the unborn, given the public pressure on this issue, or they may revert to the amendment moved in Committee, preserving Parliament's authority to legislate on abortion and capital punishment. The Government's position on the first amendment is that the Charter, while protecting the right to life, should and does remain neutral on the issue of abortion, entrenching neither a right to abortion nor a bar to Parliament legislating on the matter as it has already done in the Criminal Code. As for the second amendment,

it follows that since the Charter as now worded leaves abortion and capital punishment to Parliament's jurisdiction, the amendment is unnecessary. In addition, if this amendment were to be included, then why not include other controversial issues such as euthanasia, gun control, genetic engineering, etc.?

- (4) Adoption of Premiers' Amending Formula - in the unlikely event that there is full provincial agreement on a permanent amending formula, it is not likely to be one that will be acceptable to the Federal Government because of the opting out provisions, deletion or modification of the referendum provisions, omission of a Charter (or only a truncated Charter), etc. Thus, the Federal Government's position should probably remain that the present Resolution makes provision for replacement of the Victoria formula with another agreed-upon formula within the two-year period following patriation, and that there is therefore no reason to attempt, within a period of four days, to adopt any new formula. However, in the unlikely event that a new formula is agreed to by the eight Premiers on April 16, which is acceptable to New Brunswick, Ontario and the Federal Government, the question of how to deal with the matter will have to be discussed further by Ministers.

- (5) Severing of Charter of Rights - the Government's position on this is that the Charter must be included in the patriation package, since fundamental rights and freedoms are a basic and essential expression of Canadian values. There is no way these could be incorporated in our Constitution were they left to be dealt with by an amending formula.

C. OUTSTANDING ISSUES ON POSSIBLE AMENDMENTS

There remain two significant possible amendments which pose major political issues for the Government and which may have legal implications for the Government's position before the Supreme Court on April 28 when the appeals from the Manitoba and Newfoundland Courts are heard.

- (1) Right to Protection of Property

When the Conservative amendments to provide for protection of property rights ("freedom from unreasonable interference with enjoyment of property" and the "right to enjoyment of property and the right not to be deprived thereof except in accordance with principles of natural justice") were proposed in Committee, these were rejected by the Government because of opposition from the NDP and the provinces.

Although the Government had, during the CCMC meetings of July and August 1980, pressed the provinces vigorously for inclusion of protection of enjoyment of property, the provinces were unanimously opposed to any such provision because of the great impact it could have on their economic and social laws and policies respecting land zoning, protection of agricultural lands, environmental protection, etc.

In light of this opposition, property rights were withdrawn from the draft Charter tabled by the Government at the First Ministers' Conference in September 1980, and were not included in the October 1980 Resolution. Subsequently, in December 1980, Cabinet agreed that the Government might entertain an amendment to include "The right to enjoyment of property and the right not to be deprived thereof except in accordance with the principles of fundamental justice", but only under the most severe pressure. In other words, an amendment was to be strongly resisted, unless its acceptance became essential.

As noted above, the amendments were resisted, not only due to provincial opposition, but also because of the threat of loss of NDP support if any provision on property was included.

In view of the foregoing, it will be necessary for the Government to consider its position on any Conservative amendment, taking into account the following factors:

- the possible loss of NDP support for the Resolution if an amendment were adopted;
- the objection of all provinces to including protection of property rights, including Ontario and New Brunswick who are hostile to any such provision; and
- the public pressure, particularly from the West, for the inclusion of a property rights provision.

In addition, account must be taken of the fact that including a property rights provision could adversely affect the Government's position before the Supreme Court. Nothing is more clearly a matter of provincial jurisdiction than property rights,

and our position before the Courts has been based on the argument that nothing in the Charter is designed to affect the balance of federal and provincial powers. While this would remain equally true with respect to a protection of property provision, there nevertheless remains the fact that such a provision could place very significant fetters on the provinces' powers to deal with property rights, one of their most basic areas of jurisdiction.

Consequently, it is the view of J.J. Robinette and Michel Robert, the Government's principal counsel in the case, as well as that of the Deputy Minister of Justice, that including any provision in the Charter respecting property rights could weaken the Government's case before the Supreme Court.

(2) A Preamble with Reference to God

A decision will be required on whether or not a preamble with a reference to God should be included in the Constitution Act, 1981, and, if so, whether it should be a preamble to the Constitution or a preamble to the Charter of Rights and Freedoms.

The Conservatives may propose, as they did in the Joint Committee, that Section 1 of the Charter of Rights and Freedoms be modified to include the first two affirmations of Mr. Diefenbaker's Bill of Rights (see Annex "A"). This would make the affirmations an integral part of the Charter and should be resisted. An acceptable alternative would be to propose that the Diefenbaker affirmations be adapted as a preamble to the Charter (see Annex "A").

Such a preamble would have the advantage of including references to God and to the family. It would not create legal difficulties. It has the disadvantage of not including reference to other rights in the Charter, such as official languages, multiculturalism, aboriginal rights and mobility rights.

Another alternative would be to substantially alter the Diefenbaker affirmations as a preamble to the Charter so that it also included references to the official languages, multiculturalism, aboriginal rights and mobility rights (see Annex "A"). This would have the disadvantage, in terms of trying to broaden support for the Resolution, of not appearing to be a conciliatory gesture to the Conservatives but rather of appearing to be a substantially new set of affirmations.

The Conservatives may, on the other hand, propose the 1971 government of Ontario preamble as revised in 1980 (see Annex "B") or the June 1980 government of Canada preamble (see Annex "C"), both of which were devised as general preambles to the Constitution and are broad in scope. Only the Ontario proposal refers to the family, but both make references to God, the English and French languages, multiculturalism, equality rights and the key elements of the Canadian system of government. The Ontario proposal does not refer to aboriginal peoples whereas the federal proposal does refer to "the rights of native peoples". While both would have the advantage of making references to God, both would have the disadvantage of attempting to redefine the nature of the Canadian federation rather than prefacing the Charter of Rights.

Michel Robert, who will be one of the lead counsel for the Federal Government in the appeal to the Supreme Court, and the Deputy Minister of Justice are of the view that the adoption of a broad preamble to the Constitution would open up new possibilities of argument for the provinces before the Supreme Court. This would be particularly the case if Parliament were seen as unilaterally attempting to redefine the nature of the Canadian federation. Introducing a preamble to the Constitution Act might also generate debate on the relevance and continuing effect of the preamble to the British North America Act which, among other things, provides the basis for the operation of parliamentary government in Canada.

1. More Radical Variant of Option 1
(3) Technical Amendment

Since there is now an opportunity for amendments to be made to the Resolution, there is one technical amendment which the Government may wish to move to the French language version of section 11 (h) of the Charter. This would involve changing "trouvé coupable" to "déclaré coupable" to bring it into line with the similar wording in section 11 (d), (g) and (i).

III OPTIONS FOR CONSIDERATION BY CABINET

1. No Amendments

The Government could take the view, if the NDP amendment is not in accordance with the existing agreement, that the Resolution should not be further amended and could vote against the Conservative and NDP amendment proposals. Such a stance would be difficult to justify, however, since the Government has already indicated publicly its willingness to support amendments respecting the equality of men and women and aboriginal rights.

2. Support the NDP Proposal

If the NDP proposes amendments respecting the equality of men and women and aboriginal rights that are acceptable to the Government, the Government could support the NDP proposal.

3. A Substitute Amendment for the NDP Proposal

If the NDP proposal goes beyond what is acceptable to the Government and makes provision for the formal agreement of defined groups of aboriginal peoples to any future amendments affecting them, the Government could oppose the NDP amendment and propose its own amendment respecting the equality of men and women only or respecting both equality and aboriginal rights.

4. Support the NDP Proposal and substitute an Amendment for the Conservative Proposal

Under the conditions described in Option 2, the Government could support the NDP proposal, oppose all of the Conservative proposal except the preamble and move an amendment of its own that would preface the Charter with the Diefenbaker affirmations or a substantially altered variant which expands it (see Annex "A").

The Diefenbaker Affirmations
With a reference to God

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- (1) Conservative Party Proposal in the Joint Committee to amend Section 1 of the Charter

5. A more Radical Variant of Option 4

"5. 1. Affirming that

- (a) the Canadian people, in recognizing that Ignoring the negative effects which might be occasioned on the appeal before the Supreme Court, the Government could go beyond Option 4 by proposing, in its amendment, the inclusion of property rights and, perhaps, the June 1980 preamble to the Constitution rather than the Conservative preamble to the Charter.
- (b) individuals remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law,

the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

- (2) The Diefenbaker affirmations adapted as a preamble to the Charter

That the proposed Constitution Act, 1981 be amended by adding immediately after the heading "Canadian Charter of Rights and Freedoms" on page 3 the following:

"It is hereby affirmed that the Canadian nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free individuals and free institutions;

"It is further affirmed that individuals and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law."

- (3) A substantially altered variant of the affirmations expanded to include reference to other rights in the Charter and expressed as a preamble to the Charter

"It is hereby affirmed that Canada, constituted as one sovereign country under God, acknowledges the dignity and equality of each human person, the worth of the family in a society of free individuals and free institutions and the respect for moral and spiritual values and the rule of law which underlie our rights and freedoms,

"It is further affirmed that Canada remains committed to preserving and enhancing the status of English and French as its official languages, the diversity of its multicultural heritage, the respect for the rights of its aboriginal peoples and the ability of its people to move freely throughout the land."

The Diefenbaker Affirmations
with a reference to God

(1) Conservative Party Proposal in the Joint Committee to
amend Section 1 of the Charter

"S. 1. Affirming that

- (a) the Canadian nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free individuals and free institutions, and
- (b) individuals and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law,

the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

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Charter

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"It is further affirmed that Canada remains committed to preserving and enhancing the status of English and French as its official languages, the diversity of its multicultural heritage, the respect for the rights of its aboriginal peoples and the ability of its people to move freely throughout the land."

ANNEX "B"

ONTARIO DRAFT PREAMBLE
(proposed in 1971, revised in 1980)

Proud of our heritage,

Confident of our future,

Acting of our sovereign will under God,

We, as Canadians,

Declare our common purposes:

To establish the rule of justice

To respect the dignity and worth of persons, families
and communities

To protect their rights in free association

To foster the contribution of our native people and
peoples from many lands towards our common destiny

To honour each sex, race, colour and creed as equal

To seek freedom from want for all of our people

To preserve and share the wealth of the land and
To defend for the freedom and enjoyment of future generations

and

To seek peace, through justice, in the world at large.

In recognition of these purposes

We Therefore

Establish institutions of a democratic, parliamentary,
constitutional monarchy

Choose federalism as the system for sharing government
best suited to the achievement of unity in diversity

Recognize our fundamental linguistic dualism, and
declare English and French to be our official languages

and

Proclaim our Constitution

PROPOSAL OF GOVERNMENT OF CANADA
AS TABLED IN THE HOUSE OF COMMONS JUNE 10, 1980

A Statement of Principles For A New Constitution

We, the people of Canada, proudly proclaim that we are and shall always be, with the help of God, a free and self-governing people.

Born of a meeting of the English and French presence on North American soil which had long been the home of our native peoples, and enriched by the contribution of millions of people from the four corners of the earth, we have chosen to create a life together which transcends the differences of blood relationships, language and religion, and willingly accept the experience of sharing our wealth and cultures, while respecting our diversity.

We have chosen to live together in one sovereign country, a true federation, conceived as a constitutional monarchy and founded on democratic principles.

Faithful to our history, and united by a common desire to give new life and strength to our federation, we are resolved to create together a new Constitution which:

shall be conceived and adopted in Canada, shall reaffirm the official status of the French and English languages in Canada, and the diversity of cultures within Canadian society, shall enshrine our fundamental freedoms, our basic civil, human and language rights, including the right to be educated in one's own language, French or English, where numbers warrant, and the rights of our native peoples, and shall define the authority of Parliament and of the Legislative Assemblies of our several Provinces.

We further declare that our Parliament and provincial legislatures, our various governments and their agencies shall have no other purpose than to strive for the happiness and fulfillment of each and all of us.
